
VALOR FOR SALE: APPLYING THE COMMERCIAL SPEECH EXCEPTION TO SELF-PROMOTING INDIVIDUALS*

“Of course, in the area of commercial speech, the analysis that follows might be very different.”¹

I. INTRODUCTION

The First Amendment of the United States Constitution sets about protecting the freedom of speech in a remarkably straightforward manner. It commands that “Congress shall make no law . . . abridging the freedom of speech,”² without exceptions or qualifying modifiers. It is now widely accepted, however, “that not all expression or communication is included within ‘the freedom of speech.’”³ While some exceptions to this rule are uncontroversial,⁴ the treatment of several other exceptions as either unprotected,⁵ or of limited protection,⁶ is much less clear.

This Comment attempts to test the Supreme Court’s assertion that corporations should be treated the same as individual speakers—at least as far as First Amendment protections of political speech are concerned⁷—by exploring the possibility of

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1. *United States v. Alvarez*, 617 F.3d 1198, 1206 n.6 (9th Cir. 2010), *aff’d*, 132 S. Ct. 2537 (2012).

2. U.S. CONST. amend. I.

3. KATHLEEN M. SULLIVAN & GERALD GUNTHER, *FIRST AMENDMENT LAW* 1 (3d ed. 2007).

4. The most obvious examples include “bribery, perjury, and counseling to murder.” *Id.*; see also FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 89 (1982) (asserting that free speech rights do not “include a ‘right’ to commit perjury, or to extort, or to threaten bodily harm, although all of these are speech acts”).

5. Categories held to be outside First Amendment protection include “incitement, fighting words, libel, obscenity and child pornography.” SULLIVAN & GUNTHER, *supra* note 3, at 1; see also *New York v. Ferber*, 458 U.S. 747, 764–65 (1982) (holding that child pornography is not entitled to First Amendment protection); *Miller v. California*, 413 U.S. 15, 24 (1973) (setting out the three criteria that must be met in order for potentially obscene material to be subject to governmental regulation); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that inflammatory speech that rises to the level of incitement is not protected by the First Amendment); *N.Y. Times v. Sullivan*, 376 U.S. 254, 279–81 (1964) (requiring actual malice in defamation suits in order to preserve free speech rights); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (holding that a statute prohibiting “fighting words” did not violate the free speech guarantee of the First Amendment).

6. The Supreme Court “has upheld various regulations of sexually explicit but nonobscene speech, and it has treated commercial speech . . . as explicitly enjoying lesser First Amendment protection.” SULLIVAN & GUNTHER, *supra* note 3, at 1.

7. See *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 899 (2010) (“We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain

essentially doing the reverse: applying a categorical exception to First Amendment protection typically reserved for corporations, in the form of commercial speech, to individual speakers engaging in self-promotional speech. In other words, if corporate political speech is given the same treatment as individual political speech, should the self-promotional speech of individuals be, just as corporate promotional speech is, subject to classification as commercial speech?

Part II.A will trace the history and development of the commercial speech doctrine, including its unintentional creation, elusive definition, and underlying rationale. Part II.B will discuss how the Supreme Court has dealt with individuals and corporations by investigating the role of the speaker's identity in commercial speech cases. Part II.C will introduce the now-overturned Stolen Valor Act of 2005,⁸ which made it a crime to falsely claim receipt of military awards, and then focus on the pending Stolen Valor Act of 2013,⁹ which includes a provision criminalizing such false claims made with an intent to benefit.¹⁰

Section III will explore the practicality of the commercial speech exception's application to individual speech, largely by considering it in the context of this proposed provision. The Stolen Valor Bill provides a working analogue to truth in advertising laws—permitted under the commercial speech exception¹¹—applied to individuals speaking not as members of a commercial profession, but as individuals. Part III.A will discuss the various ways in which the speech targeted by the Stolen Valor Bill meets the definitional requirements of commercial speech. Part III.B will review the reasons why all speech proscribed by the Stolen Valor Bill satisfies the rationale behind the commercial speech exception. Following that, Part III.C will explain why the Stolen Valor Bill falls within the traditional definition of a fraud statute.

Part III.D will conclude first with a discussion of the ramifications of applying the commercial speech exception to individuals speaking in a self-promotional, rather than professionally commercial, capacity. This Comment reasons that although a subset of the kind of speech targeted by the Stolen Valor Bill falls within both the definition and underlying rationale of the commercial speech exception, courts should not attempt to extend that exception to include the Bill's proscribed speech. In the case of the Stolen Valor Bill, a classification of this particular type of self-promotional speech by individuals would lead to a blurring of the lines that currently divide political and commercial speech. Finally, Part III.E will discuss how the Court may need to reexamine the definition of, and rationale behind, commercial speech doctrine, in light of the changing nature of the speech proscribed by the Stolen Valor Bill.

disfavored speakers. Both history and logic lead us to this conclusion.”).

8. 18 U.S.C. § 704 (2006), *invalidated by* United States v. Alvarez, 123 S. Ct. 2537 (2012).

9. H.R. 258, 113th Cong. (2013); S. 210, 113th Cong. (2013).

10. See *infra* Part II.C.3 for a discussion of the precise provisions of the Stolen Valor Act of 2013. This Comment will refer to this bill as the “Stolen Valor Bill,” to avoid confusion with the now-invalidated Stolen Valor Act of 2005.

11. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980) (“[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it.”).

II. OVERVIEW

A. *The Commercial Speech Exception*

The definition of and protection provided for commercial speech has undergone vast changes since its first mention in *Valentine v. Chrestensen*.¹² Although much legal scholarship has been produced regarding the proper interpretation of the commercial speech doctrine,¹³ the law, particularly in regards to the definition of commercial speech, remains unsettled.¹⁴

1. The Unintentional Creation of the Commercial Speech Exception

The Court's first creation of a category of commercial speech in the 1942 *Chrestensen* case has been described as a "casual, almost offhand" ruling.¹⁵ Chrestensen, who earned money by exhibiting his submarine in various ports, sought to enjoin the application of a section of New York's Sanitary Code prohibiting the distribution of handbills¹⁶ as an "unconstitutional abridgement" of the First Amendment freedoms of speech and the press.¹⁷ After observing Chrestensen passing out leaflets advertising the exhibition of his submarine, Valentine, the Police Commissioner and petitioner in this case, advised Chrestensen that though handing out advertisements would violate the Sanitary Code, he could "freely distribute handbills solely devoted to 'information or a public protest.'"¹⁸ In an apparent attempt to avoid engaging in the prohibited activity, Chrestensen printed and proceeded to distribute a revised handbill that excluded any mention of an admission fee and added, on the

12. 316 U.S. 52, 54 (1942).

13. See, e.g., Erwin Chemerinsky & Catherine Fisk, *What is Commercial Speech? The Issue Not Decided in Nike v. Kasky*, 54 CASE W. RES. L. REV. 1143, 1145 (2004) (positing that "[f]actual statements by a manufacturer to consumers about its products with the objective of increasing sales are and should be considered commercial speech"); Elizabeth Blanks Hindman, *The Chickens Have Come Home to Roost: Individualism, Collectivism, and Conflict in Commercial Speech Doctrine*, 9 COMM. L. & POL'Y 237, 271 (2004) (arguing that the Supreme Court should adopt strict scrutiny approach in commercial speech questions); Shannon M. Hinegardner, *Abrogating the Supreme Court's Rational Basis Standard for Commercial Speech: A Survey and Proposed Revision of the Third Central Hudson Prong*, 43 NEW ENG. L. REV. 521, 553-62 (2009) (advocating for amendment of third prong of *Central Hudson* test used by courts when determining whether to uphold a regulation of commercial speech); Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583, 2584-86 (2008) (arguing against broad First Amendment protection of commercial speech).

14. Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 2 (2000) (describing commercial speech doctrine as "notoriously unstable and contentious" and asserting that "[n]o other realm of First Amendment law has proved as divisive").

15. *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring).

16. *Chrestensen*, 316 U.S. at 53 n.1 ("Handbills, cards and circulars.—No person shall throw, cast or distribute or cause or permit to be thrown, cast or distributed, any handbill, circular, card, booklet, placard, or other advertising matter whatsoever, in or upon any street or public place, or in a front yard or court yard, or on any stoop, or in the vestibule or any hall of any building, or in a letter-box therein This section is not intended to prevent the lawful distribution of anything other than commercial and business advertising matter." (quoting N.Y.C. ADMIN. CODE § 755(2)-7.0(5), *invalidated by* *People v. Remeny*, 355 N.E.2d 375 (N.Y. 1976)).

17. *Id.* at 54.

18. *Id.* at 53.

reverse side, a statement protesting the City Dock Department's refusal to allow Chrestensen to dock his submarine at a city pier for exhibition purposes.¹⁹ Chrestensen was then arrested by police and later brought suit.²⁰

The district court granted Chrestensen a permanent injunction,²¹ which was later affirmed by the Second Circuit Court of Appeals.²² The Supreme Court, however, reversed both lower court decisions in three short paragraphs.²³ Justice Roberts delivered the unanimous opinion of the Court, declaring that just as the Court had recognized that states and cities are not allowed to overburden or limit the exercise of freedom of speech in public places, "[w]e are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising."²⁴ As already noted by one commentator, the Court did not cite any authority in arriving at its conclusion.²⁵ Thus, the category of commercial speech was created somewhat unwittingly, and almost certainly without any conception of the role it would play in First Amendment jurisprudence.

In this first decision, the Court offered no explicit reasoning as to why "purely commercial advertising" should not be afforded First Amendment protection.²⁶ In fact, the Court refused to address Chrestensen's argument—that he was "engaged in the dissemination of matter proper for public information"—stating that it "need not indulge" in attempting to imagine the various ways in which a line might be drawn between political and commercial speech.²⁷ This refusal to set forth either a reasoning for, or clear definition of, commercial speech, however, was not without context. The Court did place commercial speech, which could be freely regulated by the legislature, in opposition to political speech, which is deserving of the utmost protection under the First Amendment.²⁸ Further, the Court made clear that an attempt to add political undertones to an otherwise commercial message—Chrestensen's removal of the price of admission and addition of a political protest—would not alter the categorization of the type of speech presented, particularly if it were merely done in order to avoid

19. *Id.*

20. *Id.* at 53–54.

21. *Chrestensen v. Valentine*, 34 F. Supp. 596, 600 (S.D.N.Y. 1940).

22. *Chrestensen v. Valentine*, 122 F.2d 511, 516–17 (2d Cir. 1941).

23. *Chrestensen*, 316 U.S. at 54–55.

24. *Id.* at 54.

25. Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 627–28 (1990) (arguing that "the Supreme Court plucked the commercial speech doctrine out of thin air" and noting that "[w]ithout citing any cases, without discussing the purposes or values underlying the first amendment, and without even mentioning the first amendment except in stating Chrestensen's contentions, the Court found it clear as day that commercial speech was not protected by the first amendment").

26. *Id.* at 628 (quoting *Chrestensen*, 316 U.S. at 54).

