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Response

The Heroic Corporation and First Amendment Romanticism: A Response to Professors Redish and Neuborne

Tamara R. Piety*

"[T]here is only one thing in the world worse than being talked about, and that is not being talked about."[1]

When I saw that Martin Redish[2] and Burt Neuborne[3] had written reviews of my book, *Brandishing the First Amendment*,[4] for the *Texas Law Review* I was both pleased and apprehensive. The apprehension is easy to understand. As Professor Larry Kramer has observed, "Having one's work closely criticized is never pleasant: hugely complimentary, and oh-so-much better than having it ignored, but still difficult and painful."[5] Thus, I approached both reviews with some trepidation. On the one hand, it was a compliment to be reviewed in such a prominent journal. On the other, I had little reason to

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1. OSCAR WILDE, THE PICTURE OF DORIAN GRAY 10 (Start Publ'g 1993).

2. Martin H. Redish & Peter B. Siegal, *Constitutional Adjudication, Free Expression, and the Fashionable Art of Corporation Bashing*, 91 TEXAS L. REV. 1447 (2013).

3. Burt Neuborne, *Taking Hearers Seriously*, 91 TEXAS L. REV. 1425 (2013).

4. TAMARA R. PIETY, BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA (2012).

5. Larry D. Kramer, *When Lawyers Do History*, 72 GEO. WASH. L. REV. 387, 387 (2003).

expect that a review from Redish would be anything but critical.[6] I hoped for something rather more positive from Neuborne. I was disappointed.

The reviewers and I obviously disagree on many points. If there were no more to it than that, I would be content to agree to disagree. However, since I think each review mischaracterizes or misunderstands one or more of the arguments in my book, or raises some issues which require a response, I want to offer some corrections and clarifications. I thank the *Texas Law Review* for giving me the opportunity to do so, as well as to preview my current work-in-progress, *Paternalism and the Regulation of Commercial Speech*.[7]

I. First Amendment Romance

Although the two reviews offer different criticisms of *Brandishing the First Amendment*, they share a perspective grounded in the romantic tradition of First Amendment absolutism.[8] For Redish and Siegal, that romanticism is reflected in a perhaps unwarranted faith that corporate and commercial speech[9] is invariably valuable *to listeners* (we know it is valuable to speakers) and that corporate speakers are important "*catalysts* in the process of self-realization" for the citizenry at large.[10] To support this proposition

6. The book received some fairly good reviews, but none of them were in law reviews. *See, e.g.*, Oscar H. Gandy, Jr., *Book Review: Brandishing the First Amendment: Commercial Expression in America, by Tamara R. Piety*, 89 JOURNALISM & MASS COMM. Q. 737 (2012). The reviews on Amazon are particularly gratifying since one was written by Steve Shiffrin, a prominent First Amendment scholar. Steve Shiffrin, Consumer Review on BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA, *Amazon.com*, http://www.amazon.com/Brandishing-First-Amendment-Commercial-Expression/dp/0472117920. For an example of a more critical review which is nevertheless fair see Mark A. Graber, *Brandishing the First Amendment: Commercial Expression in America, by Tamara R. Piety*, 2 AM. POL. THOUGHT 163 (2013).

7. Tamara R. Piety, *Paternalism and the Regulation of Commercial Speech* (unpublished manuscript) (on file with author).

8. *See, e.g.*, Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245. For one of the most well-known expressions of this tradition, see ANTHONY LEWIS, FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT (2007). For a critique see Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 21 (1971) ("Any such reading is, of course, impossible."). For a discussion of the romantic tradition generally, see STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE (1990). And for a skeptical review of the First Amendment's history, see DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 1–9 (1997) (arguing that the traditional story about the trajectory of the First Amendment obscures the often hostile reception early free speech claims received and noting that some famous, landmark cases actually upheld restrictions, even as the opinions proposed more expansive protection in theory).

9. Commercial and corporate speech are generally viewed as doctrinally distinct. And technically they are. But in the book I argue that the corporate speech line of cases owes much to the earlier decision to protect commercial speech and that the feedback loop between the two means that the corporate speech cases, in particular *Citizens United*, have an impact on the commercial speech doctrine. For these reasons I group them together in this response. The differences are discussed at length in the book. *See* Piety, *supra* note 4, at 17–51.

10. Redish & Siegal, *supra* note 2, at 1463 (emphasis in original). Given recent history, I think it requires a rather Panglossian view of the benefits of corporate and commercial speech to conclude that robust First Amendment rights for commercial enterprises is in the public interest. In another

they rely on that hoary old First Amendment chestnut, "the marketplace of ideas."[11] In this view, more protection for speech is always better for freedom. And if some speech is abusive, oppressive, intrusive or annoying, the remedy is still more speech, not regulation. Thus, Redish and Siegal applaud the Supreme Court's embrace of more protection for corporate and commercial speech because they see it as leading to an expansion of freedom of speech generally.

Professor Neuborne, on the other hand, is less sanguine about the benefits to the public of corporate political speech. He would restrict this sort of speech. Yet he apparently does not see any connection between protection for commercial speech (which he supports) and protection for corporate political speech (which he does not). I argue they are connected and that there is feedback dynamic between these concepts which, judging from recent decisions, may raise the danger of a First Amendment defense to commercial fraud or even to ordinary labeling, disclosure and truth-in-advertising regulations.

Moreover, Professor Neuborne reads into my critique of commercial speech and my argument that it should not receive robust First Amendment protection, evidence of the left's abandonment of one of its core principles. "[A]n expansive First Amendment was the darling of the American left,"[12] he writes. Now, he claims, many on the left are prepared to challenge "the very notion that regulating speech is particularly antithetical to a free society."[13] He reads *Brandishing the First Amendment* as such a challenge. I do not intend it to be. Rather, I argue in the book that commercial and corporate speech are not "speech" in the First Amendment sense (or, at this point,

work, Redish has more modestly suggested that the public and private interests may merely intersect rather than completely overlap. Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 235–36 (1998).

11. Redish & Siegal, *supra* note 2, at 1453. The metaphor is typically used, as it is in Redish and Siegal's review, to suggest that more speech is invariably better and is more likely to lead to the production of the best ideas. For a definitive refutation of that idea see Alvin I. Goldman & James C. Cox, *Speech, Truth, and the Free Market for Ideas*, 2 LEGAL THEORY 1, 11–12 (1996) (proving that the market-maximizes-truth-possession hypothesis is demonstrably false); *see also* Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2360 (2000) (critiquing the tendency to take the marketplace-of-ideas metaphor too literally).

12. Neuborne, *supra* note 3, at 1425.

13. Neuborne, *supra* note 3, at 1432–33 & n. 34. For instance, he claims that some on the left have rejected the notion of "free speech as a trumping value that overrides almost all good faith, plausible efforts at government regulation." Neuborne, *supra* note 3, at 1432 & n.34, *citing* Reza R. Dibadj, *The Political Economy of Commercial Speech*, 58 S.C. L. REV. 913, 915 (2007) and Sylvia A. Law, *Addiction, Autonomy, and Advertising*, 77 IOWA L. REV. 909, 912 (1992). I don't think either of these articles really support this characterization. These authors are carving out exceptions. For better examples of work questioning some version of First Amendment absolutism more generally, see J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375; Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1983).

ought not to be, since the Court has extended some protection to them) and therefore the absence of First Amendment protection for these categories does little or nothing to undermine a free society. To the contrary, I argue that it is offering robust First Amendment protection to these categories of speech that ultimately undermines a free society.

Finally, Neuborne also believes that my discussion of manipulation techniques and the psychology of professional persuasion is evidence that I do not give listeners enough credit and that I would support broadly paternalistic interventions because I think consumers are weak[14] He misunderstands my argument. It is precisely because I *do* credit listeners with autonomy that I argue they ought to be able to decide for themselves which advertising messages they want to receive, and that they ought to have the power to block advertising they do not wish to receive without triggering any countervailing speaker interest in speaking which would otherwise forbid them to exercise their autonomy in that way.

