Defining Commercial Speech in the Context of Food Marketing

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I. Introduction
Obesity is a public health problem in the United States. Experts have identified the regulation of food marketing as a policy strategy to address obesity and poor nutrition. However, the First Amendment can be a barrier to reducing exposure to problematic food marketing. In recent years, courts have become increasingly protective of speech, and particularly of “commercial speech,” or advertising, which can make it more difficult to regulate certain marketing practices.

Marketing is a broad concept that includes (1) speech-based communications, and (2) non-speech-related activities. In the first category, marketers communicate through an array of speech-based practices that include both traditional “advertising” (e.g., billboards and television, radio, and print ads) and broader promotional strategies (e.g., public relations communications and YouTube, Facebook, and Twitter content). Food marketers and retailers also engage in marketing practices that do not involve speech, such as establishing the price of products and determining where to locate them within a store.

The following provides an overview of First Amendment jurisprudence related to marketing, reviews several types of marketing for which companies have sought increased First Amendment protection, discusses these issues in the context of food marketing, and argues that food companies should not be able to evade public health regulations by claiming that their commercial activities warrant increased constitutional protection.

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II. First Amendment
The First Amendment states that government shall not abridge the freedom of speech. Initially, the Supreme Court applied this protection to “core” speech (such as political or religious speech). However, in 1976, the Court extended its application to “commercial” speech, or advertising. The 1980 case of Central Hudson set forth a test to determine whether commercial speech restrictions are constitutional. The test first asks whether the regulated speech is false, misleading, or related to illegal activity. If so, the First Amendment does not protect it; if not, in order for a court to uphold the restriction, the government must show a substantial interest in restricting the speech, the restriction must directly advance that interest, and it cannot be more extensive than necessary.

Though that test constitutes intermediate scrutiny, in practice no commercial speech regulation has stood a First Amendment challenge in the Supreme Court since 1995. During this same time period, the Court has granted corporations increased core speech rights, akin to those of human persons, such that corporations engaged in political speech are now protected from government interference. Even given this jurisprudence, there are areas that remain viable for government regulation to protect consumers from unhealthy food marketing.

A. Conduct/Speech Distinction
The commercial speech doctrine was developed in the context of advertising that directly involved speech, but marketing includes non-speech conduct related to the product itself, its price, and where it is located for sale. Contrast, for example, a television advertisement using words to promote a two-for-one deal with the practice of offering the two-for-one deal.
Regulations of conduct do not implicate speech and should not be subject to First Amendment scrutiny. To the extent that regulated conduct may have an expressive component and thus may implicate the First Amendment, review should proceed using the test established in the case of *United States v. O'Brien.* This test requires courts to determine if the regulation is within the government’s constitutional power and further a substantial interest unrelated to the suppression of free expression, as well as whether any incidental restrictions on alleged First Amendment freedoms are no greater than necessary to further that interest. In practice, this test is less exacting than the *Central Hudson* test. Nonetheless, companies continue to argue that regulation of their non-speech marketing practices should be reviewed using *Central Hudson,* which would render them more likely to be struck down.

The Supreme Court directly addressed the distinction between commercial speech and expressive conduct in *Lorillard v. Reilly.* In *Lorillard,* the Court reviewed, among other things, a Massachusetts regulation banning self-service tobacco displays. Because the state sought “to regulate the placement of tobacco products for reasons unrelated to the communication of ideas,” the Court upheld the ban using the *O’Brien* test, even after striking down several speech-related tobacco marketing restrictions under *Central Hudson.*

In the food context, the placement of items in checkout aisles is a marketing practice; captive audiences, often including children, must pass through in order to pay and exit the store. Arguably, product location within a store is a non-speech activity, the regulation of which should not implicate the First Amendment. Even if locating products in the checkout aisle has a communicative component, there is a non-speech-related rationale to regulate products there: ready access to unhealthy foods increases impulse purchases of products shoppers would not otherwise buy. *O’Brien* is thus the appropriate test for review of such a regulation, and the government should more easily be able to successfully argue in favor of a healthy checkout aisle law in the face of a First Amendment challenge.

The pricing of products is another non-speech marketing practice that companies have argued should constitute commercial speech. The city of Providence, Rhode Island, enacted an ordinance in 2012 that prohibited retailers from discounting tobacco products by means of coupon redemption and multipack discounts with the goal of reducing tobacco use among youth. Tobacco retailers filed suit, claiming the ordinance violated the First Amendment and should not survive review under either *Central Hudson* or *O’Brien.* The First Circuit disagreed and upheld the ordinance. While it found the dissemination of price information to be protected commercial speech, the court held that pricing practices themselves should not receive any First Amendment protection. The government can follow a similar course with foods by regulating their price through strategies such as setting minimum prices or banning the redemption of coupons for certain unhealthy products.