27. *Chrestensen*, 316 U.S. at 55.

28. *Id.* at 54 ("This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that . . . the states and municipalities . . . may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising."). This was in contrast to the lower courts. "The court below appears to have taken [Chrestensen's] view, since it adverts to the the [sic] difficulty of apportioning, in a given case, the contents of the communication as between what is of public interest and what is for private profit." *Id.* at 55.

criminal liability.²⁹ Such a ruling would, as a practical matter, mean that anyone who wished to hand out advertisements on the streets, as prohibited by the state statute, would “need only append a civic appeal, or a moral platitude, to achieve immunity from the law’s command.”³⁰ Thus, commercial speech originated as a category of speech unworthy of any type of constitutional protection and completely subject to legislative regulation and restraint.

2. The Elusive Definition of Commercial Speech

It is no secret that the precise definition of commercial speech is anything but clear, and the Supreme Court has even admitted that, “ambiguities may exist at the margins of the category of commercial speech.”³¹ Scholars argue both in support of the flexible nature of this definition,³² and for a more concrete delineation of what constitutes commercial speech.³³ Tracing the types of speech the Supreme Court has deemed to fall both within and outside the commercial speech exception—a list that includes everything from newspaper advertisements touting local attorneys’ “legal services at very reasonable fees”³⁴ to the specification of the alcohol content on beer bottles³⁵—creates at least a foundational understanding of the category.

In 1964, the Court first elaborated on the brief characterization of commercial speech offered in *Chrestensen* by focusing on the content, rather than form, of the message when it distinguished an advertisement that included information and opinions

29. *Id.* (“It is enough for the present purpose that the stipulated facts justify the conclusion that the affixing of the protest against official conduct to the advertising circular was with the intent, and for the purpose, of evading the prohibition of the ordinance.”).

30. *Id.*

31. *Edenfield v. Fane*, 507 U.S. 761, 765 (1993); *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993) (acknowledging “the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category”); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985) (stating that, although commercial speech is clearly entitled to some First Amendment protection, “[m]ore subject to doubt, perhaps, are the precise bounds of the category of expression that may be termed commercial speech”).

32. *See, e.g., Nat Stern, In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 57 (1999) (arguing that the Court’s resistance in creating a clear definition of commercial speech “represents a healthy pragmatism, not jurisprudential failure,” as the current doctrine has not resulted in a weakening of the freedom of expression).

33. *See, e.g., Tom Bennigson, Nike Revisited: Can Commercial Corporations Engage in Non-Commercial Speech?*, 39 CONN. L. REV. 379, 379 (2006) (arguing that “all speech by commercial corporations, regardless of content, should be classified as ‘commercial speech,’” as it must always be tied to an underlying profit motive); *Stern, supra* note 32, at 86–87 (detailing various scholars’ proposed revisions to the definition of commercial speech).

34. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 354 (1977).

35. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481 (1995); *see also Bennigson, supra* note 33, at 387–88 (listing various types of commercial speech that “bear[] only an indirect relation to proposing a transaction, including trade names, professional identification on attorney’s letterhead and business cards, real estate ‘Sold’ signs (not just ‘For Sale’ signs), alcohol content printed on beer bottle labels, and a condom distributor’s pamphlet ‘discussing at length the problem of venereal disease and the use and advantages of condoms in aiding [its] prevention’” (second alteration in original) (footnotes omitted) (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 62 n.4 (1983))).

on matters of obvious public interest in *New York Times Co. v. Sullivan*³⁶ from “purely commercial advertising.”³⁷ The Court held that the newspaper’s receipt of money for publishing the advertisement was “immaterial” in the consideration of whether or not the advertisement in question merited First Amendment protection.³⁸ Thus, the advertisement—describing discriminatory actions taken against civil rights protestors and soliciting contributions for Martin Luther King Jr.’s legal defense of a pending perjury indictment—could not be categorized as commercial speech.³⁹ The Court went on to explain that holding otherwise might substantially “handicap” the freedom of speech of those individuals wishing to purchase “editorial advertisements” in order to participate in public debate.⁴⁰ This concern for ensuring unfettered participation in the realm of public discourse is one reason the Court has been careful when categorizing speech as purely commercial.

The Court’s ensuing decisions continued to augment and give substance to the types of communication that commercial speech encompassed. Nine years after *Sullivan*, in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,⁴¹ the Court described employment advertisements classified by gender as “classic examples of commercial speech” that were “no more than . . . proposal[s] of possible employment,” and thus rightfully the subject of a city ordinance prohibiting employment discrimination on the basis of gender.⁴² The Court noted, however, that it was the illegal nature of the prohibited speech that precluded it from any potential First Amendment protection, suggesting that had the prohibited commercial speech been legal, it might have warranted some measure of constitutional protection.⁴³ Two years later, in *Bigelow v. Virginia*,⁴⁴ the Court was more explicit in holding that although the speech at issue “did more than simply propose a commercial transaction,” it was both classified as commercial speech *and* afforded some free speech protection.⁴⁵ Although the Court was unwilling to set precise rules regulating what level of constitutional protection was guaranteed to commercial speech in various contexts,⁴⁶ it ultimately

36. 376 U.S. 254, (1964). The Court further explained:

The publication here was not a “commercial” advertisement in the sense in which the word was used in *Chrestensen*. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.

Id. at 266.

37. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

38. *Sullivan*, 376 U.S. at 266.

39. *Id.* at 256–67.

40. *Id.* at 266.

41. 413 U.S. 376 (1973).

42. *Pittsburgh Press*, 413 U.S. at 385.

43. *Id.* at 389 (“Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.”).

44. 421 U.S. 809 (1975).

45. *Bigelow*, 421 U.S. at 822.

46. *Id.* at 826 (“We need not decide here the extent to which constitutional protection is afforded commercial advertising under all circumstances and in the face of all kinds of regulation.”).

expanded the definition of commercial speech beyond the narrow characterizations offered in *Chrestensen* and *Pittsburgh Press*. Further, this was the beginning of the notion—solidified a year later in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*⁴⁷—of purely commercial speech as a category of “lower value” speech that is “protected, but not fully protected” by the First Amendment.⁴⁸

Virginia State Board of Pharmacy, considered the “opening chapter” of the Court’s current interpretation of the commercial speech doctrine,⁴⁹ contains the first list of characteristics of commercial speech. In creating this list, the Court described “commonsense differences between speech that does ‘no more than propose a commercial transaction’” and noncommercial speech.⁵⁰ In the majority opinion, Justice Blackmun asserted that because the speaker’s purpose in a commercial speech context is “to disseminate information about a specific product or service that [the speaker] himself provides,” it is reasonable to assume that the speaker knows more about the subject of his message than not only the listener, but “than anyone else.”⁵¹ Thus, Blackmun reasoned that the truth of any commercial statement is easy for the speaker to verify, particularly when compared to news reports or political speech.⁵² Blackmun also stated that commercial speech is “more durable” than other types of speech, as “proper regulation[s]” are unlikely to keep businesses from advertising.⁵³ Thus, the Court concluded that the “greater objectivity” and “hardiness” of commercial speech support the conclusion that, though this kind of speech should be afforded some degree of First Amendment protection, it need not be as stringent as those provided to other types of speech “to insure that the flow of truthful and legitimate commercial information is unimpaired.”⁵⁴

In later decisions, the Court moved away from a strict definition necessitating the message’s sole purpose be one proposing a commercial transaction to a more flexible definition that takes other factors into account. In *Friedman v. Rogers*,⁵⁵ the Court described commercial speech as “relat[ing] to a particular product or service.”⁵⁶ In *Central Hudson Gas & Electric Corp. v. Public Service Commission*,⁵⁷ which adopted

47. 425 U.S. 748 (1976).

48. SULLIVAN & GUNTHER, *supra* note 3, at 163.

49. David C. Vladeck, *Lessons from a Story Untold: Nike v. Kasky Reconsidered*, 54 CASE W. RES. L. REV. 1049, 1052 (2004).

50. *Va. State Bd. of Pharmacy*, 425 U.S. at 771 n.24 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973)). For analyses critiquing the use of these distinctions, see Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372, 385–86 (1979), Kozinski & Banner, *supra* note 25, at 634–38, and Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 633 (1982).

51. *Va. State Bd. of Pharmacy*, 425 U.S. at 772 n.24.

52. *Id.* But see Kozinski & Banner, *supra* note 25, at 636–37 (arguing that the claimed objectivity of commercial speech counsels for less—rather than more—government regulation, as listeners can easily check the truth or falsity of such statements by reference to verifiable facts).

53. *Va. State Bd. of Pharmacy*, 425 U.S. at 772 n.24.

54. *Id.* The Court characterizes the commercial message in this case, which it deems somewhat protected by the First Amendment, as simply “I will sell you the X prescription drug at the Y price.” *Id.* at 761.

55. 440 U.S. 1 (1979).

56. *Friedman*, 440 U.S. at 10.

57. 447 U.S. 557 (1980).

the current four-part analysis the Court must conduct in order to determine whether a regulation unconstitutionally limits commercial speech,⁵⁸ the category was characterized as “expression related solely to the economic interests of the speaker and its audience.”⁵⁹ In *Bolger v. Youngs Drug Products Corp.*,⁶⁰ the Supreme Court reiterated “the ‘common-sense’ distinction” between commercial and noncommercial speech.⁶¹ Following that, the Court identified three considerations that, in combination, classified the speech at issue as commercial speech: (1) whether the communication is an advertisement, (2) whether it refers to a specific product, and (3) whether the speaker has an economic motivation in disseminating the communication.⁶² While none of these factors alone would automatically classify the questioned speech as commercial, when viewed in combination, they “provide[] strong support” for characterization as commercial speech.⁶³ It is also important to note that this three-factor analysis was adopted in an attempt to determine whether the pamphlets in question “constitute[d] commercial speech notwithstanding the fact that they contain[ed] discussions of important public issues.”⁶⁴ The Court’s discussion of what constituted commercial speech in *Bolger* is the most thorough analysis available, as the Court typically does not undertake anything more than a cursory inquiry into whether or not the speech in question can be considered to fall into the commercial speech exception.⁶⁵

The *Bolger* Court then proceeded to address the problem of mixed commercial and noncommercial speech.⁶⁶ In dealing with cases of mixed speech, the Supreme

58. *Cent. Hudson*, 447 U.S. at 566. For commercial speech to be protected by the First Amendment under the *Central Hudson* test, it must (1) not be misleading or concern unlawful activity, (2) be affiliated with a substantial governmental interest, (3) directly advance the asserted governmental interest, and (4) be only as extensive as “necessary to serve that interest.” *Id.* The *Central Hudson* test has been refined by subsequent cases. See, e.g., *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 476–81 (1989) (clarifying that *Central Hudson*’s assertion that commercial speech regulations must be “no more extensive than necessary” did not mean that the government must apply the least restrictive alternative). Nonetheless, *Central Hudson* continues to serve as the governing test for determining the protections afforded commercial speech. See, e.g., *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 377 (2002) (applying the *Central Hudson* test to strike down a provision of the Food and Drug Modernization Act of 1997); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554–55 (2001) (finding “no need to break new ground,” as the *Central Hudson* test “provide[d] an adequate basis for decision”); *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 184 (1999) (applying the *Central Hudson* test despite members of the legal community advocating “a more straightforward and stringent test”); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507–14 (1996) (majority declining to alter or abandon *Central Hudson* test).

