6

Freedom of Speech

> A federal judge has ruled that the City of New Orleans cannot ban sidewalk book sales because it violates the First Amendment. Here's what I don't understand. Why did New Orleans decide to ban book sales? You ever been to New Orleans? People are drinking on the sidewalk. They're taking their tops off on the sidewalks. They're urinating on the sidewalks. They just don't want people reading on the sidewalk.
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> —Jay Leno, *The Tonight Show*, NBC (June 19, 2003)

FOR A LONG time, Josh Wexler and Anne Jordan Blanton wanted to open a sidewalk book stand on the streets of New Orleans, a first step toward their dream of one day owning their own bookstore. When they went to the city to obtain a permit, they learned that they could secure permission to sell such items as razor blades, pencils, and shoelaces—but not books. In fact, the bureaucrats wouldn't even give them an application. "We're not attempting to cause any trouble or get anything special from the government," Blanton explained. "We just want to earn an honest living sharing our love of books."

City officials too often seem to derive malicious pleasure

in denying people the chance to realize their dreams, and it seemed about to happen this time as well. But fortunately Wexler and Blanton had a tool at their disposal that is usually unavailable to secure entrepreneurial freedoms: the First Amendment. The first command of the Bill of Rights—"Congress shall make no law abridging freedom of speech"—applies through the 14th Amendment to state and local governments. As applied by conservative and liberal courts alike, the free-speech clause has proved a powerful weapon against governments' constant efforts to repress speech.

So too did it secure the rights of the young entrepreneurs in New Orleans.[1] Represented by the Institute for Justice, Wexler and Blanton secured a permanent injunction against the city. The city is "charged with the obligation of drafting ordinances that avoid trampling on First Amendment freedoms," declared federal district court Judge Stanwood R. Duval.[2] The city had defended the law as a reasonable regulation of the time, place, and manner of speech. The judge rejected that defense. "An ordinance, like the one the City of New Orleans adopted, that operates as a blanket ban on book selling or under the City's interpretation, prohibits book selling from a small easily moveable table is an unreasonable restriction that does not provide ample, alternative means of communication."

Still, despite their generally good record in enforcing an unequivocal constitutional command,[3] the courts have created a hierarchy of First Amendment values that receive varying degrees of protection. At the top of the hierarchy is political speech, of which government regulations (notwithstanding the Supreme Court's disappointing decisions regarding restrictions of campaign contributions) trigger the strictest scrutiny. In many areas, the courts generally have protected even offensive speech, such as flag-burning and the

right to view pornography. But at the bottom of the hierarchy is commercial speech—that is, speech intended to propose a commercial transaction. Suppression or regulation of commercial speech invokes much lower judicial scrutiny than other types of speech.

That juxtaposition—greater judicial protection for pornography than for commercial speech—is startling. The First Amendment uses the term "speech," with no differentiation among its types. Indeed, the courts in other contexts have taken a broad view of the concept, protecting even such "symbolic" speech as cross-burning. Moreover, the United States is emphatically a commercial republic. In today's society, commercial information (such as drug prices), whether conveyed in traditional media or over the Internet, is arguably as important—if not more so to many people—as political speech. To return to a theme from the first chapter, ask a person on the street who his or her mayor is, and you'll probably evoke a blank stare; ask for the names of long-distance telephone providers and you'll probably get a half-dozen. Surely most Americans spend much more time reading about commercial products than politics, indicating their subjective priorities. In my own household, "Don't throw out the advertisements" is a common command; indeed, my wife even subscribes to a popular magazine *about shopping*, a subject upon which a majority of the subscribers likely are already quite expert.

But the importance most people attach to commercial speech is not always reflected in local government policy. Edward Salib owns a Winchell's Donuts on the corner of Main Street and Country Club Drive in Mesa, Arizona (yes—the very same corner from which the city tried to erase Randy Bailey's brake shop). Over the course of several months, his store was the subject of intense law-enforcement scrutiny by

the city, which dispatched one of its 27 "code enforcers" repeatedly to monitor the store, eventually filling an 80-page file.

His suspected crime? Selling drugs? Harboring criminal activity?

No, hanging signs.

Like millions of business owners, Salib relies on signs to attract customers into his business. Periodically, Salib receives standardized signs from the company, advertising donut specials, cappuccino, and the like, which he hangs in his windows.

