

FREEDOM AND CULTURE: WHY WE SHOULD NOT BUY COMMERCIAL SPEECH

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INTRODUCTION

It is not surprising that a commercial culture would grant special constitutional protection to commercial speech. There is, however, no reason to suppose that special protection for commercial speech in our cultural context promotes the overall freedom and well-being of the public. A strong case can be made that in our culture, reducing the constitutional protection of commercial speech would actually tend to promote freedom and well-being in the long term. This is not because some commercial speech is false, fraudulent, or deceptive. The focus of attention should instead be on non-deceptive commercial speech, framed in the broader context of our culture.

Because this Article's argument is broad in scope, it begins by establishing some perspective before focusing on the current case law of commercial speech. Thus Section I below briefly surveys some of the classic discussions of commodity consumption and well-being. The Article then turns to the contemporary social science literature. This literature suggests that for most contemporary Americans, there is actually only a minimal relationship, if any, between consumption and well-being.

Section II discusses further the effects of commercial speech—in particular, the dominance, within its sphere, of commercialism in our cultural context. Commodification and commercial speech are pervasive in our society. Section II traces the implications of this state of affairs for freedom of speech generally.

Most important for free speech doctrine is the absence, in our culture, of any meaningful institutional challenge to the influence of commercialism and commercial speech. No cultural institution is able, or inclined, to provide significant "counterspeech" to the broad "message," intended or unintended, of commercial speech. Any reasonable regulation of commercial speech, whatever its more particular justification, actually tends, at least minimally and indirectly, to contribute to freedom and well-being. Such regulation has this effect by implicitly raising the issue of the proper role of commercialism and commercial speech in our society. There is, at a minimum, nothing in the Free Speech Clause that should bar a society from democratically acting on these beliefs, along with any other appropriate grounds for reasonably regulating commercial speech.

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This does not mean that government itself can be expected to counterbalance the influence of commercialism, or that implicitly questioning the cultural sovereignty of commercialism by itself establishes viable alternatives to commercialism. Reasonable regulation of commercial speech is merely one step in the process of legitimizing and democratically facilitating free choices of less commercial styles of life, in ways consistent with the Free Speech Clause and the rest of the Constitution.

With this basic argument in place, Section III surveys the most important discussions of the constitutional status of commercial speech. The commentators have been hopelessly split on whether or how to protect specially commercial speech. This dispute stems largely from commentators' inclination to insist on either a broad or a narrow range of values or purposes underlying the Free Speech Clause, and to define each of those values or purposes in ways friendly or unfriendly to commercial speech. This Article seeks to avoid this trap. One way of bypassing this interminable conflict is to adopt the broader cultural institutional focus I have introduced above. Thus this Article does not rest on a narrow, controversial view of why we value free speech in the first place.

To this point, I have relied on intuitive, uncontroversial ideas of the meaning of commercial speech. Classifying speech as either commercial or non-commercial often will be easy. But what if the idea of commercial speech turns out to be so complex or contestable as to be unusable in practice? Section IV is intended to allay such fears and offers a method for minimizing the cost of judicial errors in misclassifying commercial and non-commercial speech in borderline cases.

Section V then considers in some detail the case law establishing the degree of special protection currently accorded commercial speech. As matters stand, the constitutional tests imposed on regulations of commercial speech are unreasonably demanding or, at best, so inescapably subjective and indeterminate as virtually to invite an unsympathetic court to strike the regulation down. This state of the law does not serve the public interest.

Finally, the Conclusion expands the theme of the preceding section, warning that the level of protection currently given to commercial speech jeopardizes reasonable regulation of that speech in a wide variety of subject matter areas. Whether the benefits of striking down reasonable regulation of commercial speech in these areas outweigh the social costs of doing so is, in our cultural context, doubtful in the extreme.

I. WELL-BEING AND COMMERCIAL SPEECH

The relationship between acquiring consumer goods and genuine happiness or well-being has long been doubted. Classically, for example, Epictetus argues that "if you have not the want of riches, know that you possess more than this [rich] man possesses and what is worth much

more."¹ Epictetus raises the possibility that the desire for riches and the objects acquired from riches may be self-defeating and pathological.² Epictetus argues as well that the costs of consumption may take the form not merely of the loss of leisure or some other consumer good or service, but of an unintended, unforeseen change for the worse of one's character.³ A lifestyle emphasizing consumption is said to transform one's character adversely, in ways that the consumer does not recognize even after the fact.⁴ Thus Epictetus denies that a lifestyle emphasizing consumption is typically rational, in the sense of being chosen with conscious awareness of its most important costs.

Skepticism as to the relation between consumption and happiness is not unexpected in classical or medieval writers, but similar sentiments are expressed from surprising quarters. Consider, for example, the observation of Adam Smith, a writer not insensitive to the power and virtues of economic markets:

[W]ealth and greatness are mere trinkets of frivolous utility, no more adapted for procuring ease of body or tranquility of mind than the tweezer-cases of the lover of toys; and like them too, more troublesome to the person who carries them about with him than all the advantages they can afford him are commodious.⁵

Rousseau develops this theme in discussing the conversion of luxuries into "negative" necessities that have largely lost the power to please, but whose absence creates unhappiness.⁶ Following Rousseau's lead, Immanuel Kant argues that "with growing wealth we acquire fresh wants, and the more we satisfy them the keener becomes our appetites for more."⁷ Henry David Thoreau amplifies this theme in positing that "[m]ost of the luxuries, and many of the so-called comforts of life, are not only not indispensable, but positive hindrances to the elevation of mankind."⁸

Thoreau suggests two additional relevant points. First, his reference to "so-called comforts" suggests with Rousseau that our inevitable adjustment to a good means that we derive only diminishing satisfaction from that good, while becoming more vulnerable to its loss and to whatever

1. THE DISCOURSES OF EPICETUS book IV, ch. 9, at 399 (George Long trans., A.L. Burt ed. 1885); see also THE ANALECTS OF CONFUCIUS book VII, § 15, at 126 (Arthur Waley trans. 1938) ("The Master said, He who seeks only coarse food to eat, water to drink and bent arm for pillow, will without looking for it find happiness to boot").

2. See THE DISCOURSES OF EPICETUS, *supra* note 1, at 399.

3. See *id.* at 400.

4. See *id.*

5. Adam Smith, *Theory of the Moral Sentiments*, in 1 BRITISH MORALISTS 309 (part IV, ch. 1) (L.A. Selby-Bigge ed. 1897) (Dover 1965).

6. JEAN J. ROUSSEAU, A DISCOURSE ON INEQUALITY part II, at 113 (Maurice W. Cranston trans., Penguin 1984) (as commodities "degenerated into actual needs, being deprived of them became much more cruel than the possession of them was sweet; and people were unhappy in losing them without being happy in possessing them").

7. IMMANUEL KANT, LECTURES ON ETHICS 7 (Louis Infield trans., Hackett 1992) (1930) (citing Rousseau); see also STANLEY LEBERGOTT, PURSUING HAPPINESS 69 (1993) (quoting EMILE DURKHEIM, SUICIDE 249 (1952)).

8. HENRY D. THOREAU, WALDEN AND OTHER WRITINGS 13 (Brooks Atkinson ed., Modern Library 1950).

disutility may attach to our fear for its loss. Thus Thoreau, Rousseau and Kant hint at a loosely "addictive" quality of consumption. But Thoreau does not see addiction as inevitable. Thoreau argues instead that once we have obtained what is necessary for life, "there is another alternative than to obtain the superfluties; and that is, to adventure on in life now, [one's] vacation from humbler toil having commenced."⁹ For Thoreau, the alternative to endless acquisition and consumption is not asceticism, self-denial, or nirvana, but an affirmative, active use of one's liberation.

Early Marx was struck by the almost miraculous transformative powers of wealth and the acquisitions made possible by wealth.¹⁰ Marx was equally interested in the ideas of authenticity and alienation in its various forms.¹¹ Authentic, non-commodified bases and standards of human relationships and human standards may, in Marx's view, become historically possible. Some of these themes have been developed by later writers under the ambiguous¹² rubric of "commodity fetishism."¹³ In an informal sense, commodity fetishism refers to the tendency for the sphere of market exchange of goods and services to expand in ways destructive to the fullest and highest development of personality.

It is possible that market transactions tend, at least among the immediate parties, to in some sense maximize wealth.¹⁴ The theorists of commodity fetishism may respond, however, that it is a further and fallacious step to infer from this that human well-being in the broadest sense is most fully realized when social relationships are converted into market-based relationships, or when the logic of the commercial market affects the nature of those social relationships.

A society's attempt to satisfy the full range of its needs through commodity exchange has been described as an aspect of the process of reifica-

9. *Id.* at 14; cf. Ralph W. Emerson, *Thoreau*, in THE OXFORD AUTHORS: RALPH WALDO EMERSON 475, 477 (Richard Poirier ed. 1990) ("He chose to be rich by making his wants few."); WILLIAM WORDSWORTH, 1 THE POEMS 568 (John O. Hayden ed., Penguin 1990) ("Getting and spending, we lay waste our powers.").

