UNITED STATES V. SCHIFF: COMMERCIAL SPEECH REGULATION OR FREE SPEECH INFRINGEMENT?

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I. INTRODUCTION

On August 9, 2004, the United States Court of Appeals for the Ninth Circuit upheld a preliminary injunction[1] issued by the United States District Court for the District of Nevada prohibiting Irwin Schiff and two of his associates from selling his book, *The Federal Mafia: How the Government Illegally Imposes and Unlawfully Collects Income Taxes*.[2] In agreeing that the over three-hundred page book could be regulated and suppressed as commercial speech, the Ninth Circuit denied Schiff his freedom of speech guaranteed under the First Amendment.[3]

The Federal Mafia is the latest book in a series of works on federal income tax written by Schiff, a 77-year-old avid anti-tax proponent.[4] The book contains, among other things, extensive criticism of the methods the federal government employs in collecting income tax.[5] For example, in condemning the government's use of a "Notice of Levy" to seize funds to pay off tax debt, Schiff writes:

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[1] United States v. Schiff (*Schiff II*), 379 F.3d 621 (9th Cir. 2004).

[2] IRWIN SCHIFF, THE FEDERAL MAFIA: HOW THE GOVERNMENT ILLEGALLY IMPOSES AND UNLAWFULLY COLLECTS INCOME TAXES (1990).

[3] *Schiff II*, 379 F.3d at 630 ("Because we can uphold the injunction as an appropriate restriction on fraudulent commercial speech, we do not need to address the alternate bases cited by the district court to support the injunction . . . .").

[4] *See* SCHIFF, *supra* note 2, at back cover. Schiff's other books include HOW AN ECONOMY GROWS AND WHY IT DOESN'T (1985); HOW ANYONE CAN STOP PAYING INCOME TAXES (1982); THE BIGGEST CON: HOW THE GOVERNMENT IS FLEECING YOU (1977); THE GREAT INCOME TAX HOAX: WHY YOU CAN IMMEDIATELY STOP PAYING THIS ILLEGALLY ENFORCED TAX (1985); THE SOCIAL SECURITY SWINDLE: HOW ANYONE CAN DROP OUT (1984). His latest video seminar is SECRETS TO LIVING AN INCOME TAX FREE LIFE (1999). His tax packets, consisting of documents and taped materials, include "The Lien and Levy Package" and "The Audit Package." SCHIFF, *supra* note 2, at 319–20.

[5] *See, e.g.*, *id.* at 98.

> [I]n resorting to such trickery and extortion, is the government breaking any laws? The answer is no. The government, remember, wrote into the law its right to seize property "by any means." So the government apparently feels it has a legal right to get its money by extortion, bribery, mail and wire fraud, under false pretenses and in ways that are generally not available to the rest of us. So, as you can see, the only real distinction between the federal government and the Mafia is that the government really has a license to steal, the Mafia doesn't.[6]

In addition, the book details Schiff's long history of tax protesting, including the various jail sentences he has served in connection with tax evasion.[7] Throughout *The Federal Mafia*, Schiff refers to other books and reports he has written and published through Freedom Books, the publishing company he operates with the help of his associates.[8] Furthermore, to support his interpretation of the laws concerning payment of income tax, Schiff repeatedly quotes specific language from the Internal Revenue Code sections he interprets, and he uses excerpts from court cases and works by other authors to strengthen his arguments.[9]

At the heart of *The Federal Mafia* lie Schiff's contentions that the payment of income tax is voluntary and thus the collection of income tax is unconstitutional.[10] According to Schiff, a compulsory income tax would violate the taxing clauses of the Constitution.[11] Schiff contends that the United States government, realizing the unconstitutionality of a compulsory tax, has based its collection of income tax revenues on a system of "voluntary compliance."[12] Schiff states that no Internal Revenue Code section makes one liable for

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[6] *Id.* at 152.

[7] *Id.* at 239. Schiff has served at least thirty months in prison. *Id.* at 256. On October 24, 2005, the United States District Court for the District of Nevada found Schiff guilty of charges including conspiracy, tax evasion, and tax fraud. Schiff could receive up to 43 years in prison in sentencing scheduled for January 20, 2006. Press Release, U.S. Dep't of Justice, Professional Tax Resister Irwin Schiff and Two Associates Convicted in Las Vegas Tax Scam (Oct. 24, 2005), *available at* http://www.usdoj.gov/opa/pr/2005/October/05_tax_548.html.

[8] *See, e.g.*, SCHIFF, *supra* note 2, at 60 nn.1–2 (referring reader to SCHIFF, THE SOCIAL SECURITY SWINDLE: HOW ANYONE CAN DROP OUT (1984) for "some really outrageous examples" of the public accepting what government and professional tax preparers tell them); *id.* at 97 n.6 (referring reader to SCHIFF, THE GREAT INCOME TAX HOAX (1985) for more on how federal judges make "a total mockery out of the American jury system").

[9] *See, e.g.*, *id.* at 18, 55, 61.

[10] *Id.* at 20.

[11] *Id.* at 20 (citing U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. art. I, § 9, cl. 4).

[12] *Id.* at 11.

paying income tax;[13] therefore, according to Schiff, one should be able to legally claim on a W-4 form that he or she is "exempt" from tax liability.[14] Although Schiff provides detailed instructions on how to respond to Internal Revenue Service (IRS) forms to avoid a tax liability that, in his view, does not exist, Schiff also warns readers of the consequences of such a response:

> When you get your Questionnaire, you will have to decide how to answer it. Since you will be dealing with a criminal government that acts in arbitrary and unpredictable ways, you will have to respond based upon that understanding, in conjunction with the knowledge you acquired through this book.[15]

Schiff further notes in relation to claiming "exempt," or filing a "zero-income" tax return:

> So, you may find that even though you correctly responded to the IRS's inquiry, you might still be fined $500.00 for filing an "incorrect W-4." Your employer might be "directed" to disregard your W-4 and to withhold even more taxes than would otherwise be the case. Your employer might also be "directed" to take both the fine and the larger tax payments (that you also don't owe) out of your pay. AND THE OVERWHELMING MAJORITY OF AMERICAN EMPLOYERS WILL DO JUST THAT! In addition, your government is now using W-4s upon which individuals have validly claimed "exempt" as evidence of **an affirmative act of tax evasion** and prosecutes and imprisons people accordingly! All of this is happening because the American public (with a magnificent assist from the media) has allowed this nation to degenerate into a neo-fascist state where neither law nor the Constitution holds much interest for either the government or its courts.[16]

Such attacks on the United States government color almost every page of *The Federal Mafia*.[17]

The First Amendment to the Constitution declares "Congress shall make no law . . . abridging the freedom of speech."[18] Included within the First Amendment is the right, venerated by Thomas Jefferson in his Inaugural Address, to speak critically of the government: "If there be any among us who would wish to dissolve this Union or change its republican form, let them stand undisturbed as monu-

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[13] SCHIFF, *supra* note 2, at 11.
[14] *Id.* at 154–55.
[15] *Id.* at 155–57.
[16] *Id.* at 157.
[17] *See* SCHIFF, *supra* note 2.
[18] U.S. CONST. amend. I.

ments of the safety with which error of opinion may be tolerated where reason is left free to combat it."[19]

The United States Supreme Court has at times interpreted the First Amendment broadly, and as Justice Brandeis explained: "even advocacy of [law] violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on."[20] The courts have treated Schiff's views with varying degrees of seriousness, and have labeled them "legally frivolous"[21] and "knowingly false."[22]

Regardless of the legitimacy of Schiff's position on taxes, however, on August 9, 2004, the Ninth Circuit denied Irwin Schiff his right to free speech.[23] In announcing that *The Federal Mafia* was commercial speech and regulating it as such, the Ninth Circuit may have been focusing not on the First Amendment, what it meant to our founding fathers, and how it has been interpreted by the Supreme Court, but rather on information collected by the IRS, indicating that almost 5,000 zero-income returns, representing an estimated $56 million in attempted tax evasion, were filed by nearly 3,100 of Schiff's followers during a three-year period from approximately 2000–2003.[24]

Accordingly, this Comment supports the position that the Ninth Circuit erred in deciding that *The Federal Mafia* is properly regulated as commercial speech. First, this Comment briefly traces the histories of political speech and commercial speech protections. The Comment then summarizes *Schiff I* and *Schiff II* before analyzing the cases and concluding that that *The Federal Mafia* is political speech entitled to full First Amendment protection.

II. POLITICAL SPEECH

Political speech, including criticism of the government, occupies the core of the protection afforded by the First Amendment.[25] As the Court in *Mills v. Alabama*[26] stated:

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[19] President Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), *available at* http://usinfo.state.gov/usa/infousa/facts/democrac/11.htm.

[20] Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

[21] United States v. Schiff (*Schiff I*), 269 F. Supp. 2d 1262, 1269 n.3 (D. Nev. 2003).

[22] *Id.* at 1269.

[23] *See* United States v. Schiff (*Schiff II*), 379 F.3d 621, 623 (9th Cir. 2004).

[24] *Schiff I*, 269 F. Supp. at 1268.

[25] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346 (1995) (holding a statute prohibiting distribution of anonymous campaign literature an unconstitutional violation of the First Amendment).

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes. The Constitution specifically selected the press, which includes . . . newspapers, books, and magazines . . . to play an important role in the discussion of public affairs.[27]

The Court similarly extolled the virtues of free speech in *Terminiello v. City of Chicago*,[28] stating that government remains responsive to the will of the people "only through free debate and free exchange of ideas."[29] Thus, the Court declared, "[T]he right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes."[30] The *Terminiello* Court further noted that one of the functions of "provocative and challenging" free speech is to invite dispute.[31] In fact, the Court opined that free speech is best serving "its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[32] Furthermore, the Court observed that free speech, while serving its laudable purpose, may also "strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea."[33] The Court has additionally justified free political speech, declaring that "[t]he protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[34] Most importantly, the right to criticize the government is "the heart of what the First Amendment is meant to protect."[35]

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[26] 384 U.S. 214 (1966) (holding a statute criminalizing the publishing of an editorial urging people to vote for a certain candidate in public election a violation of the First Amendment).

[27] *Id.* at 218–19 (citation omitted).

[28] 337 U.S. 1 (1949).

[29] *Id.* at 4 (citing De Jonge v. Oregon, 299 U.S. 353, 365 (1937)).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] Roth v. United States, 354 U.S. 476, 484 (1957) (holding obscenity not constitutionally protected).