Or he did, until the city told Salib that he was violating its sign ordinance, which forbade signs occupying more than 30 percent of a window space. The rule was hopelessly arbitrary and irrational, with its percentage based on an average derived from other cities' ordinances. If a store had bigger windows, it could have bigger signs. There was not much Salib could do about the size of the company's standard signs, so he asked if he could leave one window empty, resulting in an average of 30 percent of the total windows being covered. No dice, the city replied: The restriction applies to each window. Because Salib had no control over the size of the advertisements, the effect of the ordinance would be to prevent him from advertising altogether.

The ordinance was motivated by city officials' anger over another store whose windows were completely covered over with paint. But ironically, that store was exempted from the law by a grandfather clause. Salib's signs were grandfathered, too, until he took down the ads and put up new ones.

The city grasped for post hoc justifications for the ordinance. One explanation was that part of the windows had to remain clear so the police could look in. But in the case of a donut shop, that isn't necessary because in many instances the police often are already munching donuts inside. The

Institute for Justice Arizona Chapter once again took Mesa to court—to date, the only city it has sued twice—challenging the sign ordinance as a violation under both the federal and state constitutions.[4] A trial court upheld the ordinance—illustrating the low regard for commercial speech under current law—and the case is now on appeal.

While Edward Salib was battling local bureaucrats in a desert suburb, Dennis Ballen was facing a similar ordeal in the Pacific Northwest. Several years ago, Ballen lost his job. Instead of finding another one, he started his own business, Blazing Bagels, in Redmond, Washington. I can personally attest to the quality of Ballen's bagels. Trouble is, the shop is located in a strip of warehouses off a main street. Given the paucity of pedestrian traffic, Ballen needed to lure customers off the main drag.

So he hired Daniel Pickard to stand on the main street wearing a sandwich board bearing the words, "Fresh Bagels Now Open." Taking on the job with gusto, Pickard danced and used the sign as an air guitar, attracting smiles from passing motorists and, more importantly, business for Blazing Bagels.

But the human advertising campaign didn't last long. The City of Redmond wielded its sign ordinance, threatening Ballen with fines up to $5,000. "Now my sign guy's afraid to go out there, that they'll arrest him," Ballen said. "He's so afraid he won't even carry a protest sign."

After the city yanked Pickard off the street, Blazing Bagels saw its sales plummet 35 percent, and Ballen faced the prospect of losing his business altogether. The city justifies its ordinance as a means of preventing traffic distractions and preserving aesthetics. But at the same time that it prohibits most commercial signs, the city allows signs for other activities, such as announcing events, promoting political campaigns, and selling or leasing real estate. So that were Ballen

to display a sign that read "For Sale: Blazing Bagels," the legality of the sign would depend on whether Ballen was selling his store or his bagels.

The Institute for Justice Washington Chapter filed a lawsuit challenging the sign ordinance under the free-speech protections of the federal and state constitutions.[5] In January 2004, the federal district court in Seattle issued a preliminary injunction against the ordinance, finding the city's discriminatory policy troublesome. "There is no evidence in the record that the banned signs are less aesthetically appealing or more harmful to pedestrian traffic than the permitted signs," the court declared. "The City must do more than argue the importance of deferring to the legislative judgment to succeed . . . ; the City has the burden of showing that the Ordinance's ten categories of exempted signs do not undermine and counteract the asserted interests of the City."[6] Though the injunction means that Ballen can advertise his business while the case continues, the opinion underscores the reality that under current jurisprudence, the city potentially could ban *all* commercial signs so long as it did so in a nondiscriminatory way.

Those two cases are part of an ongoing effort to increase judicial scrutiny for commercial speech by eliminating the jurisprudential dichotomy between commercial and other types of speech—or at least to boost state constitutional protection of commercial speech beyond the current federal constitutional standards. A victory would not necessarily mean a proliferation of tacky signs—local governments still could reasonably regulate the time, place, or manner of speech. But it would force local governments to calibrate their restrictions carefully, recognizing the vital importance of commercial speech to businesses and consumers alike.

Sometimes the line between political and commercial speech is blurry, which exacerbates the problems created by

the courts' multiple tiers of scrutiny in the speech context. If the speech is categorized as commercial speech, the right to political speech can be the proverbial baby that is thrown out with the bathwater.