59. *Central Hudson*, 447 U.S. at 561.

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

61. *Bolger*, 463 U.S. at 64–65 (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455–56 (1978)) (holding that a federal statute prohibiting unsolicited mailing of contraceptive advertisements was an unconstitutional restriction on commercial speech).

62. *Id.* at 66–67.

63. *Id.* at 67.

64. *Id.* at 67–68 (citing *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967)). The public issues discussed in *Bolger* included “venereal disease and family planning.” *Id.*

65. See Bennigson, *supra* note 33, at 389 (explaining that, although the Court usually just assumes that the speech in question is either commercial or noncommercial, the *Bolger* decision identified considerations necessary to make such a determination).

66. *Bolger*, 463 U.S. at 81–82.

Court “sometimes has allowed lesser protection for the whole hybrid communication where the noncommercial elements are easily separable and their inclusion reasonably may be perceived to be a pretext for claiming a higher degree of protection for the commercial element.”⁶⁷ In those cases where the line between commercial and noncommercial speech is less obvious, the Court will often protect the noncommercial elements of the mixed speech,⁶⁸ citing its goal of maintaining the “breathing space”⁶⁹ necessary to encourage “uninhibited, robust, and wide-open” debate on “public issues . . . [where] erroneous statement[s] [are] inevitable.”⁷⁰ In *Bolger*, however, the Court ruled that speech concerning public issues will not be taken out of the realm of commercial speech merely due to its association with matters of public concern, as doing so would allow commercial speakers “to immunize false or misleading product information from government regulation simply by including references to public issues.”⁷¹

The precise definition of commercial speech was most recently under investigation in *Nike, Inc. v. Kasky*,⁷² which presented the issue of whether a corporation’s allegedly false statements about its production and labor practices—likely to matter a great deal to certain consumers when making purchasing decisions, though not presented in the format of typical advertisements—would be considered commercial speech.⁷³ Though “[i]n taking the case, the Court appeared to signal that a significant revision of the commercial speech doctrine would be forthcoming,”⁷⁴ the Court unexpectedly, and after having heard oral argument, dismissed the case without rendering a decision, declaring the certiorari “improvidently granted.”⁷⁵

As Justice Breyer stated in his dissent, the *Nike* case presented a scenario in which

67. Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. Rev. 1107, 1129 (2006) (citing Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 473–75 (1989); *Bolger*, 463 U.S. at 67–68; Cent. Hudson Gas & Elec. v. Pub. Serv. Comm’n, 447 U.S. 557, 562 n.5 (1980)).

68. Varat, *supra* note 67, at 1129.

69. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270–72 (1964) (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

70. *Sullivan*, 376 U.S. at 270–71.

71. *Bolger*, 463 U.S. at 67–68. Somewhat ironically, this limitation on commercial speech addresses the very act—adding matters of public concern to a handbill in order to keep them from being classified as commercial—that the petitioner attempted in *Chrestensen*, the original commercial speech case. See *Valentine v. Chrestensen*, 316 U.S. 52, 53–54 (1942).

72. 539 U.S. 654 (2003) (per curiam).

73. *Nike*, 539 U.S. at 657. The statements in question included press releases, letters to newspaper editors, and letters to university presidents and athletic directors. *Id.* at 656.

74. Tamara R. Piety, *Grounding Nike: Exposing Nike’s Quest for a Constitutional Right to Lie*, 78 TEMP. L. REV. 151, 151 (2005).

75. *Nike*, 539 U.S. at 655. The Court listed three reasons for its dismissal:

(1) the judgment entered by the California Supreme Court was not final within the meaning of 28 U.S.C. § 1257 [limiting Supreme Court review of state court decisions to those in which the highest court in the State has rendered final judgment]; (2) neither party has standing to invoke the jurisdiction of a federal court; and (3) the reasons for avoiding the premature adjudication of novel constitutional questions apply with special force to this case.

Id. at 657–58 (Stevens, J., concurring).

the communications in question were “not purely commercial in nature,” but rather were “better characterized as involving a mixture of commercial and noncommercial (public-issue-oriented) elements.”⁷⁶ In arriving at this conclusion, Breyer paid particular attention to a letter from Nike to university presidents and athletic directors.⁷⁷ He reasoned that although the letter had obvious commercial characteristics, there were other noncommercial characteristics “inextricably intertwined” with the commercial.⁷⁸ Those noncommercial characteristics consisted of the communication’s clear classification outside the realm of traditional advertising, its lack of a proposal of sale or other commercial transaction, and the inclusion of information—including a description of pertinent facts—regarding matters of “significant public interest and active controversy.”⁷⁹ Further, Breyer explicitly pointed out his view that the letter’s factual content “does not argue against First Amendment protection, for facts, sometimes facts alone, will sway our views on issues of public policy.”⁸⁰

By dismissing the case, the Supreme Court left the novel questions presented by *Nike* unanswered, particularly the issue—discussed by several commentators—of whether knowing false factual statements made by a corporation in contexts other than conventional advertisements are considered commercial speech and, thus, somewhat protected by the First Amendment.⁸¹ A flurry of scholarly opinion followed, ranging from disappointment about the loss of an opportunity for doctrinal clarification,⁸² to hope that the issues of the case would soon be reexamined,⁸³ to predictions of negative consequences sure to ensue.⁸⁴ Because the dividing lines between commercial and noncommercial speech have not been concretely elucidated, the precise definition of commercial speech remains elusive.

76. *Id.* at 676 (Breyer, J., dissenting).

77. *Id.* (“The document *least* likely to warrant protection—a letter written by Nike to university presidents and athletic directors—has several commercial characteristics.”).

78. *Id.* at 677 (quoting *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988)).

79. *Id.*

80. *Id.* at 678.

81. See Piety, *supra* note 74, at 157 (suggesting that Nike was asking for a right to lie); Varat, *supra* note 67, at 1127–33 (stating that “[w]hen core speech on controversial matters of public concern [implicates both freedom of speech and consumer protection], there is great danger in leaving the ascertainment of truth so readily to judicial rather than public determination”).

82. See, e.g., J. Wesley Earnhardt, *Nike, Inc. v. Kasky: A Golden Opportunity to Define Commercial Speech—Why Wouldn’t the Supreme Court Finally “Just Do It™”?*, 82 N.C. L. REV. 797 (2004) (asserting that the Supreme Court had missed a valuable opportunity to clarify the exceedingly complicated commercial speech doctrine).

83. See, e.g., Vladeck, *supra* note 49, at 1051 (stating that “[a]lthough *Nike* will not return to the Supreme Court, the case plainly piqued the Court’s interest, so much so that the Court is likely to look for another case presenting similar issues” (footnote omitted)).

84. See, e.g., Vicki McIntyre, Note, *Nike v. Kasky: Leaving Corporate America Speechless*, 30 WM. MITCHELL L. REV. 1531, 1562–66 (2004) (predicting the Supreme Court’s dismissal would have a “chilling” effect on corporate speech, negatively affecting both corporate social responsibility and media journalism); Alyssa L. Paladino, Note, *Just [Can’t] Do It: The Supreme Court of California Overly Restricted Nike’s First Amendment Rights in Holding That Its Public Statements Were Commercial Speech*, 33 U. BALT. L. REV. 283, 304 (2004) (asserting that when it dismissed the *Nike* case, “the Supreme Court ran the risk of significantly hindering public debate and corporate communications in general”).

3. The Rationale Behind the Commercial Speech Exception

The Court's decisions regarding its rationale for offering some protection for commercial speech rely heavily on an aspiration to protect the free flow of commercial communication in the marketplace. *Virginia State Board of Pharmacy* was the first case to set out the Court's reasoning for designating commercial speech as a separate category subject to a lower level of protection than purely noncommercial speech.⁸⁵ The Court, in its consideration of whether a Virginia law prohibiting pharmacists from advertising the prices of prescription drugs,⁸⁶ framed the question before it as "whether speech which does 'no more than propose a commercial transaction' is so removed from any 'exposition of ideas' and from "'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,'" that it lacks all protection."⁸⁷ The Court answered that question in the negative, and proceeded to conclude that commercial speech was, in fact, worthy of some constitutional protection.⁸⁸ In arriving at this conclusion, the Court paid particular attention to the interests of the listener—the consumer—rather than the economic interests of the speaker, in this case, the pharmacist.⁸⁹ The Court described the "consumer's interest in the free flow of commercial information" as just as profound, if not more so, than her interest in the most important political debates of the time.⁹⁰ Moreover, the Court's holding expressed a practical concern with the discriminatory effects a ban on pharmaceutical drug prices would have on the needier members of society.⁹¹ The Court took this argument one step further in claiming that, because we live in a free enterprise economy, virtually all commercial speech could be considered of public interest, as it is used to inform our economic decisions, which should be "intelligent and well informed."⁹² In subsequent decisions, the Court has reiterated its desire to ensure an unhindered flow of information in the economic marketplace, suggesting that this concern motivates its limited protection of commercial speech.⁹³

85. See SULLIVAN & GUNTHER, *supra* note 3, at 163–65 (tracing the development of commercial speech and identifying the shift in *Virginia State Board of Pharmacy*).

86. The challenged statute, Virginia Code § 54-524.35, provided that a pharmacist who "publishe[d], advertise[d], or promote[d] . . . any amount, price, fee, premium, discount, rebate or credit terms . . . for any drugs which may be dispensed only by prescription" would be found guilty of "unprofessional conduct." *Va. State Bd. of Pharmacy*, 425 U.S. at 749–50 (second omission in original) (quoting VA. CODE ANN. § 54-524.35 (West 1974)).

87. *Id.* at 762 (citations omitted) (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *Roth v. United States*, 354 U.S. 476, 484 (1957)).

88. *Id.*

89. *Id.* at 763–64.

90. *Id.*

91. See *id.* ("Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent.")

92. *Id.* at 765.

93. See, e.g., *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 646 (1985) (asserting that the "free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the

Despite the addition of a new veil of protection for most commercial speech, the *Virginia State Board of Pharmacy* Court went on to declare that certain types of commercial speech would not enjoy any free speech protection,⁹⁴ much like the original iteration of commercial speech in *Chrestensen*.⁹⁵ Neither advertisements for illegal transactions nor factually false or misleading advertisements would be provided any protection, as commercial speech contemplated only “the dissemination of concededly truthful information about entirely lawful activity.”⁹⁶ Though the general definition of commercial speech has become increasingly complicated and contentious over time,⁹⁷ the refusal to extend to false factual statements the limited protection available to commercial speech has not wavered.⁹⁸ In fact, Justice Stevens has further suggested that it is this aspect of the nature of commercial speech—its “potential to mislead”—that provides “reasons for permitting broader regulation.”⁹⁹ Thus, although the Court’s desire to ensure a robust flow of commercial information to consumers motivates its protection of commercial speech, it is the Court’s apprehension about the ease with which commercial speech can misinform and mislead consumers that forces it to cabin that protection.

