

The Openness of the Commercial Free Speech Test and the Value of Self-Realization

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I. HOW THE COURTS UNDERSTAND COMMERCIAL SPEECH

This Article holds that the openness and indeterminacy of the main judicial test of commercial speech regulation actually opens the door to valuable legal and social possibilities. In particular, this Article shall argue that courts can and should normally subject regulation of purely commercial speech to test merely the reasonableness of such regulation. The reason for doing so, upon which this Article focuses, is that this test would best promote the most important version of the value of self-realization that underlies freedom of speech itself.

This version of self-realization focuses mainly on freely-arrived-at human flourishing, personal development, genuine fulfillment, and happiness. Having an understanding of this crucial form of self-realization

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casts light on the relevant institutional power relationships that characterize our culture. Once we grasp these institutional power relationships, we can better see the logic of what amounts to minimum scrutiny for purely commercial speech regulations. Crucially, we must avoid simply assuming that a more rigorous judicial test of commercial speech regulation must automatically promote the crucial values underlying freedom of speech in the first place.

This Article will present no precise definition of commercial speech. The idea of commercial speech probably cannot be defined with precision, but the intuitive idea is clear enough for our purposes. The Supreme Court has sought to define commercial speech in two different ways, with both apparent definitions embodying imperfections. The Court first defined commercial speech in terms of “speech proposing a commercial transaction.”¹ Apart from the limited value of defining both “commercial” and “speech” by incorporating both terms crucially into its own definition,² there is also a problem of underinclusion. To define all commercial speech in terms of “proposals”³ for commercial transactions is grossly underinclusive as a matter of logic. We do not, by analogy, define the idea of a “hand” in terms exclusively of left hands. Commercial transactions, and presumably commercial speech, comprise more than proposals. Proposals can be answered, for example, by a rejection or request for clarification, but a rejection or request for clarification of a commercial proposal can also amount to purely commercial speech, without amounting to a proposal or a counter-proposal.⁴ So this definition of commercial speech is at best grossly underinclusive.

The Court has, however, also apparently defined commercial speech as an “expression related solely to the economic interests of the speaker and its audience.”⁵ Here, the reference to “economic interests”⁶ lends a substantive tone to the definition. And we can certainly understand the desire to focus narrowly on “solely”⁷ economic interests. For example, imagine a political candidate’s policy speech on macroeconomics or global trade. Surely, we could think of such a speech as fully protected political speech. And it might seem relevant that speaker or listener interests beyond economics—certainly beyond any discrete economic transaction—could be involved. Or we might think of an advertisement for a traditional

1. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 562 (1980) (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455–56 (1978)), quoted in *Ballen v. City of Redmond*, 466 F.3d 736, 742 (9th Cir. 2006).

2. *See id.* at 562.

3. *See id.*

4. Presumably, even an unqualified acceptance of a commercial proposal could also amount to commercial speech without constituting a proposal in its own right.

5. *Cent. Hudson*, 447 U.S. at 561, quoted in *Ballen*, 466 F.3d at 741.

6. *Id.*

7. *Id.*

political magazine, aimed at enhancing circulation. Certainly, such a speech could partake of non-economic and non-commercial elements.

This alternative definition's focus on an exclusive relation to "economic" interests does, however, threaten an opposite problem. Merely for the sake of argument, let us assume that clearly commercial speech by the sellers of goods and services is motivated by, and related solely to, the sellers' economic interests. But we should still hardly assume that commercial speech, with respect to potential buyers of all goods and services, relates solely to economic interests. The interests of sellers and buyers may be of a dramatically different character.

Even as to buyers, we may assume that commercial advertising, insofar as it focuses solely on price, relates solely to the potential buyer's economic interests. We may set aside the fact that price is sometimes a matter of status, prestige, or of self-image beyond purely economic dimensions. But even so, in an advanced consumer society, the appeal of some commercial speech is not only, if at all, to the buyer's economic interests. Some commercial speech appeals to interests in social relationships, self-esteem, public image, play value, distraction, the value of a vague association with celebrity, refinement in taste, popularity and belonging, novelty or excitement, or even to happiness itself, in senses distinct from the buyer's economic interests as normally defined.⁸

However the courts choose to define commercial speech, it is clear that the courts display ambivalence as to the constitutional value of commercial speech and its regulation. On the one hand, it is claimed that commercial speech "not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information,"⁹ giving commercial speech "important informational value."¹⁰ It has been claimed as well, if perhaps with some ambiguity, that a "particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate."¹¹ Of course, persons

8. Consider, for example, the implausibility of the claim that all clearly commercial speech by Chanel, Pfizer, Merck, Rolex, Nike, Old Spice, General Mills, Spalding, or Toys-R-Us, appeals, on the consumer side, solely to the economic interests of the potential consumer. For a much closer case, see *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (Stevens, J., concurring). For another case on the vague border between commercial and political speech, see *SKF USA, Inc. v. U.S. Customs & Border Prot.*, 583 F.3d 1340, 1341 (Fed. Cir. 2009) (denying petition for panel rehearing and rehearing en banc).

9. See *Cent. Hudson*, 447 U.S. at 561–62, *quoted in* *W. Va. Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 301 (4th Cir. 2009).

10. See *Musgrave*, 553 F.3d at 301.

11. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976), *quoted in* *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 366–67 (2002). For an attempt to partially bridge this gap between commercial speech and speech bearing upon democratic decisionmaking, see Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 15–20 (2000).

may take no subjective interest in matters of the highest public interest or keen interest in utter trivia.

On the other hand, it is sometimes recognized that much of the standard post-New-Deal administrative regulatory state depends upon the government's ability to restrict or mandate purely commercial speech without having to pass exacting judicial scrutiny. It has thus been argued that

restrictions on commercial speech do not often repress individual self-expression; they rarely interfere with the functioning of democratic political processes; and they often reflect a democratically determined governmental decision to regulate a commercial venture in order to protect, for example, the consumer, the public health, individual safety, or the environment.¹²

Also, while freedom of speech is also said to promote the search for truth in various important realms,¹³ commercial speech sometimes intends no recognizable assertion that could be considered as true or false.¹⁴ More importantly, where commercial speech actually intends to make potentially true or false claims about any broader cultural, economic, or political issues, it ceases to be purely commercial speech.¹⁵ Thus, we can

12. *Thompson*, 535 U.S. at 388 (Breyer, J., dissenting) (citing 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996) (plurality opinion) ("[T]he State's power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is 'linked inextricably' to those transactions.")).

13. See, e.g., JOHN STUART MILL, *ON LIBERTY* 76–77 (Gertrude Himmelfarb ed., Penguin Books 1974) (1859); Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 130–33 (1989); William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1 (1995).

14. In a sense, all speech (including all commercial speech) at least dimly hints at some proposition that has some relation to truth or falsity or to value and disvalue. Advertising speech that is vaguely evocative or imagistic but non-verbal could fall into this category. Likewise falling into this category are vague commercial commands, such as to "buy product X," or perhaps even to "Just Do It." But if there is, by the speaker's intention, a sufficient invocation of some cognizable broader social issue, the speech ceases to be purely commercial speech.

15. For discussion, see Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 235–36 (1998). Among the cases, see the controversy surrounding the proper characterization of Nike's speech in *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) and the distinction drawn in *Virginia Pharmacy*: "Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters." *Virginia Pharmacy*, 425 U.S. at 761. For the idea of "inextricable intertwining" of commercial and fully protected political speech, see *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474–75 (1989); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67–68 (1983); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562 n.5 (1980); *BellSouth Telecomms., Inc. v. Farris*, 542 F.3d 499, 505 (6th Cir. 2008). To the extent, though, that commercial speech is "inextricably intertwined" not with private-

understand a certain ambivalence about the value, in free speech terms and otherwise, of commercial speech.

II. THE OPENNESS AND INDETERMINACY OF THE *CENTRAL HUDSON* COMMERCIAL SPEECH TEST

The standard judicial test for regulating typical commercial speech reflects, in its broad openness and indeterminacy, this judicial ambivalence about commercial speech in general. The crucial *Central Hudson* test,¹⁶ as later modified,¹⁷ involves four elements. As a prerequisite to receiving any free speech protection, the commercial speech first must not be false, misleading, deceptive, or amount to a proposal for an illegal transaction.¹⁸ If the commercial speech passes this minimum threshold, the court will then ask whether the government has presented a substantial or significant interest or purpose for regulating the speech in question.¹⁹ Third, the government must then show that the regulation in question “directly” advances the asserted governmental interest.²⁰ Fourth and finally, the regulation must in some appropriate fashion be sufficiently narrowly tailored with respect to promoting the government interest in question.²¹

Of course, this bare description of the widely used *Central Hudson* commercial speech test hardly begins to convey any sense of the broad openness and indeterminacy of the test and, most especially, of the crucial fourth or narrow-tailoring prong. But it is certainly possible to briefly indicate below a few of the relevant indeterminacies and opposing tendencies.

The *Central Hudson* commercial speech regulation test, to begin with, has a somewhat murky relationship to the even murkier distinction between

party political speech, but with official non-regulatory speech by the government itself, somewhat different problems are raised. See *W. Va. Ass’n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 301 (4th Cir. 2009).

16. See *Cent. Hudson*, 447 U.S. at 566; *Thompson*, 535 U.S. at 367; *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001).

17. In particular, see the clarification, or the loosening, of the fourth or narrow-tailoring prong as elaborated in *Fox*, 492 U.S. at 480–81. Despite this modification, Professor Martin Redish plausibly argues that the *Central Hudson* test, even as thus modified by *Fox*, has generally been applied over time in a more commercial-speech-protective way. See Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 68 (2007). This development—simultaneous loosening and tightening—itself illustrates what this Article is referring to as the distinct “openness” of the *Central Hudson* test. See also Deborah J. La Fetra, *Kick It Up a Notch: First Amendment Protection for Commercial Speech*, 54 CASE W. RES. L. REV. 1205, 1216 (2004) (noting the unpredictability in applying *Central Hudson* and calling for a more stringent test).