II. Redish and Siegal: The Heroic Corporate Speaker

The Redish and Siegal book review is only partially a review of *Brandishing the First Amendment*. A substantial portion of it is devoted to jousting with Professor Neuborne,[15] and about a third of the review promotes the authors' own substantive project, which they describe as an attempt "to fashion a coherent explanatory theory of constitutional adjudication in order to understand this widespread systemic choice in favor of extending the overwhelming number of constitutional rights and protections to corporations."[16]

To this end, Redish and Siegal present a picture of the corporation as hero—a Hohfeldian[17] plaintiff litigating on our collective behalf.[18] They argue that corporations "do and should possess First Amendment rights. . . . because *of the vital instrumental role which the corporation serves in advancing the fundamental goals served by the First Amendment right of free expression through the process of private litigation*."[19] Corporations, they

14. *Id.* at 1439.

15. Redish & Siegal, *supra* note 2, at 1458–63 (most of this section discusses the authors' disagreements with Neuborne).

16. *Id*. at 1450.

17. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 YALE. L.J. 16 (1913).

18. Redish & Siegal, *supra* note 2, at 1467–72.

19. *Id.* at 1450 (emphasis added). Apparently, only corporate litigants serve this important role of advancing our common goals through private litigation as Redish is not terribly enthusiastic about class actions which serve a similar function. He does acknowledge that "[o]ne of us has argued" that class actions "undermine[] democratic legitimacy." *Id* at 1466 n.93 (citing Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 73); *see also* Martin H. Redish & Clifford W. Berlow, *The Class Action as Political Theory*, 85 WASH. U. L. REV. 753 (2007). In contrast, Judge Richard Posner has suggested class actions have proven more effective than the FTC in protecting consumer interests (although he believes the FTC nevertheless plays an important role in consumer protection). Richard A. Posner, *The Federal Trade Commission: A Retrospective*, 72

argue, act as "economically incentivized" private-attorneys-general to vindicate First Amendment rights for us all.[20] I am skeptical of this proposition. Indeed, my skepticism about whether freedom for corporate and commercial speech advances fundamental First Amendment goals is one of the principal themes of *Brandishing the First Amendment*.

Redish and Siegal offer many criticisms of my book, but a major one is that it is simply "corporation bashing."[21] But to illustrate this claim they offer up strawmen. For example, Redish and Siegal imply that I would challenge a corporation's right to bring a lawsuit, declaring that "[o]ur economy would no doubt quickly degenerate into a state of chaos if corporations were denied the opportunity to vindicate their legal rights in court."[22] This observation would be more germane if in the book I were challenging this right. I do not.[23] What I *do* dispute is whether commercial and corporate speech ought to enjoy *full* First Amendment protection, a proposition which is not so well settled as Redish and Siegal would like it to be.

They also resort to some rather intemperate, or at least ungenerous, characterizations. Despite being on opposite sides of the commercial speech debate,[24] I could have hoped for a more collegial tone. Instead, Redish and

ANTITRUST L.J. 761, 769–80 (2005). So, it is not clear why litigation by *corporations* as private-attorneys-general, benefits the public while class actions by consumers do not. From a democratic-legitimacy standpoint, class actions are arguably on firmer ground since the plaintiffs may also be voters, while corporations are not.

20. Corporate litigants themselves have shown somewhat less enthusiasm for the private-attorney-general device, at least in the hands of consumers. *See* Brief for the Ass'n of National Adver., Inc., *et. al.* as Amici Curiae Supporting Petitioners at 3–4, Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (No. 02-575), 2003 WL 835112 (objecting to the private-attorney-general provision of the California Unfair Competition and False Advertising laws involved). In 2004 Nike and its amici got by ballot initiative what they could not get from the courts. The law was amended to remove the private-attorney-general provision after a ballot initiative (Proposition 64), campaigned for heavily by business on the grounds that it permitted fraudulent and extortionate law suits against small businesses. Companies such as Philip Morris, Exxon, and State Farm combined to collectively contribute millions of dollars to the Proposition 64 campaign. *See* Jacquetta Lannan, Note, *Saving 17200: An Analysis of Proposition 64*, 46 SANTA CLARA L. REV. 451, 469 (2006). Nike itself contributed $50,000. *Id.* Ten years on, it is not clear that Proposition 64 has deterred fraudulent claims, but Lannan argues it has had a deleterious impact on consumer protection. *Id.* at 475–76.

21. Redish & Siegal, *supra* note 2, at 1457. As I observe in the book, much of the criticism of corporate speech and of the influence of corporations on society has come from corporate governance scholars or authors whose long careers in business suggest that their criticism cannot so easily be dismissed as a product of "left-wing, corporation bashing." PIETY, *supra* note 4, at 146 & n.27.

22. Redish & Siegal, *supra* note 2, at 1449.

23. Moreover, with respect to the right to sue, we do not need to engage in parsing of the meaning of the word "person" (or "citizen") in general because there is a specific statutory grant of rights in 28 U.S.C. § 1332(c)(1) (2012), which provides that "a corporation shall be deemed to be a citizen" for purposes of diversity jurisdiction in federal court.

24. Although I fundamentally disagree with him, I give Redish full credit for having been the principal architect of the commercial speech doctrine. *See* Tamara R. Piety, *"A Necessary Cost of Freedom"? The Incoherence of* Sorrell v. IMS, 64 ALA. L. REV. 1, 21 & n.109 (2012). Its subsequent expansion owes a great deal to Redish's advocacy, both as a scholar and as an advocate.

Siegal appear to "dismiss any disagreement as a product of bad faith or intellectual weakness."[25] I am accused of engaging in "fashionable"[26] corporation bashing, motivated by some unspecified "sociopolitical,"[27] "reflex[ive]"[28] opposition.[29] They use inflammatory characterizations, claiming my critique is marked by obsession,[30] rage,[31] and hatred.[32] But, perhaps most disappointingly, Redish and Siegal charge me with "a complete lack of familiarity" with constitutional law and a failure to grasp "the broader lens of constitutional theory,"[33] as if my observations are outside the bounds of acceptable constitutional discourse. Given that some of the most distinguished constitutional scholars in the nation[34] have made arguments similar to mine, this charge seems unfair.

Apart from the overheated rhetoric, Redish and Siegal's substantive critiques appear as follows: (1) that for-profit corporations *must*, as a logical matter, enjoy full First Amendment rights because corporations have been

Indeed, he has continued to push for an expansive read of the First Amendment past the point many might deem advisable. *See, e.g.*, Martin H. Redish & Michael J.T. Downey, *Criminal Conspiracy as Free Expression*, 76 ALB. L. REV. 697 (2012—2013) (criminal conspiracy).

25. Kramer, *supra* note 5, at 387.

26. Redish & Siegal, *supra* note 2, at 1457. This allusion is in both the title of the review and in the text. *Id.* ("In constitutional academic circles, corporation bashing has in recent years become a very *fashionable* activity.") (emphasis added). I would note that I have been writing on this topic in much the same way long before it was "fashionable."

27. *Id.* at 1464.

28. *Id.* at 1472.

29. *Id.* ("There appears to exist a post-*Citizens United reflex* among the *uninformed* and the *ideologically driven* to assume that because corporations are not humans, they are—both legally and metaphysically—incapable of asserting *any* constitutional right, much less the First Amendment right of free expression.") (first and second emphases added; third emphasis in original). This is a technique Redish has employed before. *See, e.g.*, Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67 (2007) (generally accusing opponents of being motivated by anti-capitalist ideology and "intuition"); Martin H. Redish, *First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy*, 24 N. KY. L. REV. 553 (1997) (same).

30. Redish & Siegal, *supra* note 2, at 1467.

31. *Id.* at 1459 ("outrage").

32. *Id.* at 1464 ("detests"); *id.* at 1458 ("contempt").

33. *Id.* at 1448–49.