10. KARL MARX, EARLY WRITINGS 191-93 (T.B. Bottomore trans., 1964) (Third Economic and Philosophical Manuscript).

11. *See, e.g., id.* at 192-94; cf. JACQUES ELLUL, MONEY AND POWER 76-79 (LaVonne Neff trans., 2d ed. 1984).

12. *See* Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1872 n.85 (1987) (referring to a non-technical sense of commodity fetishism in which one is said "to have one's identity too tied to possessions, to be too dependent upon thing-ownership for pleasure and a sense of self-worth"). We should, of course, recognize the increasingly important role of commercial services as opposed to commercial goods in our culture. Consider purchases of a wide range of advertised commercial services that in other cultures would be unnecessary because of the depth of genuine friendships. In our culture, friendship may itself be commercialized, and thereby impaired or tainted, or left undernourished.

13. Commodity fetishism in a non-technical sense has been identified simply as "the continuing emphasis on 'transactions' under capitalism." William J. Wagner, *The Contractual Reallocation of Procreative Resources and Parental Rights: The Natural Endowment Critique*, 41 CASE W. RES. L. REV. 1, 148 n.654 (1990).

14. *See, e.g.,* Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 433 (1971) (maximum information regarding competing products as necessary in order to maximize "material satisfaction").

tion.¹⁵ The reification of commodities, importantly, does not reflect the conscious, knowledgeable decision or intention of individuals or of the public collectively. It has been said that “[t]he commodity form . . . necessarily functions independent of, or autonomously from, the will of the subjects who set it in motion.”¹⁶ On this view, the commodity form, and the role of commodity exchange, tend to take on lives of their own.¹⁷ To the extent that this is so, persons can hardly be said to be sovereign, free, and autonomous with regard to the scale and scope of commodity exchange.

Thus pervasive commodification is not simply the embodiment of free choices. Equally importantly, though, commodification tends to be self-justifying. The very pervasiveness of commodity exchange tends to make any departure from commodity exchange as a way of fulfilling human needs and potentials seem unnatural, utopian, or simply inconceivable.¹⁸ Thus the free market exchange of goods and services is not the unequivocal embodiment of human development, human freedom, and fulfilled intention.¹⁹

One should consider as well how the early capitalists described by Max Weber, driven by other-worldly considerations, would have reacted to the historical shift in focus from capital accumulation to consumption, however inevitable such a shift may have been.²⁰ By the early part of the twentieth century, writers such as Thorstein Veblen²¹ and R.H. Tawney²² deemed a significant portion of the production and consumption of goods as “waste,” not in the sense that such goods were unwanted,²³ but that consumers had unnaturally learned to want such goods,²⁴ even though those goods did not genuinely serve human well-being.²⁵

15. See GEORGE LUKÁCS, *HISTORY AND CLASS CONSCIOUSNESS* 91 (Rodney Livingstone trans., 1971); see also HERBERT MARCUSE, *NEGATIONS: ESSAYS IN CRITICAL THEORY* 172-73 (Jeremy J. Shapiro trans., 1968).

16. Isaac D. Balbus, *Commodity Form and Legal Form: An Essay on the “Relative Autonomy” of the Law*, 11 *LAW. & SOC’Y REV.* 571, 574 (1977) (emphasis deleted).

17. See *id.*; Marlin H. Smith, *The Limits of Copyright: Property, Parody, and the Public Domain*, 41 *DUKE L.J.* 1233, 1272 n.202 (quoting *A DICTIONARY OF MARXIST THOUGHT* 86-87 (Tom Bottomore et al. eds., 1983)).

18. See Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 *AM. U. L. REV.* 939, 991-92 (1985).

19. Cf. MAX WEBER, *1 ECONOMY AND SOCIETY* 351 (Guenther Roth & Claus Wittich eds., 1978) (“[t]he various modes of want satisfaction, always the result of struggles between different interests, often exert a far-reaching influence beyond their direct purpose”).

20. See MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 172 (Talcott Parsons trans., Scribner’s 1958); see also THOMAS S. ROBERTSON, *CONSUMER BEHAVIOR* 102 (1970).

21. See THORSTEIN VEBLÉN, *THE THEORY OF THE LEISURE CLASS* (Mentor 1953) (1899).

22. See R.H. TAWNEY, *THE ACQUISITIVE SOCIETY* (1920).

23. See VEBLÉN, *supra* note 21, at 78.

24. See *id.* at 69.

25. See *id.* at 78; TAWNEY, *supra* note 22, at 37-38.

These themes were in turn developed by John Maynard Keynes²⁶ and at length by John Kenneth Galbraith.²⁷ Nevertheless, it is still standard for anyone trained in economics to think of consumer choices, in the absence of force and fraud, as revealed free preferences, and to think of non-fraudulent commercial speech as contributing to the efficiency of markets and to wealth maximization.

The contemporary discussion of the relationships among consumption, commercial speech, and well-being is addressed below, but it is useful to bear in mind two preliminary points. First, it is not inconsistent for someone to both wish to lead a life emphasizing consumption, and to be chagrined or embarrassed if too many other people make the same choice. By analogy, confining one's charitable donations exclusively to, say, Amnesty International does not imply that one should be pleased if everyone else does so as well. And second, we must not take the language itself of free markets, freedom of commercial speech, and revealed preferences to mean that we need not examine the actual effects of those institutions on human freedom, happiness, and well-being. Whether contemporary commercial speech actually promotes freedom and well-being is a partly normative and partly empirical question, and not simply a matter of the definitions of free markets and commercial speech.

The relationships among commercial speech, consumption, happiness, and freedom are doubtless complex. We may be tempted to think of them as simply mutually supporting, without conflict. But we may also suspect that matters may be more complicated than this, at least in today's highly developed economies. The novelist and philosopher Iris Murdoch argues, for example, that "modern industrial society, with all its vast diversity of entertainments and mass of incoherent information (of which television may serve as image and example), has radically changed people's lives and mode of well-being, bringing some benefits and doing much damage."²⁸

An important link in the argument for the protection of commercial speech, and of advertising in particular, is that such speech promotes wealth maximization, and thus satisfaction and well-being. But the linkage between wealth maximization and well-being or happiness, at least for our society, in our time, should not be established merely by definition. Let us then consider, for our culture, the evidence bearing upon the assumed linkage between wealth, consumption, and well-being.

26. See John M. Keynes, *Economic Possibilities for Our Grandchildren*, in *ESSAYS IN PERSUASION* 358, 365 (1963) (referring to needs "which are relative in the sense that we feel them only if their satisfaction lifts us above, makes us feel superior to, our fellows").

27. See JOHN K. GALBRAITH, *THE AFFLUENT SOCIETY* 120 (1958) ("Nothing in economics so quickly marks an individual as incompetently trained as a disposition to remark on the legitimacy of the desire for more food and the frivolity of the desire for a more elaborate automobile."); see also JOHN K. GALBRAITH, *THE CULTURE OF CONTENTMENT* 8 (1992) ("One may marvel at the attraction of often frivolous and dispensable consumer artifacts and entertainments in our time, but their ultimately controlling appeal cannot be doubted.")

28. IRIS MURDOCH, *METAPHYSICS AS A GUIDE TO MORALS* 372 (1992).

In some respects, it might be improper to treat wealth or income as an adequate proxy for consumer spending. But given the remarkably low contemporary American private savings rate²⁹ and the evidence that over 90% of American incomes are devoted to consumption,³⁰ it seems reasonable to draw upon the literature discussing the relation between income or wealth and reported happiness.

For many economists, voluntary consumption of non-defective goods is not the beginning, but the end of any inquiry into the relationship between consumption and happiness.³¹ This approach in turn reinforces the process by which "the market culture teaches us that money is the source of well-being."³² Many of us suppose that we would be significantly happier, over the long term, if we were able to afford to buy some particular set of commodities. Based on the available social science evidence, however, this belief is likely wrong.

It has been observed, for example, that "[w]hile GNP and material standards of life have advanced substantially in the post-World War II decades, the extent of happiness and the rate of subjective satisfactions have not."³³ In particular, real income rose quite substantially in the United States in the period from 1957 to 1973, but reported levels of satisfaction declined slightly during this period.³⁴ During this same period, interestingly, the percentage of those describing themselves as "very happy" steadily decreased, and this decrease was most evident among the most affluent.³⁵

It is tempting to dismiss these findings as largely a reflection of unique historical events. Naturally, it may be thought, a pre-Sputnik America would, all else equal, be happier than a post-Vietnam era America. To this, several replies may be made. First, the trends referred to above have not reversed themselves in the years following 1973.³⁶ As the data is extended in time, it becomes increasingly difficult to dismiss as aberrant or artifactual. Second, trying to explain the data on reported happiness in terms of broader cultural and historical events comes perilously close to undermining, rather than rescuing, the notion that wealth and consumption lead to happiness. And finally, the weak, limited relationship between income or expenditures and happiness is supported from a number of angles.