18. See *Cent. Hudson*, 447 U.S. at 566.

19. See *id.*

20. See *id.*

21. See *id.*; *Fox*, 492 U.S. at 480.

content-based and content-neutral regulations of speech in general.²² It seems to be typically assumed that garden-variety regulation of purely commercial speech normally evokes the *Central Hudson* test—or perhaps a more rigorous test if the regulation is deemed to be narrowly paternalistic²³—regardless of whether the regulation might also be somehow characterized as content-based or content-neutral.²⁴ And the *Central Hudson* test is often thought of as roughly akin, as a test of vaguely intermediate scrutiny, to the similarly intermediate degree of scrutiny associated with content-neutral speech regulations in general.²⁵

Occasional attempts have been made to distinguish the *Central Hudson* commercial speech test from the general content-neutral regulation test.²⁶ The most obvious way in which the two formulas commonly differ is that under the content-neutral regulation test, but not under *Central Hudson*, the regulation must leave open and available for the speaker “ample alternative channels for communication.”²⁷ Courts may imagine that some sort of narrow-tailoring requirement will cover the same ground or serve the same purposes, as such an ample-remaining speech channel

22. For discussion, see R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333 (2006).

23. For hints of a more rigorous constitutional test of classically paternalistic regulation of commercial speech, see the opinions in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (plurality opinion) (limitations on store advertising of the prices of legally available alcohol) and *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 572 (2001). (Thomas, J., concurring in part and concurring in the judgment) (restriction of truthful commercial speech based on government fear of the ideas conveyed as deserving of strict scrutiny).

24. See, e.g., *Metro Lights, L.L.C. v. City of L.A.*, 551 F.3d 898, 903 n.6 (9th Cir. 2009) (citing *Ballen v. City of Redmond*, 466 F.3d 736, 743–44 (9th Cir. 2006)) (“[W]hether or not the City’s regulation is content-based, the *Central Hudson* test still applies because of the reduced protection given to commercial speech.”). See also *Naser Jewelers, Inc. v. City of Concord*, 513 F.3d 27, 31 n.1 (1st Cir. 2008) (commercial speech test as “substantially similar” to that for a time, place, or manner restriction on speech, which is often casually assumed to incorporate a requirement of content neutrality as well).

25. See, e.g., *Berger v. City of Seattle*, 569 F.3d 1029, 1092 (9th Cir. 2009) (N.R. Smith, J., concurring in part and dissenting in part); *Naser Jewelers*, 513 F.3d at 33–34. For the general intermediate-level stringency of the *Central Hudson* test, whatever its openness and indeterminacy, see Charles Fischette, *A New Architecture of Commercial Speech Law*, 31 HARV. J.L. & PUB. POL’Y 663, 664 (2008) (“[C]ommercial speech is entitled to substantial but reduced protection under the First Amendment[.]”).

26. See, e.g., *Gen. Auto Serv. Station v. City of Chi.*, 526 F.3d 991, 1007–08 (7th Cir. 2008).

27. *Hill v. Colorado*, 530 U.S. 703, 725–26 (2000); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)); *Naser Jewelers*, 513 F.3d at 33–34. See also *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 323 n.3 (2002) (quoting *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992)).

requirement. This would, however, be clearly and importantly false.²⁸ A regulation could be magnificently tailored to its purposes and thus neither underinclusive nor overinclusive, while leaving a speaker with anywhere from many to zero alternative ways or channels to convey its message.²⁹ In any event, the standard commercial speech regulation tests usually make no explicit reference to a requirement that speakers be left with other ways of communicating their messages.³⁰

There is a sense in which some commercial speech regulations are based on the content of the speech. Of course, any regulation that is aimed specifically at commercial speech will require enforcement authorities to look at the content of the speech to determine whether the given instance of speech falls within the scope of the regulation.³¹ But it is far from being clear that the obvious and inevitable need to examine the message, to see merely whether it is commercial or not, should prompt the courts to abandon *Central Hudson* for a more rigorous content-based test.³²

Yet, there also seem to be cases of commercial speech regulation in which a form of relatively rigorous scrutiny might seem appropriate.³³ Imagine a statute that read simply: "All purely commercial speech on the Internet by registered Democrats is prohibited." We should not be swept away by the obviousness of the right outcome in such a case to a hasty choice among theories and tests. Such a commercial speech regulation would inevitably have indirect political effects and would fail under any reasonable interpretation of *Central Hudson* as surely as under strict scrutiny as a content- or viewpoint-based regulation, let alone under any test for the equal protection of the laws or the privileges or immunities of citizens.

More broadly, the openness and indeterminacy of *Central Hudson* presents opportunities for judicially validating both broad and narrow

28. See generally R. George Wright, *The Unnecessary Complexity of Free Speech Law and the Central Importance of Alternative Speech Channels*, 9 PACE L. REV. 57 (1989).

29. See *id.*

30. But for a merely partial substitute doctrine in the commercial speech area, see *infra* notes 84–88 and accompanying text.

31. See, e.g., *Berger v. City of Seattle*, 569 F.3d 1029, 1091–92 (9th Cir. 2009) (N.R. Smith, J., concurring in part and dissenting in part).

32. See *id.* at 1092 (N.R. Smith, J., concurring in part and dissenting in part) ("Presumably, a regulation that applies only to commercial speech requires an evaluation of the content of the speech to determine the character or type of speech (whether it is commercial). Yet, this type of evaluation has not generally been held to be content-based and does not trigger strict scrutiny review.").

33. For cases that are at least arguably tested rigorously based on their respective facts, see *Metro Lights, L.L.C. v. City of L.A.*, 551 F.3d 898, 912 (9th Cir. 2009); *Ballen v. City of Redmond*, 466 F.3d 736, 743 (9th Cir. 2006) (exemption for the "powerful" real estate industry, but not for, e.g., a lone bagel shop); *Passions Video, Inc. v. Nixon*, 458 F.3d 837, 839 (8th Cir. 2006) (regulation of the commercial advertising signage of "adult cabarets" and "sexually oriented" businesses).

forms of commercial speech regulation where the regulations can be viewed as reasonable and not improperly discriminatory among forms of commercial speech. The crucial points would be these: it would be reasonable for a democratic majority to conclude that, taken as a whole, commercialism and commercial speech amount to powerful cultural influences for good or ill. It would also be reasonable to democratically conclude that even broad limitations on commercial speech in the aggregate could have favorable effects on freedom of speech in general, on broader cultural freedom, and on genuine human fulfillment and well-being, particularly including the most valuable forms of the free speech value of self-realization. No approach to commercial speech can possibly be simply politically neutral and unbiased. And no approach to commercial speech can be said to maximize the value of self-realization just as a matter of definition. Any approach to commercial speech must argue substantively for its favorable effects on self-realization, not merely build them in by definition.

At this point, it is important to emphasize that reasonable regulation of commercial speech need not take the form of paternalism and need not be viewed as the powerful suppressing the weak or the poorly organized. It is, however, reasonable for a society to act on the belief that while many particular commercial speakers may not intend to promote commercialism as a general lifestyle, just such a promotion of a commercialized approach to life may be an important overall effect of commercial speech. Instances of commercial speech for “competing” products actually do not undermine, but mutually reinforce, the perhaps unintended overall commercializing effect on culture. And it is also reasonable to believe that in the absence of broad commercial speech regulation, there is currently no cultural institution or any set of such institutions that can meaningfully respond to the implicit promotion of commercialism at a scale conducive to a genuinely meaningful debate over our cultural future.

On these assumptions, it is entirely appropriate to respond to the openness and indeterminacy of the *Central Hudson* commercial speech test by generally preferring less, rather than more, stringent test interpretations. That is, in general, the openness and indeterminacy of *Central Hudson* should be taken in the direction of minimum, rather than stricter, judicial scrutiny of commercial speech regulations. There is already some limited case authority for this sort of minimalist approach to commercial speech regulation in certain areas, as in many cases of the governmentally mandated disclosure of information by commercial speakers.³⁴

34. On the minimum scrutiny often given to the government-mandated disclosure of information in commercial speech cases, see *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985) (The disclosure requirement must merely be “reasonably related to the State’s interest in preventing deception of consumers.”); *N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health*, 556 F.3d 114, 132 (2d Cir. 2009) (required posting of food calorie content information as subject only to a rational

Thus far, it has simply been assumed that the *Central Hudson* test is sufficiently open to allow for the reasonable pursuit of what might be democratically determined to be important constitutional and other public interests. These interests could involve the non-paternalistic promotion of free speech itself, worthwhile forms of cultural freedom in general, and the free pursuit of fulfillment, flourishing, happiness, and well-being. Therefore, it is important to at least briefly survey some of the relevant openness and indeterminacy of the *Central Hudson* test in judicial practice. While all of the elements of the *Central Hudson* test are open, indeterminate, and contestable, this Article will show that the openness of the fourth or narrow-tailoring prong is of special interest.

A. The Openness of the “Deception” Prong Under *Central Hudson*

Central Hudson requires an initial determination of the actual, or potential, deceptiveness³⁵ of the speech. But to ask whether an instance of commercial speech is deceptive or misleading commonly invites a series of important follow-up questions with no determinate answers. Even the most basic judicial distinctions in this regard, such as whether the commercial speech is inherently, actually, or only potentially misleading, are themselves misleading and open to indefinite re-characterization.³⁶

Consider the advertising claim that a particular brand of orange juice contains no cholesterol. Is that a true claim or an inherently, or potentially, misleading claim?³⁷ Is it not necessary to somehow consider the context, including the knowledge base of some selected audience for the commercial speech in question? Will determining the appropriate audience

basis test); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114–15 (2d Cir. 2001); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 & n.8 (1st Cir. 2005) (quoting *Zauderer*, 471 U.S. at 651). For possible limits on the regulatory purposes in such cases, if minimum scrutiny is to remain applicable, see *United States v. United Foods, Inc.*, 533 U.S. 405, 416 (2001). For the appropriateness of more demanding scrutiny of compelled disclosure where the commercial speech is “inextricably intertwined” with fully protected political speech, see *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781 (1988), discussed in *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989). For a critique of *Riley*, see R. George Wright, *Free Speech and the Mandated Disclosure of Information*, 25 U. RICH. L. REV. 475 (1991).

35. See *supra* note 18 and accompanying text.

36. See, e.g., R. George Wright, *Freedom and Culture: Why We Should Not Buy Commercial Speech*, 72 DENV. U. L. REV. 137, 162–64 (1994) [hereinafter *Freedom and Culture*]. For a recent judicial finding of potentially (as opposed to actually) misleading commercial speech, see *Byrum v. Landreth*, 566 F.3d 442, 447 (5th Cir. 2009) (unlicensed use of the “interior designer” job title as only potentially, as opposed to actually, misleading, even though some consumers presumably know of the license requirement—perhaps reflecting subconscious judicial skepticism over any real need for licensing “interior designers” as vaguely defined).