B. *People and Corporations*

Although debate concerning the precise free speech rights of corporations, particularly in comparison to those of individual speakers, has been reinvigorated by the Court’s recent decision in *Citizens United v. Federal Elections Commission*,¹⁰⁰ the

harmful”); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 561–62 (1980) (declaring that “[c]ommercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information”); *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 783 (1978) (stating that “[a] commercial advertisement is constitutionally protected not so much because it pertains to the seller’s business as because it furthers the societal interest in the ‘free flow of commercial information’” (quoting *Va. State Bd. of Pharmacy*, 425 U.S. at 764)).

94. *Va. State Bd. of Pharmacy*, 425 U.S. at 770–73.

95. See Kozinski & Banner, *supra* note 25, at 628 (stating that “the Court [in *Chrestensen*] found it clear a day that commercial speech was not protected by the first amendment”).

96. *Va. State Bd. of Pharmacy*, 425 U.S. at 771–73.

97. See Stern, *supra* note 32, at 83–87 (cataloguing and summarizing critiques of commercial speech doctrine).

98. See, e.g., *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation*, 512 U.S. 136, 142 (1994) (asserting that “[b]ecause ‘disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information,’ only false, deceptive or misleading commercial speech may be banned” (citation omitted) (quoting *Peel v. Attorney Registration & Disciplinary Comm’n*, 496 U.S. 91, 108 (1990))); *In re R.M.J.*, 455 U.S. 191, 203 (1982) (declaring that “[m]isleading advertising may be prohibited entirely”); *Cent. Hudson Gas*, 447 U.S. at 563 (stating that “there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity”).

99. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 494 (1995) (Stevens, J., concurring).

100. 130 S. Ct. 876 (2010). The Court held, by a five-justice majority, that corporations enjoy the same First Amendment rights as individuals, at least as regards political speech, allowing them to spend unlimited money on political elections. *Citizens United*, 130 S. Ct. at 924–25. The public response to this case has been immense, and overwhelmingly negative. See, e.g., Bob Wieckowski & Robert Weissman, *How to Help Overturn Citizens United Ruling*, S.F. CHRONICLE, Nov. 9, 2011, at A12 (stating that “[t]he majority [in *Citizens United*] got it wrong,” and inviting citizens to attend local gatherings in order to “raise awareness” about the case); Melanie Mason, *Study: Corporations Placing Own Limits on Political Spending*, L.A. TIMES

issue traces its origins to *First National Bank of Boston v. Bellotti*,¹⁰¹ in which the Court first held that corporate political speech was protected by the First Amendment.¹⁰² This decision, coupled with later decisions applying the commercial speech exception to situations where individuals are the speakers, makes clear that the commercial speech classification, though arguably difficult to define, does not hinge on the speaker's identity.

1. The Role of the Speaker's Identity in Commercial Speech Doctrine

The Court has decisively ruled that, because the focus in commercial speech cases is more on the rights of the listener than the speaker, the speaker's identity is not a determinative factor in categorizing speech as commercial.¹⁰³ In *Bellotti*, the Court made clear that a message would not fall into the commercial speech exception simply because it was spoken by a corporation.¹⁰⁴ In arriving at this conclusion, the Court prefaced its discussion by stating that the question presented in the case was not whether "corporations 'have' First Amendment rights" similar to those of natural persons, but rather "whether [the challenged statute] abridges expression that the First Amendment was meant to protect."¹⁰⁵ Thus, the Court made clear that its focus was on *what* is being said—and the First Amendment protection afforded that type of speech—rather than *who* is saying it.

The Court went on to clarify that the identity of the banks and corporations was

(Oct. 29, 2011), <http://articles.latimes.com/2011/oct/29/news/la-pn-corporate-spending-20111029> (describing a report, conducted by the Center for Political Accountability and the Zicklin Center for Business Ethics Research at the University of Pennsylvania's Wharton School, finding that corporations "[f]aced with the option of limitless spending in a post-Citizens United world" are more often choosing to disclose their political giving, and, in some cases, to ban it altogether); Hayley Miller, *Citizens United Going Down? Democrats Introduce Constitutional Amendment To Overturn Ruling*, HUFFINGTON POST (Nov. 1, 2011, 4:40 PM), http://www.huffingtonpost.com/2011/11/01/citizens-united-constitutional-amendment_n_1069596.html (detailing a proposed Constitutional amendment introduced to Congress in November 2011 that "would effectively reverse two landmark Supreme Court decisions," including *Citizens United*). One of the more notable reactions to the *Citizens United* decision is political satirist Stephen Colbert's creation of a Super Political Action Committee (Super PAC), which can, under *Citizens United*, raise unlimited funds from a variety of sources, including corporations, unions, and individuals. For a sample of Colbert's exploration of the ramifications of the *Citizens United* decision, see *Colbert Super PAC*, COLBERT NATION, <http://www.colbertnation.com/colbert-superpac> (last visited Feb. 25, 2013).

101. 435 U.S. 765 (1978).

102. *Bellotti*, 435 U.S. at 776; see also Bennigson, *supra* note 33, at 397 (outlining a brief history of corporations' First Amendment rights).

103. *Bellotti*, 435 U.S. at 776–77; see also Bennigson, *supra* note 33, at 396–433 (discussing the "free flow of commercial information" rationale underlying this focus on listeners' rights).

104. *Id.* at 777, 784. This case involved a constitutional challenge, initiated by a group of national banking associations and business corporations, to a Massachusetts criminal statute that prohibited them from contributing to or making expenditures "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation." *Bellotti*, 435 U.S. at 767–68 (omission in original) (quoting MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977)). Specifically, appellants wished to spend money in order to promote their views regarding a proposed state constitutional amendment—to be included as a ballot question in an upcoming election—that, if passed, would permit the legislature to impose a graduated tax on individual incomes. *Id.* at 769.

105. *Id.* at 776.

inconsequential because their attempted speech could be obviously classified as “discussion of governmental affairs,” which is universally agreed to be the kind of speech the First Amendment was designed to protect.¹⁰⁶ The Court then expressed its concern with the right of listeners to be fully informed by stating that “[t]he 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.”¹⁰⁷

This precise line of reasoning provided the basis for the Court’s more recent ruling in *Citizens United*.¹⁰⁸ By overturning a federal statute barring the use of general corporate treasury funds in financing campaign advertisements, the Court cemented its stance that a corporation can engage in both fully protected political speech and lesser-protected commercial speech, and the determination of which in no way hinges upon its corporate identity.¹⁰⁹ These two types of speech, however, remain exclusive categorizations—as they were in *Chrestensen*—because the Court has not yet determined any type of speech to be both political and commercial.¹¹⁰

2. Individual Speakers and the Commercial Speech Exception

The “long line of cases”¹¹¹ concerning individual speakers engaged in commercial speech further solidifies the Court’s assertion in *Bellotti* that the commercial speech distinction is not dependent upon the speaker’s identity. One of the earlier landmark commercial speech cases, *Virginia State Board of Pharmacy*, dealt with the straightforward scenario of individuals—specifically pharmacists—advertising their professional services to the public.¹¹² One year later, the Court extended its reasoning in *Virginia State Board of Pharmacy* to the legal profession, overturning a state rule prohibiting an attorney’s “truthful advertisement concerning the availability and terms of routine legal services.”¹¹³ By 1995, the Court pronounced that “[i]t is now well established that lawyer advertising is commercial speech and, as such, is accorded a measure of First Amendment protection.”¹¹⁴ Thus, individuals, just as corporations, can

106. *Id.* at 776–77 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

107. *Id.* at 777. The Court explained that “[i]f 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.” *Id.* (footnote omitted).

108. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 913 (2010) (“We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker’s corporate identity.”).

109. *Id.*

110. See *supra* notes 21–25 and accompanying text for a discussion the Court’s distinction in *Chrestensen* between commercial and political speech. Further, in his concurring opinion in *Rubin v. Coors Brewing Co.*, Justice Stevens noted that “[t]ransaction-driven speech usually does not touch on a subject of public debate.” 514 U.S. 476, 496 (1995) (Stevens, J., concurring).

111. Stern, *supra* note 32, at 94–95.

112. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976) (invalidating a law prohibiting pharmacists from advertising the prices of their prescription drugs as an unconstitutional ban of legal and truthful commercial speech).

113. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977).

114. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995) (citing *Shapero v. Ky. Bar Ass’n*, 486 U.S.

engage in commercial speech by advertising their professional services.

Some instances of individual commercial speech, however, occur outside the traditional advertising framework. The best example of this is found in *Ibanez v. Florida Department of Business & Professional Regulation*,¹¹⁵ where the Court had to decide whether the attorney petitioner's use of her designations as both a Certified Public Accountant (CPA) and Certified Financial Planner (CFP) in her "advertising and other communication with the public" constituted commercial speech.¹¹⁶ Ibanez's public communication, which included placing her CPA and CFP designations in her yellow pages listing (found under the "Attorneys" section), on her business card, and on the left side of her legal office stationery, did not fall neatly into the category of traditional advertising.¹¹⁷ Despite its unconventional format, the Court appeared to find Ibanez's speech to fit so obviously into the commercial speech exception that it deemed further explanation of this preliminary decision unnecessary.¹¹⁸ Moreover, because "only false, deceptive, or misleading commercial speech can be banned," the Court asserted that Ibanez's truthful and nonmisleading statements should not have been subject to censure by the Board of Accountancy.¹¹⁹

Although the Court has made it clear through these decisions that both individuals and corporate entities can engage in commercial speech, it should be noted that each of the cases involved professionals speaking in their professional capacities as pharmacists or lawyers, rather than in their own individual capacities. Because the Court has never addressed the question of whether individuals can engage in nonprofessional commercial speech, this possibility is best explored through the lens of pending legislation that would criminalize a specific type of this nonprofessional individual speech.

C. *The Stolen Valor Act*

The history of military medals created to honor soldiers' service and their valiant acts on the field of battle dates back to the latter part of the Revolutionary War.¹²⁰ In 1782, General George Washington ordered that several military uniform badges be created to honor "singularly meritorious action" of "unusual gallantry," "extraordinary fidelity," and "essential service."¹²¹ Washington declared that his motivation for

466, 472 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985); *In re R.M.J.*, 455 U.S. 191, 199 (1982).

115. 512 U.S. 136 (1994).

116. *Ibanez*, 512 U.S. at 136–38.

117. *See id.* at 138, 142–43 (stating that the advertising in question was commercial speech but because it was not "false, deceptive, or misleading" the restriction imposed on Ibanez could not survive scrutiny).

118. *Id.* at 142 (stating simply that "[t]he Board [of Accountancy] correctly acknowledged that Ibanez' use of the CPA and CFP designations was 'commercial speech'" (quoting FINAL ORDER OF THE BOARD OF ACCOUNTANCY, FLA. BOARD OF ACCT. (May 12, 1992))).