29. See generally THE U.S. SAVINGS CHALLENGE: POLICY OPTIONS FOR PRODUCTIVITY AND GROWTH (Charles E. Walker et al. eds., 1990); LAWRENCE H. SUMMERS & CHRIS CARROLL, WHY IS U.S. NATIONAL SAVING SO LOW? (1987).

30. See LEBERGOTT, *supra* note 7, at 65.

31. See Robert E. Lane, *Does Money Buy Happiness?*, 113 PUB. INT. 56, 61 (1993).

32. *Id.*

33. GEORGE KATONA, *PSYCHOLOGICAL ECONOMICS* 363 (1975).

34. See RONALD INGLEHART, *THE SILENT REVOLUTION* 116 (1977).

35. See Angus Campbell, *Subjective Measures of Well-Being*, 31 AM. PSYCHOLOGIST 117, 118 (1976).

36. See Alan T. Durning, *Are We Happy Yet? How the Pursuit of Happiness is Failing*, 27 FUTURIST 20, 21 (1993) (percentage of those reporting themselves as "very happy" fluctuating but stable at roughly one-third since the mid-1950s).

In fact, there is evidence suggesting that the linkage between income and happiness is growing weaker over time in the United States.³⁷ In any event, a number of surveys illustrate the weak relationship between money and happiness.³⁸ The evidence extends far beyond the American context. Robert Lane concludes, for example, that "[i]n almost all developed countries there is no substantial relation between income and well-being."³⁹ And the evidence in the American context can be particularized. For example, a 1973 study indicated that despite regional differences in income, when Southern state residents are "asked to evaluate the quality of their lives, they are modestly but consistently more positive than people living in the other major regions of the country."⁴⁰ A survey of 22 large lottery winners "found no clear difference between their happiness and that of controls."⁴¹ Nor does wealth tend to be associated with reduction in the amount of worrying; instead, "it simply changes the subject"⁴² of the worrying.

As a general rule, then, with some qualifications, happiness does not appear to be strongly linked with income and wealth, or, presumably, consumer expenditures guided, facilitated, or prompted by commercial speech. Turning from survey data to introspection confirms key elements of this conclusion. The philosopher James Griffin observes that "[i]t is depressingly common that when even some of our strongest and most central desires are fulfilled, we are no better, even worse, off."⁴³

As we have seen, the typical inability of consumption to generate lasting satisfaction has been variously diagnosed. When discussing consumption-based lifestyles, contemporary writers tend, again consistent with introspection, to recur to concepts such as self-defeatingness⁴⁴ and the "hedonic treadmill,"⁴⁵ to the phenomenon of being trapped,⁴⁶ and of being "addicted."⁴⁷ This literature thus helps quantify or make more precise the observations of some of the historical writers discussed above. Thus, for example, based upon his important survey work, the political scientist Ronald Inglehart concludes that "[w]hile increased prosperity may produce a short-term sense of gratification, an individual gradually adjusts his aspiration level to his external circumstances; after a certain time lag, one takes a given level of prosperity for granted and aspires to more."⁴⁸ This result should not be surprising.

37. See MICHAEL ARGYLE, *THE PSYCHOLOGY OF HAPPINESS* 94 (1987).

38. See *id.* at 93 (citing several studies).

39. Lane, *supra* note 31, at 57.

40. Campbell, *supra* note 35, at 118.

41. ARGYLE, *supra* note 37, at 97.

42. Lane, *supra* note 31, at 60.

43. JAMES GRIFFIN, *WELL-BEING* 10 (1986).

44. See, e.g., Richard A. Easterlin, *Does Money Buy Happiness?*, 30 *PUB. INTEREST* 3, 10 (1973).

45. *Id.*; Lane, *supra* note 31, at 63.

46. Easterlin, *supra* note 44, at 10.

47. *Id.*; TIBOR SCITOVSKY, *HUMAN DESIRE AND ECONOMIC SATISFACTION* 118 (1986).

48. INGLEHART, *supra* note 34, at 147.

If getting and spending, perhaps via commercial speech, does not significantly affect happiness, there are stronger influences on happiness. The evidence suggests that happiness is more crucially affected, generally, by "social relations, work, and leisure."⁴⁹ These sources of satisfaction often do not depend upon market-based consumption of goods and services.⁵⁰ Nor, for that matter, do we tend to find genuine friendship, appropriately stimulating work, and leisure in general to parallel consumption as an entrapping, self-defeating "treadmill."⁵¹ If wealth is subject to the law of diminishing returns,⁵² genuine friendship does not seem to be similarly vulnerable.⁵³

Admittedly, it is not easy to measure attributes like the "quality" of work or friendship in a rigorous way. But measurement problems do not obscure the basic message. Incidentally, the evidence seems to suggest that "informal visits between neighbors and friends, family conversation, and time spent at family meals have all diminished in the United States since mid-century,"⁵⁴ though this may have been offset by more interesting work for some persons.

Why we remain on the hedonic treadmill need not be fully answered here. It may be that at least some relationships, creative work, and productive, potentially enjoyable leisure activity require investments, initial sacrifices, or training which we are now unable or unwilling to undertake.⁵⁵ But a more important explanation, it would seem, for remaining on the hedonic treadmill may be more broadly institutional, with commercial speech at the heart of that explanation.

Before taking up the broader role of commercial speech in our cultural context, though, one should acknowledge the possibility that the genuinely poor, whether conceived of as a relatively poor nation-state, or as a segment of a particular society, would be significantly better off at higher consumption levels, or would, more particularly, be happier as a result of uninhibited non-deceptive commercial speech.

As it turns out, there is some controversy over whether poor societies are significantly unhappier than rich societies.⁵⁶ In any event, as the United States presumably does not fall into the former category, broadly increasing our collective happiness through additional consumer spending seems unlikely. More interesting is the relationship between income and happiness among the poor within our own society. This precise ques-

49. Durning, *supra* note 36, at 20; *see also* Lane, *supra* note 31, at 63.

50. *See* SCITOVSKY, *supra* note 47, at 119; *see also* Sut Jhally, *Commercial Culture, Collective Values and the Future*, 71 *TEX. L. REV.* 805, 809 (1993) ("[A] market-based society has a tendency to push people towards those things that it can provide—goods and services—while the real sources of satisfaction are outside the capability of the marketplace to provide.").

51. *See* Lane, *supra* note 31, at 63.

52. *See, e.g.*, Ruut Veenhoven, *National Wealth and Individual Happiness*, in *UNDERSTANDING ECONOMIC BEHAVIOR* 9, 19 (Klaus G. Grunert & Folke Ölander eds., 1989).

53. *See* Lane, *supra* note 31, at 63.

54. Durning, *supra* note 36, at 22.

55. *See* SCITOVSKY, *supra* note 47, at 123.

56. *Compare, e.g.*, Lane, *supra* note 31, at 56-57 and sources cited therein with ARCYLE, *supra* note 37, at 94 and Easterlin, *supra* note 44 (work is re-examined in Lane, *supra* note 31).

tion must be kept in perspective. We plainly ought to take relief of poverty far more seriously than we do, whether this would be politically popular or not. This is a matter of justice and basic moral principle quite independent of survey evidence of subjective satisfaction among the poor.⁵⁷

With this understanding, it is certainly plausible to argue that the declining marginal utility of wealth⁵⁸ is of scant relevance to the poor, and that money can at least reduce some forms of brute distress, such as relieving cold or hunger.⁵⁹ It is thus not surprising that people in poverty within our society tend to report greater unhappiness.⁶⁰

Assuming, then, some negative correlation between poverty within the United States and happiness, the question for our purposes then becomes whether the poor can be made significantly happier through a regime of specially constitutionally protected commercial speech. In some respects, this is a difficult question. But we must not lose sight of the obvious. A poor person benefits far more from a warm coat than from commercial speech about coats, even when the indirect benefits of unrestricted commercial speech in enhancing quality and driving down prices are considered.

Doubtless the poor may, to take one example, benefit from prescription drug price advertising, directly or indirectly, at least under some health insurance and welfare policies. But there are costs for the poor as well. It is possible that prescription drug price advertising may affect the commercial viability of small, independent pharmacies owned by persons with a long-term stake in a poor community. There may be some tradeoff between price and the availability of a pharmacist with ties to the poor community who is able and inclined to treat the local poor as individuals, who knows their broader needs, and who can establish the kind of personal, caring relationship of the sort that existing evidence suggests is important to happiness.⁶¹

As well, we must consider that as constitutional protection for commercial speech increases, so may the potential for commercial speech to manipulate and distract the poor, without violating whatever restrictions may exist on fraudulent, deceptive, or misleading commercial speech. Along with useful information about accessible goods in accessible places comes the broader, phantasmagorical effects of contemporary advertising as well.