37. See, e.g., *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 479 (1988) (attorney commercial speech case concerned with speech that “unduly emphasizes trivial or ‘relatively uninformative fact[s]’”).

and the appropriate-audience-survey methodology usually be uncontroversial? Young children tend to be misled by commercial speech that would mislead no competent adult. But is it clear how much weight to attach to any degree of incomprehension by young children if the product is intended to be bought by adults?³⁸ Even if it is assumed that misled children drive the purchases of adults, are courts not in other speech contexts reluctant to hold adult audiences hostage to standards appropriate for (some young) children?³⁹ Would a disclaimer of some sort help?⁴⁰

But the openness and indeterminacy of the “misleadingness” inquiry only continues to unfold. Often, a crucial question is not whether the commercial speaker’s claim is in any sense misleading to any audience, but whether the speaker can fairly be said to have implied the supposedly misleading claim at all, or whether the claim is being unfairly read into the speech.⁴¹ And then there is the sheer openness of the question of how much real harm potentially misleading commercial speech is likely to cause.⁴² Can there be a substantial state interest in regulating misleading commercial speech if there are no significant consequences from the misleadingness of that speech?

B. The Joint Openness of the “Substantial-Interest” and the “Direct-Advance” Prongs Under Central Hudson

This line of inquiry eventually leads into the openness and indeterminacy of the second *Central Hudson* requirement—that there be some substantial or significant governmental interest at stake.⁴³ Realistically, crucial choices, including subtle shifts in the burden of proof, are open to judicial discretion. Generally, the range of possible judicial choices would cover every set of circumstances between the sheer conceivability of merely legitimate governmental interests (with little attention to burdens of proof)⁴⁴ all the way to just short of any genuinely compelling, clearly demonstrated governmental interest.⁴⁵ The Supreme Court has, closer to the latter end of the spectrum, rejected a merely

38. See, e.g., *ITT Cont’l Baking Co. v. FTC*, 532 F.2d 207, 214 (2d Cir. 1976) (concerning Captain Kangaroo’s “fantasy growth” claim to produce tree-like stature among viewers through (at least in part) consuming Wonder Bread).

39. Classically, see *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

40. See R. George Wright, *Your Mileage May Vary: A General Theory of Legal Disclaimers*, 7 PIERCE L. REV. 85 (2009).

41. See, e.g., *ITT Cont’l Baking Co.*, 532 F.2d at 213.

42. See *Freedom and Culture*, *supra* note 36, at 163–64.

43. See *supra* note 22 and accompanying text.

44. That is, anything more demanding than the minimal standards embodied in, say, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981) (setting aside a state supreme court’s arguably realistic equal protection analysis).

45. For a broader discussion of the idea of a compelling government interest, see Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917 (1988).

hypothetical state interest in the *Central Hudson* context⁴⁶ and has on some occasions described the state interest requirement as being “significantly stricter than the rational basis test.”⁴⁷

For a real sense of the openness and indeterminacy of what may or may not count as a substantial governmental interest under *Central Hudson*, the inseparable third or “direct-advance” element must be considered as well.⁴⁸ On the one hand, any court may insist that the government “demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”⁴⁹ Any assertions made by the government in this regard may be independently evaluated.⁵⁰ But on the other hand, courts may take a laxer approach in this regard. The courts may instead choose to allow a government to rely, for example, on surveys taken in other jurisdictions,⁵¹ on what is thought to be “common sense,”⁵² or on sheer anecdote.⁵³ The room for judicial maneuver in applying the *Central Hudson* second and third prongs is thus substantial and again allows for liberalization of the overall test for the purposes outlined herein.

C. *The Joint Openness of the “Direct-Advance” and the “Narrow-Tailoring” Prongs Under Central Hudson*

The third *Central Hudson* prong, or “direct-advance” prong, is in turn difficult to separate, in practice and even in theory, from the fourth and final “narrow-tailoring” prong. Both in some fashion consider the

46. See *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002).

47. See, e.g., *id.* at 374.

48. See *supra* note 20 and accompanying text.

49. *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 188 (1999) (quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)); *W. Va. Ass’n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 303 (4th Cir. 2009).

50. See, e.g., *Musgrave*, 553 F.3d at 303.

51. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001); *Musgrave*, 553 F.3d at 303. In the context of what is treated as a content-neutral restriction on sexually explicit speech, see *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51–52 (1986) (no need for new independent local studies, subject to a reasonable belief in the relevance of other studies).

52. See *Lorillard*, 533 U.S. at 555 (quoting *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 628 (1995)), quoted in *Musgrave*, 553 F.3d at 303. In the area of the regulation of sexually explicit speech, see *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 439 (2002) (on the sufficiency of appeals to “common sense” as distinguished from empirical evidence). For skepticism, however, toward “common sense” in a closely related context, see *Horina v. City of Granite City*, 538 F.3d 624, 633 (7th Cir. 2008) (“common sense . . . can all-too-easily be used to mask unsupported conjecture, which is, of course, *verboten* in the First Amendment context[.]”), quoted in *Klein v. City of San Clemente*, 584 F.3d 1196, 1199 (9th Cir. 2009) (preliminarily enjoining the prohibition of leafleting of unoccupied vehicles on city streets).

53. See *Lorillard*, 533 U.S. at 555; *Musgrave*, 553 F.3d at 303.

regulatory means chosen in light of the regulatory goal, or goals, sought.⁵⁴ The two prongs are, by the Court's own admission, not always distinguishable.⁵⁵

For the sake of an oversimplified but manageable model, it could be said that the third or direct-advance prong emphasizes achieving rather than failing to achieve the goal of the regulation, which could be linked to avoiding underinclusiveness of the regulation.⁵⁶ The fourth or narrow-tailoring prong could be said, in contrast, to emphasize, with one degree of stringency or another, the costs of a regulation's overinclusiveness or of sweeping too broadly.⁵⁷ While it is fair to think of the fourth prong as focusing on degrees of overinclusiveness, it should be mentioned, for the sake of avoiding confusion, that the Supreme Court has declined to apply what is technically called the "overbreadth" doctrine in commercial speech cases.⁵⁸

As for the fourth prong itself, it is said that the burden of proof on sufficiently narrow tailoring is on the regulating government.⁵⁹ However, the fourth prong of the *Central Hudson* test, as clarified in cases such as *Board of Trustees of the State University of New York v. Fox*,⁶⁰ is one of intermediate—or realistically indeterminate—scrutiny.⁶¹ The courts plainly vary in their approach to intermediate scrutiny in the specific context of the required degree of tailoring.

This judicial equivocation derives in part from our obvious cultural ambivalence about the underlying value of commercial speech in our constitutional system. On the one hand, the courts sometimes assign a subordinate constitutional value to talk of commercial buying and selling, as distinct from talk of broader civic concerns.⁶² But there is also

54. See *United States v. Edge Broad. Co.*, 509 U.S. 418, 427–28 (1993) (“[T]he last two steps of the *Central Hudson* analysis basically involve a consideration of the ‘fit’ between the legislature’s ends and the means chosen to accomplish those ends.”); *Metro Lights, L.L.C. v. City of L.A.*, 551 F.3d 898, 904 (9th Cir. 2009).

55. See *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 183 (1999) (deeming the four *Central Hudson* stages as “not entirely discrete”); see also *Metro Lights*, 551 F.3d at 904.

56. See *BellSouth Telecomms., Inc. v. Farris*, 542 F.3d 499, 508 (6th Cir. 2008).

57. See *id.*

58. For the non-applicability of the “overbreadth” doctrine in the commercial speech area, see *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982); *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 618 n.12 (1998) (Souter, J., dissenting); *Waters v. Churchill*, 511 U.S. 661, 670 (1994). Whether a current majority of the Court might be inclined to modify or abolish this rule is of course difficult to say.

59. See, e.g., *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993); *Ballen v. City of Redmond*, 466 F.3d 736, 742 (9th Cir. 2006).

60. See *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480–81 (1989).

61. See, e.g., *Verizon Cal. v. FCC*, 555 F.3d 270, 275 (D.C. Cir. 2009).

62. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 562–63 (1980) (“The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.” (citing *Ohralik v. Ohio State Bar Ass’n*,

recognition that in a realistic sense, we care more about, and are more affected by, commercial speech than by political speech at any level, including campaign rhetoric.⁶³ This Article's thesis herein seeks to synthesize the insights of both of these views. In certain respects, commercial speech has come to assume a position, not merely of importance, but of pre-eminence. But such pre-eminence can, in some respects, justify a greater and not a lesser regulatory concern.

On the one hand, there is ample support in the case law for a limited, deferential judicial approach to the narrow-tailoring prong under *Central Hudson*. Thus, the case law seeks only a "reasonable fit" between the substantial governmental interest promoted and the scope of the regulatory means chosen.⁶⁴ The required "reasonable fit," despite language and dicta occasionally to the contrary, need not amount to the least speech-restrictive means capable of promoting the substantial interest at stake.⁶⁵ As in content-neutral regulation of speech, the regulation of commercial speech must simply "not 'burden substantially more speech than is necessary.'"⁶⁶ In particular, "if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable."⁶⁷

On the other hand, however, the courts often interpret the *Central Hudson* narrow-tailoring prong with considerable rigor. To begin with, "regulating speech must be a last—not first—resort."⁶⁸ The commercial speech regulation must be "'designed carefully' to achieve the stated goal."⁶⁹ Most crucially, the government must show that it has "'carefully calculated' the costs and benefits associated with the burden on speech imposed by its prohibition."⁷⁰ In particular, the government must "demonstrate a careful calculation of the speech interests involved."⁷¹

436 U.S. 447, 456–57 (1978)); see also *United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993); *Fox*, 492 U.S. at 477. But cf. *Discovery Network*, 507 U.S. at 433–34 (denying any lesser constitutional weight, in itself, to commercial speech per se).

63. See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976).

64. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001); *Discovery Network*, 507 U.S. at 416 & n.12; *Ballen*, 466 F.3d at 742.

65. See, e.g., *Fox*, 492 U.S. at 477–78.

66. *Id.* at 478 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (in the content-neutral restriction context)); see also *Edge Broadcasting*, 509 U.S. at 430 (citing *Ward*, 491 U.S. at 799); *Prime Media, Inc. v. City of Brentwood*, 398 F.3d 814, 819–20 (6th Cir. 2005) (content-neutral sign restriction ordinance).