[35] McConnell v. Fed. Election Comm'n, 540 U.S. 93, 248 (2003) (Scalia, J., concurring in part and dissenting in part) (addressing campaign finance reform;

The Court has thus recognized that "speech concerning public affairs is more than self-expression; it is the essence of self-government."[36] The Court has also recognized that the high value of free speech can often lead those in power to seek to suppress it.[37] Free speech and expression therefore have special significance with respect to government because "[it] is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression."[38] The Supreme Court has acknowledged "the fundamental freedoms of speech and press,"[39] declaring that "[t]he door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests."[40]

To avoid burdening core political speech, a strict scrutiny test is applied to restrictions on political speech, such that a restriction is upheld only if it is narrowly tailored to serve an overriding state interest.[41] Failing to apply such a strict standard in suppressing speech could "lead to standardization of ideas either by the legislatures, courts, or dominant political or community groups."[42] The Court has also asserted that political speech must be protected regardless of whether it has the intended effect on the audience.[43] In fact, the Court has held that "[u]rgent, important, and effective speech can be no less protected than impotent speech, lest the right to speak be relegated to those instances when it is least needed."[44]

Instead of suppressing speech, then, the Court has been apt to open the channels of communication to allow Americans to form

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prohibiting in part corporate and national-party use of money to fund campaign ads).

[36] Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964).

[37] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978) (citing Associated Press v. United States, 326 U.S. 1, 20 (1945)) (observing "[s]elf-government suffers when those in power suppress competing views on public issues from diverse and antagonistic sources") (internal quotation and citation omitted).

[38] *Id.* at 777 n.11 (citations omitted).

[39] *Roth*, 354 U.S. at 488.

[40] *Id.*

[41] *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995).

[42] Terminiello v. City of Chicago, 337 U.S. 1, 4–5 (1949).

[43] *See id.*

[44] *McIntyre*, 514 U.S. at 347 (citation omitted) (holding a statute prohibiting distribution of anonymous campaign literature violated a speaker's First Amendment rights).

their own judgments in making informed choices.[45] President Woodrow Wilson justified free speech on these grounds, stating:

> I have always been among those who believed that the greatest freedom of speech was the greatest safety, because if a man is a fool, the best thing to do is to encourage him to advertise the fact by speaking. It cannot be so easily discovered if you allow him to remain silent and look wise, but if you let him speak, the secret is out and the world knows that he is a fool. So it is by the exposure of folly that it is defeated; not by the seclusion of folly, and in this free air of free speech men get into that sort of communication with one another which constitutes the basis of all common achievement.[46]

Such rhetoric may lead one to believe that the government has always venerated free speech and has never denied Americans the right to speak out or hear speech criticizing the government. It should be noted, however, that throughout American history, the Supreme Court, often during politically tense times, has altered its approach to protecting speech critical of the United States.[47] During World War I and the McCarthy era, for instance, the Court morphed the standards for protecting political speech, and allowed restrictions on speech that may not have been upheld during less turbulent times.[48]

III. THE EVOLUTION OF COMMERCIAL SPEECH PROTECTION

A. What Constitutes Commercial Speech?

Although political speech is often touted as receiving full First Amendment protection,[49] courts have at times restricted even this type of speech.[50] On the other hand, courts have never afforded

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[45] *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

[46] *Terminiello*, 337 U.S. at 36 (Jackson, J., dissenting) (quoting President Woodrow Wilson, Address at the Institute of France (May 10, 1919)).

[47] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.3.2 (2d ed. 2002).

[48] *See id.*; *see also* Dennis v. United States, 341 U.S. 494 (1951) (upholding convictions for teaching books written by Josef Stalin, Karl Marx, Frederic Engels, and Vladimir Lenin); Whitney v. California, 274 U.S. 357 (1927) (upholding a conviction for attending a Communist Labor Party meeting in violation of state syndicalism law); Gitlow v. New York, 268 U.S. 652 (1925) (upholding a conviction for publishing "Left Wing Manifesto" in violation of statute prohibiting advocacy of overthrowing government); Schenck v. United States, 249 U.S. 47 (1919) (upholding a conviction for circulating leaflet arguing that draft violated Thirteenth Amendment).

[49] *See, e.g.*, Mills v. Alabama, 384 U.S. 214, 218 (1966).

[50] *See* CHEMERINSKY, *supra* note 47, at § 11.3.2.

commercial speech full First Amendment protection.[51] Courts have explained the rationale for treating commercial speech differently than political speech by citing the differences between the types of speech.[52] Commercial speech, according to the Supreme Court, is more objective and factual than political speech, and its truth is more easily verifiable.[53] Moreover, as commercial speech is linked to commercial profits, it is considered hardier and thus less easily chilled.[54] Exactly what constitutes "commercial speech," however, remains vague.[55] In fact, the Court has admitted that "the precise bounds of the category of expression that may be termed commercial speech" are subject to doubt.[56] The Court has further admitted that the commercial speech doctrine relies on "the 'common-sense' distinction between speech proposing a commercial transaction . . . and other varieties of speech."[57]

The United States Supreme Court offered a clear and narrow definition in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[58] stating that commercial speech is expression that "propose[s] a commercial transaction."[59] Price and quantity information, for example, fit into this definition of commercial speech.[60]

The Court expanded the limits of "commercial speech" from mere price advertising into a broader yet less workable definition in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.[61] The Court held that commercial speech is "expression related solely to the economic interests of the speaker and its audience."[62] Three years later, the Court addressed the scope of the *Central Hud-*

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[51] *See, e.g.*, Rubin v. Coors Brewing Co., 514 U.S. 476, 482 (1995) (observing that some restrictions on commercial speech are tolerated given the nature of such speech).

[52] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 772 (1976).

[53] *Id.*

[54] *Id.*

[55] *See* Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1223 (1983).

[56] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 (1985) (holding an attorney may not be disciplined for soliciting legal business in a truthful, nondeceptive printed advertisement).

[57] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978) (upholding Ohio's imposition of discipline on an attorney who engaged in in-person solicitation).

[58] 425 U.S. 748, 762 (1976).

[59] *Id.*

[60] *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67 n.12 (1983).

[61] 447 U.S. 557 (1980).

[62] *Id.* at 561.

son definition in *Bolger v. Youngs Drug Products Corp.*[63] *Bolger* remains the only Supreme Court case to directly confront what, other than pure advertising, constitutes commercial speech.[64] In addressing whether pamphlets containing information about condoms, generally, and the defendant's contraceptive products, specifically, were commercial speech, the Supreme Court stated that:

> The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech. Similarly, the reference to a specific product does not by itself render the pamphlets commercial speech. Finally, the fact that Youngs has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech.
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> The combination of *all* these characteristics, however, provides strong support for the . . . conclusion that the informational pamphlets are properly characterized as commercial speech.[65]

The Court concluded that the mailings were thus subject to the qualified protection afforded commercial speech.[66]

Bolger therefore acknowledged three characteristics of commercial speech.[67] First, it is a type of advertisement;[68] second, it refers to a specific product;[69] and last, the speaker has an economic motivation for the expression.[70] The Court, however, was reluctant to provide a distinct method for distinguishing between commercial and noncommercial speech.[71] Expressing no opinion as to whether reference to a specific product or service is necessary to move expression into the realm of commercial speech, the Court declined to suggest that each of the characteristics set forth in *Bolger* must be present in order to deem particular expression commercial speech.[72] The standard for determining when speech moves from fully protected expression into the less protected territory of commercial speech therefore remains unclear.[73]

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[63] 463 U.S. 60 (1983).
[64] CHEMERINSKY, *supra* note 47, at § 11.3.7.2.
[65] *Bolger*, 463 U.S. at 66–67 (citations omitted).
[66] *Id.* at 68.
[67] *Id.* at 67.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *See Bolger*, 463 U.S. at 67.
[72] *Id.* at 68 n.14.
[73] *Id.*

B. The History of Governmental Protection and Regulation of Commercial Speech

Examining the history of the protection and regulation of commercial speech elucidates the uncertainty surrounding what constitutes commercial speech. Prior to 1975, the Supreme Court had not interpreted the First Amendment to provide any protection for speech deemed commercial in nature.[74] The notion of protecting commercial speech was first introduced in *Bigelow v. Virginia*.[75] In holding that the First Amendment protected newspaper advertisements for abortion services, the Court announced that the fact that speech "had commercial aspects or reflected the advertiser's commercial interests did not negate all First Amendment guarantees."[76] Moreover, the Court observed that the "relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas."[77] The Court, however, left unanswered the extent to which the First Amendment allows regulation of advertising related to activities properly regulated by the State.[78]

A year later, the Supreme Court again addressed the issue of protecting commercial speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[79] The Court examined the constitutionality of a Virginia law that prohibited pharmacists from advertising prescription drug prices.[80] The Court, in an opinion by Justice Blackmun, acknowledged that "[i]f there is a right to advertise, there is a reciprocal right to receive the advertising,"[81] and noted that the First Amendment affords protection "to the communication, to its source and to its recipients both."[82]

The Court began its analysis of whether the First Amendment provides an exception for commercial speech by noting that speech, such as a paid advertisement, does not lose First Amendment protec-

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[74] Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (upholding a law prohibiting distribution of any advertising matter on any street); Breard v. City of Alexandria, 341 U.S. 622, 642 (1951) (upholding a conviction for a violation of ordinance prohibiting door-to-door solicitations).

[75] 421 U.S. 809 (1975).

[76] *Id.* at 818.

[77] *Id.* at 825–26.

[78] *Id.* at 825 (noting "[w]e need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit").

[79] 425 U.S. 748 (1976).

[80] *Id.* at 763.

[81] *Id.* at 757.

[82] *Id.* at 756.

tions merely because money is spent to convey it.[83] Further, the Court reiterated that speech is protected despite being in forms such as books or motion pictures that are sold for profit.[84] Moreover, the Court stated that the First Amendment protects speech even though it may involve a solicitation to purchase, pay, or contribute money.[85] The Court also noted that even assuming the advertiser's interest is purely economic, the advertiser's speech is not disqualified from receiving First Amendment protection.[86] The Court further observed that consumers on the receiving end likewise have a right to enjoy the free flow of commercial information.[87]

The Court also made note of the value of commercial speech in a free enterprise economy,[88] stating that the free flow of commercial information was "indispensable" in creating an intelligent and well-informed public.[89] Further, the Court observed that the First Amendment makes the choice "between the dangers of suppressing information, and the dangers of its misuse if it is freely available."[90] Instead of paternalistically regulating advertising, the Court proposed an approach less offensive to the First Amendment: assume that information is not inherently harmful; assume that well-informed people will judge their own best interests; and assume it is better to open the channels of communication than to close them.[91]

In holding that commercial speech deserves First Amendment protection, the Court noted that "[n]o one would contend that our pharmacist may be prevented from being heard on the subject of whether, in general, pharmaceutical prices should be regulated, or their advertisement forbidden."[92] The Court recognized that speakers, recipients, and society in general benefit from the free flow of ideas, including types of commercial speech.[93]

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[83] *Id.*

[84] *Id.* (citing Smith v. California, 361 U.S. 147, 150 (1959); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952)).