34. For example, the scholars criticizing *Citizens United* include: Erwin Chemerinsky, Op-Ed., *Conservatives Embrace Judicial Activism in Campaign Finance Ruling*, L.A. TIMES, Jan. 22, 2010, http://articles.latimes.com/2010/jan/22/opinion/la-oe-chemerinsky22-2010jan22 ("[T]here is not the slightest shred of evidence that the framers of the 1st Amendment meant to protect the rights of corporations to spend money in election campaigns."); David Kairys, *Money Isn't Speech and Corporations Aren't People*, SLATE (Jan. 22, 2010, 6:03 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/01/money_isnt_speech_and_corporations_arent_people.html (contending that expansion of some constitutional rights to corporations does not necessarily include speech rights); and Laurence H. Tribe, *What Should Congress Do About* Citizens United*?*, SCOTUS BLOG (Jan. 24, 2010, 10:30 PM), http://www.scotusblog.com/2010/01/what-should-congress-do-about-citizens-united/ (arguing that corporations are using other people's money when they engage in political speech, those people have not necessarily authorized the speech, and there are important differences between for-profits and not-for-profits in this context).

granted other constitutional rights;[35] (2) that my principal argument against robust protection for commercial and corporate speech is that a corporation lacks a "soul" and that this is an inappropriate criterion;[36] (3) that regulation of corporate and commercial speech, which I support, represents "viewpoint" discrimination and that my support for regulation emanates from hostility to capitalism or free enterprise;[37] and (4) that my failure to articulate a theory for why media companies can be distinguished from other for-profit corporations dooms my thesis. I address each of these in turn.[38]

A. Logical Coherence

Redish and Siegal portray the extension of First Amendment rights to corporations as speakers with distinct dignitary rights qua speakers as so obvious, so well-settled, that only someone without a good "grasp" of the broader sweep of constitutional law could be unaware of its existence and sagacity. This is simply not true. As they later admit, this issue is not *quite* so well-settled, or at least as explicitly articulated, as they wish it were.[39] Nevertheless, they press the logical coherence argument: "[I]f no doubt exists that corporations have standing to vindicate *subconstitutional* rights and protections, how, *purely as a logical matter*, could they be categorically denied the opportunity to invoke the nation's highest law, the United States Constitution?"[40]

What Redish and Siegal mean by "subconstitutional" is a bit ambiguous, but if they mean to refer to rights created by statute, it is clear that the creation of a statutory privilege does not necessarily convey constitutional rights as well.[41] Nevertheless, the authors imply that the extension of some constitutional rights to corporations must necessarily include the extension of all of them, except where it would be "incoherent"[42] to do so, without saying why this is not one of those places where it would be incoherent. Instead, they resort to a sort of ipse dixit: "[I]t is far too late in the day to let the mere fact of their corporate form categorically disqualify them from constitutional protection."[43] "Most of the battles over the constitutional status of

35. Redish & Siegal, *supra* note 2, at 1457.

36. *Id.* at 1458–59.

37. *Id.* at 1463–65.

38. *Id.* at 1460–61.

39. *Id.* at 1452 n.25. This footnote essentially admits that their argument has not been explicitly adopted by the Supreme Court.

40. *Id.* at 1449 (second emphasis added).

41. If it did, then it would seem that the declaration that a corporation is a "citizen" for purposes of jurisdiction in 28 U.S.C. § 1332(c)(1) would mean that corporations are citizens for purposes of the interpretation of the word "citizen" everywhere in the Constitution. That is not the case, as Redish and Siegal reluctantly admit..

42. Redish & Siegal, *supra* note 2, at 1449.

43. *Id.*

corporations," they write, "were long ago resolved in favor of allowing corporations to invoke constitutional guarantees."[44]

The key word here is "most." Redish and Siegal know that it is not only "conceivable"[45] that a corporation might enjoy some constitutional rights without enjoying all of them; it is the law.[46] The issue is whether it is coherent to extend full First Amendment protection to corporations and to commercial speech. *Brandishing the First Amendment* is a book-length argument that it is not. Redish and Siegal offer little by way of refutation of the evidence I discuss.

B. The Corporation Has No "Soul"

Redish and Siegal's second claim is that my opposition to robust protection for commercial and corporate speech grows out of the observation that a corporation has no "soul." Although I use the famous observation that corporations have "'no body to kick or soul to be damned,'"[47] I am not nearly so concerned with the metaphysics of the corporate soul as I am with whether protection of commercial or corporate speech is as beneficial to listeners as its proponents claim, or whether protecting it promotes the values that the First Amendment is commonly assumed to protect.

To be sure, one of the reasons for my argument that protection for this speech does not advance these interests is that the corporation is just a legal fiction—a tool—not a moral actor in its own right. That is not my only or most important claim, but I should note that this argument has a respectable, and, I might add, conservative, pedigree. As former Chief Justice Rehnquist put it:

> *Although the Court has never explicitly recognized a corporation's right of commercial speech,*[48] such a right might be considered necessarily incidental to the business of a commercial corporation. *It cannot be so readily concluded that the right of political expression is equally necessary to carry out the functions of a corporation organized for commercial purposes*. A State grants to a business

44. *Id.* at 1448.

45. *Id.* at 1449.

46. They offer the Fifth Amendment right against self-incrimination as "the exception that proves the rule," *id.* at 1457, as if this example stands in splendid isolation. Yet they then go on to discuss at length another departure from this coherence model, the Privileges and Immunities Clause. Redish and Siegal describe this line of cases as an "error" and exhort courts and commentators to eschew "anachronistically textualist stances" in interpreting the Clause. *Id.* at 1452. I am at a loss to know what an "anachronistically textualist" interpretation is, but it sounds suspiciously like they are urging the Court to reject the "plain meaning" or "original intent." Perhaps the Court similarly strayed from the coherence model in denying a corporation a personal privacy exemption under The Freedom of Information Act. *See* FCC v. AT & T, Inc., 131 S. Ct. 1177 (2011).

47. PIETY, *supra* note 4, at 224.

48. Note that this dissent indicates that, at least as of 1978, Chief Justice Rehnquist did not believe that *Virginia Pharmacy* had unmistakably conferred a First Amendment right on commercial *speakers*.

> corporation the blessings of potentially perpetual life and limited liability to enhance its efficiency as an economic entity. It might reasonably be concluded that those properties, so beneficial in the economic sphere, pose special dangers in the political sphere. *Furthermore, it might be argued that liberties of political expression are not at all necessary to effectuate the purposes for which States permit commercial corporations to exist.*[49]

If, as Justice Rehnquist suggested, expressive rights are not intrinsic to a for-profit corporation's organizing purpose, it is arguably "incoherent" to extend to it these expressive or dignitary rights.[50] This is the opposite of Redish and Siegal's argument.

Many distinguished scholars have argued that the corporation lacks status as a dignitary speaker.[51] Indeed, this proposition is one locus of Redish and Siegal's disagreement with Professor Neuborne.[52] And they acknowledge that "scholarly criticism of the idea of corporate free speech rights is not entirely new."[53] Indeed it is not. So the notion that this issue is well-settled or must be the product of some sort of political hostility seems like wishful thinking. I am not sure what critical mass of contrary opinion is necessary before you can no longer claim that a viewpoint is completely out of bounds of respectable constitutional discourse as opposed to one you simply disagree with, but I think it has been reached here.

Redish and Siegal's discussion of the corporate soul is simply an attempt to compress a number of my arguments. In *Brandishing the First Amendment*, I argue that protection of corporate *political* speech owes a great deal to the earlier protection given to *commercial* speech,[54] protection which

49. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 825–26 (1978) (Rehnquist, J., dissenting) (emphasis added). To be clear, in the above quote, Justice Rehnquist was playing devil's advocate. He did not agree with the decision to extend First Amendment protection to commercial speech either. He also dissented in *Virginia Pharmacy*, observing that the decision "extends the protection of that [the First] Amendment to purely commercial endeavors which its most vigorous champions on this Court had thought to be beyond its pale." Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 781 (1976) (Rehnquist, J., dissenting). However valuable the free flow of commercial information may be, Rehnquist thought the Virginia law was simply a regulation of commerce and thus well within the powers of the state. *Id.* at 784 ("[T]here is certainly nothing in the United States Constitution which requires the Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession."). Rehnquist argued that the *Virginia Pharmacy* decision threatened to revive the discredited substantive due process jurisprudence of the *Lochner* era. *Id.*, *citing* Ferguson v. Skrupa, 372 U.S. 726, 730 (1963).

50. *See* Tom Bennigson, Nike *Revisited: Can Commercial Corporations Engage in Non-Commercial Speech?*, 39 CONN. L. REV. 379 (2006).