119. *Id.*

120. *See* Order of George Washington (Aug. 7, 1782), in GENERAL ORDERS OF GEO. WASHINGTON, COMMANDER-IN-CHIEF OF THE ARMY OF THE REVOLUTION, ISSUED AT NEWBURGH ON THE HUDSON, 1782–1783, at 34–35 (Edward C. Boynton ed., 1909) (1883) (creating a system of badges of distinction for officers and soldiers).

121. *Id.*

creating these honorary awards was his desire “to cherish a virtuous ambition in his soldiers, as well as to foster and encourage every species of military merit.”¹²² In order to ensure these distinctions were meaningful, Washington set out a protocol of rigorous examination and review necessary to determine whether a badge should be awarded.¹²³ Washington also expressed concern that people may falsely claim to have been awarded the honors, stating that anyone with such “insolence” should be “severely punished.”¹²⁴ The United States currently “maintains a system of military decorations and honors that shares its essential characteristics with the first awards authorized by General Washington.”¹²⁵

1. Origins and Purpose of the Stolen Valor Act

Although Congress has made attempts to prevent the dilution of the reputation and meaning of the medals since the early twentieth century,¹²⁶ the Stolen Valor Act of 2005 was enacted to address the growing concern that the longstanding ban on the unauthorized wearing and sale of medals was not sufficiently deterring false claims of receipt of military awards.¹²⁷ This provision of the Act, unlike Congress’ previous protective provisions, created criminal consequences for false speech by making it an offense when any person “falsely represents himself or herself, verbally or in writing, to have been awarded” a military medal or decoration.¹²⁸

2. The Stolen Valor Act of 2005

Following its enactment in December 2006, section 704(b) of the Stolen Valor

122. *Id.* at 35.

123. *Id.* (“Before this favor can be conferred on any man, the particular fact or facts on which it is to be grounded must be set forth to the Commander-in-Chief, accompanied with certificates from the commanding officers of the regiment and brigade to which the candidate for reward belonged, or to other incontestable proof . . .”).

124. *Id.* at 34. Conversely, General Washington stated that his expectation that men who had honestly received their awards “will, on all occasions, be treated with particular confidence and consideration.” *Id.* at 34–35.

125. Brief for Petitioner at 3, *United States v. Alvarez*, 132 S. Ct. 2537 (2011) (No. 11-210).

126. These efforts include publishing the names of Medal of Honor recipients, patenting the design of the medal to prevent imitations, and creating a committee charged with reviewing previous Medal of Honor recipients to ensure that, in accordance with 10 U.S.C. §§ 3744(c), 6249 (2006), none had later engaged in dishonorable conduct, causing their medal to be revoked. Brief for Petitioner, *supra* note 125, at 5–6.

127. Brief for Petitioner, *supra* note 125, at 6 (citing Act of Feb. 24, 1923, ch. 110, 42 Stat. 1286 as an example of past congressional attempts to safeguard the integrity of the award and citing 151 Cong. Rec. S12, 688 (daily ed. Nov. 10, 2005) (statement of Sen. Conrad) as an example of Congress recognizing that the law at the time served as an insufficient deterrent); see also John Crewdson, *False Courage: Claims for Top Military Honors Don’t Hold Up*, CHI. TRIB., Oct. 26, 2008, at A1 (discussing investigation that uncovered hundreds of unsupported claims of veterans with military awards).

128. 18 U.S.C. § 704(b) (2006). The text of the Act reads:

Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button or rosette of any such badge, decoration or medal, or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both.

Id.

Act of 2005 faced several constitutional challenges in the lower courts,¹²⁹ three of which reached circuit courts of appeals.¹³⁰ In June 2012, the Supreme Court affirmed the Ninth Circuit's decision in *United States v. Alvarez*,¹³¹ finding section 704(b) to be unconstitutional.¹³²

Xavier Alvarez was the first person charged and convicted under the Stolen Valor Act of 2005 due to his false assertions that he had won the Medal of Honor.¹³³ After winning a seat on the Three Valley Water District Board of Directors in 2007, Alvarez, at a joint meeting with a neighboring water district board, stood up and introduced himself by stating, "I'm a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy. I'm still around."¹³⁴ Other than the statement, "I'm still around," however, Alvarez's "self-introduction was nothing but a series of bizarre lies."¹³⁵ The FBI later obtained a recording of the meeting, and Alvarez was charged with two counts of violating the Stolen Valor Act, specifically with "falsely represent[ing] verbally that he had been awarded the Congressional Medal of Honor when, in truth and as [he] knew, he had not received the Congressional Medal of Honor."¹³⁶ After a failed attempt to have the indictment dismissed under both facial and as applied challenges to the Act's constitutionality, Alvarez pled guilty to the first count but reserved his right to appeal the First Amendment issue.¹³⁷

In reaching its conclusion that the Stolen Valor Act of 2005 failed to pass constitutional muster, the Ninth Circuit mentioned the potential difficulties that might have arisen had either party argued that the speech at issue under the Act be considered commercial speech.¹³⁸ The court cited the *Nike* opinion in stating that a commercial speech argument would require "a novel extension of *Gertz* by the fact that, *even in the context of commercial speech*, knowingly false factual speech about a matter of public

129. See, e.g., *United States v. Kepler*, No. 4:11-cr-00017-JAJ, 2011 WL 8202542, at *6 (S.D. Iowa May 31, 2011) (finding that "§ 704(b), and by relation, § 704(d) [of the Stolen Valor Act of 2005] are facially unconstitutional"); *United States v. Robbins*, 759 F. Supp. 2d 815, 817 (W.D. Va. 2011) (holding that the Stolen Valor Act of 2005 did not violate the First Amendment). See *infra* notes 203–04 and accompanying text for further discussion of the political nature of the misrepresentations in *Robbins*.

130. *United States v. Amster*, 484 Fed. Appx. 338 (11th Cir. 2012); *United States v. Strandlof*, 667 F.3d 1146 (10th Cir. 2012); *United States v. Alvarez*, 617 F.3d 1198 (9th Cir. 2010), *aff'd*, 132 S. Ct. 2537 (2012).

131. 617 F.3d 1198 (9th Cir. 2010).

132. *Alvarez*, 617 F.3d at 1218.

133. *Id.* at 1200–01.

134. *Id.* at 1200. The Medal of Honor is often incorrectly referred to as the "Congressional Medal of Honor." Bill Mears, *Justices Dismiss Law Making Lying About Military Honors a Crime*, CNN.COM (June 29, 2012, 10:02 AM) <http://edition.cnn.com/2012/06/28/justice/scotus-stolen-valor-ruling/index.html>. Rather, the award is simply the "Medal of Honor." *Medal of Honor*, U.S. ARMY, <http://www.history.army.mil/moh.html> (last updated Dec. 3, 2010).

135. *Alvarez*, 617 F.3d at 1201. Alvarez was apparently something of a pathological liar, whose additional misrepresentations included statements claiming that he been awarded the Medal of Honor after rescuing the American Ambassador during the Iranian hostage crisis, that he had played professional hockey as a member of the Detroit Red Wings, and that he had once been "secretly married to a Mexican starlet." *Id.*

136. *Id.*

137. *Id.* Alvarez was sentenced to pay a \$100 special assessment and \$5,000 fine, to serve 3 years of probation, and to perform 416 hours of community service. *Id.*

138. *Id.* at 1206 n.6.

concern is potentially entitled to heightened First Amendment scrutiny.”¹³⁹ In any event, the court resisted considering the Act as a form of commercial speech “given the unique way [commercial speech] is treated under the First Amendment.”¹⁴⁰

Although the Supreme Court’s affirmation of the Ninth Circuit decision did not specifically mention any relation between the Stolen Valor Act of 2005 and commercial speech doctrine, the Court did stress that the Act failed to include a “material gain” element.¹⁴¹ Furthermore, in his concurrence, Justice Breyer stated that one potential solution to remedy the impermissibly broad sweep of the Stolen Valor Act of 2005 would be for Congress to enact a more narrowly-tailored statute which might “insist upon a showing that the false statement caused specific harm or at least was material, or focus its coverage on lies most likely to be harmful or on contexts where such lies are most likely to cause harm.”¹⁴² The proposed Stolen Valor Act of 2013 not only addresses Justice Breyer’s suggestion but also pushes the speech targeted by the 2005 Act much closer to a traditional definition of commercial speech.

3. The Proposed Stolen Valor Act of 2013

In January 2013, Representative Joe Heck of Nevada introduced a bill to amend the Stolen Valor Act of 2005 in the House of Representatives.¹⁴³ The proposed legislation, which was a direct response to the Ninth Circuit’s holding, attempted to avoid any free speech objections by introducing an intent to benefit requirement.¹⁴⁴ The

139. *Id.* (citing *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (per curiam)) (characterizing the *Nike* decision, in a parenthetical, as “dismissing—with a highly fractured Court—certiorari as improvidently granted in a case involving the question of whether false speech with both commercial and public interest aspects is entitled to a degree of First Amendment protection”).

140. *Id.*

141. *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012) (“The statute seeks to control and suppress all false statements on this one subject in almost limitless times and settings. And it does so entirely without regard to whether the lie was made for the purpose of material gain.”).

142. *Id.* at 2556 (Breyer, J., concurring).

143. Stolen Valor Act of 2013, H.R. 258, 113th Cong. (2013); *see also* Press Release, Congressman Joe Heck, Heck Introduces Stolen Valor Act to Protect Integrity of Military Awards (Jan. 15, 2013). Nevada Senator Dean Heller and Montana Senator Jon Tester introduced an identical companion bill in the Senate less than one month later. Stolen Valor Act of 2013, S. 210, 113th Cong. (2013). Both versions of the bill were originally introduced in 2011. Stolen Valor Act of 2011, H.R. 1775, 112th Cong. (2011); Stolen Valor Act of 2011, S. 1728, 112th Cong. (2011). Though the House of Representatives passed the original legislation, the Stolen Valor Act of 2011 was not enacted due to disagreements between House and Senate negotiators. Rick Maze, *Stolen Valor Bill Reintroduced*, ARMY TIMES, Jan. 28, 2013, at 6. The bill has been referred to the Committee on the Judiciary in both the House and the Senate. 159 Cong. Rec. H168 (daily ed. Jan. 15, 2013); 159 Cong. Rec. S469 (daily ed. Feb. 4, 2013).

Virginia Senator Jim Webb introduced a similar bill following the Supreme Court’s *Alvarez* decision. Press Release, Senator Jim Webb, Senator Webb to Offer “Military Service Integrity Act” Complying with Supreme Court Ruling (July 10, 2012). The proposed Military Service Integrity Act of 2012 not only criminalized knowing misrepresentations regarding one’s military service made “with the intent of securing a tangible benefit or personal gain,” but also further defined such tangible benefits to include “employment or professional advancement,” “financial remuneration,” and “an impact on one’s personal credibility in a political campaign.” Military Service Integrity Act of 2012, S. 3372, 112th Cong. § 704(b)(1), (b)(2)(B)–(C), (E) (2012). This bill did not become law. S. 3372: *Military Service Integrity Act of 2012*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/s3372> (last visited Feb. 25, 2013).