[85] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976).

[86] *Id.* at 762 (observing that although the interests of the contestants in a labor dispute are economic, the speech of both employees and employers enjoys First Amendment protections).

[87] *Id.* at 763.

[88] *Id.* at 765.

[89] *Id.*

[90] *Id.* at 770.

[91] *Va. State Bd. of Pharmacy*, 425 U.S. at 770.

[92] *Id.* at 761–62.

[93] *Id.* at 756, 764.

Justice Stewart wrote a separate concurrence to explain how a government that "has no power to restrict expression because of its message, its ideas, its subject matter, or its content"[94] can legitimately regulate false and deceptive advertising.[95] Justice Stewart distinguished between pure commercial price and product advertising, which the government can properly regulate, and ideological communication, deserving full First Amendment protections.[96] Commercial price and product advertising, according to Justice Stewart, relates to tangible goods or services, and is confined to promoting such specific goods and services.[97] As the factual claims in price and product advertising may be empirically tested, and consequently corrected to reflect the truth without restricting the free dissemination of thought, this type of speech differs markedly from ideological expression.[98] The Justice stated:

> Ideological expression, be it oral, literary, pictorial, or theatrical, is integrally related to the exposition of thought—thought that may shape our concepts of the whole universe of man. Although such expression may convey factual information relevant to social and individual decisionmaking, it is protected by the Constitution, whether or not it contains factual representations and even if it includes inaccurate assertions of fact. Indeed, disregard of the "truth" may be employed to give force to the underlying idea expressed by the speaker.[99]

Justice Rehnquist disagreed with Justice Stewart and the majority, and noted in his dissent his view that commercial speech should not be afforded any First Amendment protection.[100] In Justice Rehnquist's view, the First Amendment's protections were "to relate to public decisionmaking as to political, social, and other public issues, rather than the decision of a particular individual as to whether to purchase one or another kind of shampoo."[101]

Cases following *Virginia State Board of Pharmacy* explained that the government's power to regulate commerce justifies its power to regulate commercial speech that is inextricably linked to commercial

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[94] *Id.* at 776 (Stewart, J., concurring) (quoting Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972)).

[95] *Id.* at 776.

[96] *Id.* at 779.

[97] *Va. State Bd. of Pharmacy*, 425 U.S. at 780 (Stewart, J., concurring).

[98] *Id.* at 780–81.

[99] *Id.* at 779–80.

[100] *Id.* at 781–90 (Rehnquist, J., dissenting).

[101] *Id.* at 787.

transactions.[102] The commercial speech doctrine thus "represents an accommodation between the right to speak and hear expression about goods and services and the right of government to regulate the sales of such goods and services."[103] Nevertheless, the Supreme Court has noted that the government retains less authority to curtail commercial speech when restrictions strike at "the substance of the information communicated" rather than the "commercial aspect of [the speech]—with offerors communicating offers to offerees."[104]

After the Supreme Court held that the First Amendment protected commercial speech,[105] the Court addressed the extent to which the government could regulate such speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.[106] The issue in *Central Hudson* was whether the New York Public Service Commission, in order to conserve scarce fuel supplies, could order electric utilities in the state to cease all advertising promoting the use of electricity.[107] The Court first acknowledged that commercial speech, defined as "expression related solely to the economic interests of the speaker and its audience,"[108] is protected by the First Amendment.[109] The majority then held that, in protecting the informational function of advertising, it is constitutionally valid to suppress commercial messages that are "more likely to deceive the public than inform it,"[110] and, citing *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,[111] the Court stated that the government may ban "commercial speech related to illegal activity."[112]

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[102] *See, e.g.*, Friedman v. Rogers, 440 U.S. 1, 10 n.9 (1979) (holding that the prohibition of practicing optometry under a trade name violates the First Amendment's commercial speech protections); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 457 (1978) (holding that a lawyer's in-person client solicitation, while not entirely removed from the protection of the First Amendment, is analyzed under a lower level of judicial scrutiny because it "is a business transaction in which speech is an essential but subordinate component").

[103] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 903 (2d ed. 1988).

[104] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 499 (1996) (citing Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85 (1977). *See also* Carey v. Population Servs. Int'l, 431 U.S. 678, 701 n.28 (1977) (holding statute banning advertisement of contraceptives unconstitutional).

[105] *Va. State Bd. of Pharmacy*, 425 U.S. at 770.

[106] 447 U.S. 557 (1980).

[107] *Id.* at 558.

[108] *Id.* at 561.

[109] *Id.*

[110] *Id.* at 563 n.5 (citing Friedman v. Rogers, 440 U.S. 1, 11 (1979); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 464–65 (1978)).

[111] 413 U.S. 376 (1973).

[112] *Central Hudson*, 447 U.S. at 564.

The Court then adopted a four-part analysis for commercial speech cases.[113] First, a court must determine whether the commercial speech is protected by the First Amendment; in other words, if it concerns lawful activity and is not misleading.[114] Next, a court must determine "whether the asserted governmental interest is substantial."[115] If answers to the previous questions are in the affirmative, the majority announced, a court must then determine whether the restriction on speech directly advances the state interest involved, and, finally, whether the regulation of the commercial speech is more extensive than necessary to serve the governmental interest.[116] Applying this analysis, essentially an intermediate scrutiny test,[117] the Court determined that energy conservation, one of the state's rationales for regulating the utility companies' truthful advertising, was a substantial interest that could be directly advanced by banning the advertisements.[118] Under the fourth prong of the test, however, the Court found that no showing had been made that the state's interest could not have been served by a less restrictive means.[119]

Justice Stevens concurred in the judgment, questioning whether the restriction on the promotion of the use of electricity through advertising was truly a ban on exclusively commercial speech.[120] The Justice reasoned that because commercial speech is afforded less protection than other forms of speech, the Court must not define "commercial speech" too broadly "lest speech deserving of greater constitutional protection be inadvertently suppressed."[121] Justice Stevens then noted that the Court's definition of "commercial speech," as "expression related solely to the economic interests of the speaker and its audience,"[122] is unclear as to "whether the subject matter of the speech or the motivation of the speaker [is] the limiting factor." According to Justice Stevens, either interpretation "encompasses

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[113] *Id.* at 566.

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *See* Florida Bar v. Went For It, Inc., 515 U.S. 618, 623 (1995) (stating that under the intermediate scrutiny test, the government must assert a substantial state interest in support of its regulation, demonstrate that the restriction directly and materially advances the interest, and the regulation must be narrowly drawn).

[118] *Central Hudson*, 447 U.S. at 568–69.

[119] *Id.* at 570 (finding that "the energy conservation rationale, as important as it is, cannot justify suppressing information about electric devices or services that would cause no net increase in total energy use").

[120] *Id.* at 579 (Stevens, J., concurring).

[121] *Id.*

[122] *Id.*

speech that is entitled to the maximum protection afforded by the First Amendment."[123] The Justice supported his argument by observing that neither a labor leader's call for a strike "nor an economist's dissertation on the money supply should receive any lesser protection because the subject matter concerns only the economic interests of the audience."[124] Similarly, the prospect of pecuniary reward for a speaker should not result in the loss of First Amendment protections; otherwise, speech found in newspapers, or made by paid public speakers, professional authors, or political candidates with partial economic motives would no longer enjoy full protection.[125] In addition, Justice Stevens noted that labeling all promotional advertising as commercial speech, and limiting it as such, runs the risk of curtailing "expression by an informed and interested group of persons of their point of view on questions relating to [issues]... frequently discussed and debated by our political leaders."[126] Finally, Justice Stevens opined that the justification for regulating the speech involved was merely "the expressed fear that the audience may find the utility's message persuasive."[127]

The *Central Hudson* test has been regularly invoked in commercial speech cases.[128] Conflict exists, however, over whether the fourth prong of the test[129] remains applicable.[130]

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[123] *Id.*

[124] *Central Hudson*, 447 U.S. at 579–80 (Stevens, J., concurring).

[125] *Id.* at 580 n.2.

[126] *Id.* at 581.

[127] *Id.*

[128] *See, e.g.*, Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002) (applying *Central Hudson* to restrictions on the advertising of compounded drugs); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (applying *Central Hudson* to restrictions on cigarette advertising); Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999) (applying *Central Hudson* to restrictions on the advertising of gambling); 44 Liquormart, Inc., v. Rhode Island, 517 U.S. 484 (1996) (applying *Central Hudson* to restrictions on a liquor advertisement); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (applying *Central Hudson* to restrictions on information on a beer label); Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989) (applying *Central Hudson* to restrictions on a Tupperware sales presentation).

[129] *See Central Hudson*, 447 U.S. at 566 (announcing that the fourth prong determines whether means less restrictive than curtailing commercial speech can be used to promote asserted governmental interest).

[130] *See Thompson*, 535 U.S. at 371 (imposing least-restrictive-means requirement); *44 Liquormart*, 517 U.S. at 507 (imposing least-restrictive-means requirement); *Rubin*, 514 U.S. at 491 (imposing least-restrictive-means requirement). *But see Greater New Orleans Broad. Ass'n*, 527 U.S. at 188 (holding that the government is not required to employ least-restrictive means possible, but the restriction must be narrowly tailored to fit the asserted interest); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 418 n.13 (1993) (rejecting least-restrictive-means test for a reasonable-fit-

While commercial speech is entitled to limited protection, the Supreme Court, without offering an explanation, has repeatedly held that the First Amendment does not protect advertising of illegality.[131] In 1973, two years before commercial speech was afforded any Constitutional protection, the Supreme Court decided the only case addressing advertising of an illegal activity.[132] In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,[133] the Court held that prohibiting the *Pittsburgh Press* from placing newspaper advertisements in columns entitled "Jobs-Male Interest" and "Jobs-Female Interest" did not infringe upon the First Amendment rights of the *Pittsburgh Press*.[134] The Court stated that "[d]iscrimination in employment is not only commercial activity, it is *illegal* commercial activity . . . . We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes."[135] Significantly, the Court noted that the advertisements involved did not express a position on whether social policy called for filling certain jobs with certain genders;[136] nor, the Court observed, did the advertisements criticize any ordinance or employment practice.[137] Inasmuch as the advertisements were no more than a proposal of possible employment, the Court found that, they were "classic examples of commercial speech."[138] Therefore, the majority held that prohibiting the *Pittsburgh Press* from placing advertisements in gender-based columns did not violate the newspaper's First Amendment rights.[139] The Court, however, emphasized that its holding in no way allowed the government to forbid the newspaper to publish advertisements commenting on either the ordinance involved or on employment practices.[140] *Pittsburgh Press* has since been cited as establishing that the First Amendment does not protect the advertising of illegal activities, and furthermore, such advertisements

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between-ends-and-means analysis); *Fox*, 492 U.S. at 480 (rejecting least-restrictive-means requirement).