67. *Discovery Network*, 507 U.S. at 417 n.13, quoted in *Ballen*, 466 F.3d at 742.

68. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002); *BellSouth Telecomms., Inc. v. Farris*, 542 F.3d 499, 508 (6th Cir. 2008).

69. *Verizon Cal., Inc. v. FCC*, 555 F.3d 270, 275 (D.C. Cir. 2009).

70. *Discovery Network*, 507 U.S. at 417 (quoting *Fox*, 492 U.S. at 480); see also *RTM Media, L.L.C. v. City of Hous.*, 584 F.3d 220, 225 (5th Cir. 2009); *W. Va. Ass'n of Club*

In this context, the requirement that the government show that it has carefully considered the costs involved, including the commercial free speech costs of its regulation, invites a judicial re-weighing and re-balancing of the particular interests at stake by any court so inclined, without much genuine constraint on any such re-weighing.⁷² On this approach, a court might simply speculate about conceivable alternative regulations that are arguably less burdensome on some of the speech interests involved overall, in light of the regulatory interests cited.⁷³

Beyond this opening of the door to judicial re-weighing of the interests involved, the courts have been in no hurry to resolve basic questions that their judicial re-weighing must inevitably pose. Most inescapably, is the government allowed to justify its regulation as narrowly tailored when the regulation is taken as a whole—i.e., either the regulation in question or no regulation at all—or must the government justify any and every marginal element of the regulation? That is, must the government justify any incremental reach of its regulation beyond some minimal scope? If the regulation could, at least in the imagination of the court, have been sliced to remove the unappealing “heel” thereof, is the regulation therefore unconstitutional for lack of narrow tailoring? How thin is the retrospective “slicing” of the regulation required to be?

Commonly, a commercial speech regulation may aim at some clear abuses, but the regulation will extend beyond those clear abuses to less crucial cases. The scope of the regulation may well encompass less crucial or even debatable cases. Does that mean that the regulation lacks sufficient tailoring? Would there not, almost inevitably, be some range of cases in which the regulation is still, to some lesser degree, further promoting the basic regulatory goal but only at an increasingly steep cost in the value of the regulated commercial speech?

In such cases, often near the outer limits of the regulation, courts may, in the name of narrow tailoring, be tempted to judicially re-balance the interests at stake.⁷⁴ If there are real or imagined cases in which the payoff from the regulation strikes the court as only modest when weighed against the judicially perceived cost in commercial speech or other values, the courts may well be tempted to find insufficient tailoring.⁷⁵ The problem is

Owners & Fraternal Servs., Inc. v. Musgrave, 553 F.3d 292, 305 (4th Cir. 2009); *BellSouth Telecomms.*, 542 F.3d at 509.

71. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 562 (2001).

72. For such an arguable instance, see *id.* at 562–66. In a related context, see *Prime Media, Inc. v. City of Brentwood*, 398 F.3d 814, 824 (6th Cir. 2005).

73. See, e.g., *Thompson*, 535 U.S. at 372; *Lorillard*, 533 U.S. at 562–65; 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507–08 (1996) (rejecting regulation of alcohol advertising in light of unaddressed conceivable alternative approaches to the cited problem, including intensified alcohol education programs).

74. For example, see the evident balancing of interests the Court undertakes at or near the margins of the regulation in *Lorillard*, 533 U.S. at 564.

75. See, e.g., *id.* at 564–65.

that most regulations of commercial speech (or of anything else) will inevitably have “core” areas of application where the net benefit is relatively high and other areas where the net benefit is relatively low.⁷⁶

Further complicating the narrow-tailoring inquiry is the scope and quality of information before the court. As in other sorts of cases, the commercial speech regulation may have direct or indirect effects, short- or long-term effects, and positive or negative effects, on various entities not represented before the court.⁷⁷ Therefore, the courts often attempt, on whatever basis, to evaluate the regulation as applied generally and not just with respect to the circumstances of those persons challenging the regulation.⁷⁸ A commercial speech regulation may seem to unduly burden an aggrieved party, while also being necessary in its breadth of scope, to adequately address problems posed by other commercial speakers not before the court.

Commercial speakers as well, even more than non-commercial speakers, may have financial incentives to be less than entirely forthright about the actual speech effects of various conceivable regulations. Courts will already have difficulty enough in telling whether one rule is really less burdensome overall than another. Commercial speakers may well be motivated to seek to maximize their profitability, not their freedom of commercial speech. Merely as one possible example, a commercial speaker could have a financial incentive to represent some alternative commercial speech regulation as less burdensome and more narrowly tailored, whatever its financial or free speech costs, if the speaker knows that such a regulation would realistically not be imposed in practice.⁷⁹

Introducing even further openness into the narrow-tailoring inquiry, an important additional complication is that commercial speech regulations, like most sensible behavior,⁸⁰ do not generally seek to maximize any single substantial government interest to the neglect of all other partly competing values. Many sensible commercial speech regulations are drafted with some concern for more than one interest.⁸¹ It is unlikely (and too much to

76. See generally E.J. MISHAN & EUSTON QUAH, *COST-BENEFIT ANALYSIS* (Routledge, 5th ed. 2007) (1976).

77. See, e.g., *United States v. Edge Broad. Co.*, 509 U.S. 416, 427 (1993); *Metro Lights, L.L.C. v. City of L.A.*, 551 F.3d 898, 904 (9th Cir. 2009).

78. See *Edge Broad.*, 509 U.S. at 427; *Metro Lights*, 551 F.3d at 904.

79. Thus, a commercial speaker might endorse, as less burdensome and more narrowly tailored, a tax on its conduct, rather than direct regulation of its speech, even if the tax would put the speaker out of business, which would end the speech as long as the tax alternative in reality could be blocked by lobbying. For discussion of a tax alternative to the regulation of commercial speech, see *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996).

80. See, classically, the work on marginalism in ALFRED MARSHALL, *PRINCIPLES OF ECONOMICS* ch. 18 (Prometheus Books 1997) (1881).

81. See, e.g., *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 368 (2002) (government as citing three distinct interests underlying the commercial speech regulation);

expect) that the drafters will specify all of their valued interests, along with their perceived conflicts and trade-off rates. In many cases, among the interests valued by the drafters will be the interests we have in commercial speech.

The problem is that any commercial speech regulation that sensibly balances a number of partly conflicting interests will not be maximizing the promotion of any single interest. Any court inclined to do so can thus find the commercial speech regulation to lack sufficient tailoring,⁸² as the regulation is aimed at both more and less than promoting some single interest upon which a court has chosen to focus. But this is, crucially, all within a court's discretion. If a court chooses to do so, it can instead recognize some of the multiple interests at stake, appreciate the various complexities involved, and reasonably defer on the question of narrow tailoring.⁸³

A final source of sheer openness and indeterminacy in testing for narrow tailoring involves an occasional judicial attempt to distinguish between those regulations that amount to a complete, or nearly complete, ban⁸⁴ on a form of commercial speech and those that do not. The former variety of regulation could then receive somewhat more rigorous judicial scrutiny,⁸⁵ especially under the narrow-tailoring prong. This is sometimes known, whether in commercial or noncommercial speech contexts, as the complete (or nearly complete) "suppression doctrine."⁸⁶

The problem and the source of further openness here is that almost any absolute or nearly absolute ban on a form or medium of commercial speech can easily be re-characterized in less absolutist terms. A commercial speaker who is barred from using off-premises advertising

Ballen v. City of Redmond, 466 F.3d 736, 740 (9th Cir. 2006) (regulation having ten separate exceptions of varying degrees of plausibility).

82. A closely related judicial concern might also be expressed under the third prong, as the regulation may well appear to fail to directly or materially advance the single government interest upon which judicial attention is focused. *See, e.g., Metro Lights*, 551 F.3d at 904–05.

83. *See, e.g., W. Va. Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 294 (4th Cir. 2009) (The court recognized, in the context of video lottery advertising, the State's understandable attempts to balance the goals of raising revenue for education and other purposes against the risks and costs of increasing addiction to gambling: "It is this interest in a balanced approach to lottery promotion that would be eviscerated by the wholesale invalidation of West Virginia's advertising restrictions.").

84. *See, e.g., Prime Media, Inc. v. City of Brentwood*, 398 F.3d 814, 824 (6th Cir. 2005).

85. *See id.; cf. Passions Video*, 458 F.3d at 843 (referring to an "absolute proscription against any form of off-site advertising").

86. *See, e.g., Maldonado v. Morales*, 556 F.3d 1037, 1046 (9th Cir. 2009) (the suppression doctrine as referring to "foreclosing or nearly foreclosing an entire medium of expression").

signs⁸⁷ can often presumably re-direct the same advertising budget nearly as effectively into other advertising venues. To say that the government has blocked (or nearly blocked) one means of commercial speech says almost nothing about the existence or free speech value of any remaining channels for commercial speech available to the speaker.⁸⁸ Whether a court chooses to say that a commercial speech regulation blocks (or nearly blocks) an “entire” single means of communication is largely within the court’s discretion.

The narrow-tailoring inquiry under *Central Hudson* is thus the source of much of the openness and indeterminacy of the overall test. This should not be surprising, as there are parallel states of affairs under even more rigorous judicial tests that should be less vulnerable to judicial manipulation. Thus, even in the political speech context, Justice Blackmun observed that “[a] judge would be unimaginative indeed if he could not come up with something a little less ‘drastic’ or a little less ‘restrictive’ in almost any situation, and thereby enable himself to vote to strike legislation down.”⁸⁹

Even more pointedly, Chief Judge Alex Kozinski recently observed:

Fortunately for my colleagues, *their* proposed solutions [do not] need to pass constitutional muster; they can just toss them out as supposedly superior alternatives. But if the city were gullible enough to follow these suggestions, my colleagues would find reasons to strike down the new rules in the next round of litigation. This artifice can be repeated many times, to the delight of plaintiff and the general enrichment of the legal profession.⁹⁰

With respect to commercial speech in particular, some courts have recognized some of the dangers of aggressive narrow-tailoring review. Thus, the Fourth Circuit Court of Appeals has appreciated that “[t]he danger of getting too deep into the fourth *Central Hudson* prong of tailoring is that it enmeshes federal courts in a wealth of subsidiary . . .