51. Redish & Siegal, *supra* note 2, at 1458 n.50 (citing C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989) and Randall P. Bezanson, *Institutional Speech*, 80 IOWA L. REV. 735, 739 (1995)); *see also* Bennigson, *supra* note 51; Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995 (1998).

52. *See, e.g.*, Redish & Siegal, *supra* note 2, at 1461–63.

53. *Id.* at 1458.

54. PIETY, *supra* note 4, at 22-30.

was listener- not speaker-centric. The subsequent development of a corporate political speech right dodged the hard question, which Justice Rehnquist alluded to in the quote above, of whether political speech was a necessary part of a for-profit corporation's function. Instead of answering that question, the Court (and many commentators) employed the listener-centric justification for protecting this speech without sufficient attention to the question of whether the corporation *as such*, particularly the for-profit corporation, ought to be viewed as a speaker possessing distinct *expressive*, as opposed to *economic*, interests.

I argue that giving expressive rights to a legal fiction is a categorical mistake.[55] My argument is not simply that a corporation is not a human being with expressive needs as a constitutive part of self (or, as Redish and Siegal would have it, that the corporation has "no soul"[56]), but that there are structural reasons to conclude that corporations "cannot be expected to produce truthful or reliable information when it is not in their economic interest to do so,"[57] and that therefore, the assumption that robust First Amendment protection for corporate and commercial expression will benefit listeners or society generally is not well-founded. Instead, such robust protection is likely to make it more difficult to regulate commercial entities—whether by inhibiting the ability of the government to require disclosures,[58] warnings[59] or otherwise provide consumers with information,[60] or by inhibiting the government's ability to punish or restrain false, misleading, or otherwise injurious promotional speech and activities, whether through regulatory actions or through private lawsuits. I also argue that if we look at the practice of commercial and corporate speech, it does not appear that granting expansive First Amendment protection to what is, particularly with respect to commercial speech, essentially an artifact of commerce,[61]

55. *Id.* at 141–61.

56. Redish & Siegal, *supra* note 2, at 1458–59.

57. PIETY, *supra* note 4, at 161.

58. It is hard to keep up with the steady stream of First Amendment decisions on disclosures emanating from the D.C. Circuit. *See*, *e.g.*, Nat'l Ass'n. of Mfrs. v. SEC, No 13-5252, (D.C. Cir. Apr. 14, 2014) (holding SEC rule requiring disclosure of conflict minerals violates First Amendment); Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947 (D.C. Cir. 2013) (striking down an NLRB rule requiring employers to post information about the right to unionize).

59. For example, the FDA's graphic warning labels on cigarettes were struck down by the D.C. Circuit as compelled speech infringing on the tobacco companies' First Amendment rights. R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205 (D.C. Cir. 2012). Interestingly, another court found that another aspect of the new rules, that 50% of the package must be devoted to the warning, was constitutional under *Central Hudson*. Discount Tobacco City & Lottery, Inc. v. U.S., 674 F.3d 509, 530–31 (6th Cir. 2012).

60. After all, protecting consumers' rights to receive truthful information was the rationale on which commercial speech received First Amendment protection in the first place. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770–71 & n.24 (1976).

61. To quote Judge Richard Posner, "[i]t seems paradoxical . . . to allow virtually unlimited regulation of the product . . . but to impose a constitutional obstacle . . . to the regulation of the sales materials for it." Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L.

advances the interests the First Amendment is meant to protect. Indeed, such protection may actually *undermine* those goals. Robust protection for commercial speech appears to offer what Professor Tom McGarity has called protection for the "freedom to harm."[62]

In *Brandishing the First Amendment* I use Thomas Emerson's survey of the various theories for why a society might wish to protect freedom of expression[63] to ask if robust protection for corporate and commercial speech appears to further any of these values. The four values in Emerson's framework are: (1) autonomy and self-fulfillment; (2) contribution to knowledge (often invoked as the "marketplace of ideas"); (3) contribution to democratic self-government; and (4) contribution to social stability.[64] Drawing on evidence from work in a number of disciplines I conclude that, for the most part, protecting corporate and commercial speech does not further these goals. Where such speech can be said to contribute some public benefit by, for example, offering consumers abundant choice with respect to some consumer good or a rich trove of material which can be used for consumers' own expressive purposes,[65] those benefits seem fairly modest compared to the rather more obvious types of harm which, if such speech does not cause, at least exacerbates—harms such as increased economic instability,[66] pollution,[67] contribution to increased childhood obesity,[68] and disproportionate corporate influence in the democratic process.[69] The book's

REV. 1, 40 (1986). Posner argues it is "sensible from an economic standpoint" to offer less constitutional protection to commercial advertising. *Id.* at 39.

62. *See generally* THOMAS O. MCGARITY, FREEDOM TO HARM: THE LASTING LEGACY OF THE LAISSEZ FAIRE REVIVAL (2013) (discussing how limited regulation allows corporations to act in ways that harm the public).

63. THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963) [hereinafter Emerson, *Toward a General Theory*]. Here I note that, contrary to Professor Neuborne's assertion that Emerson fails to include the argument that the special dangers of government censorship warrant strong protection, *see* Neuborne, *supra* note 3, at 1437 n.54, Emerson actually spends a good deal of time, in a couple of sections of his article, discussing this issue, Emerson, *Toward a General Theory*, *supra*, at 887–96. As I read him, Emerson does not include the checking value of the First Amendment in his catalog of *positive* values because he takes this aspect as a given, perhaps because of the First Amendment's wording as a negative restraint on government. For a discussion of how the courts' application of this consideration has been uneven and how the checking value ought to receive more systematic and consistent consideration, see Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

64. Emerson, *Toward a General Theory*, *supra* note 64, at 878–79.

65. *See* PIETY, *supra* note 4, at 80 (observing that commercial speech can offer consumers valuable information and may generally contribute to culture, but arguing the net effect is negative, for reasons explored in the rest of the book).

66. *Id.* at 186–201 (discussing commercial and corporate speech's contribution to economic instability and boom/bust cycles in financial markets).

67. *Id.* at 202–22 (discussing commercial and corporate speech's contribution to high levels of consumption, which generate a great deal of waste).

68. *Id.* at 104–06 (noting its contribution to childhood obesity through marketing efforts to children).

69. *Id.* at 165–85 (explaining its effects on the political process).

argument relies on a great deal more than the question of the corporation as a dignitary speaker, but Redish and Siegal ignore much of that material.

C. Viewpoint Discrimination

Redish and Siegal's third claim is that to make a distinction between corporations and human beings, or between commercial and non-commercial speech, is a form of viewpoint discrimination.[70] And they claim I am motivated to engage in this viewpoint discrimination by my supposed hostility to corporations or to free enterprise. But of course such "viewpoint discrimination" was endorsed by that well-known enemy of free enterprise, Chief Justice Rehnquist.[71]

As to the charge of viewpoint discrimination itself (independent of motives), I submit that, *by definition*, the current commercial speech doctrine is not neutral; it singles out commercial speech for different treatment than other protected speech (at least in theory). So the viewpoint discrimination claim does not work, at least with respect to commercial speech. More fundamentally, I argue that there is no viewpoint discrimination in regulating commercial (and corporate) speech because for-profit corporations do not engage in promoting "viewpoints"; they promote the sales of their products and services.

The entity itself is not alive and so doesn't have opinions or viewpoints. And the human beings who work for a corporation are agents.[72] If there happens to be a convergence between their personal views on, for instance, the desirability of drinking Pepsi, that may be a happy accident or the product of the psychological mechanism of motivated reasoning or cognitive dissonance. But there is no necessary, or even likely, connection between the two. When a salesman urges you to buy the vacuum cleaner he is selling he may believe it is truly the best for your needs, or he may secretly believe it is junk. But the sales pitch he makes is not a "viewpoint" unless "I hope you buy my product" is a viewpoint. It is an action intended to generate a sale.[73] And as an organization that is the whole of the organization's viewpoint; it is some variation on, "Buy our product!" "Our company is responsible!" "Our company is a good investment!"