[131] CHEMERINSKY, *supra* note 47, at § 11.3.7.4.

[132] *Id.*

[133] 413 U.S. 376 (1973).

[134] *Id.* at 391.

[135] *Id.* at 388.

[136] *Id.* at 385.

[137] *Id.*

[138] *Id.* at 385.

[139] *Pittsburgh Press Co.*, 413 U.S. at 391.

[140] *Id.*

may be prohibited, punished, and may even become the basis for civil liability.[141]

Therefore, political speech, receiving utmost First Amendment protection, is subject only to a governmental restriction narrowly tailored to serve an overriding state interest.[142] Restrictions on less-protected commercial speech are subject to the intermediate scrutiny test announced in *Central Hudson*;[143] the advertisement of illegal activities, in contrast, receives no First Amendment protection.[144] Due to these varying levels of protection, the label the courts give speech is paramount in determining the level of protection it receives—a point illustrated by the cases surrounding *The Federal Mafia*.[145]

IV. THE GOVERNMENT'S CASE AGAINST SCHIFF

On August 9, 2004, the Ninth Circuit upheld a preliminary injunction[146] issued by the United States District Court for the District

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[141] *See, e.g.*, Braun v. Soldier of Fortune Magazine, Inc., 968 F.2d 1110 (11th Cir. 1992) (holding the publisher of a magazine civilly liable after running an advertisement for an assassin that resulted in a murder committed by a person responding to the ad).

[142] *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995).

[143] Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

[144] *Pittsburgh Press Co.*, 413 U.S. at 391.

[145] *See* United States v. Schiff (*Schiff II*), 379 F.3d 621 (9th Cir. 2004); United States v. Schiff (*Schiff I*), 269 F. Supp. 2d 1262 (D. Nev. 2003).

[146] The injunction provides in relevant part that the defendants may not engage in any of the following activities:

> (1) Organizing, promoting, marketing or selling, or assisting in organizing, promoting, marketing or selling, any plan or arrangement which advises or encourages taxpayers to attempt to violate internal revenue laws or unlawfully evade the assessment or collection of their federal tax liabilities, including those that promote, sell, or advocate the use of the "zero income" tax return, and the use of false with-holding forms;
> (2) Engaging in conduct subject to penalty under 26 U.S.C. § 6700, including organizing or selling a plan or arrangement and making or furnishing a statement regarding the excludability of income that they know or have reason to know is false or fraudulent as to any material matter;
> (3) Engaging in conduct subject to penalty under 26 U.S.C. § 6700, including organizing or selling a plan or arrangement and making or furnishing a statement regarding the excludability of income that they know or have reason to know is false or fraudulent as to any material matter;
> (4) Advertising, marketing or promoting any false, misleading, or deceptive tax position in any media for the purpose of advising or encouraging taxpayers to unlawfully evade the assessment or payment of federal income taxes, including the positions that (1)

of Nevada,[147] prohibiting Irwin Schiff and his associates from selling *The Federal Mafia*.[148] The injunction was issued pursuant to 26 U.S.C. § 7408,[149] which authorizes an action to enjoin promoters of abusive tax shelters from further engaging in conduct subject to penalty under § 6700[150] (promoting abusive tax shelters)[151] and § 6701 (aiding

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persons can legally stop paying income taxes or become tax free by using the plan or arrangement; (2) federal income tax is voluntary; (3) there is no law requiring anyone to pay income tax; (4) there is no income tax, only a profits tax; (5) it is legal to report zero income regardless of what you may have earned, or to use false withholding forms; (6) Schiff's personal services as witness or brief writer will be materially helpful in defending criminal prosecution; or any other false, misleading, or deceptive tax position;

(5) Assisting others to violate the tax laws, including the evasion of assessment or payment of taxes;

(6) Inciting others to violate the tax laws, including the evasion of assessment and payment of taxes;

(7) Instructing or assisting others to hinder or disrupt the enforcement of internal revenue laws by filing frivolous lawsuits, taking frivolous positions in an effort to impede IRS audits and Collection Due Process Hearings, or engaging in other conduct intended to interfere with the administration and enforcement of the internal revenue laws;

(8) Preparing or assisting in the preparation of any federal income tax return for any other person;

(9) Engaging in conduct subject to penalty under 26 U.S.C. § 6694 (preparing any part of a return or claim for refund that includes an unrealistic position);

(10) Engaging in any conduct subject to penalty under 26 U.S.C. § 6695 (failing to sign and furnish the correct identifying number on tax returns they prepare); or

(11) Engaging in any other activity subject to injunction or penalty under 26 U.S.C. §§ 7407, 6694, or 6695, including fraudulent or deceptive conduct that substantially interferes with the proper administration of the internal revenue laws.

Schiff II, 379 F.3d at 624–25.

147 *Schiff I*, 269 F. Supp. 2d at 1284–85.

148 *Schiff II*, 379 F.3d at 623.

149 *Schiff I*, 269 F. Supp. 2d at 1265.

150 26 U.S.C. § 6700(a) authorizes in part the imposition of a penalty on any person who:

(1)

(A) organizes (or assists in the organization of)—

(i) a partnership or other entity,

(ii) any investment plan or arrangement, or

(iii) any other plan or arrangement, or

(B) participates (directly or indirectly) in the sale of any interest in an entity or plan or arrangement referred to in subparagraph (A), and

(2) makes or furnishes or causes another person to make or furnish (in connection with such organization or sale)—

(A) a statement with respect to the allowability of any deduction

and abetting understatement of tax liability).[152] The district court decided, and the Ninth Circuit agreed, that the government had carried its burden of establishing a violation of § 6700 and that a preliminary injunction was appropriate.[153]

To establish a violation of § 6700, the United States must carry the burden of showing that:

> (1) the defendants organized or sold, or participated in the organization or sale of an entity, plan, or arrangement;
> (2) they made or caused to be made false or fraudulent statements concerning the tax benefits to be derived from the entity, plan, or arrangement;
> (3) they knew or had reason to know that the statements were false or fraudulent;
> (4) the false or fraudulent statements pertained to a material matter; and
> (5) an injunction is necessary to prevent recurrence of this conduct.[154]

A. Schiff I, *The District Court Opinion*

1. Establishing a Violation of 26 U.S.C. §§ 6700 and 6701

Written by Judge Lloyd George, the district court opinion[155] first recounted the government's documentation of Schiff's enterprise, which includes selling books, tapes, and packages, marketing seminars and workshops, and performing letter-writing services and

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> or credit, the excludability of any income, or the securing of any other tax benefit by reason of holding an interest in the entity or participating in the plan or arrangement which the person knows or has reason to know is false or fraudulent as to any material matter, or
> (B) a gross valuation overstatement as to any material matter.

26 U.S.C. § 6700(a) (2004); *Schiff I*, 269 F. Supp. 2d at 1265.

[151] *Schiff I*, 269 F. Supp. 2d at 1264.

[152] *Id.*

[153] *Schiff II*, 379 F.3d at 625. Factors the district court may consider in determining whether an injunction is appropriate include:

> (1) the gravity of the harm caused by the offense; (2) the extent of the defendant's participation; (3) the defendant's degree of scienter; (4) the isolated or recurrent nature of the infraction; (5) the defendant's recognition (or non-recognition) of his own culpability; and (6) the likelihood that the defendant's occupation would place him in a position where future violations could be anticipated.

Id. (quoting United States v. Estate Pres. Servs., 202 F.3d 1093, 1105 (9th Cir. 2000)).

[154] *Schiff I*, 269 F. Supp. 2d at 1266 (citing *Estate Pres. Servs.*, 202 F.3d at 1093).

[155] *Id.* at 1264.

personal consultations for a fee.[156] The judge cited *The Federal Mafia* as being "central" to Schiff's "zero-income scheme," and noted that the book is included in each of the product packages Schiff sells.[157] Judge George observed that the book is "largely autobiographical, containing in large part Schiff's anti-tax and anti-government diatribes and theories."[158] The judge further observed, however, that "[t]rue to its promise, *The Federal Mafia* contains specific instructions on how to stop employers from withholding taxes by submitting an 'exempt' W-4, and how to file 'zero income' tax returns."[159] Interestingly, the judge noted that in *The Federal Mafia*, Schiff offers to send readers, for no charge, an update of issues not fully developed in the book.[160]

The district court opinion then addressed the second and third prongs of proving a § 6700 violation.[161] Judge George noted that the Supreme Court and the Ninth Circuit have repeatedly rejected Schiff's theories concerning the unconstitutionality of the income tax.[162] Moreover, the judge, citing numerous legal battles Schiff has fought, asserted that Schiff's claim that paying taxes is voluntary is "knowingly false."[163] Judge George quoted a Second Circuit case[164] affirming an appeal from a summary judgment against Schiff, in which the Second Circuit described Schiff as "an extremist who reserve[s] the right to interpret the decisions of the Supreme Court as he read[s] them from his layman's point of view regardless of and oblivious to the interpretations of the judiciary."[165]

As further support for the contention that Schiff knew or had reason to know that his theories were false, the district court cited cases involving individuals convicted of tax crimes after following Schiff's theories.[166] The district court included *United States v. Den-*

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[156] *Id.* at 1266.

[157] *Id.* at 1267.

[158] *Id.*

[159] *Id.* (citing SCHIFF, *supra* note 2, at 154–68, 244–45, 274–75).

[160] *Schiff I*, 269 F. Supp. 2d at 1267–68 (citing SCHIFF, *supra* note 2, at 275).

[161] *Id.* at 1268.

[162] *Id.* (observing that the Supreme Court and lower federal courts have repeatedly recognized the Sixteenth Amendment's authority to impose a non-apportioned direct income tax on United States citizens) (citations omitted).

[163] *Id.* (citations omitted).

[164] Schiff v. United States (*Schiff*), 919 F.2d 830 (2d Cir. 1990).