Beginning in 1996, a group of activists began publicizing allegations that Nike and its subcontractors were engaged in unfair and illegal labor practices in foreign countries, violating minimum-wage and maximum-hours laws, subjecting laborers to abuse, and unlawfully exposing them to harsh chemicals and other unsafe working conditions. Reports of those allegations appeared on *48 Hours* and in a host of national publications.

Nike struck back, denying the charges and projecting a positive image of its labor practices, in the form of news releases, correspondence, and full-page newspaper advertisements. Among other things, the company publicized a report by former United Nations ambassador Andrew Young, which found no evidence of illegal or unsafe working conditions in Nike factories.

Regardless of which side had it right—or if both sides had a bit of the truth—the debate exemplified precisely the no-holds-barred give and take on issues of vital public concern that the First Amendment was designed to protect. In public debate, the First Amendment protects even untruthful statements—witness almost any speech by every politician—subject to rules of libel and slander. Likewise, in debate over issues of public concern, the government is not ever supposed to take sides, tipping the balance to one side or the other. Rather, both sides are at liberty to use whatever mechanisms are at their disposal to make their views known.

Unfortunately, the state of California abandoned its constitutionally ordained neutrality. The anti-Nike activists invoked the state's consumer-protection laws to file a false-

advertising claim against Nike, seeking to force Nike to disgorge any profits tied to its advertisements and to engage in a court-approved "public information" campaign.

The California courts should have ruled in favor of Nike. A rule exposing companies to liability for defending themselves against charges of wrongdoing would have an enormously chilling effect on speech about issues of enormous public importance. As companies such as Microsoft, ExxonMobil, and Pfizer attested in a brief supporting Nike, exposing businesses to long and costly litigation over statements about public-policy issues or business practices would force them to stay silent in the face of public criticism.[7]

Moreover, it would unbalance the level First Amendment playing field by allowing critics to raise reckless and untrue charges while forcing the object of the critics to meet a meticulous standard of accuracy, with truth in the eye of the judicial beholder. Given that many such debates are far from black and white, it would create great risk to those accused of wrongdoing who dare to stand up for themselves.

The trial and appellate courts obeyed the clear command of the First Amendment, dismissing the claims against Nike. But the California Supreme Court, by a 4-3 margin, reversed and reinstated the case. The majority noted that false statements in a commercial speech context are not accorded First Amendment protection. Even though Nike's advertisements did not fit the classic definition of commercial speech—that is, speech that proposes a commercial transaction—the Court found that Nike's motivation was economic, and that the debate might affect consumers' decisions about whether to buy Nike's products. Therefore, if Nike's assertions were found to be false, the company could be held liable for false advertising.[8]

Justice Janice Brown, a vigilant defender of individual lib-

erties, launched her dissent with an attack on current First Amendment jurisprudence. "In 1942, the United States Supreme Court, like a wizard trained at Hogwarts, waved its wand and 'plucked the commercial speech doctrine out of thin air'."[9] Under the doctrine, she charged, all speech is *either* commercial or noncommercial, and commercial speech "receives less protection than noncommercial speech."[10] She urged a more nuanced approach that takes into account the different types of speech encompassed within the broad definition of commercial speech, and concluded that treating all forms of commercial speech the same way would have a deleterious impact on the free flow of ideas. "Making Nike strictly liable for any false or misleading representations about its labor practices stifles Nike's ability to participate in a public debate *initiated by others*."[11]

The United States Supreme Court granted review, but ultimately decided to remand the case to the lower courts for further deliberations without reaching the merits.[12] Thereafter, Nike settled with the plaintiffs, paying them $1.5 million to make the lawsuit go away, thereby establishing a precedent that indicates lawsuits of this type may be lucrative for anti-corporation activists, and emboldening such activists to go after other companies.

The California Supreme Court majority's broad definition of commercial speech and its flimsy protection for discussion of public issues in that context could have broad ramifications for the free speech of companies and those who work for them. Corporations often have an eye out for the bottom line whenever they "speak" in public, but that doesn't render their speech on public-policy issues any less important or sacrosanct than anyone else's, and certainly doesn't justify protecting it less. After the *Kasky* decision, what if a company speaks out on a widely debated policy issue—like free trade or

taxes—and makes a statement found to be false? What if a corporation sponsors a play in which characters do so? Are unions and other players in the marketplace subject to similar constraints? At the very least, the decision will make companies and others similarly bound think twice before engaging in controversial speech—and it relegates them to the status of second-class entities with regard to the First Amendment.