57. See, e.g., KANT, *supra* note 7, at 42-43.

58. See Veenhoven, *supra* note 52, at 19.

59. See ARGYLE, *supra* note 37, at 93.

60. See *id.* at 94; Lane, *supra* note 31, at 57; Campbell, *supra* note 35, at 121.

61. See generally Durning, *supra* note 36 and Lane, *supra* note 31 and accompanying text. For discussion of similar issues without special reference to the poor, see the several opinions in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

II. THE EFFECTS OF COMMERCIAL SPEECH

One need not deny the beneficial effects of commercial speech generally or of advertising in particular. However maldistributed wealth may be, there is plainly more of it, in some obvious sense, in a materialist-oriented consumer economy.⁶² Commercial speech, including various forms of advertising, obviously plays a significant role in this process. This discussion does not minimize the plight of the poor, who plainly are better off with consumer goods such as clothing and food.⁶³ More broadly, the society as a whole clearly benefits from rapid dissemination of accurate information concerning, for example, a safe and uniquely effective drug treatment for a serious illness.⁶⁴

As well, it is difficult to deny the adverse consequences on wages and employment if many of us tomorrow abandoned familiar consumption levels in favor of communing with nature or verse composition.⁶⁵ Of course, my proposal to accord no special constitutional protection to commercial speech does not seem likely to lead to any such consequences. Those persons who eventually discover themselves in possession of excess income and wealth may reasonably be advised to enhance the effective market demand of the poor.

Nor should we deny that the very activity of searching for, selecting, and acquiring commercial goods and services may itself be utility-enhancing.⁶⁶ On the contrary, "it is a cliché to say that the best way to deal with being depressed is to go shopping."⁶⁷ Whether this is actually the best path to well-being seems, however, given the evidence and analyses discussed above,⁶⁸ rather doubtful. Or so a reasonable government might come to believe.

Neither is it necessary for us to endorse any distinction between natural, healthy, and authentic consumer needs and artificial, unhealthy, or contrived consumer needs.⁶⁹ To some degree, as Jean Baudrillard has argued, modern advertising often tends to break down any traditional distinction between authentic and contrived, artificial responses to advertisements.⁷⁰ It might be noted, though, that if any distinction between natural and contrived responses to advertising tends to dissolve, it

62. See KATONA, *supra* note 33, at 363.

63. See, e.g., ERICH FROMM, *THE REVOLUTION OF HOPE: TOWARD A HUMANIZED TECHNOLOGY* 120 (Ruth N. Anshen ed., 1968).

64. See Keith B. Leffler, *Persuasion or Information? The Economics of Prescription Drug Advertising*, 24 J.L. & ECON. 45, 74 (1981).

65. See FROMM, *supra* note 63, at 131.

66. See CHRISTOPHER LASCH, *THE TRUE AND ONLY HEAVEN: PROGRESS AND ITS CRITICS* 521-22 (1991) [hereinafter LASCH, *THE TRUE AND ONLY HEAVEN*]. But see ROBERT E. LANE, *THE MARKET EXPERIENCE* 469 (1991).

67. Stuart Ewen, *Advertising and the Development of Consumer Society*, in *CULTURAL POLITICS IN CONTEMPORARY AMERICA* 82, 85 (Ian Angus & Sut Jhally eds., 1989).

68. See *supra* text accompanying notes 1-61.

69. See, e.g., FROMM, *supra* note 63, at 124; JERRY MANDER, *FOUR ARGUMENTS FOR THE ELIMINATION OF TELEVISION* 125 (1978) (citing, perhaps controversially, an electric hair dryer as a contrived, artificial, implanted need).

70. See Jean Baudrillard, *The Masses: The Implosion of the Social in the Media*, 16 *NEW LITERARY HISTORY* 577, 578-79 (Marie McLean trans., 1985).

may become more difficult to specify how commercial speech distinctively serves any of the values typically thought to underlie the free speech clause.⁷¹ If, for example, our responses to ads tend to be neither classically manipulated nor authentic, it may be hard to say why that murky state of affairs is most consistent with genuine autonomy.

Finally, we need not ascribe to commercial speech, and to commercial advertising in particular, powers they do not possess. Plainly, neither particular advertisements nor broader ad campaigns are invariably effective. It is reported, for example, that "about 70% of test-market brands are not expanded nationally and can therefore be classed as failures."⁷² The ability of advertising to influence choice among competing brands often does not translate into effective influence over whether one buys that general kind of good at all.⁷³ And even when advertising affects behavior, the effect may well be temporary.⁷⁴

None of this implies, however, that commercial advertising is without significant, long-term, intended or unintended effects on American culture and decisionmaking. It is admittedly true that advertisements often compete against each other,⁷⁵ with one product's gain being another product's loss. But the proliferation of ads does not amount simply to a process of mutual annihilation. Importantly, advertisements that conflict or compete at one level may, at another level, mutually reinforce one another. Such effects need not be intended or even recognized. Consider, by way of loose analogy, that in the natural world, two or more separate waves may mutually interfere or tend to cancel each other if they arrive out of phase, or they may tend to reinforce one another,⁷⁶ thereby in some respect heightening their potential impact.

At a fairly specific level, an ad for a particular drug, as "reinforced" by other ads for competing and non-competing drugs, may tend in our cultural context to promote drug ingestion more generally as a response to medical, psychological, and even social problems. As one former participant in the process has written, "[w]hile it might matter to Upjohn or Cutter Laboratories which drug a consumer buys, both are in agreement that they benefit whenever people seek any drug rather than a nondrug solution to a problem."⁷⁷ More precisely, though, this mutual reinforce-

71. See *infra* note 78; see also Ronald K.L. Collins & David M. Skover, *Commerce & Communication*, 71 TEX. L. REV. 697, 712 (1993) (noting commercial ads have "helped devalue the coin of communication by developing a massive, unthinking tolerance for nonsense" (quoting LEO BOGART, *STRATEGY IN ADVERTISING* 7 (2d ed. NTC Business Books 1984) (1967))).

72. J. Hugh Davidson, *Why Most New Consumer Brands Fail*, HARV. BUS. REV., Mar.-Apr. 1976, at 117; see also MICHAEL NOVAK, *THE SPIRIT OF DEMOCRATIC CAPITALISM* 108 (1982) ("The history of advertising is full of quirks and failures.").

73. TIBOR SCITOVSKY, *THE JOYLESS ECONOMY* 205 (1976).

74. See Lester D. Taylor & Daniel Weiserbs, *Advertising and the Aggregate Consumption Function*, 62 AM. ECON. REV. 642, 650 (1972).

75. NOVAK, *supra* note 72, at 108.

76. E.g., NICK HERBERT, *QUANTUM REALITY* 74 (1985).

77. MANDER, *supra* note 69, at 126.

ment and "generalization" process would seem to operate whether it is intended or even recognized by any party, including the audience.⁷⁸

More broadly, even when commercial ads compete, or fail to sell a particular product, they may at least inadvertently, through their mutually reinforced cumulative impact, legitimize and support commercial consumption as a style of life and a solution to life's problems.⁷⁹ Thus it is only a harmless exaggeration to say that "[a]dvertising serves not so much to advertise products as to promote consumption as a style of life."⁸⁰

Thus while consumers reject or ignore most of the particularized ad messages they receive, as would inevitably be the case, they may be less able to resist the unintended broader "message" of the superiority of commercial consumption as a basic approach to living.⁸¹ This assumption reflects a realistic assessment of the contemporary balance of cultural forces. Consider that one writer has estimated that by the age of retirement, the typical American will have seen at least two million television commercials.⁸² This is a remarkable figure. Children's television programming, where basic preferences might be formed, commonly seeks to merge substantive programming and commercial huckstering.⁸³ The vector of forces tending to engender commercial consumption is, plainly, powerful.

By itself, the power of commercial speech to shape inadvertently our culture might not be so troubling, were it not for the fact that today, in our cultural context, there is no realistic prospect for effective "counter-speech" tending to promote noncommercial approaches to life's problems and opportunities. In our cultural circumstances, no institution currently devotes any real energy or resources to provide a counterspeech remedy⁸⁴ for the implicit message of our commercial culture.⁸⁵ Of course, some

78. Actually, the case for restricting commercial speech is additionally strengthened to the degree that the typical ad does not reflect an actual intent to promote an ethos of materialism or consumption, or any other broadly social idea. See, e.g., R. GEORGE WRIGHT, *THE FUTURE OF FREE SPEECH LAW* 1-31 (1990).

79. See Durning, *supra* note 36, at 22.

80. CHRISTOPHER LASCH, *THE CULTURE OF NARCISSISM* 137 (1979) [hereinafter LASCH, *THE CULTURE*]; see also LASCH, *THE TRUE AND ONLY HEAVEN*, *supra* note 66, at 518.

81. See Ewen, *supra* note 67, at 83. Again, it is possible that the expansion of commercialism tends to promote the atrophy of the most non-commercial elements of other cultural institutions.