[165] *Schiff I*, 269 F. Supp. 2d at 1269 (quoting *Schiff*, 919 F.2d at 834) (rejecting Schiff's contention that the income tax violates the Constitution in an action brought by Schiff seeking tax refunds on amounts collected by the government).

[166] *Id.* at 1269–70 (citing United States v. Dentice, No. 99-50101, 1999 U.S. App. LEXIS 30024 (9th Cir. Nov. 15, 1999); United States v. Middleton, 246 F.3d 825 (6th

tice[167] in its list of cases. Although the district court stated that it was citing *Dentice* as evidence of Schiff's knowledge of the reception of his theories and not for the propositions of the case, Judge George noted parenthetically that in *Dentice*, the defendant's good faith defense to a tax crime was rejected in part because the court determined that the "defendant could not reasonably rely on Schiff, who was neither a CPA nor an attorney and had himself been convicted of tax evasion."[168] The judge further observed that Schiff's acknowledgment that people influenced by his works have gone to jail provides even more support for the charge that Schiff knowingly made false or fraudulent statements.[169] Judge George went on to detail the "deceptive nature" of Schiff's scheme by referring to Schiff's suggestions in *The Federal Mafia* that readers might avoid prosecution for falsely claiming exempt status on a W-4 form by writing "under duress" next to their signatures.[170]

The district court decision next noted that Schiff's statements, having a substantial impact on the decision-making process of the taxpayer, were material within the meaning of § 6700.[171] The court then opined that an injunction was appropriate, as future § 6700 violations were likely and each element to prove a violation of § 6700 was present.[172] Before reaching the First Amendment issues, the court stated that as the government had shown that Schiff and his associates had prepared false tax returns for their customers in violation of § 6701, their tax preparation assistance was also subject to the preliminary injunction.[173]

2. Asserting *The Federal Mafia* is Commercial Speech

Although the district court introduced its discussion of the First Amendment issues involved in Schiff's case by announcing that Schiff's "message is subject to injunction as false, misleading and deceptive commercial speech, incitement, and aiding and abetting illegal conduct," the bulk of the district court's analysis focused on commercial speech issues.[174] Further, although the Ninth Circuit ac-

Cir. 2001); United States v. Payne, 978 F.2d 1177 (10th Cir. 1992); United States v. Burdett, 962 F.2d 228 (2d Cir. 1992)).

[167] *Dentice*, 1999 U.S. App. LEXIS 30024.

[168] *Schiff I*, 269 F. Supp. 2d at 1269–70.

[169] *Id.* at 1270.

[170] *Id.* (citations omitted).

[171] *Id.* at 1271.

[172] *Id.*

[173] *Id.* at 1271–72.

[174] *Schiff I*, 269 F. Supp. 2d at 1272.

knowledged three theories by which the sale and publication of *The Federal Mafia* could be enjoined,[175] the court upheld the injunction as an appropriate restriction on commercial speech and declined to address the issues of incitement or aiding and abetting criminal activity.[176]

The district court began its commercial speech discourse by acknowledging that while the Constitution accords less protection to commercial speech, the bounds of commercial speech are unclear.[177] The court then noted that although "core" commercial speech "does no more than propose a commercial transaction,"[178] commercial speech has also been defined more broadly as "expression related solely to the economic interests of the speaker and its audience."[179] Judge George then mentioned in a footnote that the First Amendment does not protect false commercial speech,[180] and commercial speech "more likely to deceive the public than to inform it" may be banned.[181] The judge then detailed the commercial speech aspects of Schiff's "scheme."[182] The district court listed as "core" commercial speech Schiff's statements or suggestions that:

> (1) persons can legally stop paying taxes, or become tax free through the use of the scheme, (2) income tax is voluntary, or that there is no law requiring anyone to pay income tax, (3) there is no income tax, only a profits tax, (4) it is legal to report zero income regardless of what you may have earned, and (5) it is legal to stop the withholding of taxes by submitting an "exempt" W-4 form.[183]

Judge George then attempted to illustrate how Schiff's speech could also be considered commercial speech under its broader definition—expression related solely to the economic interests of the speaker and its audience.[184] The judge relied primarily on the Ninth Circuit's decision in *United States v. Estate Preservation Services.*[185] Observing that "the importance of *Estate Preservation* to this court's First

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[175] United States v. Schiff (*Schiff II*), 379 F.3d 621, 626 (9th Cir. 2004).

[176] *Id.* at 630.

[177] *Schiff I*, 269 F. Supp. 2d at 1272–73 (citations omitted).

[178] *Id.* at 1273 (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976)).

[179] *Id.* (quoting Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980)).

[180] *Id.* at 1273 n.6.

[181] *Id.* at 1273 (quoting *Va. State Bd. of Pharmacy*, 425 U.S. at 771–72 n.24).

[182] *Id.*

[183] *Schiff I*, 269 F. Supp. 2d at 1274.

[184] *Id.*

[185] 202 F.3d 1093 (9th Cir. 2000).

Amendment analysis cannot be overstated,"[186] Judge George noted that therein, the Ninth Circuit had affirmed an injunction against the organizers and promoters of Estate Preservation Services for violating § 6700 in the marketing of trusts and other asset protection devices that were essentially abusive tax shelters.[187] Judge George pointed out that like Schiff, Robert L. Henkell, the central figure organizing and promoting Estate Preservation Services, conducted seminars through which he advised customers how to create and use the trusts.[188] Henkell also published a training manual containing "numerous representations about the permissibility of tax deductions and credits purportedly available to [the trusts]."[189] The *Estate Preservation* court, applying the broader definition of commercial speech, rejected a First Amendment challenge and enjoined the defendants from promoting, marketing, or selling the trusts or any other abusive tax shelter plan.[190] In so doing, the court in *Estate Preservation* relied on previous cases[191] that had used the "relating solely to the economic interests of the speaker and its audience" definition of commercial speech to enjoin the promoters of asset-management kits from further distributing their materials.[192]

Drawing parallels to *Estate Preservation* and the cases it drew upon, Judge George applied a commercial speech standard to Schiff's expression, involving not only the advertising, but also "the promoting, marketing or selling of the scheme."[193] The court, noting Schiff's "sophistication and education in tax matters,"[194] also found that "to the extent Schiff holds himself out to be a tax consultant, familiar with the taxing system, . . . the promotion, marketing and sales of the scheme involves the offering of fraudulent tax advice, and is not protected by the First Amendment."[195]

The district court then considered whether banning *The Federal Mafia* constituted an impermissible prior restraint on speech.[196] First,

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[186] *Schiff I*, 269 F. Supp. 2d. at 1273 n.7.

[187] *Id.* at 1274.

[188] *Id.*

[189] *Id.* (quoting United States v. Estate Pres. Servs., 202 F.3d 1093, 1097 (9th Cir. 2000).

[190] *Id.* at 1274–75.

[191] United States v. Kaun, 827 F.2d 1144 (7th Cir. 1987); United States v. White, 769 F.2d 511 (8th Cir. 1985); United States v. Buttorff, 761 F.2d 1056 (5th Cir. 1985).

[192] *Schiff I*, 269 F. Supp. 2d at 1275 (citing *Estate Pres. Servs.*, 202 F.3d at 1093).

[193] *Id.* at 1276.

[194] *Id.* at 1276 n.10.

[195] *Id.* at 1276.

[196] *Id.* at 1276–77.

Judge George addressed whether the book qualifies as commercial speech.[197] As *The Federal Mafia* includes descriptions along with the prices of other books, cassettes, and audio reports by Schiff, the judge concluded that the book fit the core definition of commercial speech.[198] The judge further opined that although the book comments on public issues, doing so "does not elevate speech from commercial to political rank."[199] In addition, Judge George asserted that Schiff could "publish his ideology or comment on matters of public concern without advertising his tax scheme;" therefore, the judge stated, the commercial speech components of the book are not "inextricably intertwined" with its protected speech.[200] The judge cited the fact that *The Federal Mafia* is marketed as part of Schiff's "instructional packages" as further evidence of the commercial nature of the book.[201] Judge George identified the "training-manual characteristics of the book (including instructions and materials regarding the false filings of zero returns and submissions of W-4s)" as furthering the promotion of Schiff's "overall tax scheme."[202] *The Federal Mafia*, the court stated, promotes the use of this "scheme" for Schiff's profit and therefore constitutes "commercial speech not shielded by the First Amendment."[203] In support of this contention, Judge George stated:

> The book does not provide information or advocacy on tax reform in general, and then leave the reader to act on his own judgment, or consider the advice of legitimate tax professionals before engaging in conduct of legal significance. Rather, it is part of the effort to sell for profit Schiff's materials and services. In this regard, *The Federal Mafia* hardly stands alone, but by its very essence is closely connected to the scheme expressly and financially.[204]

The judge then reiterated that the government may ban the distribution of a publication even though it contains a combination of protected and unprotected speech.[205] Finally, the district court concluded that the "commercial speech and tax advice aspects of the

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[197] *Id.* at 1277.
[198] *Schiff I*, 269 F. Supp. 2d at 1277.
[199] *Id.* (citations omitted).
[200] *Id.*
[201] *Id.* at 1278.
[202] *Id.*
[203] *Id.*
[204] *Schiff I*, 269 F. Supp. at 1279.
[205] *Id.*

scheme (including those contained in *The Federal Mafia*) can be enjoined to the extent that they are false, misleading or deceptive."[206]

B. Schiff II*, The Ninth Circuit Decision*

Like the district court, the Ninth Circuit began its commercial speech discussion by acknowledging the vagueness of the definition of commercial speech.[207] The opinion, written by Judge Procter Hug, Jr., noted that if *The Federal Mafia* is considered commercial speech, the *Central Hudson* test is implicated.[208] The judge then summarily stated that Schiff would lose on the first prong of the test, which gives the government the right to regulate false, misleading, or deceptive commercial speech.[209] The court acknowledged, however, that if the contested portions of the book were considered political speech, they would be entitled to greater protection.[210]

The court noted that commercial speech, under the narrower definition urged by Schiff, is present on the back cover of *The Federal Mafia* and in inserts which list other products made available by Schiff.[211] Concerning the broader definition of commercial speech urged by the government, the court observed:

> Although neither the government nor the district court, which adopted the government's definition of commercial speech, specifically states which pages would meet this broad definition of commercial speech, it can be assumed the government believes that, at least, Chapter Eight ("How to Stop Paying Income Taxes") and the Epilogue and Addendum to the Second Edition (which give instructions on how to file the "zero-income" returns and samples of such returns) would qualify as commercial speech under this definition.[212]

To clarify the definition of commercial speech and to shed light upon what the Supreme Court meant by "expression related solely to the economic interests of the speaker and its audience," the court referred to two recent Ninth Circuit commercial speech cases, *Mattel, Inc. v. MCA Records, Inc.*[213] and *Hoffman v. Capital Cities/ABC, Inc.*[214]

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[206] *Id.* at 1279–80.
[207] United States v. Schiff (*Schiff II*), 379 F.3d 621, 626 (9th Cir. 2004).
[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] *Id.*
[212] *Id.* at 627.
[213] 296 F.3d 894 (9th Cir. 2002).
[214] 255 F.3d 1180 (9th Cir. 2001).