Commercial speech is an artifact of commerce, and its regulation is necessary to effective regulation of commerce. And although corporate

70. Redish & Siegal, *supra* note 2, at 1463–65.

71. For a discussion of pro-business decisions made by the Rehnquist Court, see generally Barbara K. Bucholtz, *Destabilized Doctrine at the End of the Rehnquist Era and the Business Related Cases in its Final Term*, 41 TULSA L. REV. 219 (2005) (discussing numerous pro-free-enterprise decisions of the Rehnquist Court's final term, as well as many other previous cases that held in favor of business interests).

72. Professor Greenwood has made this argument particularly forcefully. *See* Greenwood, *supra* note 52, at 1061.

73. If we were thinking about it in evidence terms we might call it a verbal act. Verbal acts are statements that are not hearsay because of their character as legally significant actions that happen to take the form of words.

political speech looks more "viewpoint-like," I argue that appearances are deceiving because even corporate political speech is essentially driven by the same imperative, profit, not by the substantive issues. Much of what looks like political speech by corporations – such as issue related advertising or the discussion of labor practices – is really simply part of an integrated marketing communications strategy and thus, at least arguably, should be regulable on the same terms its other promotional speech is regulable. The reason the two categories—corporate and commercial speech—are today doctrinally blurred is that the commercial speech doctrine, which located protection for commercial speech in *listeners'* interests, contributed to the creation of the corporate-speech doctrine.[74] Like in V*irginia Pharmacy*, in *Bellotti* the Court relied on listeners' interests to justify protection for corporate political expression. [75] But the opinion also raised the viewpoint discrimination argument, [76] despite not grappling, as Chief Justice Rehnquist so keenly observed, with the question of whether a corporation can even be said to have a "viewpoint," let alone one that merited First Amendment protection.

In *Bellotti* the Court suggested that distinctions between corporate and other speakers were a sort of invidious discrimination. Justice Powell writing for the majority observed:

> If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and *this is no less true because the speech comes from a corporation rather than an individual.*[77]

This sounds as if the Court is saying that the corporation's speech is protected not because it is valuable to the listener, but because it is an intrinsic right of the speaker. Yet it did not expressly say the corporation's speech was protected for its own sake. This viewpoint discrimination trope reflected in this much quoted passage becomes quite problematic when it is applied to commercial speech. And although the commercial speech doctrine focuses on listener, not speaker interests this viewpoint discrimination trope *has* migrated back to the commercial speech doctrine.[78] Thus, advocates like

74. The connections between the two are described at length in the book. *See* PIETY, *supra* note 4 at 17–30.

75. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978).

76. *Id.* at 777 ("The inherent worth of the speech *in terms of its capacity for informing the public* does not depend upon the identity of its source, whether corporation, association, union, or individual.") (emphasis added).

77. *Id.*

78. In at least one case a court has explicitly held that "business entities . . . are a species of associations of citizens entitled to constitutional protection as citizens" and that a law which applied only to certain businesses violated the Equal Protection Clause by "fencing out" "lawful businesses that are otherwise entitled to the same protections of law as other citizens." Noel v. Board of Election Commissioners, No. 1422-CC00249, slip op. at 15–16 (Mo. Cir. Ct. Mo. Feb. 11, 2014). The measure in question was a ballot initiative which sought to bar the City of St. Louis from

Professor Redish argue that regulating commercial speech more heavily than other protected speech constitutes viewpoint discrimination.

However, as Professor Neuborne has noted, the commercial speech doctrine did not include a notion of a dignitary speaker.[79] Yet the viewpoint discrimination argument seems to *assume* such a dignitary speaker. Without such a dignitary speaker, it is much more difficult to see why corporate or commercial speech must be protected because if protection for it rests solely on the benefit to listeners, then it should be unproblematic to deny protection where any benefit to listeners outweighs the harms such speech may entail. It strains credulity to suppose that everything for-profit corporations wish to say (and perhaps more to the point, much they do *not* want to say) is in the listeners' interest to hear or that the public even wants to hear it. Very often the public most definitely does *not* want to hear what advertisers wish to say.[80]

Of course, if there *is* a dignitary speaker, that changes the calculus. When the speaker himself has an expressive interest that the law respects the First Amendment provides that he must not be unreasonably censored and strict scrutiny applies. Respect for the equal dignity of persons compels this result. But there is no such theory of the equal dignity of legal fictions. Corporations are creatures of law. It is perfectly appropriate to condition their privileges and powers by virtue of the terms governing their creation. Different types of corporations receive different tax treatment. Companies organized to conduct specific types of business, such as banking or public utilities, are subject to different regulations than the producers of ordinary consumer goods. There is nothing particularly sinister or discriminatory about such distinctions. That does not change because the distinctions relate to speech.

D. Media Corporations

Finally, Redish and Siegal claim my arguments are unconvincing because I do not distinguish between media corporations and other for-profit

granting financial incentives to any "Unsustainable Energy Producer," as defined in the proposal, as part of a Sustainable Energy Plan. The judge granted a preliminary injunction against putting the proposal on the ballot because (among other things) he found "[t]he measure *is quintessentially indistinguishable* from the Colorado measure struck down in [*Romer v.*] *Evans.*" *Id.* at 16 (emphasis added) (citing Romer v. Evans, 517 U.S. 620 (1996) (attempt to prelude legislature from passing laws which would forbid discrimination against homosexuals violated Equal Protection).

79. Neuborne, *supra* note 3, at 1442 & n.80.

80. *See* Eric Goldman, *A Coasean Analysis of Marketing*, 2006 WIS. L. REV. 1151, 1152–53 ("Consumers hate spam. They hate pop-up ads, junk faxes, and telemarketing. Pick any marketing method, and consumers probably say they hate it. In extreme cases, unwanted marketing can cause consumers to experience 'spam rage.'"). Goldman argues consumers don't always appreciate the value of marketing, and he makes an argument for robust protection for commercial speech despite this consumer dislike. In my work-in-progress, *Paternalism and the Regulation of Commercial Speech*, I argue that it is this kind of argument that is paternalistic and does not respect consumers' autonomy. Piety, *supra* note 7.

corporations.[81] It is true that I do not discuss that distinction in the book, although I have discussed it elsewhere.[82] As they know,[83] however, this argument has been extensively articulated by others, in particular by Professor Ed Baker.[84] So it is not as if there is no basis for concluding that such a distinction can be made. Since the treatment of the press clause would be the subject for another book, I never intended to provide a full answer to this question in *Brandishing the First Amendment*. (Even if I had, I am not sure Redish and Siegal would have liked my book any better.) But given that I was writing the book for a general audience and that this question is bound to occur to even the casual reader, I did intend allude to it. Somewhere in the many revisions the reference was apparently cut. I regret that omission. I will try to correct it very briefly here so it is clear why I do not think the objection about media corporations is fatal to my argument.

The press plays a distinctive role in checking government power and orthodoxy.[85] This role justifies distinctive treatment of press corporations, despite their status as profit-making organizations. Moreover, the existence of a separate press clause lends textual support to the proposition that media companies should be treated differently than other corporations. According to the late Professor Baker, the special status of the press means that the press may receive both *more* protection than other protected speakers and, in some circumstances, *less*.[86]

It is true, however, that the Supreme Court has tended to collapse the free speech and the free press clauses;[87] although, once again, this issue is perhaps not quite as well-settled as Redish and Siegal suggest. And one problem with arguing that "the press is different" is that it is increasingly difficult to distinguish between the press and other businesses. The interpenetration of marketing with editorial content is increasingly erasing what used to be the line between editorial and advertising content.[88] And as

81. Redish & Siegal, *supra* note 2, at 1460–61.

82. Tamara R. Piety, *Free Advertising: The Case for Public Relations as Commercial Speech*, 10 LEWIS & CLARK L. REV. 367, 411 & n.248 (2006).

83. Redish & Siegal, *supra* note 2, at 1458 n.50 (citing BAKER, *supra* note 51).

84. Professor Baker makes this argument in several of his works, but the one that perhaps most clearly addresses the question is C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955 (2007)*; see also* BAKER, *supra* note 51, at 229–49. A newer theory was recently offered by Professor Michael McConnell. Michael W. McConnell, *Reconsidering* Citizens United *as a Press Clause Case*, 123 YALE L.J. 412 (2013).