87. See *Passions Video*, 458 F.3d at 843 (citing *State v. Café Erotica, Inc.*, 507 S.E.2d 732, 735 (Ga. 1998)).

88. See *Naser Jewelers, Inc. v. City of Concord*, 513 F.3d 27, 36 (1st Cir. 2008) (“[T]he argument raises the issue of how one defines ‘medium[.]’ [T]he fact that a regulation bans a particular medium does not mean that the ordinance is not narrowly tailored.” (citing *Globe Newspaper Co. v. Beacon Hill Architectural Comm’n*, 100 F.3d 175, 191–92 (1st Cir. 1996))). The court then pointed out the continuing availability to commercial speakers of “static and manually changeable signs.” *Id.*

89. *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 188–89 (1979) (Blackmun, J., concurring).

90. *Berger v. City of Seattle*, 569 F.3d 1029, 1062 (9th Cir. 2009) (Kozinski, C.J., dissenting) (non-commercial speech context).

issues, which have historically been left to the state legislatures and agencies that create and implement these programs.”⁹¹

Of course, this Article’s focus has been not only on judicial intrusion into matters of policy and pragmatics better left to elected or expert officials, but on the openness of the entire narrow-tailoring inquiry,⁹² along with the rest of *Central Hudson* in general.⁹³ And it has shown that the scope of legitimate indeterminacy thereunder is large enough to accommodate a deferential approach to commercial speech regulation, especially (as will now be discussed) when reasonable commercial speech regulation in general can be sensibly defended on broad policy and free speech-based grounds.

III. SELF-REALIZATION AND COMMERCIAL SPEECH IN THEORY AND PRACTICE

This Article has briefly referred, above, to the specific free speech values or purposes of the pursuit of truth and the promotion of genuinely democratic decision-making.⁹⁴ But it has also been suggested that these two free speech values do not constitute the most central battleground on which issues of the depth of protection for commercial speech should be fought.⁹⁵ Of the typically acknowledged reasons for especially protecting many forms of speech in general, the value of self-realization seems actually most crucial to the case for or against specially protecting commercial speech under contemporary circumstances.

The overall relationship between strong or weak First Amendment protection for purely commercial speech and the value of self-realization can at the very least be quite reasonably contested. One important complication is that there are two distinct and partially conflicting interpretations of the idea of self-realization.⁹⁶ It is thus often necessary for the public or for their democratically elected representatives, if not also for the courts, to somehow choose one understanding of self-realization or the other, or some prioritized combination thereof. Crucially, no one can opt for one view of the free speech value of self-realization over another on the

91. *W. Va. Ass’n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 307 (4th Cir. 2009).

92. For a concrete illustration of the openness of the narrow-tailoring and the related direct-advance prongs, see *Metro Lights, L.L.C. v. City of L.A.*, 551 F.3d 898, 910 (9th Cir. 2009) (note the re-characterizability of the plaintiff’s preferred alternative regulation).

93. For an interesting contrasting argument in the strict scrutiny context, see Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2417 (1996) (arguing that, in some instances, a state regulation passes strict scrutiny in the sense that the State can defend the regulation as narrowly tailored to advance a compelling government interest; yet a court likely would and should strike the speech regulation down as unconstitutional).

94. See *supra* notes 9–15 and accompanying text.

95. See *id.*

96. See *infra* Section III.A.

theory that her preferred view is simply required by either the dictionary or the text of the Free Speech Clause. Whatever view anyone chooses to take of self-realization, and of the related status and effects of commercial speech and its regulation, must be argued for on the merits for our own cultural context.

In particular, no one should start by merely assuming in favor of strongly protected commercial speech, determining which understanding of self-realization most naturally supports that pre-determined outcome, and then claiming that exactly that understanding of self-realization is required by the dictionary or by the Free Speech Clause itself. If we are, as seems sensible, to steer free speech law in light of the basic purposes or genuinely important values to be promoted by freedom of speech, we must be more pragmatic. Strong protection for commercial speech may promote self-realization in some senses (but not others) or to different degrees. And the Free Speech Clause itself does not tell which forms or degrees of self-realization are themselves most valuable. This decision must be made on other grounds in light of our broader interests and goals.

This Article's conclusion herein will be that in our own current cultural context, one particular understanding of the value of self-realization can and should take general precedence over others in the typical run of commercial free speech cases,⁹⁷ and that this particular understanding of self-realization is typically suggestive of something like a mere reasonableness test for the regulation of purely commercial speech.

But it is appreciated that reasonable minds could differ as to this conclusion. To those who remain ultimately unconvinced by this Article's recommended approach to the value of self-realization and the reasonable regulation of commercial speech, it must be asked in the end why their own approaches are so clearly and strongly superior that judges should feel entitled on that basis to override entirely reasonable legally-adopted understandings of the value of self-realization.

A. Two Views of the Free Speech Value of Self-Realization

As for the value of self-realization itself, some complications are inevitable. Students of free speech and social philosophers more broadly have recognized two distinct, partly conflicting understandings of the idea of self-realization as arguably underlying freedom of speech. It is possible to focus on either of these two understandings and to then argue on either basis for or against generally strong commercial free speech protection. But it seems more natural to link one, but not the other, of these alternative understandings of self-realization with relatively strong protection of commercial speech and vice versa.

For the sake of convenience, these alternative conceptions will be referred to with numerical subscripts as self-realization₁ and self-

97. See *infra* Sections III.B. and IV.

realization₂. For the sake of some initial clarity, self-realization₁ can generally be linked to any given person's somehow choosing as she happens to wish, and acting (buying or not buying) on that basis. This initial description, of course, leaves much unexplored. But the basic idea is roughly that of personal choice (or conduct libertarianism) in the realm of consumer purchases.

In contrast, self-realization₂ can be thought of as descended from lines of thought developed by Plato,⁹⁸ Aristotle,⁹⁹ John Stuart Mill,¹⁰⁰ and T.H. Green.¹⁰¹ Historically, self-realization₂ tends to more strongly emphasize the ideas of development, higher and lower value, fulfillment or lack of fulfillment, flourishing, unfolding, self-actualization, and in some senses self-perfection.¹⁰² Modern self-realization₂ is compatible with a high priority for liberty, autonomy, diversity, and equality for and among all persons.¹⁰³

Many contemporary free speech theorists tend not to dwell on such a distinction at any great length, if at all. But some sense of the distinction between self-realization₁ and self-realization₂ is often present, as well as of their possible conflicts.¹⁰⁴ Professor Martin Redish, for example,

98. See PLATO, *THE REPUBLIC OF PLATO* 232 (Francis MacDonald Cornford trans., The Legal Classics Library 1991) (1945) ("[T]he entire soul must be turned . . . until its eye can bear to contemplate reality and that supreme splendour which we have called the Good.").

99. See ARISTOTLE, *THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS* 305 (J.A.K. Thomson trans., Penguin Books 1955) (1953) ("[O]ught we, so far as in us lies, to put on immortality and to leave nothing unattempted in the effort to live in conformity with the highest thing within us."); ANTHONY KENNY, *ARISTOTLE ON THE PERFECT LIFE* 103 (1992) (Aristotle on degrees of perfection among different kinds of lives).

100. See MILL, *supra* note 13, at 121 (quoting von Humboldt on "the highest and most harmonious development" of one's powers as objectively, and not merely subjectively, prescribed by reason as the human end). Of course, Mill can also be cited as a crucial defender of self-realization₁ as well. See, e.g., *id.* at 77.

101. See T.H. GREEN, *THE POLITICAL THEORY OF T.H. GREEN* 75–76 (John R. Rodman ed. 1964) (1881) (distinguishing between choices that fail and those that succeed in reaching their aim of self-satisfaction). For discussion at length, see DAVID O. BRINK, *PERFECTIONISM AND THE COMMON GOOD: THEMES IN THE PHILOSOPHY OF T.H. GREEN* 40–41 (2003) (self-realization in a liberal, egalitarian perfectionist sense as the highest good for Green).

102. See the liberal egalitarian contemporary versions of perfectionism prefigured in T.H. Green and developed in, for example, THOMAS HURKA, *PERFECTIONISM* (1993) and STEVEN WALL, *LIBERALISM, PERFECTIONISM AND RESTRAINT* (1998). But see STEVEN LECCE, *AGAINST PERFECTIONISM: DEFENDING LIBERAL NEUTRALITY* (2008) (attempting to abstract from issues of value and of living (more or less) well in matters of governance).

103. See, e.g., HURKA, *supra* note 102, at 148–89; WALL, *supra* note 102, at 125–204. Nor does contemporary liberal perfectionism necessarily assume that there is some unique or fixed human nature, substantially shared by all persons, that is in itself normative or that trumps the obvious rich diversity among persons of aptitudes, tastes, talents and abilities, and pursuits. Liberal perfectionism is compatible not only with equality and autonomy, but with any valuable form of pluralism among ways of life.

104. For the idea of conflicts between these conceptions, see John T. Valauri, *Smoking and Self-Realization: A Reply to Professor Redish*, 24 N. KY. L. REV. 585, 591 (1997).

distinguishes between the “value in allowing individuals to control their own destiny”¹⁰⁵ and the “value in developing individuals’ mental faculties so that they may reach their full intellectual potential.”¹⁰⁶ As Professor Redish then develops his self-realization theory, “advertising deserves substantial constitutional protection since advertising provides information which is more useful in life decisions than what is available from other sources.”¹⁰⁷

This Article’s approach to self-realization and advertising is developed below.¹⁰⁸ That approach will place substantial emphasis on self-realization₂ or self-realization as “flourishing.” More precisely, some emphasis is placed on a presumably democratically elected government’s legitimacy in intentionally or unintentionally promoting self-realization₂, or flourishing, either expressly or by reasonable implication, in reasonably regulating advertising and other commercial speech.

For the moment though, a few preliminary points are in order. First, Professor Redish’s idea of controlling one’s own destiny in this context¹⁰⁹ would of course require some development. There is a sense in which as a matter of the logic of the terms, no one can possibly control his or her own destiny or fate; whatever is under our control is not literal destiny or fate. Professor Redish presumably means that self-realization is in one sense a matter of controlling something like one’s transactional interactions (at least as to initiating or responding, though of course not as to selecting market prices) insofar as those choices are affected by commercial speech rules. The question would then become whether self-realization understood this way is best promoted by the *Central Hudson* test, if not by some more rigorous commercial speech test, or else by a test typically

105. Martin H. Redish, *Self-Realization, Democracy, and Freedom of Expression: A Reply to Professor Baker*, 130 U. PA. L. REV. 678, 679–80 (1982).