The court noted that *Mattel* and *Hoffman* involved intellectual property challenges in which a speaker had used pre-existing images to create a new expressive work with commercial aspects.[215] Although the courts in those cases held that the commercial speech within the new works was "inextricably entwined" with expressive speech and thus entitled to full First Amendment protection, the *Schiff* court found the case at hand to be "markedly different."[216]

The court asserted that "[i]nstead of using an iconic figure of Americana to lampoon American culture, Schiff has created an entire line of tax avoidance products and services, of which *The Federal Mafia* is the linchpin."[217] The court continued: "The extravagant claims made in *The Federal Mafia* are designed to convince readers that they can lawfully avoid paying their income taxes so that the readers will buy other products in Schiff's line."[218] As support for this contention, the court cited examples from the book, including an insert entitled "From the Desk of Irwin Schiff."[219] The insert states that the book now contains new, previously unavailable information concerning zero income tax returns and refunds.[220] This insert, the court opined, along with the flyleaf of the book discussing the illegality of income taxes, is "made to assure the taxpayer that the taxpayer can legitimately follow these suggestions and forms."[221] The Ninth Circuit cited the page listing Schiff's other products and their prices, as well as excerpts taken from Schiff's website, as further evidence that *The Federal Mafia* is "an integral part of Schiff's whole program to market his various products for taxpayers to utilize his forms and techniques to avoid paying income tax."[222]

The Ninth Circuit then addressed the district court's reliance on *Estate Preservation* and noted Schiff's counterargument that his case is distinguishable because the book enjoined in *Estate Preservation* contained no political speech.[223] Judge Hug observed that the book

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[215] United States v. Schiff (*Schiff II*), 379 F.3d 621, 627 (9th Cir. 2004). In *Mattel*, a pop group had used the image of Barbie to create a song parodying American culture. *Mattel*, 296 F.3d at 899. *Hoffman* involved a magazine's use of digitally altered images, including one of Dustin Hoffman, to showcase spring fashions. *Hoffman*, 255 F.3d at 1183.

[216] *Schiff II*, 379 F.3d at 627.

[217] *Id.*

[218] *Id.*

[219] *Id.*

[220] *Id.*

[221] *Id.* at 628.

[222] *Schiff II*, 379 F.3d at 628–29.

[223] *Id.* at 629.

involved in *Estate Preservation* was an instruction manual for tax evasion entitled "Asset Preservation Trusts (APT)–Description, Use & Benefits."[224] The judge further noted that the defendants in *Estate Preservation* made no claims that the manual did anything except describe the use and benefits of the trusts.[225] The court nevertheless found that *The Federal Mafia* could be likened to the training manual since it "is acting as an advertisement for Schiff's full range of tax-avoidance products and services."[226]

An advertisement, the court reasoned, is commercial speech, and commercial speech may be enjoined when it is fraudulent.[227] The court explained that "[a]n advertisement is fraudulent when it misleads customers about the benefit of the offered product."[228] *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*[229] was offered as an example.[230] Judge Hug compared Schiff's case to *Madigan*, in which the defendants, a for-profit fundraising company, told customers that a "significant amount" of each dollar donated would be given to charity when in fact only fifteen cents per dollar were donated.[231] The Ninth Circuit stated that Schiff is making "similarly fraudulent claims" by informing readers that "no law requires you to file income tax returns" and indicating that there is no law authorizing federal courts to prosecute anyone for income tax crimes.[232] The court then concluded: "Although these claims are far-fetched, they could mislead a customer into believing that he or she could use Schiff's products to legally stop paying income taxes. Given the risk of consumer confusion, the district court did not abuse its discretion when it enjoined *The Federal Mafia*."[233]

Thus, the district court and the circuit court found that *The Federal Mafia* fit both the narrower and the broader meanings of commercial speech.[234] Furthermore, both courts relied on *Estate Preservation* in concluding that Schiff could be enjoined from distributing

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[224] *Id.*
[225] *Id.*
[226] *Id.*
[227] *Id.* at 630.
[228] *Schiff II*, 379 F.2d at 630.
[229] 538 U.S. 600 (2003).
[230] *Schiff II*, 379 F.3d at 630.
[231] *Id.* (citing *Madigan*, 538 U.S. at 606–09).
[232] *Id.*
[233] *Id.*
[234] *Schiff II*, 379 F.2d at 626–27; United States v. Schiff (*Schiff I*), 269 F. Supp. 2d 1262, 1274 (D. Nev. 2003).

The Federal Mafia.[235] Finally, the courts held that as the fully protected portions of Schiff's book were extricable from the parts considered by the courts to be commercial speech, Schiff was properly prohibited from selling *The Federal Mafia*.[236]

V. *THE FEDERAL MAFIA* IS POLITICAL, NOT COMMERCIAL SPEECH

Both the district court and the Ninth Circuit correctly acknowledged that the standards for defining commercial speech are vague.[237] The standards are in fact ambiguous, and courts have relied on "the 'common-sense' distinction between speech proposing a commercial transaction . . . and other varieties of speech."[238] Common sense, however, indicates that a three-hundred page book criticizing the policies and practices of the government and urging reform qualifies as political speech.[239] As Justice Stevens warned in *Central Hudson*, courts must not define commercial speech too broadly "lest speech deserving of greater constitutional protection be inadvertently suppressed."[240] Despite this caveat, the "common sense" of the courts hearing Schiff's case led them to conclude incorrectly that *The Federal Mafia* was not a political diatribe entitled to full First Amendment protection, but rather commercial speech that can be regulated and should be suppressed.[241]

First, *The Federal Mafia* does not qualify as commercial speech under *Bolger*,[242] the only case directly addressing the characteristics of commercial speech.[243] The Court in *Bolger* determined that the pamphlets in question were commercial speech because the author conceded that they were advertisements, they referred to a specific product, and the author had an economic motive for distributing them.[244] Schiff, however, has never conceded that *The Federal Mafia* is an advertisement, [245] and the courts offered a weak explanation as to

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[235] *Schiff II*, 379 F.3d at 629; *Schiff I*, 269 F. Supp. 2d at 1274.

[236] *Schiff II*, 379 F.3d at 629; *Schiff I*, 269 F. Supp. 2d at 1277.

[237] *Schiff II*, 379 F.3d at 626; *Schiff I*, 269 F. Supp. 2d at 1273.

[238] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978).

[239] *See* SCHIFF, *supra* note 2.

[240] Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 579 (1980) (Stevens, J., concurring).

[241] *See Schiff II*, 379 F.3d 621; *Schiff I*, 269 F. Supp. 2d 1262.

[242] Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67 (1983).

[243] CHEMERINSKY, *supra* note 47, at § 11.3.7.2.

[244] *Bolger*, 463 U.S. at 67.

[245] *See Schiff II*, 379 F.3d 621; *Schiff I*, 269 F. Supp. 2d 1262.

how Schiff's lengthy book can be likened to a promotional pamphlet or a poster announcing a product and its price.[246]

The Ninth Circuit attempted to show that *The Federal Mafia* is part of an advertising scheme for Schiff's other products by including several excerpts from Schiff's website that discuss the book in conjunction with other works by Schiff.[247] The court, however, failed to explain how the website advertisements for *The Federal Mafia* prove that the book itself is an advertisement for Schiff's other products.[248] Including quotes from advertisements for *The Federal Mafia* in the discussion of whether *The Federal Mafia* is itself commercial speech only clouded the First Amendment issue surrounding the banning of the book.[249]

In order to label *The Federal Mafia* commercial speech under *Bolger*, the district court and the Ninth Circuit also emphasized that the book is sold for profit and refers to and lists other products.[250] Under this rationale, however, virtually any newspaper or any nonfiction book or novel that lists works by the same author or publisher could be labeled and potentially regulated as commercial speech, a result that hardly seems consistent with the freedom of speech embedded in the First Amendment.[251]

Additionally, however, the district court and the circuit court surprisingly found that aspects of *The Federal Mafia* qualified as commercial speech under the narrower definition of the term—"advertising pure and simple,"[252] or speech that "does no more than propose a commercial transaction."[253] The district court stretched this straightforward definition by declaring without explanation that Schiff's contention that income tax is voluntary and his promotion of a theory in which he suggested that one may stop the withholding of taxes by submitting an "exempt" W-4 form constituted "core" commercial speech.[254] These tax theories plainly do not fall into the straightforward realm of price and product advertising contemplated by the Supreme Court in *Virginia State Board of Pharmacy* or *Bolger*, and the Ninth Circuit acknowledged as much by admitting that only the

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[246] *See Schiff II*, 379 F.3d at 629; *Schiff I*, 269 F. Supp. 2d at 1278.
[247] *Schiff II*, 379 F.3d at 628–29.
[248] *See id.*
[249] *See id.*
[250] *See Schiff II*, 379 F.3d 621; *Schiff I*, 269 F. Supp. 2d 1262.
[251] U.S. CONST. amend. I.
[252] *Schiff II*, 379 F.3d at 626 (citation omitted).
[253] *Schiff I*, 269 F. Supp. 2d at 1273 (citation omitted).
[254] *Id.* at 1274.

back cover and inserts in *The Federal Mafia* would qualify as commercial speech under its narrower definition.[255] It is highly questionable, however, that even these pages, which do list price and product information, move *The Federal Mafia* into the commercial speech category.