85. *See supra* note 84. For an argument that the First Amendment more generally performs this function, see Blasi, *supra* note 64.

86. *See, e.g.*, Baker, *supra* note 84, at 956 (pointing out that the Supreme Court has provided a "different protection for the press and for individuals, with the press sometimes receiving special protections, but also with it sometimes being subject to regulations as structured enterprises that could not be applied to individuals").

87. *See* Redish & Siegal, *supra* note 2, at 1451.

88. A recent article in *The New York Times Style Magazine* discusses Ferragamo, the shoe brand, making several short films called "Walking Stories" to feature its shoes. Alainna Lexie

Redish and Siegal note, some non-media companies have attempted to become media companies.[89] In general they haven't been very successful,[90] maybe because people don't find feature length ads terribly interesting. However, these sorts of attempts, along with phenomena like "native advertising"[91] and other stealth-marketing techniques,[92] illustrate the difficulty in making distinctions between media or press and other corporations. Redish and Siegal do not make as much of this as they could. However, the difficulty in distinguishing between editorial and promotional content and why this difficulty is troubling are topics I *do* deal with quite a bit in the book.[93]

That does not make the distinctions I propose to draw, between for-profit and not-for-profit corporations, or (by implication here) between press and non-press entities, any more fraught than many other legal line-drawing exercises, such as the distinction between public and private,[94] or between

Beddie, *Rules of Style: Ferragamo's New Leading Lady on Flying in Style and Dressing Like a Star*, T: N.Y. TIMES STYLE MAG. (Oct. 8, 2013, 3:03 PM), http://tmagazine.blogs.nytimes.com/2013/10/08/rules-of-style. Interestingly, a critical turning point in this migration may have been when *The New York Times* opened up space on its editorial page for "advertorials." *See, e.g.*, Clyde Brown & Herbert Waltzer, *Every Thursday: Advertorials by Mobil Oil on the Op-Ed Page of* The New York Times, 31 PUB. REL. REV. 197 (2005); Herbert Waltzer, *Corporate Advocacy Advertising and Political Influence*, 14 PUB. REL. REV. 41 (1988); *see also* ROBERT L. KERR, THE RIGHTS OF CORPORATE SPEECH: MOBIL OIL AND THE LEGAL DEVELOPMENT OF THE VOICE OF BIG BUSINESS (2005).

89. Redish & Siegal, *supra* note 2, at 1460–61.

90. Budweiser launched a website called "Bud.TV" which was to provide nothing but native advertising. *See infra* text accompanying note 91. The site was only up for a couple of years. Chris Albrecht, *R.I.P. Bud.tv*, GIGAOM (Feb. 19, 2009, 7:55 AM), http://gigaom.com/2009/02/19/rip-budtv. Also, recently, a feature-length film that included heavy product placement faltered rather spectacularly, in part because of the lack of a coordinated artistic vision or control free from the demands of the various brand managers involved. Jake Rossen, *Placing Products? Try Casting Them: The Rise and Fall of the Computer-Animated 'Foodfight!'*, N.Y. TIMES, Aug. 9, 2013, http://www.nytimes.com/2013/08/11/movies/the-rise-and-fall-of-the-computer-animatedfoodfight.html. The GEICO insurance "caveman" ads spawned a short-lived sitcom on ABC. Stuart Elliott, *Gauging Viewer Tastes: A New Dose of Escapism*, N.Y. TIMES, May 16, 2007, http://www.nytimes.com/2007/05/16/business/media/16adco.html. The critical reception was poor and the viewer response dismal, and the show was pulled before all the episodes aired. *See* Wikipedia, *Cavemen* (TV Series), http://en.wikipedia.org/wiki/Cavemen_%28TV_series%29 (last modified Mar. 23, 2014).

91. Native advertising is editorial content created by an advertiser for promotional purposes. It is a version of sponsored content which is far more elaborate than mere product placement. For a discussion of the issue and how it works at the Huffington Post, see Paige Cooperstein, *Native Advertising: How It Works at the Huffington Post*, PBS, (Oct. 8, 2013), http://www.pbs.org/mediashift/2013/10/native-advertising-how-it-works-at-the-huffington-post.

92. PIETY, *supra* note 4, at 39–47; *see also* Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEXAS L. REV. 83 (2006).

93. PIETY, *supra* note 4, at 39–45.

94. Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 SUP. CT. ECON. REV. 77, 78–79 (2010) (discussing the private/public dichotomy).

expert and non-expert opinion testimony.[95] And, unless we can make some of these distinctions, it seems that a good deal of the regulation of commerce will be under a constitutional cloud. This is a key argument in my book which Redish and Siegal finesse with the observation that commercial speech is "a work in progress."[96]

It was a similar observation that motivated me to write the book. I too saw that the commercial speech doctrine was a doctrine in flux and that the trend of that "progress" was away from intermediate scrutiny and the justification on which the doctrine was based[97] and toward this stealth version of a dignitary speaker and strict scrutiny. I found this movement troubling because it seemed to have the potential to destabilize many existing regulatory regimes. The movement toward strict scrutiny allows the commercial speech doctrine to be used as a weapon against regulation generally. And the strong, anti-discrimination approach of the corporate speech cases adds weight to that observation. Hence the book's title, "Brandishing the First Amendment." I predicted we would see more cases of the First Amendment being used as a weapon to challenge regulation. The record bears out this prediction.

Since *Citizens United* there have been a flurry of cases raising First Amendment challenges to a variety of legislation.[98] This turn of events may have troubling and unanticipated consequences; it may unsettle regulatory regimes which have been uncontroversial for decades.[99] And as Redish and Siegal themselves note, "the government has not won a case challenging suppression of commercial speech in the Supreme Court in over twenty years." Most recently, the Court has "at least implied that any regulatory

95. *See* FED. R. EVID. 701–702 and advisory committee's notes.

96. Redish & Siegal, *supra* note 2, at 1462.

97. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 770–71 & n.24 (1976) (noting that extending First Amendment protection to commercial speech did not prevent proper regulation or suggest that it was "wholly undifferentiable" from other types of protected speech).

98. This is by no means an exhaustive list, but some of these cases are IMS Health, Inc. v. Sorrell, 131 S. Ct. 2653 (2011) (data mining statute violates First Amendment speech clause); R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205 (D.C. Cir. 2012) (striking down FDA's graphic warning labels on cigarettes); Brown v. Entertainment Merchants Ass'n., 131 S. Ct. 2729 (2011) (striking down law regulating sale of violent video games to minors); Nat'l Ass'n of Mfrs v. NLRB, 717 F.3d 947 (D.C. Cir. 2013) (striking down NLRB rule declaring a failure to post a notice of employee rights an "unfair labor practice"); Liberty Coins, LLC v. Goodman, __ F.3d __, 2014 WL 1357041 (6th Cir. 2014) (rejecting First Amendment challenge to Ohio licensing requirement for dealers in precious metals); Law School Admission Council, Inc. v. State, 166 Cal. Rptr3d 647 (Cal. App. Dist. 2014) (rejecting First Amendment and Equal Protection challenges to law prohibiting the LSAC from "flagging" LSAT scores of applicants who have taken the exam with accommodations).

99. PIETY, *supra* note 4, at 223; *see also* Tamara R. Piety, *Citizens United and the Threat to the Regulatory State*, 109 MICH. L. REV. FIRST IMPRESSIONS 16, 20–22 (2010), http://www.michiganlawreview.org/assets/fi/109/piety.pdf (offering a brief summary of the potential for unintended consequences if the approach in the corporate political cases is exported to the commercial speech context because of the likely higher standard of review and different analytical foundation reflected in the former).

distinction of expression premised on the commercial nature of the speaker deserves strict scrutiny."[100]

Thus, the "book's principal policy recommendation [was] a conservative one: do not extend strict scrutiny review to the commercial speech doctrine."[101] In writing the book I wanted to urge courts to consider the potential ramifications of robust First Amendment protection for commercial speech[102] because strict scrutiny review has troubling implications for the government's ability to regulate commerce. Yet Redish and Siegal have almost nothing to say about this observation except to offer the non sequitur that the "commercial speech doctrine is a work in progress."[103]

III. Neuborne: The Romantic First Amendment

Neuborne, in contrast to Redish and Siegal, better addresses the arguments I actually make in my book rather than a caricature of them—while also being a more sympathetic interlocutor. But like Redish and Siegal, his view of the First Amendment seems to be that if one supports some regulation of speech, one must not be committed to freedom of speech generally. This is not correct.