144. Press Release, Congressman Joe Heck, Heck Introduces Stolen Valor Act of 2011 (May 5, 2011)

bill would replace section 704(b) of the Stolen Valor Act of 2005 with a new provision that makes it an offense when someone, “with intent to obtain money, property, or other tangible benefit, fraudulently holds oneself out to be recipient of a [military] decoration or medal.”¹⁴⁵

Thus, the inclusion of a requirement of an intent to benefit in the Stolen Valor Bill places at least some of the targeted speech much more squarely within the traditional commercial speech doctrine.

III. DISCUSSION

Though the type of speech targeted by the proposed Stolen Valor Bill meets both the definitional requirements and underlying rationale of the commercial speech exception, the inherent dangers of applying the exception to individuals engaging in promotional—rather than professional—speech advise against such a classification. An extension of the commercial speech doctrine to include self-promotional speech of the kind targeted by the Stolen Valor Bill is, however, not only unnecessary due to its more obvious classification as fraudulent speech but would also likely lead to further line blurring between both corporations and natural persons, as well as political and commercial speech. Because the speech targeted by the Stolen Valor Bill, though not within its traditional realm, could so easily be classified as commercial, it appears that commercial speech jurisprudence may be informed by this potential, yet unconventional, example.

A. *Some Speech Targeted by the Stolen Valor Bill Meets the Definitional Requirements of Commercial Speech*

1. *Some Speech Targeted by the Stolen Valor Bill Falls Within the Narrowest Definition of Commercial Speech*

Commercial speech has been most narrowly defined as speech that does nothing more than propose a commercial transaction.¹⁴⁶ The Stolen Valor Bill prohibits fraudulently representing claims of military recognition communicated with an intent to tangibly benefit on the part of the speaker.¹⁴⁷ Such statements could most certainly propose a commercial transaction, as the following examples illustrate.

In March 2012, the United States Attorney’s Office for the Eastern District of Missouri indicted Dunard Morris, the former business manager of a practice group of doctors, on counts of mail fraud, wire fraud, and violations of the Stolen Valor Act of 2005.¹⁴⁸ The indictment included allegations that Morris, in addition to embezzling millions of dollars from the doctors in his group, lied about his military service and

(“A previous version of this bill was passed by Congress, and although it was very popular, it was struck down by the 9th Circuit Court as violating free speech. My bill takes a different approach – making it illegal for individuals to benefit from lying about their military service or record.”)

145. H.R. 258 § 2(b).

146. See *supra* Part II.A.2 for a discussion of the nuanced definition of commercial speech.

147. See Stolen Valor Act of 2013, S. 210 § 2(b); Stolen Valor Act of 2013, H.R. 258 § 2(b).

148. Press Release, United States Attorney’s Office Eastern District of Missouri, Former Business Manager of Metropolitan Urological Specialists Indicted for Fraud (March 1, 2012).

receipt of the Navy Cross for “extraordinary heroism.”¹⁴⁹ U.S. Attorney Richard Callahan described Morris’s falsehoods as motivated by a desire to “give him more sway with the doctors.”¹⁵⁰ Further, Morris allegedly included his fabricated military service on his résumé and circulated a falsified Navy Cross citation document to the president of the medical practice, among others.¹⁵¹ Morris’ gains from these false claims, much like his motivations, were undeniably economic.¹⁵² Thus, Morris’ speech could be classified as both commercial and within the proscription of the Stolen Valor Act of 2013.

Similarly, in *United States v. Lawless*,¹⁵³ Aaron Lawless—who had served in both the Army and the Marines—falsely stated to both his colleagues at a federally licensed firearms dealer and a representative of the gun manufacturer Glock, Inc. that he had been awarded a Silver Star, four Purple Hearts, and two Bronze Stars during his time in the military.¹⁵⁴ After a Glock representative determined that Lawless would be a strong candidate for their annual Hero Award, he requested that Lawless document his awards in writing and later forwarded that document to Glock.¹⁵⁵ Based on that document, Lawless was selected as the recipient of the 2008 Glock Hero Award, and he and his wife subsequently received approximately \$3,500 in benefits.¹⁵⁶ Lawless was subsequently charged with violating the Stolen Valor Act of 2005, but this was dismissed after the 2005 Act—which lacks the requirement of an intent to benefit—was struck down as unconstitutional.¹⁵⁷ It is clear that Lawless’s false written claims of military honors submitted to Glock were communicated as a proposal of a commercial transaction. Thus, Lawless’s actions would be clearly prohibited under the amended Stolen Valor Act of 2013 and would also fit into the narrowest definition of commercial speech.¹⁵⁸ Lawless submitted his false document as a proposal that Glock

149. *Id.* Although Morris allegedly claimed to have received several awards during his service in the U.S. Marine Corps, he was, in fact, “discharged from the military for misconduct under other than honorable conditions.” *Id.*

150. Jim Doyle & Robert Patrick, *Former CEO of St. Louis-Area Medical Firm Indicted*, ST. LOUIS POST-DISPATCH (Mar. 1, 2012, 8:49 AM), http://www.stltoday.com/business/local/former-ceo-of-st-louis-area-medical-firm-indicted/article_e5202b3a-63ad-11e1-a61b-0019bb30f31a.html.

151. *Id.*

152. *Id.* According to the indictment,

he allegedly used company funds without authorization to pay \$5,400 per month in rent for a luxury apartment for his own use and his friends.

Prosecutors also are seeking the forfeiture of \$197,520 in an account at U.S. Bank; a 2011 Porsche Panamera; a 2011 Lexus RX350 sport utility vehicle; a 2010 Range Rover; 15 Rolex watches; seven other luxury watches; diamond jewelry; 12 pistols; two shotguns and three rifles, including a Colt AR-15 and a Wilson SS-15 tactical or sniper rifle.

Id.

153. *United States v. Lawless*, No. 11-173M (D. Md. Aug. 29, 2011).

154. *Id.* at 2.

155. *Id.*

156. *Id.* at 2–3. Specifically, Glock paid for Lawless and his wife’s airfare to and lodging in Las Vegas, Nevada, where he was presented with a trophy and two Glock semi-automatic pistols. *Id.* at 3.

157. *Id.* at 1.

158. See H.R. 258, 113th Cong. § 2(b) (2013) (stating that a person who, “with intent to obtain money, property, or other tangible benefit, fraudulently holds oneself out to be a recipient of a [military] decoration or award” shall be fined or imprisoned).

recognize his claimed accomplishments and award him a substantial economic benefit in return for his, albeit false, valorous achievements.¹⁵⁹

Finally, though he was not prosecuted under the Stolen Valor Act of 2005, the case of William G. Hillar is also instructive.¹⁶⁰ Based upon his claims of being a retired colonel in the U.S. Special Forces “trained in tactical counter-terrorism, psychological warfare and emergency medicine,” Hillar built a successful career as a public speaker, trainer of law enforcement, and instructor at the Monterey Institute of International Studies at Vermont’s Middlebury College, that lasted over a decade.¹⁶¹ None of these claims were true, however, and Hillar was eventually exposed and prosecuted for mail fraud.¹⁶² In his plea agreement, Hillar agreed to pay back \$171,000 to the institutions that had hired him based upon his false claims.¹⁶³ Just as in the previous two examples, Hillar fabricated claims of military service and made substantial profits from those claims, suggesting that his motivation in lying was an effort to obtain those economic benefits. In light of that, his speech could qualify as both commercial and of the type targeted by at least one iteration of the Stolen Valor Act.¹⁶⁴

Lying on résumés, falsifying claims in order to obtain a monetary prize, and creating a persona in order to launch a career as a military expert are just three examples of the ways in which people might engage in false speech regarding military service in order to obtain a specifically economic benefit, or, in the words of commercial speech doctrine, to “propose a commercial transaction.”¹⁶⁵ Thus, the Stolen Valor Bill’s targeted speech, at least in certain cases, falls within the narrowest definition of commercial speech.

159. See *Lawless*, No. 11-1173M, at 2–3 (stating that Lawless’s actions resulted in him receiving economic benefits totaling around \$3,500).

160. See Matthew LoFiego, *Stolen Valor, Fabricated Career*, BATTLE OF THE BILGE (Apr. 13, 2011, 8:23 AM), <http://www.moaablogs.org/battleofthebilge/2011/04/williamhillar/> (“The FBI chose not to prosecute Hillar based on the SVA and instead charged him with mail fraud due to his use of falsified career achievements to obtain work as a professor and paid speaker.”).

161. Maria Glod, *Man Charged with Profiting from Fabricated Military Resume*, WASH. POST, Jan. 26, 2011, at B04.

162. Joe Gould, *Reputed Counter-Terrorism Expert Proves a Fraud, Pleads Guilty*, ARMY TIMES, Apr. 11, 2011, § Your Army, at 26. Though he claimed twenty-eight years of service in the Army, Hillar actually served as a radarman for eight years in the Coast Guard Reserve. *Id.*

163. *Id.*

164. Because Hillar’s lies did not include the receipt of a military award, his arguably commercial speech would be prohibited under the now-dead Stolen Valor Act of 2011, but not the revamped Stolen Valor Act of 2013. Compare H.R. 1775, 112th Cong. § 1041(a) (2011) (criminalizing “misrepresentation[s] regarding . . . military service” made “knowingly” and “with [an] intent to obtain anything of value”), with H.R. 258, 113th Cong. § 2(b) (2013) (limiting its prohibition to fraudulent representations of receipt of military “decoration[s] or medal[s]”).

165. *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973). The potential benefits that result from claims of military service have led to bizarre acts of dishonesty in the past. See, e.g., *Out of the Ordinary – Fan Must Face the Music Over Phony Hannah Montana Essay*, COMM. APPEAL (Memphis), Dec. 30, 2007, at A2 (detailing a six-year-old girl’s attempt to win tickets to a Hannah Montana concert by lying about her father being killed by a roadside bomb while deployed in Iraq).

2. Some Speech Targeted by the Stolen Valor Bill Fulfills the Considerations of the Most Thorough Definition of Commercial Speech

The most thorough definition of commercial speech is one that takes into account three interrelated considerations: (1) whether the communication is an advertisement, (2) whether it refers to a specific product, and (3) whether the speaker has an economic motivation in disseminating the communication.¹⁶⁶

The first factor—whether the communication is an advertisement—may not be the impediment to commercial speech classification that it appears to be on first glance. Though it is highly unlikely that the Stolen Valor Bill’s targeted speech would ever appear in a traditional advertising format, this factor alone—just as each of the other factors in the *Bolger* analysis—is not dispositive.¹⁶⁷ The combination of current advertising trends’ potential undermining of the rationale behind the commercial speech exception,¹⁶⁸ and the growing notion of “personal branding” for individuals,¹⁶⁹ makes this factor less informative than when advertising was largely confined to its traditional realm of print advertisements, television commercials, and billboards.

