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Book Note: Brandishing The First Amendment, by Tamara Piety

Book Note**BRANDISHING THE FIRST AMENDMENT, by Tamara Piety¹**

PATRICK STOTHERS-KWAK

HOW COEXTENSIVE ARE THE rights of a corporation with that of a natural person, and when did the metaphor of corporate personhood begin to be taken literally? Tamara Piety forcefully confronts these questions, using the United States Supreme Court case of *Nike Inc v Kasky*² as a framing device. The argument that emerged in this case—that politically tinged commercial speech is entitled to full First Amendment protection—is the natural evolution of the Supreme Court’s controversial holding in *Citizens United v Federal Elections Commission*,³ in which corporations were held to stand on equal ground with citizens in their right to political speech. Countering what she sees as First Amendment jurisprudence run amok, Piety interrogates the principles underpinning freedom of expression and forcefully argues against their application to commercial speech.

The book is divided into three parts. Part I lays out the parallel development of the commercial speech and corporate political speech doctrines while charting their collision course. Noting that the protection of commercial speech is a relatively recent phenomenon, Piety discusses the 1976 case of *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council*,⁴ in which the Court held that truthful commercial expression was entitled to limited protection on the basis of the listener’s right to potentially useful information. Nevertheless, in the absence of a satisfying definition of what commercial speech is, advocates

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1. (Ann Arbor: University of Michigan Press, 2012) 328 pages.
 2. 539 US 654 (2003).
 3. 130 S Ct 876 (2010).
 4. 425 US 748 (1976).

of corporate political speech, which is entitled to full constitutional protection, have begun to blur the doctrinal lines. Piety criticizes the merging of political and commercial speech doctrines, noting their divergent theoretical underpinnings and the litany of economic regulations that will be subject to attack using this supercharged First Amendment entitlement. Part I concludes by returning to the first principles of freedom of expression and the constellation of interests that it was meant to advance: (1) individual self-fulfillment; (2) attainment of truth; (3) public participation in the political process; and (4) the maintenance of a balance between stability and change.⁵

Part II explores the first set of these interests: individual self-fulfillment and the attainment of truth. In Emerson's formulation of the principle, individual self-fulfillment encompasses notions of autonomy, self-expression, and self-actualization—interests, Piety argues, that are not advanced by an untrammelled commercial speech environment in which representations cannot even be regulated for their truth. Because corporations are simply means to ends,⁶ they are not, by definition, autonomous and they cannot self-actualize; the rights of the listener, therefore, are the appropriate locus of the commercial speech doctrine. Piety argues that the net effect of manipulative branding efforts is to actively impede an individual's struggle for autonomy and fulfillment—to say nothing of the truth-obfuscating effects of a marketing environment in which accuracy cannot be regulated—and we are more susceptible to it than we would like to believe.⁷

In Part III, Piety engages with the democratic rationales for freedom of expression, arguing that neither principle advanced by Emerson—public participation and balancing between stability and change—is furthered by enhanced protection of commercial speech. Indeed, commercial influence already distorts the political process, as the corporate form allows for an accumulation of wealth that amplifies its voice. Moreover, by constraining the ability of democratically elected bodies to regulate corporate speech, or commerce more generally, a more protective commercial speech doctrine is anti-democratic and counter-majoritarian.

5. Piety borrows this framework from Thomas Emerson. See "Toward a General Theory of the First Amendment" (1963) 72 Yale LJ 877.

6. Piety adopts a Kantian view of autonomy, which flows from the idea that human beings are ends in themselves. See Piety, *supra* note 1 at 79.

7. Piety points to recent developments in behavioural economics focusing on the predictably irrational ways in which humans make decisions. See Richard Thaler & Cass Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Human Happiness* (New Haven: Yale University Press, 2008).

Brandishing the First Amendment smartly returns to the first principles of freedom of expression, thereby bringing recent doctrinal developments into stark relief. The tone throughout is polemical, yet Piety avoids the tendency to characterize corporations as villainous or the evolution of marketing strategies as conspiratorial. Rather, the author looks past the abstractly logical, but commonsensically nonsensical premises of *Citizens United* to the realities of the modern marketplace of ideas. This is an environment in which the government gives consumers fewer and fewer tools for parsing sophisticated marketing strategies and where the consequences of fraudulent proliferations of misinformation are increasingly grave.