Neuborne's review begins with a somewhat romantic narrative about the emergence of the iconic First Amendment decisions followed by a story of decay and disarray that I am not sure I agree with.[104] On the whole, however, there is much we agree on. The disagreements we have center on his misunderstanding of my argument about what we should make of the evidence of manipulation of consumers by advertisers. I argue that there is an imbalance of power that justifies regulation, that the evidence of manipulation demonstrates that commercial entities are using superior resources to undermine consumer autonomy. Neuborne believes that my support for regulation means that I don't take consumers seriously, that I would support paternalistic interventions. Neuborne also seems to reject my claim that the application of the viewpoint-discrimination/strict-scrutiny standard to commercial speech runs the risk of insulating false speech. I discuss this issue first and then address his broader concern that I do not take listeners' interests seriously.

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100. Redish & Siegal, *supra* note 2, at 1462.

101. PIETY, *supra* note 4, at 12.

102. On the one hand, the trend I identified has become further entrenched with *Citizens United v. FEC*, 130 S. Ct. 876 (2010) and *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011). On the other, the unpopularity of at least the *Citizens United* decision has opened up some political space for discussion of this issue. It has turned what previously may have been a minority viewpoint among First Amendment scholars into one that, at least in its broadest outlines, is more mainstream. *See, e.g.*, Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153 (2012).

103. Redish & Siegal, *supra* note 2, at 1462.

104. Professor Neuborne's story of this transformation begins with "Once upon a time" and takes up the first 8 or 9 pages of his review. *Id.* at 1425–33.

A. Blurring the Commercial/Corporate Speech Distinction

As a general matter, Neuborne's review is a lament that *Brandishing the First Amendment* is not the book he thinks I ought to have written, one which would focus more on the dignitary speaker. He notes that protection for commercial and corporate speech is founded on its benefit to listeners, *not* to any dignitary rights of the commercial or corporate speaker[105] and therefore the *Citizens United* case represents a troubling development. I agree. The critical mistake I believe Neuborne makes is when he says protection for commercial and corporate speech is founded on "the dignitary and instrumental rights of hearers to receive *uncensored* information."[106] This is not correct. The commercial speech doctrine was predicated on the right of consumers to receive *truthful* information, not "uncensored" information. This distinction is very important.

The *Virginia Pharmacy* Court contemplated that its ruling would permit quite a bit of censorship, if by "censorship" one means the government suppressing false or misleading speech, requiring warnings or disclaimers, or setting the terms and conditions for communications about certain types of transactions, as with, for example, securities regulation.[107] But the courts have not traditionally viewed such regulation as censorship. Only recently have advocates like Redish argued that ordinary commercial regulation of commercial speech is a form of censorship.

The *Central Hudson*[108] test provides that in order for commercial speech to receive First Amendment protection, the speech must be about a lawful product and must not be misleading.[109] These limitations illustrate why the importation to commercial speech of the viewpoint discrimination analysis and strict scrutiny is so troubling. The viewpoint discrimination advocates seem to want to elide these limitations on the protection for commercial speech and suggest that all commercial speech is protected, including false and misleading speech. But the doctrine explicitly excluded false and misleading commercial speech, while traditional First Amendment doctrine

105. Neuborne, *supra* note 3, at 1439.

106. *Id.* (emphasis added).

107. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771 (1976) ("Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem.").

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

109. *Id.* at 566.

protects a great deal of false speech, sometimes explicitly[110] and sometimes as a function of the strict scrutiny standard of review.[111]

This is not an appropriate standard to apply to commercial regulation. A commercial entity will only have an interest in conveying truthful information to consumers about its product *if that truthful information will help it sell the product*. If it does *not* help to sell the product or, worse still, depresses sales, the company will not only have no incentive to tell the truth, it may have a legal *duty* to lie *unless* there is a legal compulsion to tell the truth. [112]

Neuborne doesn't believe that regulation of false and misleading speech is in any jeopardy because, he says, there is no dignitary speaker in the commercial speech doctrine.[113] While I agree there is no dignitary speaker in the commercial speech doctrine, I am not so sanguine. While Professor Neuborne may think "it would take an earthquake to move a majority of the Court to recognize that false and misleading commercial speech is entitled to full First Amendment protection"[114] because "the Court would need an entirely new rationale for such an expansion,"[115] I argue[116] that the Court has in fact essentially *already* dispensed with the underlying rationale for protecting commercial speech. It has already begun to treat commercial speech as *if* it had a dignitary speaker.[117]

If I am correct, then it is not at all clear why, as Professor Neuborne would have it,[118] the recent decision in *United States v. Alvarez*[119] which protected false speech about military honors, has no bearing on commercial speech.[120] In fact, the Court has not used the dignitary speaker as a rationale

110. Recently, the Court struck down a statute which criminalized false claims of military honors. Alvarez v. United States, 132 S. Ct. 2537 (2012). In so doing, the Court repudiated as mere dicta the oft-stated observation that there is no First Amendment value in false speech as such. *Id.* at 2545 ("The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection.").

111. *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964) (First Amendment requires "breathing room" which includes protection for some falsity).

112. The national experience with tobacco being the most notorious example, illustrates the truth of this observation. *See* Daniel Hays Lowenstein, *"Too Much Puff": Persuasion, Paternalism, and Commercial Speech*, 56 U. CIN. L. REV. 1205, 1222–23 (1988) (stating that the tobacco industry is "understandably motivated by enormous profits rather than by concern for truth or the public welfare").

113. Neuborne, *supra* note 3, at 1442.

114. *Id.*

115. *Id.*

116. *See* Piety, *supra* note 4.

117. On this point Redish and Siegal agree with me. They write that the commercial speech doctrine appears to be subject to strict scrutiny review even if the Court hasn't yet "explicitly taken [that] step." Redish & Siegal, *supra* note 2, at 1462.

118. Neuborne, *supra* note 3, at 1442.

119. 132 S. Ct. 2537 (2012).

120. In fact, a plaintiff in a commercial speech case has already cited *Alvarez*. *See* Petition for Review, Law School Admission Council, Inc. v. State, 2014 WL 1053298, at *15 (Cal. 2014) (appealing from Law School Admission Council, Inc. v. State, 166 Cal. Rptr. 3d 647 (2014) The Court's recent decision in the POM Wonderful case, although it did not involve a First Amendment

in *either* the commercial *or* corporate speech decisions, relying instead on the interests of listeners argument. If the absence of a dignitary speaker is dispositive it should call into question the soundness of the decision to extend constitutional protection to corporate political speech as well since, as Neuborne observes, there is no dignitary speaker there either.[121] But as we know, it has not.

Yet the absence of a dignitary speaker in both doctrines go to the heart of what is going on in commercial speech doctrine today. Resort to content neutrality and listeners' interests allow advocates to avoid acknowledging the absence of a dignitary speaker and the meagerness of the corporation's dignitary interests (or lack thereof) in both the commercial and the corporate context. It is a doctrinal sleight of hand which permits advocates of freedom for both commercial and corporate speech to level charges of paternalism at the advocates of regulation. It is only through construing commercial and corporate speech as a benefit to *hearers* that the paternalism claim, which is Professor Neuborne's main concern, seems to have plausible analytical coherence. Once we focus on the speaker's interest we see that regulation of commercial speech primarily imposes a restriction on *speakers*, not listeners. And it restrains speakers, not for *their own* benefit (which would be paternalistic), but for the *listeners'* benefit (which is not). The restraint of one person for the benefit of another person may or may not be justified, but it is not "paternalistic"—at least not in the strictest sense.[122] Yet it is an objection to what he sees as paternalism that is at the heart of Neuborne's critique.