Reference to a specific product—the second factor in the *Bolger* analysis—is more easily met in the language of the Stolen Valor Act of 2013. The title of Section 2 clearly sets out that it targets only “Fraudulent Representations About Receipt of Military Decorations or Medals.”¹⁷⁰ Additionally, the bill preserves the harsher penalties for those false claims regarding receipt of certain awards, such the Congressional Medal of Honor, as set out in the original Stolen Valor Act of 2005.¹⁷¹ Thus, it seems that the specificity consideration certainly weighs in favor of a commercial speech determination. In order to fall under the classification of the Act, speech would have to reference a military award; to receive an enhanced penalty, it would have to name one of the clearly articulated awards listed in the statute. Though it is true that military awards are not typically conceptualized as a “product,” the Supreme Court has held communications of professional designations to be commercial speech.¹⁷² Because the speech targeted by the Act includes only specific references to a kind of professional designation, the second consideration of the *Bolger*

166. See *supra* notes 61–65 and accompanying text for a discussion of the Court’s analysis of the definition of commercial speech in *Bolger*.

167. See *supra* notes 113–19 and accompanying text for a discussion of the Supreme Court’s classification of nontraditional advertising communications—the use of professional designations on business cards and office stationery—as commercial speech. Additionally, the reverse was held to be true in *Bolger*. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983) (“The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech.” (citing *N.Y. Times v. Sullivan*, 376 U.S. 254, 265–66 (1964))).

168. See *infra* notes 185–90 and accompanying text for a discussion of current advertising trends away from objective truths.

169. See *infra* notes 209–13 and accompanying text for a discussion of the growing use of personal branding.

170. Stolen Valor Act of 2013, H.R. 258, 113th Cong. §2(b) (2013).

171. *Id.*; 18 U.S.C. 704(c), (d) (2006) (providing enhanced penalties for the Congressional Medal of Honor, the distinguished-service cross, the Navy cross, the Air Force cross, the silver star, and the Purple Heart), *invalidated by* *United States v. Alvarez*, 123 S. Ct. 2537 (2012). The Stolen Valor Act of 2013 also adds combat badges to the list of awards carrying harsher penalties. H.R. 258, § 2(b)(2).

172. *E.g.*, *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation*, 512 U.S. 136, 142 (1994).

analysis is met.¹⁷³

The final factor asks the court to consider whether the speaker had an economic motivation in communicating the message in question.¹⁷⁴ The Stolen Valor Act of 2013's requirement of "[an] intent to obtain money, property, or other tangible benefit," ensures that most, if not all, speakers targeted by the Act will have an economic motivation.¹⁷⁵ Although the "tangible benefit" need not be economic, it is difficult to imagine many noneconomic tangible benefits.¹⁷⁶ Thus it seems that most, but not all, speech targeted by the Stolen Valor Bill conforms to this final factor of the *Bolger* analysis, and therefore could be classified as commercial.

The three considerations first enumerated by the Court in *Bolger* will not be met in every case of false claims regarding military awards. However, when considered in combination with one another, the three factors indicate that at least some speech—specifically, that which is motivated by an intent to benefit *economically*—targeted by the Stolen Valor Bill meets the Court's most thorough definition of commercial speech.

B. All Speech Proscribed by the Stolen Valor Act Bill Satisfies the Rationale Behind the Commercial Speech Exception

Although commercial speech is quite slippery in its definition, the rationale underlying the categorization of commercial speech is more straightforward. Commercial speech is somewhat protected in order to guard the free flow of commercial information, creating better-informed consumers, who will, in turn, make more efficient economic choices.¹⁷⁷ Conversely, misleading, dishonest, or illegal commercial speech has never been protected, as it is the "disclosure of truthful, relevant information" that will "make a positive contribution to decisionmaking."¹⁷⁸ Further, although "[u]nder the First Amendment there is no such thing as a false idea," false statements of fact have "no constitutional value."¹⁷⁹ This is due to the fact that lies, whether intentional or mistaken, do not "materially advance[] society's interest in 'uninhibited, robust, and wide-open' debate on public issues."¹⁸⁰

Though the Court has asserted that it will at times protect false speech in order to

173. See *Bolger*, 463 U.S. at 66 (highlighting references to a specific product as a consideration in classifying commercial speech).

174. *Id.* at 67.

175. See H.R. 258.

176. Perhaps the most obvious example of noneconomic tangible benefit would be a false claim of military honor communicated in order to obtain political office. See *infra* notes 201–06 and accompanying text for a discussion of false speech and political office.

177. See *supra* Part II.A.3 for a discussion of the rationale for the limited protection provided to commercial speech.

178. *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 108 (1990).

179. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974).

180. *Id.* at 340 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). The *Gertz* Court goes so far as to say that false statements "belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *Id.* (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

provide the “breathing space” necessary for freedom of speech to survive,¹⁸¹ this protection is unnecessary in the context of commercial speech due to its unique nature. As first stated in *Virginia State Board of Pharmacy*, commercial speech is characterized by both its increased objectivity and its hardiness, making commercial speech better able to withstand regulation without experiencing any of the chilling effects associated with noncommercial speech.¹⁸² These particular traits of commercial speech caused the *Virginia State Board of Pharmacy* Court to declare that “[t]he First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.”¹⁸³ Thus, if speech is both commercial and false, it is always prohibited.

1. All Speech Proscribed by the Stolen Valor Bill is Objectively Verifiable

The increased objectivity of commercial speech is due to its composition of facts about which the speaker can typically be assumed to know more about than other people.¹⁸⁴ With that rationale in mind, the speech targeted by the Stolen Valor Bill is arguably *more* objective than the traditional conception of commercial speech—advertising.

Current advertising has become increasingly removed from the notion of objectively verifiable truth, causing one commentator to label the trend as “[n]onfactual [a]dvertising.”¹⁸⁵ Rather than messages which do “no more than propose a commercial transaction”¹⁸⁶ akin to “I will sell you the X [product] at the Y price,”¹⁸⁷ modern television commercials and print ads consist of broad statements that are impossible to verify: “America Runs on Dunkin’”¹⁸⁸ or “Avis: We Try Harder.”¹⁸⁹ Similarly, commercial enterprises have begun creating short films that make no claims about the particular product or brand featured, but instead portray said product in the midst of some seemingly unrelated narrative.¹⁹⁰ This trend in advertising has removed a large

181. *Sullivan*, 376 U.S. at 271–72 (internal quotation marks omitted).

182. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976).

183. *Id.* at 771–72.

184. See *supra* notes 52–54 and accompanying text for a discussion of the “objectivity” prong of the rationale underlying the commercial speech doctrine.

185. Stern, *supra* note 32, at 119 (emphasis omitted); see also Kozinski & Banner, *supra* note 25, at 635 (“The notion that commercial speech is any more verifiable than noncommercial speech may once have been true, but it ceased to be so when advertising entered the twentieth century.”).

186. *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973).

187. *Va. State Bd. of Pharmacy*, 425 U.S. at 761.

188. Press Release, Dunkin’ Donuts, Dunkin’ Donuts Launches New Advertising Campaign “America Runs on Dunkin’”, (Apr. 10, 2006). Ironically, this slogan appears to overstate the national presence of Dunkin’ Donuts, which is concentrated heavily on the east coast and is described by one market analyst as generally unproven west of the Mississippi. Lauren Lloyd, *Will Dunkin’ Donuts Finally Grace L.A.?*, LAIST (Aug. 24, 2011, 12:40 PM), http://laist.com/2011/08/24/will_dunkin_donuts_finally_grace_los_angeles.php.

189. Anna Baskin & Rupal Parekh, *Readers Mourn “We Try Harder” as Avis Drops 50-year-old Tag*, ADVERTISING AGE, Sept. 3, 2012, at 3; see also Stern, *supra* note 32, at 119 (“It is commonplace to observe that much if not most contemporary advertising does not consist of verifiable representations about a specific product or service.”).

190. Heineken serves as a prime example of this marketing trend. *E.g.*, Heineken, *The Date*, YOUTUBE (May 25, 2011), <http://www.youtube.com/watch?v=57zo8O5pDXc> (showing a young couple sneaking to the

amount of the most traditional kind of commercial speech from the notion of objective truth.

A false claim regarding a military honor, however, is perhaps as close to the definition of an objective statement that can easily be proven either true or false.¹⁹¹ Further, just as described in *Virginia State Board of Pharmacy*, a speaker engaging in communication targeted by the Act is discussing facts that he “presumably knows more about than anyone else.”¹⁹² Given the changing nature of modern advertising, all speech proscribed by the Stolen Valor Act of 2013—regardless of whether there is an associated intent to benefit economically—can be considered objective and distinctly within the speaker’s knowledge.

2. All Speech Targeted by the Stolen Valor Bills is Durable

Another reason the Supreme Court offers less than strict constitutional scrutiny for commercial speech is its hardiness.¹⁹³ Because advertising is considered an indispensable aspect of business and commercial profit, “there is little likelihood of its being chilled by proper regulation and forgone entirely.”¹⁹⁴ Similarly, the prosecution of those who lie about having received military awards would not appear to chill truthful claims of honored veterans. Just as other commercial entities are not discouraged from advertising by truth-in-advertising laws, those who have honestly earned military awards are unlikely to be deterred from claiming the merit that is rightfully theirs due to a law prohibiting false claims of military honors. In fact, as noted by Judge Bybee in his dissenting opinion in the *Alvarez* case, the Stolen Valor Act may instead serve to chill only “false autobiographical claims by public officials such as Alvarez,” in which case “our public discourse will not be worse for the loss.”¹⁹⁵ Thus, the durability of meritorious military claims appears at least somewhat analogous to the hardiness of commercial speech.

Because it can be classified as both objective and hardy, all speech targeted by the Stolen Valor Bill meets the underlying rationale of the commercial speech exception.

front of a restaurant by slipping in through the kitchen, performing magic tricks, walking past a line of chorus girls, and avoiding a large Chinese dragon, only to clink their bottles of Heineken together in the end); Heineken, *The Entrance* YOUTUBE (Mar. 14, 2011), <http://www.youtube.com/watch?v=i4m5Wkyew0> (showing a young man making spectacular entrance to a party in which he plays an improvised jazz flute with a band and triumphantly raises a Heineken).

191. Although the facts underlying a person’s claim to have won military awards are obviously factual statements, a recent political controversy in Philadelphia suggests that those facts could be more easily verifiable. See Bob Warner, *Green Beret Claim Threatens David Oh Campaign*, PHILA. INQUIRER, August 25, 2011, at B01 (describing political turmoil faced by City Council candidate David Oh after his commanding officer claimed Oh had exaggerated his military record).

192. *Va. State Bd. of Pharmacy*, 425 U.S. at 771 n.24; Transcript of Oral Argument at 6, *United States v. Alvarez*, 132 S. Ct. 2537 (2012) (No. 11-210) (describing speech targeted by the Stolen Valor Act of 2005 as “speech that is uniquely within the knowledge of the individual speaker”).