The line between conduct and speech is not always clear. But courts’ continued willingness to maintain a distinction between the two, and their corresponding refusal to apply the First Amendment to marketing practices that do not implicate speech, present an opportunity for regulation of marketing tactics employed by food companies.

**B. Commercial/Core Distinction**

Just as companies have urged courts to provide First Amendment protection to non-speech practices, they have urged courts “to reject the *Central Hudson* analysis and apply strict scrutiny” in cases reviewing regulations of commercial speech. To date the Supreme Court has declined this invitation. Several decades ago, the Court explored the line between core and commercial speech; in *Bolger v. Youngs Drug Products,* it created a test examining the combination of three factors — advertising format, product reference, and economic motivation — to determine if speech was commercial. The subsequent case of *Nike v. Kasky* would have provided the opportunity to more precisely define this boundary, but the Court declined to hear it.

In *Nike,* Nike responded to news reports alleging that it was utilizing unfair labor practices [to manufacture its shoes and apparel] by issuing statements about its business operations through a pamphlet, website post, letter to the editor of the *New York Times,* press releases, personalized letters, and newspaper advertisements. A California resident sued Nike pursuant to California consumer protection laws, arguing that all of these communications were false and misleading commercial speech, which is not protected by the First Amendment. Nike argued that its communications were not commercial, but rather core speech, “part of ‘an international media debate on issues of intense public interest.’” The California Supreme Court found that Nike’s speech was commercial; Nike appealed but the Supreme Court denied certiorari on jurisdictional grounds. Although Nike’s communications were written by a commercial speaker representing its business practices, several Justices’ dissent to the denial of certiorari argued that the communications were a mixture of core and commercial speech because much of it was “outside a traditional adver-
The fact that speech occurs outside a “traditional” advertising context and plays a role in public debate should not remove communications from the commercial speech doctrine. Marketing promotion includes a vast array of strategies, including traditional advertisements but also extending to press releases, public relations communications, and website posts.14 Further, Nike was not engaged in debate or “political commentary”;15 rather, it was making statements about its company to show it was a “good corporate citizen”16 in response to a public debate. The speech at issue in Nike involved promotional communications, a product at issue, and an economic motivation, satisfying the Bolger test.

Modern food marketing practices include the types of speech utilized by Nike. Food marketing has evolved from straightforward advertisement of a branded product to a broader effort to shape the public’s perception of the company and its goods. For instance, fair-trade coffee might taste the same as other coffee, but the fair-trade designation conveys information about the company’s practices. David Vladeck, former director of the FTC, referred to this as “image” advertising, noting that instead of focusing on the product, it focuses on “the identity the corporation wants to project to the public.”17 Accordingly, Coca-Cola’s 2013 “Coming Together” campaign included commercials, YouTube videos, interviews with the company’s CEO, and newspaper advertisements touting Coca-Cola’s commitment to encouraging healthy lifestyles to address obesity and physical inactivity. Like Nike, Coca-Cola was discussing the company’s own practices in response to a current public debate — the link between soda consumption and obesity. These debates directly threaten profits, so both companies responded with promotional communications about their practices to illustrate that they are good corporate citizens.

The promotional format, existence of — and reference to — a product, and economic motivation leave no question that, like Nike, Coca-Cola was engaged in commercial speech.

III. Conclusion

The tendency of businesses to challenge any regulation of corporate activities on First Amendment grounds has the potential to limit the government’s ability to address the issue of unhealthy food marketing. Characterizing marketing regulations that do not target speech as First Amendment violations places a much larger burden on governments seeking to protect the public’s health. Likewise, elevating commercial communications to the level of core speech, because they respond to a public debate, represents a troubling tendency to protect corporations from government intervention.

To date, the door remains open for regulation of marketing practices that do not directly involve speech, even when those practices have a communicative component. Strategies that address pricing and product location, for example, remain viable under current First Amendment doctrine, in spite of companies’ efforts to argue otherwise. Although they have become increasingly wary of commercial speech regulation, courts still explicitly recognize a distinction between core speech, commercial speech, and conduct, and they should continue to do so.

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References

6. Id., at 569-570.
12. Id., at 964.