82. NEIL POSTMAN, *AMUSING OURSELVES TO DEATH* 126 (1985); see also Collins & Skover, *supra* note 71, at 707 (noting twelve billion display ads, 2.5 million radio ads, and 300 thousand television commercials generated each day; average person spends one and a half years watching commercials).

83. See JAMES B. TWITCHELL, *CARNIVAL CULTURE* 246-47 (1992) (arguing that children's television cartoons are essentially a merchandising medium); see also Ellen Edwards, *The Children's Half-Hour: Hostage to Toy Makers?*, WASH. POST, June 10, 1994, at A1 (arguing that children's television is driven by toymakers).

84. See *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (explaining that prohibition of free speech is dangerous and not to be done to avert merely trivial harms), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969).

85. See LASCH, *THE CULTURE*, *supra* note 80, at 140 (arguing that teachers pacify students by making school painless); LEBERGOTT, *supra* note 7, at 34-35 (arguing that Western culture maximizes pleasure as a goal); Ronald K.L. Collins & David M. Skover, *The Psychology of First Amendment Scholarship: A Reply*, 71 TEX. L. REV. 819, 826 (1993) (quoting LEO BOGART, *STRATEGY IN ADVERTISING* 107 (2d ed. 1984)).

elements of many cultural institutions speak, albeit softly or occasionally, against consumption-oriented styles of life. But even their message is often mixed, and it is overridden by the broader culture.

This is a thesis about the sustained balance of cultural institutional forces. It is admittedly not a theme the correctness of which can be demonstrated to a skeptic by a few footnote citations. Its plausibility is presumably widely accepted, and the evidence for its truth can be derived from a mere glance at our contemporary culture. As well, some portion of those who have urged special constitutional protection for commercial speech may find my basic thesis regarding the current institutional role of commercial speech to be plausible and important, and thus reconsider their position on the constitutional protection of commercial speech.

This is not to argue the more controversial thesis that genuine freedom of speech requires at least rough equality of resources among contending forces.⁸⁶ All one need argue is that in our current cultural circumstances, no single cultural institution, or set of such institutions, is either inclined to, or able to, provide any substantial "countervailing" speech to counteract the broad, reinforced influence, whether intended or not, of commercial advertising speech. A "bias," in the sense of a distinct vector of cultural institutional forces, toward some form of consumption of commercial goods and services clearly characterizes our day.⁸⁷ Of course, some persons are less affected by this cultural bias than others, but this would be true of even the most dominant cultural tendencies in any society.

One should take a moment, though, to consider a possible objection to, or extension of, the argument thus far. Perhaps one might argue that a parallel analysis could be developed for the political sphere, and particularly for the case of competing electoral candidates of opposing ideologies or parties. Isn't it possible that even genuinely competing electoral candidates may, like some waves in the natural world, or like most commercial advertising speech, tend perhaps unintentionally to reinforce certain basic political themes, so as to "bias" public thinking, perhaps in ways not responded to by other institutions?

Certainly, a debate continually dominated by one range of ideologies or parties may tend, even unintentionally, to delegitimize other political options. But for our present purposes, there are important disanalogies between contemporary electoral competition and the competition of the marketplace. A casual examination suggests that most commercial ads in

86. See *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (holding that to restrict speech of some elements in society to enhance voice of others is "wholly foreign to the First Amendment"); see also Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 YALE L.J. 1623, 1627 (1988); J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976) (analyzing *Buckley* and Federal Election Campaign Act Amendments of 1974).

87. The language of "bias" in this respect is drawn from FRED HIRSCH, *SOCIAL LIMITS TO GROWTH* 84 (1976). Note that this bias need not be toward "conspicuous" consumption or toward the most expensive affordable goods and services. There may well be fluctuations in a society's consumption patterns over time from the exotic to the plain and functional. See also Holly Brubach, *Sackcloth and Ashes*, 67 NEW YORKER, Feb. 3, 1992, at 78.

all media do not refer invidiously to any competitor's good or service, let alone to all significant competitors. Where ads are comparative, they are often done with a light touch. There is rarely any implication that any competitor's product or service is, in any absolute sense, shoddy, dangerous, or not of value in the abstract.

In the electoral realm, however, invidious comparisons are common,⁸⁸ even increasingly so.⁸⁹ While the effects of "negative" or "attack" ads in political campaigns may be complex and difficult to track,⁹⁰ such ads often repel the public, contributing to voter disenchantment, apathy, cynicism, and low voter turnout.⁹¹ Certainly, there is a greater sense conveyed that one's electoral opponent is affirmatively unworthy or harmful than is typically conveyed in the commercial context. Thus electoral speech by competing candidates may not be as typically mutually reinforcing as in the case of commercial ads.

Of course, this is not to deny that the constant exposition of mainstream political ideologies tends to make alternative perspectives seem implausible or inconceivable; this is a central problem in democratic theory. This problem, however, need not be resolved here. Instead, the reader is invited to accept either of two views. First, that mainstream political speech tends, at least by omission, to unreasonably stigmatize some or all non-mainstream political speech and that in the name of equality or freedom, the government should do something about this. Or second, that there is a significant difference between the ways in which commercial speech marginalizes non-commercial attitudes and the ways in which mainstream political speech marginalizes non-mainstream political views, such that it is reasonable to regulate commercial speech in ways unacceptable in the realm of political speech. On either of these views, the argument for the reasonable regulation of commercial speech can go forward.

Nor is it correct to think of all commercial ads as propositional. As any investigation suggests, advertising has undergone qualitative change over time.⁹² Many, though hardly all, contemporary ads are largely imagistic or atmospheric, or seek to link a product with a mood, a celebrity, or a somehow assumedly appealing non-celebrity, without proposition

88. See, e.g., Neal J. Roese & Gerald N. Sande, *Backlash Effects in Attack Politics*, 23 J. APPLIED SOC. PSYCHOL. 632, 651 (1993) (arguing that politicians frequently resort to a discussion of emotional issues).

89. See Sharyne Merritt, *Negative Political Advertising: Some Empirical Findings*, 13 J. ADVERTISING 27-28 (1984); Ruth Shalit, *The Oppo Boom: Smearing for Profit Takes Off*, NEW REPUBLIC, Jan. 3, 1994, at 16; see also *Campaigns in the Muck*, USA TODAY, Feb. 18, 1994, at A1 (increased negative campaigning anticipated by political consultants for 1994).

90. See Gina M. Garramone, *Voter Responses to Negative Political Ads*, 61 JOURNALISM Q. 250 (1984) (arguing that backlash is most common effect of negative advertising); Merritt, *supra* note 89, at 37 (admitting that study was limited due to focus on only one election); Roese & Sande, *supra* note 88.

91. See Merritt, *supra* note 89, at 37; Roese & Sande, *supra* note 88, at 651. For broader discussion, see generally KAREN S. JOHNSON-CARTEE & GARY A. COPELAND, *NEGATIVE POLITICAL ADVERTISING: COMING OF AGE* (1991).

92. See RAYMOND WILLIAMS, *TELEVISION: TECHNOLOGY AND CULTURAL FORM* 68 (1974) (arguing that television, as it evolves, is allowing people to experience educational processes rather than just being taught about the processes).

or promise.⁹³ Such ads are neither true nor false, and neither descriptive nor misleading in the traditional sense.⁹⁴ While some modern ads may perhaps be thought of as "semihypnotic and irrational"⁹⁵ by design, and others as traditionally propositional, many contemporary ads are non-propositional.

To the extent that freedom of speech is a matter of a search for some propositional truth, protecting ads that do not implicate truth or falsity is in that respect misguided. Such ads are neither fraudulent, deceptive, misleading, nor the opposite, thus cohering poorly or not at all with some of the categories and criteria by which the Supreme Court examines such speech.⁹⁶

Of course, not all commercial speech disdains truth and falsity. More broadly, regulation of contemporary commercial speech raises interesting issues of genuine freedom of speech and of freedom in general. The point of reasonable restrictions on commercial speech is not, however, to flatly prohibit underlying transactions between commercial sellers and potential buyers.⁹⁷ In our cultural context, the effects of reasonable regulation of commercial speech on freedom are more subtle.

It is important, for example, not to confuse "diversity of product choice with diversity of life-style or thoughts."⁹⁸ Having a choice among brands or products would be a poor sort of freedom if one's culture left one unable to take less consumption-oriented alternatives seriously. More particularly, to the extent that we participate in consumption fads on the basis of popularity, or "bandwagon" effects,⁹⁹ we are neither choosing autonomously, nor achieving any genuinely worthy community, especially between generations.¹⁰⁰

More insidiously, over the long term, in a cultural context in which consumption is a dominant and only ineffectively challenged theme, largely unregulated speech on behalf of consumer goods and services may

93. See POSTMAN, *supra* note 82, at 127 (commercial ads as increasingly non-propositional).

94. See JULES HENRY, *CULTURE AGAINST MAN* 47 (1963); MARK POSTER, *THE MODE OF INFORMATION* 59 (1990) (discussing the work of Jean Baudrillard); see also *supra* note 70 and accompanying text; Todd F. Simon, *Defining Commercial Speech: A Focus on Process Rather Than Content*, 20 NEW ENG. L. REV. 215, 239 (1985) (arguing that non-objective advertising is "inherently unverifiable").