Newspapers and magazines containing advertisements are often sold for profit, but they have not been and should not be regulated as commercial speech. Furthermore, many books, including works of fiction and nonfiction, advertise other books by the same author or publisher on the first or last few pages of the book. It is difficult to imagine a scenario in which the government successfully labels a novel "commercial speech" in order to regulate its contents. Although other books and products by Schiff, and even the Internal Revenue Code itself is advertised for sale on the last pages of *The Federal Mafia*, it hardly seems that this alone is enough to categorize the entire three-hundred page book as an advertisement for Schiff's "scheme."[256]

The Ninth Circuit pointed out that the few pages listing Schiff's other products and their prices were not inextricably entwined with *The Federal Mafia* and therefore the book, despite hundreds of pages of commentary on the government, could not be protected as political speech.[257] Citing *Mattel* and *Hoffman*, the court attempted to use these intellectual property cases to explain how the advertisements in *The Federal Mafia* allow the government to ban the book.[258] The court reiterated that the song "Barbie Girl" and a digitally altered picture of Dustin Hoffman, at issue in *Mattel* and *Hoffman*, contained elements of commercial speech and expressive speech that could not be separated, hence the speech was entitled to full First Amendment protection.[259] The court appropriately distinguished those works from *The Federal Mafia* by pointing out that in his book, Schiff is not "using an iconic figure of Americana to lampoon American culture."[260] While that is true enough, Schiff is in fact doing something much more thought-provoking and also much more deserving of First Amendment protection: criticizing the American government. That point notwithstanding, the court proceeded to explain that "Schiff can relate his long history with the IRS and explain his unor-

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[255] *Schiff II*, 379 F.3d at 626.
[256] SCHIFF, *supra* note 2, at 319–20.
[257] *Schiff II*, 379 F.3d at 627–29.
[258] *Id.*
[259] *Id.*
[260] *Id.* at 627.

thodox tax theories without simultaneously urging his readers to buy his products . . . . Schiff cannot use the protected portions of *The Federal Mafia* to piggy-back his fraudulent commercial speech into full First Amendment protection."[261] It seems easier to comprehend the situation in reverse, however, to argue that the government cannot use the few pages of advertising at the end of a three-hundred page book to piggy-back the protected political speech of *The Federal Mafia* into the less-protected category of commercial speech.

In addition to finding that *The Federal Mafia* fit the narrow definition of commercial speech, the district court and the Ninth Circuit found that the book also fit into the broader definition of commercial speech:[262] "expression related solely to the economic interests of the speaker and its audience."[263] As Justice Stevens pointed out in his concurrence in *Central Hudson*, however, the mere fact that speech relates to money or the economy hardly renders its First Amendment protections diminished.[264] Just as an "economist's dissertation on the money supply" is entitled to full First Amendment protection, Schiff's critique of the government's tax policy and the IRS should similarly enjoy protection, and should certainly not lose any protection due to the simple fact that taxes relate to the economic interest of most Americans.[265]

Moreover, even if the "related solely to the economic interests of the speaker and its audience"[266] definition of commercial speech is interpreted as referring not to the subject matter of the speech, but rather to the motivation of the speaker, *The Federal Mafia* still cannot be properly labeled commercial speech. Adopting such an interpretation, as Justice Stevens noted in *Central Hudson*, would allow only qualified First Amendment protection to the work of any professional author with partial economic motives.[267] If the courts in Schiff's case adopted this definition of commercial speech, producing the absurd result of subjecting almost any book, newspaper, or magazine sold for profit to the restrictions imposed on commercial speech, the question still exists as to whether Schiff's motivation in selling *The Federal*

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[261] *Id.* at 629.

[262] *See id.* at 629–30; *see also* United States v. Schiff (*Schiff I*), 269 F. Supp. 2d 1262, 1277 (D. Nev. 2003).

[263] Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980).

[264] *See id.* at 579–80 (Stevens, J., concurring).

[265] *See id.* at 580.

[266] *See, e.g.*, *id.* at 561 (majority opinion).

[267] *Id.* at 580 n.2 (Stevens, J., concurring).

Mafia is truly economic.[268] Schiff offers to send readers additional information for free.[269] Additionally, as Judge George pointed out in the district court opinion, in *The Federal Mafia*, Schiff offers to send readers an updated attachment citing court decisions, statutes, and other resources free of charge.[270] A speaker solely trying to make a profit, without regard to urging political change, is unlikely to offer such information for free. Schiff not only offers readers free information on filing tax returns, he also offers free transcripts of court proceedings in which he was a party.[271] A speaker solely concerned with his own economic interest and seeking profit through tricking the public into following a fraudulent tax scheme is even less likely to offer free transcripts of hearings in which the speaker himself was convicted of tax evasion.[272]

Perhaps attempting to overcome strong evidence indicating that *The Federal Mafia* does not fit into the broader definition of commercial speech, the district court and the Ninth Circuit compared Schiff's book to the training manual banned in *Estate Preservation*.[273] There are key differences, however, between the material banned in *Estate Preservation* and the material banned in *The Federal Mafia*.[274]

Estate Preservation Services was a business organized to market trusts and other "asset preservation devices" through a nationwide, multi-level network of financial planners.[275] A newsletter described the trusts "as the perfect way for your client to warehouse wealth" and as a "safety net" that could provide employment to donors and their families.[276] In *Estate Preservation,* the Ninth Circuit upheld an injunction enacted under the same statutes and similar in scope to the injunction prohibiting Schiff from distributing *The Federal Mafia*.[277] Under the injunction, the organizers were enjoined from distributing a training manual entitled "Asset Preservation Trusts (APT)–Description, Use & Benefits."[278] The *Estate Preservation* court, quoting

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[268] *See* SCHIFF, *supra* note 2.

[269] *See, e.g, id.* at 205, 211.

[270] United States v. Schiff (*Schiff I*), 269 F. Supp. 2d 1262, 1267–68 (D. Nev. 2003).

[271] *See* SCHIFF, *supra* note 2, at 211 n.1.

[272] *See id.*

[273] United States v. Schiff (*Schiff II*), 379 F.3d 621, 629–30 (9th Cir. 2004); *Schiff I*, 269 F. Supp. 2d at 1273–74.

[274] *See* SCHIFF, *supra* note 2; *see also* United States v. Estate Pres. Servs., 202 F.3d 1093, 1097–1103 (9th Cir. 2000).

[275] *Estate Pres. Servs.*, 202 F.3d at 1097.

[276] *Id.* at 1102.

[277] *Id.* at 1097.

[278] *Id.*

United States v. Buttorff,[279] upholding a similar injunction enacted under the same statutes, dismissed the First Amendment argument in one paragraph, declaring: "Where it has been determined that [a promoter's] statements regarding the tax benefits of his trust, *which constitute commercial speech*, are misleading in the context contemplated by Congress in enacting the statute . . . such representations are not protected by the First Amendment."[280] The *Estate Preservation* court failed to mention that the defendant in *Buttorff* conceded that he was engaged in commercial speech for profit.[281] In addition, the *Estate Preservation* opinion never mentions political speech as being part of the training manual, most likely because the manual contained no political speech.[282]

The manual thus lies in sharp contrast to *The Federal Mafia*, which contains colorful criticism and commentary on the United States government.[283] For example, in describing a government study approximating tax revenue lost because of people who avoid paying taxes on income derived from crime, Schiff writes: "True to its mafia character, the federal government believes that it is entitled to a cut from everyone's action—even your neighborhood mugger, pimp and hooker."[284] Schiff also provides extensive criticism of the judiciary. In relating a story of one of his trials, he states:

> The public undoubtedly associates all trials (especially those in lofty federal courts) as careful and conscientious efforts to arrive at true and just verdicts. The public hardly associates trials in federal courts with those often depicted in melodramatic westerns; where the judge is beholdin' to the local cattle baron, whose grip on the town is threatened by the defendant. Nor does the public associate such trials with those often depicted as taking place in the deep South with roughly the same cast of characters—but with different accents. But such trials (also with different accents) do take place in federal courts—as my trial and those of many others prove![285]

Far from using *The Federal Mafia* as an instruction manual on how to avoid taxes, Schiff utilizes it to call for political change.[286] Writing the

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[279] 761 F.2d 1056 (5th Cir. 1985).
[280] *Estate Pres. Servs.*, 202 F.3d at 1106 (emphasis added).
[281] *Buttorff*, 761 F.2d at 1066.
[282] *See Estate Pres. Servs.*, 202 F.3d at 1096–1105.
[283] SCHIFF, *supra* note 2.
[284] *Id.* at 217.
[285] *Id.* at 218.
[286] *See, e.g.*, *id.* at 268.

Epilogue from jail, where he was imprisoned for criminal tax fraud, Schiff urges readers to call for a change in the system:

> It is also clear to me that the release of this book is probably my only hope of getting out of jail in the immediate future, and is, I am sure, my only real hope of ever getting a lawless and vengeful government off my back. Obviously I am innocent of any wrongdoing, but this has not stopped the government from imprisoning me for over 24 months *before*, six months *now* (as of this writing), and for as many more months as they will try to get away with in the future . . . . My only hope is that this book will make a broad and significant public impact and elicit some kind of public outcry.[287]

Schiff then urges readers to get a copy of the book to their congressmen and senators, especially members of the House and Senate Judiciary Committees, as they oversee the legal system Schiff believes is so corrupt.[288]

Despite these instances of core political speech in *The Federal Mafia*, conspicuously absent in the Estate Preservation Services manual, the Ninth Circuit, like the district court, was nonetheless "persuaded that *Estate Preservation Services* is applicable here because *The Federal Mafia* is acting as an advertisement for Schiff's full range of tax-avoidance products and services."[289] The Ninth Circuit, however, attempted to lend further support to the district court's contention that *The Federal Mafia* fit the broader definition of commercial speech because of its similarity to *Estate Preservation Services*. Judge Hug wrote:

> Although neither the government nor the district court, which adopted the government's definition of commercial speech, specifically states which pages would meet this broad definition of commercial speech, it can be assumed the government believes that, at least, Chapter Eight ("How to Stop Paying Income Taxes") and the Epilogue and Addendum to the Second Edition (which give instructions on how to file the "zero-income" returns and samples of such returns) would qualify as commercial speech under this definition.[290]

Examining Chapter Eight and the instructions and samples in the context of *The Federal Mafia*, however, only casts more doubt on the

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[287] *See, e.g.*, *id.* at 256

[288] *Id.*

[289] United States v. Schiff (*Schiff II*), 379 F.3d 621, 629 (9th Cir. 2004).