B. Taking Hearers Seriously

As the title of his review suggests, Neuborne's main objection to my book is that, in his view, I don't take hearers seriously. He claims I "infantilize"[123] listeners, that I am "condescending."[124] I disagree. He mistakes my recognition of structural imbalances of power and time for condescension. I will not fully elaborate the argument that I make in my next article, *Paternalism and the Regulation of Commercial Speech*,[125] but I want to sketch out its basic parameters as a response to his book review.

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challenge, suggests the Court may be willing to reaffirm its commitment to regulation of commercial speech. *See* POM Wonderful LLC v. Coca-Cola Co., 81 U.S.L.W. 3372 (U.S. June 12, 2014).

121. Neuborne, *supra* note 3, at 1442. This is the subject of the dispute between himself and Redish.

122. I am aware there are arguments that restricting one person's liberty to benefit another rather than the one so restricted is paternalistic, even though not classically so. I discuss this issue at greater length in the paper. Piety, *supra* note 7. But the classic construction paternalism is the restriction of someone's liberty for his *own* good.

123. Neuborne, *supra* note 3, at 1439.

124. *Id.* at 1438.

125. Piety, *supra* note 4.

Characterizing consumers as condescended to if we recognize the enormous structural (not intellectual) disadvantages they face when coping with persuasion attempts by large, powerful companies is an argument reminiscent of that advanced by Justice Peckham in *Lochner*. In reviewing New York's limitation on the hours worked by bakers, Peckham wrote:

> There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves *without the protecting arm of the State, interfering with their independence of judgment and of action*.[126]

This characterization erases the differences in power between employer and employee. Neuborne likewise ignores the difference in power between advertiser and consumer. He mistakes my critique of the advertisers' exploitation for one about consumers' intellectual capacities. Like Redish and Siegal, Neuborne assumes that my use of the behavioral science and marketing literature demonstrates that I believe consumers have no agency, that they are no more than unwitting dupes, thus justifying "paternalistic"[127] interventions. This critique is frustrating given that I went to some lengths in the book to explain why I thought a great deal of regulation of commercial speech is not paternalistic at all.

In Chapter 6 of *Brandishing the First Amendment* I argue that much regulation of commercial speech, such as ad blocking or the Do-Not-Call Registry, is intended to give consumers more control over the sales pitches they receive or more control over their data or their privacy.[128] Such regulation is intended to *expand* consumers' autonomy. Popular demand is often the genesis for such regulation. It is not paternalistic to give citizens the legislative relief they want. To the contrary, it is paternalistic to disregard these preferences on the grounds that commercial speech offers consumers some benefit that they do not fully appreciate,[129] such as an opportunity to learn self-discipline.[130]

It is the proposition that consumers cannot freely choose to cut off their exposure to commercial messages because such exposure offers consumers valuable learning opportunities that is paternalistic. This amounts to a refusal to give consumers control over the degree to which they must be subject to unwanted persuasion attempts, not for ideas, but for commercial

126. Lochner v. New York, 198 U.S. 45, 57 (1905) (emphasis added).

127. Redish & Siegal, *supra* note 2, at 1471 (writing that I appear to embrace "governmental paternalism").

128. PIETY, *supra* note 4, at 107–20.

129. *See generally* Goldman, *supra* note 80.

130. *See, e.g.*, MARK D. WHITE, THE MANIPULATION OF CHOICE: ETHICS AND LIBERTARIAN PATERNALISM 125 (2013) (arguing that regulation may prevent consumers from having educational experiences); Jonathan Klick & Gregory Mitchell, *Government Regulation of Irrationality: Moral and Cognitive Hazards*, 90 MINN. L. REV. 1620, 1630–31 (2006) (arguing that regulation may prevent consumers from learning self-control). I call this "tough love" paternalism.

products and services, on the grounds that consumers are bad judges of what is good for them. That sounds fairly paternalistic. And it forces consumers to serve as a resource for advertisers. (They call it data "mining" for a reason.)

It is precisely because I credit listeners with the autonomy to make these decisions that I argue that listener autonomy ought to extend to the ability to cut off commercial appeals altogether or to otherwise control them in some way. In the political and social realm there is some force to the notion that we ought not to be able to shield ourselves completely from opposing points of view, if only so we can be forced to think more deeply about our own position. The idea is that it is good for us to be exposed to the ideas we hate.[131] Moreover, speaking has expressive value for the human being who wishes to speak and who would be silenced that justifies protection, quite apart from whether it has any value to any listener, anywhere.

There is no such countervailing social good that comes from forcing people to hear commercial pitches they do not want to hear. It strains credulity to suggest we must be exposed to commercial messages for products we don't want to advance the common good. Indeed, there is a compelling case to be made that there are very many harms that can emerge from it. I talk about some of them in the book—rising childhood obesity, environmental harms from high levels of consumption, and economic instability.[132]

Professor Neuborne is concerned that all of the psychological tricks and fallibilities of mass communication are present with political speech as well as commercial and, thus, it is unclear why we should not likewise intervene to test political speech for its truth.[133] However, because political speech is inevitably tied up with party politics, it is reasonable to conclude we could never trust a Federal Political Truth Commission to police the truth of political speech the way we may (hope) for an agency like the Federal Trade Commission to police the truth of private companies' promotional sales claims.[134] Truth tests in political speech would invade matters less capable of factual resolution than those in commercial speech. And political issues involve both substantial moral values and the democratic process. Truth-in-labeling seems to implicate less transcendent concerns.

131. *See generally* LEWIS, *supra* note 8.

132. There are others I don't talk about in the book but which I have addressed elsewhere, like harms to women in reinforcing anxiety about appearance or gender stereotypes. *See, e.g.*, Tamara R. Piety, *Onslaught: Commercial Speech and Gender Inequality*, 60 CASE W. RES. L. REV. 47 (2009).

133. Neuborne, *supra* note 3, at 1438. *But see* Susan B. Anthony List v. Driehaus, ___U.S. ___, No 13-193, slip op. (June 16, 2014) (plaintiff may go forward with challenge to Ohio law prohibiting false statements in "attack ads" shortly before an election).

134. For an argument that would seem to support this view, see Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993).

Moreover, Congress's power to regulate commerce seems to compel the conclusion that commerce, if not totally separate from politics, must be analytically distinct in a way that makes regulating it possible and not just politics by other means. In any event, the separation between economic activity and political activity, while somewhat artificial once money is deemed speech, is a divide that has been taken for granted for almost 200 years in our constitutional jurisprudence[135] So it is hard to argue that it is impossible to police.

Also, as to political speech, there is an argument that the First Amendment is needed primarily to protect the dissident and the powerless[136] and to allow people to make up their own minds.[137] However, major business corporations are not powerless dissidents. Indeed, it is not an uncontroversial proposition that they are even legitimate players in the democratic process. Many argue they have far too much influence in public affairs relative to the representativeness of their views. As Justice Marshall noted in *Austin v. Michigan State Chamber of Commerce*,[138] "[t]he resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas."[139] Finally, simply saying a corporation's speech is not entitled to constitutional protection is not the same thing as prohibiting it altogether. It may still be protected by statute where appropriate. What is at issue here is whether the people may use the political process to restrain private power.

Professor Neuborne accuses me of not taking listeners seriously, of endorsing excessive paternalism. Yet he appears to embrace the notion that everything the corporate speaker wishes to say in aid of selling its product is something that the listeners are necessarily interested in (or ought to be interested in) hearing, whether they know it or not and on this basis it must be protected from their illiberal impulses It is *this* argument that I propose is both deeply paternalistic and undemocratic. It deprives the people of the opportunity to use the political process to restrain private power.

To deny them this power turns them into a resource for marketers, one that can be mined just like coal or oil and that gives consumers little autonomy over their own lives. I discuss this argument in more detail in *Paternalism and the Regulation of Commercial Speech*. I do not anticipate it will meet with Professor Redish's approval, but I cherish the hope that it might as yet be more persuasive for Professor Neuborne.

135. PIETY, *supra* note 4, at 1, 78–79.

136. Emerson actually discusses these ideas throughout, but a few examples can be found in Emerson, *Toward a General Theory*, *supra* note 64, at 885, 890–98, 951.

137. Again, this element is discussed extensively throughout. *See id.* at 881–82.

138. 494 U.S. 652 (1990).

139. *Id.* at 659 (quoting FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 258 (1986)).