95. FROMM, *supra* note 63, at 123; Bailey Kuklin, *Self-Paternalism in the Marketplace*, 60 U. CIN. L. REV. 649, 649 (1992).

96. See, e.g., *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 340 (1986) (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980)).

97. See KATONA, *supra* note 33, at 376 (questioning Fromm's assertion that the consumer is passive and questioning the need for legal restrictions on advertising); NOVAK, *supra* note 72, at 108; SCITOVSKY, *supra* note 47, at 126 (arguing that although consumer stimulation is expensive, the proper remedy does not include denying the stimulus to the consumer).

98. MANDER, *supra* note 69, at 125.

99. See HARVEY LEIBENSTEIN, *BEYOND ECONOMIC MAN: A NEW FOUNDATION FOR MICROECONOMICS* 48-49 (1976) (defining "bandwagon effect" as "the desire to join the crowd").

100. See generally Robert D. Putnam, *The Prosperous Community: Social Capital and Public Life*, 13 AM. PROSPECT 35 (1993). See also Jhally, *supra* note 50, at 813 (commercial culture as discouraging bonds with future generations).

tend to change our basic tastes, capacities, and judgments¹⁰¹ in ways we do not anticipate or even recognize. Some of these changes, such as increasingly demanding standards for product warranties, may well be benign. Others, however, such as loss of capacity to value, to enjoy, or even to envision non-market solutions to problems, are not.¹⁰² To claim that a "free market" in non-deceptive commercial speech makes us genuinely freer thus raises, at a minimum, serious problems of measurement and commensurability. Why must a democratic society interpret its constitution to bias the choice in the commercial direction if that society wishes to maximize the most valuable sorts of freedom?

To illustrate this general problem, let us consider, almost at random, one particular scenario. With regard to a typical consumer good, the interests of producers and consumers may both be served, via expansion of market and economies of scale, if consumer tastes regarding a product can be modified in the direction of some homogeneous fairly low common denominator.¹⁰³ There need be nothing narrowly or classically deceptive or coercive about this taste modification process, in the sense that no literal force or fraud is applied. Jazz or classical music, say, is still in some sense available, but is widely found to be genuinely unpalatable. Admittedly, in utilitarian terms, consumers may well gain from even rather intensive development of this process, at least in some sense. But the price in freedom may be high.

True, one must grant that freedom in general and freedom of speech are hardly equivalent. But for our immediate purposes, the most relevant commonly cited purpose or value underlying freedom of speech is that of "self-realization," or the development and flourishing of the personality.¹⁰⁴ The dubious effect of largely unregulated commercial speech on consumers' genuine self-realization means that such speech may actually undermine the purposes of free speech as much as it may undermine freedom more generally.

Thus, even setting aside all cases of false or otherwise deceptive commercial speech, it is far from clear that freedom in general, or at least freedom of speech, is unequivocally maximized by special constitutional protection for commercial speech. What tips the balance, again, is a realistic assessment of contemporary institutional forces and the absence of any real institutional capacity for, or interest in, challenging the dominance of the culture of commercial speech.

101. See SCROVSKY, *supra* note 73, at 5 (arguing that the theory that consumers know what is best for them is unscientific and inaccurate).

102. See *id.*; see also Allan C. Hutchinson, *More Talk: Against Constitutionalizing (Commercial) Speech*, 17 CAN. BUS. L.J. 2, 15 (1990) ("a commercially saturated atmosphere" as tending to "trivialize and impoverish democratic politics").

103. See SCROVSKY, *supra* note 73, at 9 (arguing that sellers cater to the "desires everybody shares").

104. See, e.g., C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. PA. L. REV. 646 (1982); Robert J. Sharpe, *A Comment on Allan Hutchinson's Money Talk: Against Constitutionalizing Commercial Speech*, 17 CAN. BUS. L.J. 35, 39 (1990).

As matters stand, any reasonable governmental restriction on commercial speech thus serves, if only minimally, to reduce the degree of cultural institutional bias¹⁰⁵ in favor of a commercial speech-guided culture of consumption. Whether such restrictions on commercial speech tend, in the aggregate, to promote genuine happiness, freedom, or human dignity by reducing that bias should be left to reasonable democratic decisionmaking. It is then up to the society to take other necessary steps toward legitimizing or encouraging less commercial ways of life, consistent with the Constitution and other democratic policy preferences.

III. COMMERCIAL SPEECH AND THE VALUES UNDERLYING FREEDOM OF SPEECH

The question of whether, or how stringently, to protect constitutionally commercial speech has proved remarkably resistant to consensus. Perhaps symbolically, the leading modern free speech theorist, John Stuart Mill, was obviously ambivalent as to the level of protection properly to be accorded some forms of commercial speech.¹⁰⁶ Contemporary writers are, if not individually ambivalent, at least mutually divided.¹⁰⁷

One broad camp favors some degree of special First Amendment protection for commercial speech.¹⁰⁸ Writers in this camp recognize that many commercial ads they would protect are less propositional than imagistic or symbolic, but they note that such ads may promote distinctive lifestyles, such as materialism or hedonistic consumption, as might fully protected non-commercial speech.¹⁰⁹ Failure to protect commercial speech may, according to some, even be dangerous. Such failure to protect commercial speech fully may, it is said, provide government with "a powerful weapon to suppress or control speech by classifying it as merely commercial."¹¹⁰

In contrast, there is a broad group of writers more skeptical of the need for special protection for commercial speech.¹¹¹ In this camp, it is sometimes argued that special protection for commercial speech may en-

105. For broader background, see Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1425 (1986) ("Contemporary social structure will, if left to itself, skew public debate.").

106. See JOHN STUART MILL, *ON LIBERTY* 168-69 (Penguin ed. 1974) (1859).

107. See, e.g., Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 BROOK. L. REV. 5, 6-9 (1989) (providing a broad typology of approaches to the constitutional status of commercial speech).

108. See, e.g., *Leading Cases of the 1992 Supreme Court Term*, 107 HARV. L. REV. 144, 225 (1993) (stating that the Supreme Court "continues to leave 'commercial speech' with insufficient protection").

109. See, e.g., Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777, 791 (1993).

110. Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 653 (1990).

111. See, e.g., Joshua Cohen, *Freedom of Expression*, 22 PHIL. & PUB. AFF. 207, 237 (1993) (commercial speech as allegedly less closely connected with "expressive" interests than is political speech); Alvin I. Goldman, *Epistemic Paternalism: Communication Control in Law and Society*, 88 J. PHIL. 113, 128 (1991) (asserting that "an unregulated marketplace of ideas seems essential for political speech but not for commercial speech").

danger, rather than strengthen, protection for political speech, on the grounds that such a policy might, over time, erode any public conviction of the core value of freedom of speech.¹¹² Alternatively, it has been argued that commercial speech generates fewer "external" benefits uncaptured by the speaker than does political speech.¹¹³

Typically this battle is played out, quite inconclusively, over the relationship between commercial speech and one or more of the values or purposes thought to underlie special protection for free speech. Perhaps the basic problem in this regard is that "[i]n a pluralistic, heterogeneous society, such as ours, people disagree sharply over the needs, interests, and desires that give rise to the evaluative points of the First Amendment taxonomy of worth."¹¹⁴

Thus it has been argued that commercial speech is either unrelated,¹¹⁵ or at best differently linked,¹¹⁶ to the values thought to underlie the Free Speech Clause. Not surprisingly, the contrary also has been argued, on various grounds. Commercial speech, it is argued, typically expresses "ideas and values."¹¹⁷ Professor Burt Neuborne has observed that "abandoning protected commercial speech altogether denies consumers access to valuable information."¹¹⁸ Michael Perry has argued for protection of commercial speech under what he calls the "democratic" and "epistemic" conceptions of free speech.¹¹⁹ Writers such as Martin Redish¹²⁰ and Daniel Farber¹²¹ have noted the artistic value of at least some commercial advertisements.

This sort of persistent, apparently unresolvable controversy is paralleled by the debate over the relationship between commercial speech and the more particular value of self-realization. Some writers have argued

112. See Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 486 (1985).

113. See Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 39-40 (1986). Of course, to the extent that commercial speech, or advertising in particular, helps to generate a culture of commodity consumption, such speech may create external effects, both positive and, as we have suggested, negative.

114. Heidi L. Feldman, *Objectivity in Legal Judgment*, 92 MICH. L. REV. 1187, 1241 (1994).

115. See, e.g., Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 353 (1978) (noting the public's interest in commercial speech messages as "totally irrelevant to first amendment values").