106. *Id.* at 680; see also Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 630 (1982). For responses to Professor Redish’s distinction, see C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish’s The Value of Free Speech*, 130 U. PA. L. REV. 646, 658 (1982) and Valauri, *supra* note 104, at 590–91. For additional discussion of self-realization in terms arguably best classified under our sense of self-realization₂ see, for example, Brian C. Murchison, *Speech and the Self-Realization Value*, 33 HARV. C.R.-C.L. L. REV. 443, 444 (1998) (quoting Justice Brandeis: “‘Those who won our independence believed that the final end of the State was to make men free to develop their faculties[.]’” (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring))) along with *id.* at 448–49 (“[i]f the self-realization value on some level refers to the way in which ‘human flourishing’ takes place . . .” (citing Margaret Jane Radin, *The Colin Ruagh Thomas O’Fallon Memorial Lecture on Reconsidering Personhood*, 74 OR. L. REV. 423, 433 (1995))). For broader background, see Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875 (1994) and, classically, ISAIAH BERLIN, *Two Concepts of Liberty*, in *LIBERTY: INCORPORATING FOUR ESSAYS ON LIBERTY* 166 (Henry Hardy ed., 2002).

107. Valauri, *supra* note 104, at 587.

108. See *infra* Section III.B.

109. See *supra* note 105 and accompanying text.

focused merely on the reasonableness of the regulation. Certainly, Professor Redish recognizes it is possible that some choices, however, may for various reasons have unanticipated and self-defeating consequences.

Second, our own understanding of self-realization₂ or flourishing need not be confined to "intellectual"¹¹⁰ self-realization. As contemporary versions of perfectionism in ethics emphasize,¹¹¹ there need be no single optimal manner of living for everyone and no single dimension of life that should be preferred by everyone. Actually, this element of pluralism and diversity among writers sympathetic to perfectionism is not, in its rudiments, new.¹¹² And a similarly pluralistic and autonomy-respecting approach could be applied by anyone emphasizing non-intellectualized self-realization₂ in the realm of commercial speech regulation.

Third, Professor Redish's idea that advertising should, on a self-realization theory, be substantially protected as an especially useful source of practical information¹¹³ will be controversial in some contexts. Some contemporary advertising does not even pretend to convey useful information as opposed to something like entertainment;¹¹⁴ vague image or loose association; atmosphere, mood, or tone; or sheer brand awareness—some ads do not even mention the product. There are other ways to motivate than to provide useful information. And even if we count all of the above as some sort of information, we must then go on to assess its proper constitutional value.

Doubtless, much current advertising still conveys information useful for life decisions. But in such cases, the real value of such information, in terms of any form of self-realization, must take two important considerations into account.¹¹⁵ First, at the very specific level of choices among particular brands, or the qualities of specific products in themselves, there may in some cases be more genuinely useful or more easily accessible information available from sources other than the seller's non-compelled commercial speech on the product's behalf. In such cases, there may be, beyond compelled commercial speech,¹¹⁶ government data and reports, directly or as summarized in the media; independent non-commercial or commercial evaluations of competing products; and,

110. See *supra* note 106 and accompanying text.

111. See *supra* note 102.

112. See, e.g., Aristotle's valuation of both the life of contemplation and the politically active and successful life, as discussed in the sources cited *supra* note 99.

113. See *supra* note 107 and accompanying text.

114. Whether, or to what degree, commercial speech not otherwise especially protected should be constitutionally protected as sheer entertainment or as works of art presents fascinating questions that would, unfortunately, take us too far afield.

115. We assume here that the advertising or other commercial speech is not seriously misleading in the most direct sense. See *supra* notes 35–42 and accompanying text.

116. See *supra* note 34 and accompanying text on the mandated disclosure of commercial information, as for example in typical FDA drug-disclosure requirements.

increasingly, consumer feedback in various formats available on the Internet and various social media.¹¹⁷ And in such cases, the alternatives to the seller's unregulated commercial speech may limit any unique practical value to potential consumers of the unregulated commercial speech in question.¹¹⁸

Secondly, and more importantly, the practical value of unregulated commercial speech must, as noted below,¹¹⁹ reflect the important overall, cumulative, and aggregated effects of both unregulated and even typical regulated forms of commercial speech on the broader culture and the public in general. This will hold even where those effects are unintended by the commercial speaker and often widely unrecognized, especially given the tendency of most commercial speech—even for economically competing products and services—to reinforce and compound, at a broader level, the cultural effects in question. And this perhaps unintended reinforcement of broader messages about commercialism as the default lifestyle will hold most especially when no cultural institution or set of institutions is in a position to realistically challenge the resulting broad “consumptionist” ethos.

B. Commercial Speech in Contemporary Culture: Power Relationships, Self-Realization, and a Reasonableness Standard

The case for regulating purely commercial speech, generally, on the basis of a reasonableness standard is suggested by even a casual survey of our culture and economy over the past several decades, set against a broader historical context. In economic terms, there have been a number of disturbing and unsustainable trends developing over roughly that time frame—trends that are in some measure traceable to the overall, if often unintended, effects of commercial speech.

It is difficult to deny the seriousness of the gradually developing problems of consumer indebtedness and inability or unwillingness to attempt to save meaningfully for retirement. More than a decade ago,

117. As merely one rather formal example, note that booksellers using the Amazon.com website apparently must post customer approval percentages over some time frame. We do not typically see high customer disapproval rates, but this suggests the efficient operation of markets as much as it does the usefulness of the information provided. Admittedly, though, at some point the boundary between seller-selected customer testimonials and a meaningfully independent customer rating score may become hazy.

118. Merely as one example, consider the value of the advertising for a particular ice cream as opposed to the practical informational value of the product's USDA nutritional label or the available reporting of, say, the Center for Science in the Public Interest and of the latter's critics. See generally CENTER FOR SCIENCE IN THE PUBLIC INTEREST, <http://www.cspinet.org> (last visited Jan. 25, 2011). In general, not all useful responses to unregulated commercial speech will themselves take the form of (additional) unregulated commercial speech. For an unusually controversial case, see *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (cert. dismissed as improvidently granted).

119. See *infra* Section III.B.

social scientists such as Juliet Schor were noticing the rise of consumer indebtedness and credit card spending especially among the middle class.¹²⁰ Many middle class Americans reported that even during sustained economic prosperity, they had reserved little cushion against financial exigencies, let alone saved significantly for retirement, and that this was in large measure a matter not of their inability to save, but of their increasing unwillingness to do so.¹²¹ Where Americans had not long ago saved at least ten percent of their income, by 2005 non-retired Americans had somehow opted, in many cases, for a negative savings rate.¹²² Pre-crash bankruptcy levels were predictably high.¹²³

In part, the apparent preferences of Americans in this regard—at least for the personal spending, if not for the long-term or the broader cultural and economic effects—are attributable to the sheer pervasiveness of advertising and commercial speech. Advertising saturation at this point is increasingly difficult to even roughly quantify.¹²⁴ Commercial speech is not simply a matter of seller-consumer dialogue; commercial speech is the ambient background—the air we breathe—as we inevitably focus consciously and explicitly at any given time on only a few such ads.

The real methodological problem for free speech theorists has become the increasingly hazy boundary between commercial speech and all of commerce itself. As has recently been observed, “When a skyscraper, a ticket stub, newspaper editorials, computer hardware and software, your ballpoint pen, and your daily email are all ads, the question is less what to

120. See, e.g., JULIET B. SCHOR, *THE OVERSPENT AMERICAN: WHY WE WANT WHAT WE DON'T NEED* 19 (1998).

121. See *id.* at 20.

122. See JEAN M. TWENGE & W. KEITH CAMPBELL, *THE NARCISSISM EPIDEMIC: LIVING IN THE AGE OF ENTITLEMENT* 124 (2009); ROB WALKER, *BUYING IN: THE SECRET DIALOGUE BETWEEN WHAT WE BUY AND WHO WE ARE* xvi (2008) (referring to the period between 2000 and 2006); ROBERT H. FRANK, *LUXURY FEVER: WHY MONEY FAILS TO SATISFY IN AN ERA OF EXCESS* 4–5 (1999); PETER C. WHYBROW, *AMERICAN MANIA: WHEN MORE IS NOT ENOUGH* 26 (2005).

123. See TWENGE & CAMPBELL, *supra* note 122, at 124; FRANK, *supra* note 122, at 4–5. Of course, some percentage of these effects could be said to be due to unexpected and involuntary job loss or medical bills. But planning for such unexpected events has long been an element of financial prudence; the increased cultural preference for consumer spending over prudence is the phenomenon to be accounted for. On the other hand, one could blame such a state of affairs on chronic governmental financial responsibility. But then one would also have to explain why citizen-voters continued to focus on consumer spending at the personal level.

124. See CARRIE McLAREN & JANSON TORCHINSKY, *AD NAUSEAM: A SURVIVOR'S GUIDE TO AMERICAN CONSUMER CULTURE* 54 (Carrie McLaren & Janson Torchinsky eds., 2009); Philip Kotler, *Foreword*, in *KELLOGG ON ADVERTISING & MEDIA* vii (Bobby J. Calder ed., 2008).

count than what *not* to.”¹²⁵ Even physical, brick-and-mortar stores have become consciously intended advertisements.¹²⁶

The broader implication for this Article’s purposes is, as the social scientist and cultural historian Christopher Lasch recognized, that advertising not only markets particular goods, services, and consumer experiences, but the consumer lifestyle or broad acquisition and consumption as a central focus of life.¹²⁷ Lasch referred to the consumer as “permanently unsatisfied, restless, anxious, and bored,”¹²⁸ with consumption being promoted “as a way of life,”¹²⁹ however ultimately unsatisfyingly.¹³⁰ This amounts precisely to the basic value of self-realization, self-defeated.

Not surprisingly, it has thus for some time been true that college students in particular relate less to “history, literature, or probably anything else”¹³¹ than they do to “commercials and advertising culture.”¹³² But from the standpoint of self-realization, it is not as though the dominance of commercial speech is consciously and collectively welcomed, or widely seen as generally and collectively beneficial in some way that should not be reasonably modified. Perhaps the dominance of commercial speech and commercial value is seen by some as at this point simply inevitable, with no significant cultural institutions (including religious and educational institutions)¹³³ having the collective ability or willingness to engage in substantial countervailing speech.