193. See *supra* notes 53–54 and accompanying text for a discussion of the “hardiness” factor of the rationale underlying the commercial speech doctrine.

194. *Virginia St. Bd. of Pharmacy*, 425 U.S. at 771 n.24.

195. *United States v. Alvarez*, 617 F.3d, 1198, 1233 (9th Cir. 2010) (Bybee, J., dissenting), *aff’d*, 132 S. Ct. 2537 (2012). Though Judge Bybee referred to the Stolen Valor Act of 2005, his conclusion would also apply to the amended Stolen Valor Act of 2011.

Only a subset of the proscribed speech, however, meets both the definitional requirements and rationale behind the doctrine—false claims of military honors which are motivated by a tangible *economic* benefit. The Stolen Valor Bill is not limited to such economic benefits, however, which is one of several reasons counseling against its inclusion within the commercial speech classification.

C. *The Stolen Valor Bill Falls Within the Traditional Definition of a Fraud Statute*

The Stolen Valor Act of 2013 has been acknowledged to be a direct response to the Ninth Circuit and Supreme Court rulings in *United States v. Alvarez*.¹⁹⁶ Both courts asserted that they believed Congress could overcome the unconstitutionality of the Stolen Valor Act of 2005 by passing a more narrowly tailored piece of legislation.¹⁹⁷ The Stolen Valor Bill addresses these concerns with the inclusion of an intent to benefit requirement, allowing it to fit more seamlessly within the traditional conception of a fraud statute. According to the doctrine of constitutional avoidance, if a statute could potentially be interpreted in more than one way, courts should choose the interpretation that avoids raising constitutional questions.¹⁹⁸ Because interpreting the Stolen Valor Bill as a fraud statute necessarily avoids the First Amendment questions implicated by a reading of the statutes as regulations of commercial speech, the Stolen Valor Bill should be read as such. Though the doctrine of constitutional avoidance might save the Stolen Valor Bill from constitutional challenge, the false factual statements prohibited by the Bill would still meet the requirements of false factual statements under commercial speech, leaving those statements unprotected from constitutional challenge under commercial speech doctrines. Indeed, such classification would still leave courts to sort through the constitutional questions of the Stolen Valor Bill, in spite of the demands of the doctrine of constitutional avoidance.

D. *The Danger of Applying the Commercial Speech Exception to Self-Promoting Individuals: Blurring the Line Between Political and Commercial Speech*

The most pronounced danger associated with interpreting the subset of speech both targeted by the Stolen Valor Bill and subject to classification as commercial speech involves the risk of muddying the currently well-defined distinction between commercial and political speech. This risk is contemplated by both the potential interpretation of the Stolen Valor Act of 2013's requirement of an "intent to obtain money, property, or other tangible benefit" as including political office as a possible benefit.¹⁹⁹ While commercial speech is less protected under First Amendment

196. See *supra* notes 143–45 and accompanying text for a discussion of the origin of the Stolen Valor Act of 2011, which was the precursor to the currently proposed 2013 Act.

197. *Alvarez*, 132 S. Ct. at 2556 (Breyer, J., concurring) (suggesting that a "more finely tailored statute" could alleviate First Amendment issues); *Alvarez*, 617 F.3d at 1212 (stating that the court "believe[d] that Congress could revisit the Act to modify it into a properly tailored fraud statute").

198. *E.g.*, *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (describing the canon of constitutional avoidance as "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts").

199. Stolen Valor Act of 2013, H.R. 258, 113th Cong. § 2(b) (2013).

jurisprudence, political speech is vigorously protected.²⁰⁰ It is possible that political candidates could fabricate a lie regarding their military service in the hopes that their inflated reputation would help secure them elected office.²⁰¹ In fact, that is precisely what happened in *United States v. Robbins*.²⁰²

Ronnie L. Robbins—who served on active duty in the Army for three years, but never received any awards, served overseas, or saw combat—produced campaign materials during a reelection bid for local office falsely stating he had served in Vietnam and been awarded the Vietnam Service Medal and Vietnam Campaign Medal during his service.²⁰³ Additionally, Robbins provided altered documentation to both the Veterans of Foreign Wars organization and a local newspaper supporting his receipt of the medals.²⁰⁴ Though Robbins was prosecuted under the now-invalidated Stolen Valor Act of 2005, his speech would still fall under the purview of the amended Act of 2013, as he clearly intended to reap the tangible benefits of reelection to political office.

If such speech were interpreted as having been motivated by an intent to economically benefit—as the acquisition of most political offices entails some form of compensation—and thus classified as commercial, it would be placed directly between two types of speech that are typically considered to be completely exclusive of one another: political speech and commercial speech.²⁰⁵ Thus, a classification of the prohibited speech targeted by the Stolen Valor Bill as commercial could potentially call into question the underpinning definition of political speech and the unfettered protection it is afforded. This would be an unlikely path for the Supreme Court; such a course would muddy the relatively clear distinction between political speech and all other forms of speech, frustrating longstanding First Amendment doctrines.²⁰⁶

The Court's past decisions seem to suggest that political and commercial speech are quite unrelated to one another and easy to differentiate. When both are removed from their traditional speakers, however—when commercial speech is removed from commercial enterprises and political speech removed from natural persons—this division is less obvious. Perhaps this suggests, as one commentator has proposed, that all speech engaged in by commercial enterprises should be considered commercial speech.²⁰⁷ Or perhaps, particularly in light of the more nuanced approach to modern advertising and the growing participation of individuals and corporations in both

200. See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 898 (2010) (“[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence.”). In *Citizens United*, the Court repeatedly emphasized the high level of protection afforded political speech under the First Amendment and even ventured to suggest that “it might be maintained that political speech simply cannot be banned or restricted as a categorical matter.” *Id.*

201. See *supra* note 191 for a discussion of an allegation of precisely this type of behavior in Philadelphia's most recent City Council election.

202. 759 F. Supp. 2d 815 (W.D. Va. 2011).

203. *Robbins*, 759 F. Supp. 2d at 816–17.

204. *Id.* at 817.

205. See *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (making a distinction between political and commercial speech).

206. See *supra* notes 109–10 and accompanying text for a discussion of the exclusive nature of the political and commercial speech categories.

207. See Bennigson, *supra* note 33, at 379 (arguing that “all speech by commercial corporations, regardless of content, should be classified as ‘commercial speech’”).

commercial and political speech, it advises that the Court reevaluate both the definition of and rationale underlying the commercial speech doctrine.

E. *The Growing Commercial Nature of the Individual and The Future of Commercial Speech Doctrine*

Just as the concept of corporate identity and a corporation's free speech rights have changed in recent decades, so has the commercial nature of the individual.²⁰⁸ Personal branding—wherein “the concepts of product development and promotion are used to market persons for entry into or transition within the labor market”—first emerged in the late 1990s and “appears to be enjoying a surge in popularity.”²⁰⁹ The general concept of personal branding includes a variety of practices ranging from “concrete branding products such as the personal advertisement brochures (which resemble, in many respects, the slick promotional materials sent by colleges and universities to prospective students)”²¹⁰ to managing one's online presence.²¹¹ Further, “individuals' names and likenesses [have] become easier to commodify and commercialize, potentially to the financial advantage of the individual.”²¹² Thus, just as corporations are now not as easily distinguishable from individuals, individuals are also increasingly engaging in activities once reserved largely to corporate commercial entities.²¹³

As these two once distinct entities become more similar in their activities and the nature of traditional commercial speech itself—advertising—continues to change, the Court should reexamine its definition of commercial speech. If advertising generally no longer solely consists of objective proposals of commercial transactions, but instead is made up of suggestive—but often unverifiable or blatantly untrue—slogans and fanciful narratives in which the advertised product is nothing more than one element of an elaborate fiction, we must question the entire rationale supporting the commercial speech doctrine. Further, as corporations and individuals become more difficult to

208. See Daniel J. Lair et al., *Marketization and the Recasting of the Professional Self: The Rhetoric and Ethics of Personal Branding*, 18 MGMT. COMM. Q. 307, 308 (2005) (tracing the origins of the business self-help genre to the first publication of Dale Carnegie's *How to Win Friends and Influence People* in 1937 and the subsequent personal branding movement to a 1997 article by “influential management guru” Tom Peters in the management magazine *Fast Company*).

209. *Id.* at 309, 311; see also Anand Giridharadas, *Branding and the 'Me' Economy*, INT'L HERALD TRIB., Feb. 27, 2010, at 2 (explaining that “[t]he Internet-connected class worldwide faces growing pressure to cultivate a personal brand. Ordinary people are now told to acquire what once only companies and celebrities required: online ‘findability’”).

210. Lair et al., *supra* note 208, at 309.

211. Alina Tugend, *Putting Yourself Out There on a Shelf to Buy*, N.Y. TIMES, Mar. 28, 2009, at B6.

212. Rita Heimes, *Trademarks Identity, and Justice*, 11 J. MARSHALL REV. INTELL. PROP. L. 133, 135 (2011).

213. In response to this blurring of the lines between corporations and individuals undertaken by the majority in *Citizens United*, Justice Stevens, in his dissent, clarified:

[C]orporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their ‘personhood’ often serves as a useful legal fiction. But they are not themselves members of ‘We the People’ by whom and for whom our Constitution was established.

Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 972 (2010) (Stevens, J., dissenting).

distinguish by their commercial actions, courts should reconsider their decision to exclude an examination of the speaker's identity in determining whether or not a communication can be classified as commercial. A focus on the speaker's intent—much like the one included in the Stolen Valor Bill—may become a valuable consideration in recognizing commercial speech. Courts may decide that looking to the identity of the speaker, insofar as it would aid in determining the speaker's intent, may be necessary in light of the changes to the very assumptions underpinning commercial speech doctrine.

Though it is unclear how courts will adjust their commercial speech jurisprudence in order to address these changes, both the changing nature of commercial speech and the growing similarities between corporate and individual actions demand a reexamination of the doctrine.

IV. CONCLUSION

The commercial speech exception should not be applied to self-promotional lies about military awards motivated by economic benefit. To apply the commercial speech exception to this type of speech—at least some portion of which would likely be considered political speech—would further blur the lines delineating commercial from political speech. These two types of speech, which traditionally have been deemed diametrically opposed, would become overlapping categories, leading to incredibly complicated First Amendment analyses in free speech cases.

However, in a world where distinctions between commercial and political speech, between corporate advertising and personal branding, and between individuals and corporations are becoming increasingly nuanced, the Supreme Court should reexamine its commercial speech doctrine. The Court seemed to recognize a similar type of haziness surrounding the precise borders delineating commercial speech from communication regarding public issues in its decision to hear, but subsequently dismiss, *Nike*. Though categorical rules are not always the best solution, in the realm of commercial versus political speech, particularly in the context of the recent increase in political free speech rights of corporations under the *Citizens United* holding, a renewed examination of both the rationale behind and definition of commercial speech is the appropriate step in ensuring that commercial speech remains both distinct from and less protected than political speech.