116. See Thomas I. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CAL. L. REV. 422, 460 (1980) ("Commercial speech does not promote the underlying values of the system in the same manner as does other expression.").

117. Ronald D. Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U. ILL. L. F. 1080, 1091.

118. Burt Neuborne, *A Rationale For Protecting and Regulating Commercial Speech*, 46 BROOK. L. REV. 437, 440 (1980); see also *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980) ("The First Amendment's concern for commercial speech is based on the informational function of advertising."); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978).

119. Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U. L. REV. 1137, 1171-72 (1984).

120. Redish, *supra* note 14, at 431.

121. Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372, 384 (1979).

that commercial speech typically promotes self-realization,¹²² while others are more skeptical on this score.¹²³ This debate remains unresolvable largely because of ambiguity surrounding ideas such as self-expression and autonomy.¹²⁴ Roughly, self-realization in the sense of acting as one happens to wish with respect to receiving commercial messages is obviously promoted by freedom of commercial speech. In contrast, if we think of self-realization in terms of human dignity or the highest development of the human personality, the connection between commercial speech and such self-realization will seem much more dubious. Whether unregulated non-deceptive commercial speech promotes self-realization in the sense of happiness or subjective well-being has been controversial, but as we have seen above,¹²⁵ available evidence suggests that it does not.

In this context, little is gained by insisting upon a controversially narrow view of free speech values. Perhaps the leading exponent of such an approach is C. Edwin Baker. Professor Baker argues that "interpretations of the free speech clause should focus on the liberty or freedom of the speaker"¹²⁶ as opposed to that of any actual or potential audience. As Professor Baker then develops the argument, corporations—or more particularly, non-household-oriented, non-media corporations other than labor unions—fall outside the scope of the Free Speech Clause.¹²⁷ This is because such corporations are, in a competitive market, structurally bound to pursue profit in some relevantly constrained, determinate way that sufficiently explains their speech, and cannot otherwise pursue truth, anyone's self-realization, or freedom.¹²⁸

Each of the necessary steps in Professor Baker's subtle and complex argument will be plausible to some. But the combined controversiality of those steps leads one to suspect that the argument is acceptable only to a subset of those already disposed to deny special constitutional protection to commercial speech. Given the overall stringency of Professor Baker's premises, his theory is of only limited use in persuading those who are agnostic on the question of protecting commercial speech.

122. See, e.g., David F. McGowan, *A Critical Analysis of Commercial Speech*, 78 CAL. L. REV. 359, 361 (1990); Kenton F. Machina, *Freedom of Expression in Commerce*, 3 L. & PHIL. 375 (1984) (arguing for full protection for commercial speech on "autonomy" grounds).

123. See, e.g., Michael Davis, *The Special Resiliency of Commercial Speech as Deus Ex Machina*, 6 L. & PHIL. 121 (1987) (replying to Machina, *supra* note 122); Thomas H. Jackson & John C. Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 14 (1979) (asserting "commercial speech has no apparent connection with the idea of individual self-fulfillment").

124. See, e.g., NICHOLAS WOLFSON, *CORPORATE FIRST AMENDMENT RIGHTS AND THE SEC 63* (1990) (linking the ideas of self-expression, human dignity, and autonomy).

125. See *supra* text accompanying notes 1-61.

126. C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 4 (1976).

127. See *id.* at 13, 28, 40.

128. See *id.* For further relevant discussion by Professor Baker, see C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097, 2232-33 (1992) (expanded in C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* (1994)). Of course, structural constraints may be a sufficient explanation for speech without being necessary to explain the speech, which may have other sufficient motivations.

More generally, theorists' understandable focus on whether, or to what extent, commercial speech promotes the values thought to underlie the Free Speech Clause has been unproductive because of the equivocality and controversial nature of the concepts involved. It is largely because of this methodological dead end that one takes a different tack. First, the widely presumed linkage between typical commercial speech and freedom or happiness is in doubt. Second, the practical irrelevance of "counter-speech" responses to commercial speech in a cultural context in which no institution is either able or inclined to provide any such challenge on a meaningful scale is noted.

IV. COMMERCIAL AND NON-COMMERCIAL SPEECH

To this point, we have set aside the question of a precise, maximally useful definition of commercial speech, relying instead on uncontroversial examples. A precise and widely useful definition, allowing courts or other persons to classify easily and uncontroversially instances of speech into commercial or noncommercial may well not be possible. But one may at least provide some reason for believing that ambiguities in the idea of commercial speech will not commonly generate implausible or seriously harmful results.

In this respect, the Supreme Court has been of limited assistance.¹²⁹ The leading commercial speech case, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,¹³⁰ referred to "speech which does 'no more than propose a commercial transaction.'"¹³¹ On the other hand, the Court has also, in the influential case of *Central Hudson Gas & Electric Corp. v. Public Service Commission*,¹³² referred to "expression related solely to the economic interests of the speaker and its audience."¹³³

Apart from their inconsistency, these two definitions of commercial speech are useful only in particular contexts. Consider first the "no more than propose a commercial transaction" approach. Intuitively, commercial speech may involve more than merely a proposal without losing its commercial character. This definition may serve in contexts of commercial advertising, securities offerings, and other areas, as long as nothing hangs on the fact that this definition itself does not specify what is meant by 'commercial.' But other intuitively commercial forms of speech, such as many proxy statements, corporate financial statements, reports to shareholders, commercial contracts, product safety brochures, warranties, product labels, and so on do not fit neatly within the category of "proposals."¹³⁴

129. See David F. McGowan, *supra* note 122, at 400-02 (discussing and critiquing judicial inconsistency in defining the scope of commercial speech).

130. 425 U.S. 748 (1976).

131. *Id.* at 762 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)); see also *Board of Trustees v. Fox*, 492 U.S. 469, 482 (1989).

132. 447 U.S. 557 (1980).

133. *Id.* at 561.

134. See Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 Nw. U. L. REV. 1212, 1214 (1988).

On the other hand, the "solely economic interests" approach to defining commercial speech may include some instances of commercial speech beyond mere proposals, but it also leaves out much that is ordinarily considered commercial speech.¹³⁵ Consider, for example, the central example of a typical commercial advertisement for a perfume, an elaborate exercise machine, a hair replacement technique, cigarettes, or athletic shoes. Now, these and similar ads may relate in part to the economic interests of producers and consumers. Far more is at stake, however, than "solely"¹³⁶ economic interests in the purchase of these and many other products and services.

These definitions are thus in certain respects less than ideal. But no simple, invariably helpful alternative definition seems attainable. It has been declared that "the doctrine of commercial speech rests on a clean distinction between the market for ideas and the market for goods and services."¹³⁷ This approach is useful in certain respects. It is helpful, for example, in reminding us of the important truth that often speech about markets, generally or in particular, and especially speech about whether or how such markets should be regulated, transcends commercial speech.

Plainly, though, markets for ideas, however we reasonably define "ideas," and markets for goods and services are not mutually exclusive. It is not difficult to imagine that authors and publishers of all sorts of books propounding ideas may be in part motivated by a quest for profit, as, in turn, may many of the book's purchasers.¹³⁸ Inquiring into the degree, or the causal necessity, of profit motivation on a case-by-case basis is obviously problematic.

No simple distinction between the markets for ideas and for goods and services is thus possible. But this does not mean that the distinction is useless for all purposes, or that no serviceable distinction between commercial and noncommercial speech is possible. Commercial speech can be a viable category even if it has no "essence." Professor Christopher Stone has observed that "[w]e may be able to find nothing better than 'family resemblances' among members of the commercial speech set."¹³⁹

One is at least able to distinguish commercial speech well enough to justify treating commercial speech differently from political speech. The most important reasons for this differential treatment have been set forth at some length above.¹⁴⁰ But a bit more may be said to enhance interest in the distinction. Professor Ronald Coase wonders why governments should be deemed generally more competent to regulate commercial than

135. *See id.* at 1222.

136. *See supra* text accompanying note 133.

137. Jackson & Jeffries, *supra* note 123, at 2; *see also* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 (1985) (declaring that "advertising pure and simple" is clearly within the bounds of commercial speech).

138. *See* FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 159-60 (1982) (declining to include all profit-motivated speech within the category of commercial speech).

139. Christopher D. Stone, *Theorizing Commercial Speech*, 11 *Geo. Mason U. L. Rev.* 95, 113 (1988).

140. *See supra* sections I-III.

political speech.¹⁴¹ If Professor Coase is right, much of the fuss over distinguishing commercial and political speech would seem misplaced.

But this skepticism is itself misplaced. No doubt some government regulation of commercial speech is really driven by an enterprise's desire to impose restrictions on entry by potential competitors, by a wish to unjustly discriminate, or by a range of other anticompetitive motivations.¹⁴² But this is hardly the whole story, and it is implausible to imagine that a particular government can be equally trusted to regulate fairly its own rival political parties, movements, and ideologies along with commercial enterprises and commercial speech.