Higher educational institutions may at one time have seen themselves as a refuge from, if not as promoting some alternative to, a commercially and consumption-focused lifestyle. But in large measure, campuses today “have gone prostrate before corporate sponsors of research that academic administrators have neither the will nor the independent funding to oppose.”¹³⁴ Nor have educational institutions, including school buildings themselves, escaped the general pervasiveness of advertising and commercial speech.¹³⁵ Juliet Schor argued over a decade ago that our nation “places a lower priority on teaching its children how to thrive

125. See MCLAREN & TORCHINSKY, *supra* note 124, at 54.

126. See the exceptionally interesting PACO UNDERHILL, *WHY WE BUY: THE SCIENCE OF SHOPPING—UPDATED AND REVISED FOR THE INTERNET, THE GLOBAL CONSUMER, AND BEYOND* 26 (paperback ed. 2009).

127. See CHRISTOPHER LASCH, *THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS* 72 (paperback ed. 1991).

128. *Id.*

129. *Id.*

130. See *id.*

131. SCHOR, *supra* note 120, at 24.

132. *Id.*

133. See, e.g., BENJAMIN R. BARBER, *CONSUMED: HOW MARKETS CORRUPT CHILDREN, INFANTILIZE ADULTS, AND SWALLOW CITIZENS WHOLE* 14 (2007).

134. *Id.*

135. See *supra* note 125 and accompanying text.

socially, intellectually, even spiritually, than it does on training them to consume.”¹³⁶

Part of the problem is that, what we might call the culture of consumption, like the only very loosely related classical vice of avarice,¹³⁷ can take many forms. The survey data on the importance of material goods to Americans, and on what is perceived as a luxury or a necessity, can vary over time.¹³⁸ One problem is that consumption of expensive, if not unaffordable, housing, vehicles, and other material consumer durables is only part of the focus of commercial speech. Buying more of a house than one can realistically afford is undoubtedly a significant problem.¹³⁹ But much commercial speech is aimed, directly or indirectly, at the purchase of all sorts of consumer goods at any level of prestige or social status, including inexpensive fad items. And then there is the under-discussed segment of commercial speech aimed at a similarly broad range of the purchase of services, as opposed to goods.

Finally, and most neglected, there is the realm of commercial speech ultimately aimed not at the purchase of “material” goods, or really even of services in a crucial sense, but at what we might call commercial-speech-promoted “experiences.” The experiences can be individual or group-oriented. “Materialism” is not the focus of such commercial speech. A trip, a cruise, or an expensive night out or a day of expensive pampering may seem less narrowly or literally “materialistic,” but may be equally motivated and legitimized by commercial speech. Prestige and status and social standing may be largely irrelevant in the case of some personally, or more commonly socially, consumed market “experiences.”

Underlying all the above purchases may be the unarticulated premise that the typical solution to one’s problems, even on matters such as mild depression, anxiety, or feelings of isolation, is through consumer spending in response to commercial speech. Where the first purchase does not work, the fallback approach is often some other form of consumer purchase. Many persons do have a vague sense that the genuine solution to their problems will not take the form of a pill, a cruise, a consumptionist night out, or a more complex life of getting and spending.¹⁴⁰ But many persons have, as well, the sense that it is the broader culture that is too

136. BARBER, *supra* note 133, at 16 (quoting SCHOR, *supra* note 120, at 19). For the sake of clarity, presumably neither Schor nor Barber means to argue that we have been trained as consumers with much prudence and judiciousness in even that capacity.

137. See Rebecca Konyndyk DeYoung, GLITTERING VICES: A NEW LOOK AT THE SEVEN DEADLY SINS AND THEIR REMEDIES 100 (2009). Professor DeYoung goes on to describe a cycle in which “first we overacquire—avarice—and then we overtrash—prodigality.” *Id.* at 102.

138. See SCHOR, *supra* note 120, at 15 (on the increasing focus on material goods and luxuries between 1975–1991).

139. Witness recent economic events within the housing sector.

140. See SCHOR, *supra* note 120, at 83.

consumptionist or “materialistic,” and not they themselves as individuals, even as they confess their own individual under-saving.¹⁴¹

In any event, many Americans see a widely undesired collective outcome as the aggregate result of our various individual responses to commercial speech.¹⁴² Many Americans vaguely sense the ineffectiveness of seeking self-realization through commercial-speech-prompted consumption. But in the absence of comparably publicized alternatives, they may also have only modest faith that self-realization might actually result from a less consumption-focused lifestyle, including genuine friends, family, contribution to the well-being of others, or many sorts of spiritual pursuits.¹⁴³

In the meantime, the historical stigma against overspending or avoidable consumer bankruptcy has, appropriately or inappropriately, been reduced. At the extreme, “[t]he shame of consuming too much at too high a level has become the shame of consuming too little at too low a level.”¹⁴⁴ This re-valuation of values¹⁴⁵ may not conduce to self-fulfillment,¹⁴⁶ or be unequivocally endorsed by the public,¹⁴⁷ or even be particularly stable.¹⁴⁸ The idea of the collectively successful pursuit of self-realization over time, largely through commercial consumption, may come to seem pathological, self-defeating, unworthy, and immature.¹⁴⁹

It is sometimes dramatically suggested that we have collectively embarked upon an era of “induced childishness”¹⁵⁰ or “infantilization.”¹⁵¹ The proper metaphor is actually unclear since there is something plausible in the claims for perpetual adolescence, delayed adulthood, and the premature deprivation of genuine childhood as well—all with some direct

141. See *id.*

142. See *id.*

143. See *id.* This theme is developed *infra* notes 164–169 and accompanying text.

144. JAMES B. TWITCHELL, *LIVING IT UP: AMERICA’S LOVE AFFAIR WITH LUXURY* 166 (Simon & Schuster 2003) (2002). Of course, the standards assumed will be sub-cultural dependent; graduate students in college towns may not be expected to be enjoying a luxury condo lifestyle, but trips to Vegas or indulgent weekends may be considered appropriate.

145. For discussion, see PHILIPPA FOOT, *VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY* 81–95 (Clarendon Press 2002) (1978) (discussing Nietzsche’s broader concept).

146. See *infra* notes 157–162 and accompanying text.

147. See *supra* notes 140–142 and accompanying text.

148. See the concerns classically raised in DANIEL BELL, *THE CULTURAL CONTRADICTIONS OF CAPITALISM* 295 (Twentieth anniversary ed. 1996), referred to *infra* notes 153–155 and accompanying text.

149. See, e.g., GEOFFREY MILLER, *SPENT: SEX, EVOLUTION, AND CONSUMER BEHAVIOR* 89 (2009) (“[T]he fundamental consumerist delusion that products and brands matter, that they constitute a reasonable set of life aspirations, seems . . . infantile, inhuman, and existentially toxic.”).

150. BARBER, *supra* note 133, at 3.

151. *Id.*

relation to commercial speech.¹⁵² It has nonetheless been argued that today's "infantilist ethos is as potent in shaping the ideology and behaviors of our radical consumerist society . . . as what Max Weber called the 'Protestant Ethic' was in shaping the entrepreneurial culture of . . . early capitalist society."¹⁵³

Rather than embark upon an inevitably controversial attempt to pin down Weber's precise meaning, let us merely refer to Daniel Bell's own more recent argument.¹⁵⁴ Bell's thesis is that capitalism aimed originally at unifying "economy, character structure, and culture in a common frame." But this attempt at unification was not entirely successful over time. The first "contradiction . . . is that the unfolding of capitalism destroyed the keystone of that character—the sober, prudential, delayed gratification of the Protestant ethic—with . . . acquisitive impulses."¹⁵⁵

Few would think to characterize most of today's commercial speech as emphasizing the virtues of sobriety, prudence, or delayed gratification. Whether a conventionally successful economy can be sustained over the long term as the classic Weberian virtues are gradually replaced by their opposites is in some respects a matter for important speculation.

This Article's argument in this particular respect does not rely on such problems of unsustainability.¹⁵⁶ It focuses more on the better documented limitations, if not the self-defeating quality, of consumption motivated by commercial speech as a path to collective self-realization and genuine flourishing.

Many of us do feel a vague ambivalence, if not a sense of entrapment, regarding consumer spending as a distinctively valuable, irreplaceable source of self-realization or of happiness in any genuine form. There are limits, particularly in advanced economies, to the extent to which commercial speech that is intended to stimulate consumer purchases genuinely adds to individual and collective self-realization. Of course,

152. See, e.g., JULIET B. SCHOR, *BORN TO BUY: THE COMMERCIALIZED CHILD AND THE NEW CONSUMER CULTURE* (2004); SUSAN LINN, *CONSUMING KIDS: THE HOSTILE TAKEOVER OF CHILDHOOD* (2004). It has been estimated that "[b]y the time American children have reached first grade, they 'will have soaked in 30,000 advertisements.'" ROBERT E. LANE, *THE LOSS OF HAPPINESS IN MARKET DEMOCRACIES* 189 (2000).

153. BARBER, *supra* note 133, at 3 (referring to MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (Talcott Parsons trans., Dover Publ'ns Dover ed. 2003) (1958)).

154. See BELL, *supra* note 148, at 295.

155. *Id.* For an interesting qualification of the failure-to-delay-gratification thesis, see John Tierney, *Carpe Diem? Maybe Tomorrow*, N.Y. TIMES (Dec. 29, 2009), <http://www.nytimes.com/2009/12/29/science/29tier.html>.

156. For useful discussion of the slightly more technical idea of sustainability in the context of economic growth and the environment, see LISA H. NEWTON, *ETHICS AND SUSTAINABILITY: SUSTAINABLE DEVELOPMENT AND THE MORAL LIFE* (2003); SIMON DRESNER, *THE PRINCIPLES OF SUSTAINABILITY* (2d ed. 2008); ANDRES R. EDWARDS, *THE SUSTAINABILITY REVOLUTION: PORTRAIT OF A PARADIGM SHIFT* (2005).

there are limits as well to the degree to which any reasonable regulation of commercial speech can by itself promote genuine self-realization.