[290] *Id.* at 627.

conclusion that the book fits the broader definition of commercial speech.[291]

Chapter Eight begins with a quote attributed to Woodrow Wilson: "The history of liberty is the history of the limitation of governmental power, not the increase of it."[292] In the opening paragraph of the chapter, Schiff reiterates his view that the IRS, knowing that a compulsory income tax would violate the Constitution, has based the income tax on a system of voluntary compliance.[293] Thus, Schiff opines, the government has tricked taxpayers into believing they must pay a voluntary income tax, because the government knows that a mandatory income tax system is unconstitutional.[294] Schiff then asks, in the second paragraph of Chapter Eight: "Overlooking the lawless responses the government is capable of making, how can Americans stop paying a tax for which they have no legal liability?"[295] This question once again alerts the reader that although Schiff wholeheartedly believes his interpretation of the law is correct, the government disagrees and is capable of taking "lawless" action against citizens following Schiff's advice.[296]

Much of the chapter does contain Schiff's advice on how, under the law as he interprets it, one may avoid paying income tax.[297] Chapter Eight contains excerpts from the Internal Revenue Code and sample IRS forms, and describes in detail how Schiff believes a taxpayer can respond to these forms to avoid paying taxes that, in Schiff's view, he or she does not owe.[298] It is clear, though, that Chapter Eight is not merely an instruction manual designed to dupe the public into thinking they may legally save money by avoiding taxes. The chapter instead provides support, based in the tax code and forms, for Schiff's unorthodox tax theories.[299] Rather than summarily stating that the government and the IRS know that income taxes are voluntary, an unconventional view that few readers would likely adopt without proof, Schiff attempts to give credence to his theory by pointing out ways readers can interpret the code and tax forms to arrive at the same conclusions he has concerning the voluntary nature of the income tax. Unlike a manual describing a trust scheme as a way to

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[291] *See* SCHIFF, *supra* note 2, at 154–68.
[292] *Id.* at 154.
[293] *Id.*
[294] *Id.*
[295] *Id.*
[296] *See id.*
[297] SCHIFF, *supra* note 2, at 154–68.
[298] *Id.*
[299] *Id.*

save and create wealth, Chapter Eight warns readers of the pitfalls, including fines and imprisonment, of filing a "zero-income" tax return.[300] Schiff simultaneously tries to convince readers that the income tax is unconstitutional while informing them of the consequences they could face for acting on his theories:

> However, the "law" provides what might be considered "liability" traps for those who allegedly "must" withhold. So, such organizations and persons are advised to check out the "law" for themselves, though I will present enough of it to convince anyone that legally, no one is really required to take any notice of it.[301]

Therefore, *The Federal Mafia*, filled with political speech even in the chapter most akin to an "instruction manual," cannot be equated with the manual distributed in *Estate Preservation Services*.

The content of *The Federal Mafia* thus is not related *solely* to the economic interest of the speaker and its audience, as in the case of a training manual detailing how to set up a trust. Instead, *The Federal Mafia* is speech relating the interest Schiff has, and believes readers have, in exposing a government he feels is rife with corruption. Schiff's contention with the United States government happens to concern income taxes, a topic related to the economic interest of most Americans.

The Federal Mafia thus is not commercial speech under either its narrower or broader definition. Additionally, the Court's justifications for regulating commercial speech, while certainly valid, do not support banning the sale of *The Federal Mafia*. Commercial speech has long been considered less worthy of full First Amendment protection than political speech because the government need not tolerate inaccuracies in objective, factual commercial speech as it tolerates false assertions in political commentary.[302] Schiff's book is far from objective, but is rather a biased, anti-government rant, more akin to a political commentary than a poster depicting a product and a price. Courts also treat commercial speech differently than political speech because, "[s]ince advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely."[303] After reading an account of Schiff's ongoing court battles and learning of his unpleasant experiences in prison, [304]

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[300] *Id.* at 157.

[301] *Id.* at 161.

[302] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 772 (1976).

[303] *Id.* at 772 n.24.

[304] SCHIFF, *supra* note 2, at 239–57.

as well as learning of the government's unwilling reception of his theories and his book, it is incongruous to assume that others will relay Schiff's message in order to make a profit. Schiff's speech is thus not durable or hardy; instead, the suppression of *The Federal Mafia* may effectively silence Schiff's message.

Therefore, it is apparent that *The Federal Mafia* falls more clearly into the realm of political speech. A major purpose of the First Amendment is to protect discussion of governmental affairs, and to promote debate and the free exchange of ideas.[305] The Court in *Pittsburgh Press*, while forbidding a newspaper advertisement for an illegal activity, emphasized that nothing in its holding allowed the government to prohibit the newspaper from publishing or distributing advertisements commenting on or criticizing any ordinance or practice.[306] Similarly, the Court in *Virginia State Board of Pharmacy* stressed that nothing would prevent the pharmacist, whose advertisements were at issue, from being heard on the topics of regulating pharmaceutical prices or allowing pharmaceutical advertising.[307] Schiff's book is unlike a help-wanted ad in a newspaper or a poster advertising prescription drugs, as *The Federal Mafia* consists almost entirely of comments and criticisms of the government's statutes and practices involving taxes in general. If the First Amendment truly was designed to protect political and social decision-making, "rather than the decision of a particular individual as to whether to purchase one or another kind of shampoo,"[308] *The Federal Mafia* illustrates exactly the type of speech the Court sought to protect in *Pittsburgh Press* and *Virginia State Board of Pharmacy*.[309] Even more importantly, the essential goal of the First Amendment is to protect the right to criticize the government.[310] Criticism of the government potentially creates unrest and dissatisfaction, which in turn leads to social and political change.[311] It is apparent that condemning the government in the hope of generating change is exactly the purpose Schiff contemplated in writing *The Federal Mafia*.[312]

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[305] Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949).

[306] Pittsburgh Press v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 391 (1973).

[307] *Va. State Bd. of Pharmacy*, 425 U.S. at 761–62.

[308] *Id.* at 787 (Rehnquist, J., dissenting).

[309] *See id.* at 761–62 (majority opinion); *Pittsburgh Press*, 413 U.S. at 391.

[310] McConnell v. Fed. Election Comm'n, 540 U.S. 93, 248 (2003) (Scalia, J., concurring in part and dissenting in part).

[311] Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949).

[312] *See, e.g.*, SCHIFF, *supra* note 2, at 256 (urging readers to contact legislators concerning the unconstitutionality of income tax).

Unfortunately, however, the high value of free speech often leads those in power to seek to suppress it,[313] and speech is often silenced due to "the expressed fear that the audience may find the [speaker's] message persuasive."[314] The ability to speak freely is needed least in instances involving an ineffective speaker relating a powerless message to an apathetic audience; free speech is most needed when an effective speaker with an urgent, controversial message finds an audience willing to listen.[315] Schiff is such a speaker.[316] The government's effort to ban *The Federal Mafia* merely suggests the government's apprehension that citizens will call for change, or, worse yet, will follow Schiff's path of civil disobedience.[317]

Assuming informed people will judge their own best interests, the First Amendment makes the choice between the dangers of suppressing information and the dangers of its potential misuse.[318] Schiff clearly alerts readers to the possible consequences of following his advice and adopting his ideas; in fact, he describes in detail his time spent in prison.[319] As the district court pointed out, Schiff is neither a CPA nor a tax attorney, but rather a convicted felon.[320] Instead of allowing readers to take this information into account and form their own opinion of Schiff's theories, the government has stretched the bounds of the commercial speech doctrine beyond recognition in an attempt to silence Irwin Schiff.

VI. CONCLUSION

The Federal Mafia is not commercial speech; instead the book is political speech entitled to full First Amendment protection. The lengthy volume fits no definition of commercial speech and cannot be likened to promotional pamphlets or training manuals properly

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[313] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978).

[314] *See* Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 581 (1980) (Stevens, J., concurring).

[315] *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995) (citation omitted).

[316] *See* United States v. Schiff (*Schiff I*), 269 F. Supp. 2d 1262, 1268 (D. Nev. 2003) (noting IRS information indicates that almost 5,000 tax returns were filed by nearly 3,100 of Schiff's customers from 2000–2003). *See also* SCHIFF, *supra* note 2, at front cover (claiming over 90,000 copies of *The Federal Mafia* sold).

[317] *See* SCHIFF, *supra* note 2, at 257. Schiff's claim that while he was in transit between correctional facilities, the government "lost" his documents relating to *The Federal Mafia* bolsters this contention. *Id.*

[318] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 769–70 (1976).

[319] *See, e.g.*, SCHIFF, *supra* note 2, at 239–57.

[320] *Schiff I*, 269 F. Supp. 2d at 1268–70.

regulated as such.[321] Instead, *The Federal Mafia* so convincingly criticizes the practices of the government of the United States, that the government has regulated Schiff's book under the guise of protecting the public from deceptive commercial speech, rather than providing Schiff's speech with the full First Amendment protection it deserves.[322]

Schiff's tax views may be completely invalid, and his arguments may be frivolous.[323] He admits and in fact provides readers with details of the various ways the government has rejected his claims throughout the years. If Schiff is a fool, however, "the best thing to do is to encourage him to advertise the fact by speaking . . . [because] it is by the exposure of folly that it is defeated."[324] Perhaps Schiff is not a fool, but in an effort to convince readers of his sincere distrust of the American government, he may have stretched the truth or even spoken falsely of our government and its agencies.[325] *The Federal Mafia* is still safe, as "[u]nder the First Amendment, there is no such thing as a false idea," and the only way that ideas can be suppressed is through "the competition of other ideas."[326] Perhaps, though, there is some truth to Schiff's theories on tax and government, and banning *The Federal Mafia* embodies "the expressed fear that the audience may find the [speaker's] message persuasive."[327] With the national debt currently over eight trillion dollars,[328] there could hardly be a less appropriate time for Americans to find persuasive a theory questioning the government's authority to collect income tax.

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[321] *Id.*

[322] *See* SCHIFF, *supra* note 2; United States v. Schiff (*Schiff II*), 379 F.3d 621 (9th Cir. 2004); *Schiff I*, 269 F. Supp. 2d 1262.

[323] *See, e.g.*, *Schiff I*, 269 F. Supp. 2d at 1268 (observing that the right of Congress to impose income tax cannot be doubted; further, income tax is constitutional) (citations omitted).

[324] President Woodrow Wilson, Address at the Institute of France, Paris (May 10, 1919), *in* 2 SELECTED LITERARY AND POLITICAL PAPERS AND ADDRESSES OF WOODROW WILSON 330, 333 (Grosset & Dunlap).

[325] *See* SCHIFF, *supra* note 2, at 162 (Asserting under the heading "Camels, Being Ducks, Can Fly," that "[i]n order to create a legal basis for all forms of 'backup withholding,' the government makes a claim no more rational than the one stated above.").

[326] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 780 (1976) (Stewart, J., concurring) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974)).

[327] Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 581(1980) (Stevens, J., concurring).

[328] On January 6, 2006 (08:23:29 PM GMT), the ever-rising U.S. National Debt Clock placed the national debt at $8,210,458,331,965.02. U.S. National Debt Clock, *available at* http://www.brillig.com/debt_clock (last visited Jan. 6, 2006).