Which is exactly what businesses in Las Cruces, New Mexico, recently discovered. The city prohibits political signs on commercial property except for campaign-related signs posted within 90 days of an election. Other political signs, announcing support for abortion rights or opposition to gun control, require a permit from the city. Prior to the February 3, 2004, presidential caucus, several businesses posted signs supporting Democratic candidates: Howard Dean or Wesley Clark. But the city ordered them to take the signs down. Why? Because a caucus is "a selection and not an election," explained Deputy City Attorney Harry "Pete" Connelly, so the signs are not allowed. "It would be simple to just amend the ordinance to include a caucus," Connelly added, "but we haven't gotten there yet."[13] Until the bureaucrats get around to changing the law, apparently, political speech will be suppressed.

Contemporary local government violations of free speech extend beyond merely restricting commercial and political speech. As dangerous and offensive to the First Amendment as suppression of speech is, equally repugnant is compelled speech, where people are forced to support ideas with which they disagree. Yet that phenomenon is taking place with increasing frequency as states move toward subsidizing candidates in political campaigns. The most sweeping effort is Arizona's so-called Clean Elections Act, which was narrowly approved in a voter initiative. The law showers massive subsidies on participating candidates who collect the requisite

number of $5 contributions, even as it seriously limits contributions to those who prefer to run for office without taxpayer subsidies. The result is to skew the election system in favor of subsidized candidates and against those running solely with voluntary contributions.[14]

Funding for the program was earmarked from three sources: a 10 percent surcharge on all civil and criminal fines, which accounted for most of the funding; a $100 annual fee collected from lobbyists for for-profit entities; and state income tax deductions and credits. Few Arizonans realize that if they incur a parking fine or a speeding ticket, they will also be involuntarily contributing to candidates not of their choosing.

It is a hallmark of a free society that participation in politics must be voluntary. Typically, only in authoritarian nations does turnout in elections approach 100 percent—remarkably, often all for the same unopposed candidate. American courts universally have held that campaign contributions are a form of political speech; and that individuals cannot be forced to support beliefs with which they disagree, such as participating in the flag salute. By enacting the Clean Elections Act, Arizona joined the dark side, transforming a deeply intimate personal choice—whether or not to contribute to a political candidate—from a voluntary one into an object of government coercion.

The Institute for Justice challenged the involuntary funding sources as a violation of the federal and state constitutions. One plaintiff, Steve May, incurred a parking ticket, to which was added a surcharge for campaign subsidies. Adding insult to injury, May was a state legislator who was running without public subsidies against candidates who were receiving them. That meant May was being forced to contribute to his opponents' campaigns. Joining May as a plaintiff was Rick

Lavis, a lobbyist for Arizona cotton growers, who objected to subsidizing candidates with which his organization disagreed.

The trial court struck down the lobbyist fee, but upheld the surcharge.[15] The court of appeals struck down the surcharge, concluding that it was impermissible compelled speech, but this decision was overturned by the Arizona Supreme Court.[16] The U.S. Supreme Court declined to review the decision.

Fortunately, the beast may yet be slayed. In January 2004, the Institute for Justice Arizona Chapter filed a new challenge, this time in federal court. The plaintiffs are an advocacy group that objects to the subsidies given to match independent expenditures and thereby diluting the group's message; as well as past and future candidates who object to the rules of the game that reward candidates who participate in the subsidy system while punishing those who do not. A new initiative forbidding subsidies to politicians is slated for the November 2004 ballot. In a time of soaring state budget deficits, it is difficult to imagine that voters will assign a high priority to bankrolling political campaigns with taxpayer money. A nonbinding referendum to repeal campaign subsidies in Massachusetts in 2002 was supported by three-quarters of the state's electorate. If the residents of one of the nation's most liberal states resoundingly opposed subsidies for politicians, perhaps the zeal for this particular type of "reform" will die a well-deserved death.

Given that freedom of speech is perhaps our most vibrant liberty, it is remarkable how many attempts persist to suppress speech—ranging from controversial art exhibits to "offensive speech" on college campuses—or to compel it. Free speech is vital to democracy and a free society. Let's hope that the courts will be even more aggressive in protecting that vital liberty—and that governments will grow a bit more restrained in abridging it.