The relationship between income—which in our contemporary culture unfortunately serves as a proxy for consumer spending¹⁵⁷—and subjective happiness, let alone self-actualization, is murky. Upon looking at the broad range of nations and economies, a positive correlation is found between overall wealth and subjective reports of well-being.¹⁵⁸ But even in the aggregate, “people in wealthy nations have not increased much in happiness over the past decades despite the fact that average incomes have risen dramatically.”¹⁵⁹ Some goods, of course, are unfortunately “positional” or desired as presumably better than the goods available to particular other persons; in general, our desires for more and better goods can undermine their subjective enjoyment. And in some broader sense, “materialism can be toxic to happiness.”¹⁶⁰

To some degree, the limited ability of commercial speech in advanced economies to promote happiness, let alone self-realization in the sense of flourishing, is easily understandable. Whether we can afford to buy what is advertised or not, we often recognize advertisements as trying to create and then perhaps offer to remedy dissatisfaction—perhaps even dissatisfaction with ourselves without the product or service in question.¹⁶¹ More broadly, the inference, whether intended by the commercial speaker or not, is that the remedy for dissatisfaction should, generally, take the form of spending in response to commercial speech.

But responding to advertisements as a sort of broad self-medication has its limits. Despite what the advertisements may tell us, consumer spending cannot typically be a path to expressing our own individuality, uniqueness, or distinctive autonomy; most producers in a competitive economy at our level of technological development could not survive by expensively catering to genuine individuality.¹⁶² Even this very idea

157. See *supra* note 122 and accompanying text.

158. See ED DIENER ET AL., WELL-BEING FOR PUBLIC POLICY 85 (2009). For further discussion of the possible usefulness of measures of subjective well-being, including our surprising ability to adapt to undesired events, see Matthew Adler & Eric A. Posner, *Happiness Research and Cost-Benefit Analysis*, 37 J. LEGAL STUD. S253 (2008).

159. ED DIENER & ROBERT BISWAS-DIENER, HAPPINESS: UNLOCKING THE MYSTERIES OF PSYCHOLOGICAL WEALTH 105 (2008).

160. *Id.* at 97. For a discussion of “positional” goods, see FRED HIRSCH, SOCIAL LIMITS TO GROWTH 118–61 (Taylor & Francis 2005) (1976). See, more broadly, JOHN MAYNARD KEYNES, *Economic Possibilities for Our Grandchildren*, in ESSAYS IN PERSUASION 358 (1963). Alternatively phrased, the “toxicity” argument has been put in the following terms: “[w]e live in a culture in which our acquisitive cravings have been promoted beyond our needs, and the demand and strain, which that craving now inflicts on mind and body, are beginning to exceed the flexibility inherent in our biological heritage.” WHYBROW, *supra* note 122, at 13.

161. See LANE, *supra* note 152, at 179.

162. See TIM KASSER, THE HIGH PRICE OF MATERIALISM 73 (2002).

assumes that one's own distinctive essence as a person can, even in the principle, be caught and expressed by advertisement-driven consumer purchases. This will strike many of us as crudely reductionist.

This is not to suggest that commercial speech and some appropriate level of income and spending play little role in our self-realization or flourishing. Some such element is clearly necessary for most persons.¹⁶³ But self-realization is crucially a matter of biology and psychology; meaningfulness and spirituality; emotions; family, social, and work relationships; values; activities and achievements; recognition; and health.¹⁶⁴ Even the relatively well-off in our advanced economy tend to see their (minimally greater) happiness as flowing not from commercial-speech-driven purchases, but from "pleasing family relationships, helping the world, and fulfillment and pride from their work"¹⁶⁵ and accomplishments.¹⁶⁶

One writer has attempted to summarize the state of the evidence in this fashion:

A host of careful studies suggest that across-the-board increases in our stocks of material goods produce virtually no measurable gains in our psychological or physical well-being. Bigger houses and faster cars, it seems, don't make us any happier. But other studies identify a variety of categories in which extra spending would promote longer, healthier, and happier lives for all. For example, we could expect such improvements if we spent more to alleviate traffic congestion, or spent more time with our families and friends, or provided cleaner air and drinking water for our cities.¹⁶⁷

Other, generally similar listings,¹⁶⁸ often emphasizing the quality of our social relationships,¹⁶⁹ could be elaborated.

Now, it is certainly possible for commercial speech and advertising to attempt to promote, in some limited way, the attributes that really do significantly contribute to happiness and self-realization. There are,

163. See DIENER & BISWAS-DIENER, *supra* note 159, at 6. Free speech law cannot be designed for saints and ascetics.

164. *Id.* at 6, 9. See also LANE, *supra* note 152, at 251 (noting a quarter century of decline in "interpersonal trust").

165. Note, here, the echo of something closer to the original anxiety-driven work ethic. See *supra* notes 153–155 and accompanying text.

166. See DIENER & BISWAS-DIENER, *supra* note 159, at 93.

167. FRANK, *supra* note 122, at 6.

168. See, e.g., JONATHAN HAIDT, *THE HAPPINESS HYPOTHESIS: FINDING MODERN TRUTH IN ANCIENT WISDOM* 92–95 (2006) (referring to potentially controllable elements including noise, lack of control, shame, relationships, and task-immersion). Classically, see ABRAHAM H. MASLOW, *MOTIVATION AND PERSONALITY* (3d ed. 1987).

169. See HAIDT, *supra* note 168, at 94 ("The condition that is usually said to trump all others in importance is the strength and number of a person's relationships.").

doubtless, a multitude of self-help books about friendship and meaning, all supportable by book advertisements or marketing campaigns. Collections of our best data on genuine self-realization can be marketed and sold as commodities. Yet the overwhelming preponderance of advertising and commercial speech supports consumption with at best only a modest relationship to self-realization and flourishing as understood by the social scientists cited above. And the instances of commercial speech promoting genuine self-realization could in most cases survive broad commercial speech regulation¹⁷⁰ tested only for reasonableness.

CONCLUSION

The point of adopting a general standard of reasonableness in regulating commercial speech is thus only in part to combat any particular, context-specific harms associated with some instance of commercial speech. The main problem is not, say, that advertising leads us to overeat, or to buy defective products, or to over-consume some particular mineral. Our emphasis has instead been on the legitimacy of reasonably promoting a vision of the self-realization value underlying freedom of speech. Such a vision would involve a traditional, appealing, and social-scientifically supportable understanding of self-realization. Such a vision maintains that contemporary commercial speech pervades and dominates our cultural discourse from childhood on, to the general prejudice of crucial forms of the free speech value of self-realization.

The argument has thus focused on the most valuable forms of the crucial free speech value of self-realization in the sense of self-fulfillment, happiness, flourishing, and self-development. All else equal, under our cultural circumstances and their relevant power relationships, a reasonableness standard for the judicial examination of most democratically adopted forms of the regulation of purely commercial speech seems the most appropriate choice.

This is again not to suggest that the most basic consumptionist “lessons” are either necessarily intended by commercial speakers¹⁷¹ or are necessarily endorsed by all of us who opt for commercial speech-driven solutions to our real and perceived problems. In part, the choice of a

170. For an endorsement of the regulation of advertising directed to both adults and children with an eye toward the sheer inescapable omnipresence of such advertising, see KASSER, *supra* note 162, at 109.

171. Hypothetically, we can imagine that the persons who advertise, for example, mood altering prescription drugs intend for those drugs to be widely prescribed and purchased—and presumably used to some benefit by appropriate persons. But it would hardly follow that such speakers would in the case of their own children also endorse any quickly-arrived-at belief that prescription pharmaceuticals should be one’s first recourse, as opposed to a long-term alternative strategy of confronting life’s setbacks through means other than commercial consumption. More generally, it does not follow from the choice to widely advertise various such pharmaceuticals that any or all of such commercial speakers believes that any particular level of use, by the general population, is collectively desirable.

reasonableness standard for regulating commercial speech in general instead reflects a sense that no contemporary cultural institution is able and inclined to meaningfully contest the self-reinforcing, basic cultural dominance, in the relevant respects, of commercial speech.¹⁷²

It goes without saying that any speech that is intended to promote or otherwise discuss the constitutional value of commercial speech, to argue for a rigorous test for commercial speech regulation, or to disagree with any of the arguments presented above (whether presented by a commercially interested speaker or not)¹⁷³ will fall outside the scope of purely commercial speech and will thus deserve the fullest constitutional protection under strict scrutiny.¹⁷⁴ The debate in particular over the most useful meaning of the free speech value of self-realization—and on that basis, over the proper level of constitutional scrutiny for commercial speech regulation—deserves to be robust and uninhibited.

172. Note that as the established cultural institutions typically fail to meaningfully confront and counterbalance the most basic implied “messages” of commercial speech, commercial speech has recently been expanding into the various social media in numerous ways. See, e.g., TOM HIMPE, ADVERTISING IS DEAD: LONG LIVE ADVERTISING 6–14 (2008) (on the rise of staged events and “viral” marketing); LON SAFKO & DAVID K. BRAKE, THE SOCIAL MEDIA BIBLE: TACTICS, TOOLS, AND STRATEGIES FOR BUSINESS SUCCESS 5–14 (2009) (emphasizing the exertion of influence, rather than control, at the individual entity level); LARRY WEBER, MARKETING TO THE SOCIAL WEB: HOW DIGITAL CUSTOMER COMMUNITIES BUILD YOUR BUSINESS 3–35 (2d ed. 2009) (individual marketers as again aggregators or community builders as opposed to broadcasters or top-down controllers, at the level of the particular business); Ann Meyer, *Facebook, Twitter, Other Social Media Help Drive Business for Small Firms*, CHI. TRIB. (Apr. 27, 2009), http://articles.chicagotribune.com/2009-04-27/news/0904260181_1_social-media-facebook-social-networks. On the research cutting edge, see Stuart Elliott, *A Neuromarketer on the Frontier of Buyology*, N.Y. TIMES (Dec. 24, 2008), <http://www.nytimes.com/2009/01/04/education/edlife/IDEAs-NEUROMARKETING.html> (attempting to use MRI scanning to understand consumer brand loyalties and preferences).

173. For additional more generally sympathetic approaches to the protection of commercial speech, see, for example, Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 653 (1990) (referring to a possible “unspoken mistrust of the free market, a fear that unrestrained speech in the commercial arena will cause graver harm than unrestrained speech in other areas”); Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 106 (2007) (expressing concern over distinctive ideological preferences or more particularized objections to products or services as underlying certain critiques of commercial speech protection); Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777, 778 (1993) (questioning whether contemporary advertising “really causes much palpable social harm,” as well as the realistic benefits to discourse or the society from any regulatory regime consistent with core first-amendment values). See also LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? 138 n.16 (2005) (noting, in a different context, the difficulties in somehow neutrally or fairly determining “adequacy” in the expression of particular viewpoints).

174. See, e.g., *Ashcroft v. ACLU*, 542 U.S. 656, 665–66 (2004); *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979).