The point may be put this way: it is at least plausible in some cases that we are better off protecting unpopular political ideas, perhaps for the sake of promoting an ethos of tolerance.¹⁴³ On the other hand, few¹⁴⁴ would argue that we are better off, even in the long run, legally protecting the advertisement of latently dangerous products and relying on the tort system, *Consumer Reports*, and the possibility of criminalizing the production of the goods themselves to minimize the carnage. Banning an obvious carcinogen and banning an allegedly harmful political party require entirely different justifications.

This is not to minimize the potential for abuse of the government's power to regulate commercial speech. But such abuse can be reduced by means other than specially protecting commercial speech. Most, if not all, denunciations of an enterprise's attempt to reduce competition by inducing the government to restrict commercial speech are themselves fully protected political speech. Any government actions reducing competition by restricting commercial speech should be subject to a judicial test of reasonableness under the Free Speech, Equal Protection, and Due Process Clauses.¹⁴⁵ Any restrictions of commercial speech that are, for example, racially invidious¹⁴⁶ should be subjected to the most stringent judicial scrutiny under the Equal Protection Clause.¹⁴⁷

There is thus no reason to suppose that permitting reasonable government regulation of even non-deceptive commercial speech could not, at least over the long term, provide significant net social benefits. But we must do what we reasonably can to prevent political or other socially valuable kinds of speech from being inadvertently swept into the net of commercial speech regulation.

141. See R.H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1, 2 (1977); see also Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 751-52 (1993); Fred S. McChesney, *Commercial Speech in the Professions: The Supreme Court's Unanswered Questions and Questionable Answers*, 134 U. PA. L. REV. 45 (1985).

142. See, e.g., Ronald A. Cass, *Commercial Speech, Constitutionalism, Collective Choice*, 56 U. CIN. L. REV. 1317, 1361-62 (1988); David A. Strauss, *Constitutional Protection for Commercial Speech: Some Lessons from the American Experience*, 17 CAN. BUS. L. J. 45, 45 (1990) (emphasizing speech regulation as a possible cover for discrimination).

143. See generally LEE BOLLINGER, *THE TOLERANT SOCIETY* (1986).

144. But see HERBERT SPENCER, *THE MAN VERSUS THE STATE* (Eric Mack ed. 1982) (1884).

145. Cf. *Williamson v. Lee Optical*, 348 U.S. 483, 487-88 (1955).

146. See Strauss, *supra* note 142, at 45.

147. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967).

It is not difficult to think of cases that test the classificatory boundary of political and commercial speech: a cigarette manufacturer's corporate support of the Bill of Rights,¹⁴⁸ or a clothing manufacturer's advertised stance on social issues.¹⁴⁹ Ironically, some ads may even play off the public perception of the fraying of many social relationships, offering consumption-oriented solutions.¹⁵⁰ A desperately poor person who is reduced to begging may engage in commercial or political speech, or both.¹⁵¹ A magazine such as *Consumer Reports* may seek to guide consumer purchases, but with no financial stake in the recommended goods and services.¹⁵² Presumably scientifically based health claims may be made on behalf of particular products, sometimes in the context of an otherwise purely commercial ad.¹⁵³

However, it is important not to overestimate the scope and severity of these sorts of arguable borderline cases. Most typical advertisements will be classified as commercial speech on any reasonable theory. Most speakers, on the other hand, who wish primarily to convey a political message can readily avoid entanglement with the problem of commercial speech on any reasonable definition. Thus the costs of misclassifying political or commercial speech are likely limited.

In particular kinds of cases, special considerations may play a role in classifying an instance of speech as commercial or non-commercial. Consider, for example, a claim that egg yolks are nutritionally beneficial, despite or because of their cholesterol content. Some courts may wish to distinguish between proponents of such a claim based not on the presence or absence of a pecuniary stake, but on a broader consideration of what reactions would logically please the particular speaker. A scientist who sees special nutritional benefit in egg yolks presumably wants people to actually eat, rather than merely buy, the eggs. An egg producer who makes the same claim, on the other hand, may or may not care what purchasers of eggs actually do with them, and may be most pleased by purchasers who buy eggs, throw them away, and then buy more.

There is no guarantee that some acceptable shortcut method for deciding particular close cases will always be available. On the other hand, approaches are available to reduce the costs, if not the risk, of misdeciding genuinely close cases. For example, courts faced with a close classification

148. See Leo Bogart, *Freedom to Know or Freedom to Say?*, 71 TEX. L. REV. 815, 816 n.5 (1993).

149. Brubach, *supra* note 87, at 78; see also LASCH, *THE CULTURE*, *supra* note 80, at 139 (discussing the phenomenon of advertisements attempting, reasonably or otherwise, to link themselves to the idea of freedom).

150. See Ewen, *supra* note 67, at 93.

151. See *Loper v. New York City Police Dept.*, 999 F.2d 699 (2d Cir. 1993); *Young v. New York City Transit Auth.*, 903 F.2d 146 (2d Cir.), *cert. denied*, 498 U.S. 984 (1990).

152. See T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 541 (1979) (*Consumer Reports* entitled to full free speech protection).

153. See Martin H. Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech*, 43 VAND. L. REV. 1433 (1990) (arguing for protection of scientific health claims in the context of commercial advertising); see also *National Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157 (7th Cir. 1977).

problem may notice that speakers may have some antecedent control over their own destiny. At least some speakers are easily able, if they choose, to formulate what they wish to say in a way that makes their speech as clearly non-commercial as reasonably possible under the circumstances.

Courts may thus wish to establish a reasonable and socially desirable incentive for speakers who fear their speech may be classified commercial. A judicial rule might take something approaching the following form: in genuinely close, borderline cases only, the court may wish to protect specially speech where the speaker came as close as reasonably possible, under the circumstances, to presenting the speech in question as clearly non-commercial. What is "reasonably possible" must be considered in light of the speaker's own resources and capacities, as well as the speaker's interests in not sending a distorted or insincere message, or in addressing an undesired audience.¹⁵⁴

Thus in borderline cases of commercial speech, the courts should look to the range of speech alternatives antecedently available to the speaker, and determine whether more clearly non-commercial speech alternatives were essentially ignored. For example, a court might point out to a store that it is not difficult to express one's views as to the Fourth of July without also describing items for sale on that occasion in lavish detail. Perhaps in cases on the border of commercial and non-commercial speech, more can be realistically asked of major corporations¹⁵⁵ than of the destitute.¹⁵⁶

V. INTERMEDIATE-LEVEL PROTECTION AS EXCESSIVE PROTECTION FOR COMMERCIAL SPEECH

Currently, the Supreme Court majority seems to accept the idea of according commercial speech, in at least some cases,¹⁵⁷ some lesser degree of constitutional protection than is given to political or other fully protected speech. The basic contours of the current constitutional test for regulating commercial speech were set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,¹⁵⁸ which concerned regulation of the promotion of electricity consumption, for the sake of energy conservation. There, the Court established a four-part test that begins by specifying that the speech at issue:

must concern lawful activity and not be misleading. Next, we must ask whether the asserted governmental interest is substan-

154. For a more elaborate exposition of this theme in a related context, see generally R. George Wright, *Speech on Matters of Public Interest and Concern*, 37 DEPAUL L. REV. 27 (1987).

155. See, e.g., *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 68 (1983) ("Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues.").

156. See *supra* note 151 and accompanying text.

157. See, e.g., *Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993) (referring to "an intermediate standard of review"); *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989); *In re Primus*, 436 U.S. 412, 435 (1978) (toleration of more imprecise regulation of commercial than of political speech); *Ohrlik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

158. 447 U.S. 557 (1980).

tial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.¹⁵⁹

In practice, the *Central Hudson* test is problematic because it erects obstacles to reasonable regulation of purely commercial speech at every turn. The test invites constitutional challenges to such regulations on grounds so vague and open-ended as, in many cases, to encourage the expression of mere subjective judicial preference. Let us consider the elements, and complications, of the *Central Hudson* test in turn.

It is important to bear in mind that the general burden of proof in these cases is on the government.¹⁶⁰ However useful this burden placement may be in political speech cases, in the commercial speech context it tends to undermine reasonable government regulation at every stage of the *Central Hudson* test.

Consider first the test's invitation to the government to prove that the speech at issue is "misleading."¹⁶¹ However familiar the idea of "misleadingness" may seem, in practice its application is often complex and indeterminate. With regard to commercial speech, typically, "[t]he line between truth and falsity . . . is hardly crystal clear."¹⁶² More broadly, cases suggest that "verification is very difficult in both the political speech and the commercial speech areas."¹⁶³

The problem here is in part that typical commercial claims may be, even if in some sense true, deceptive or misleading to some persons to some degree.¹⁶⁴ The court is thus required to decide what degree of deception, of what number of persons, with what sorts of arguable consequences, is required before the speech will be labeled as misleading.¹⁶⁵ A court may inquire, for example, whether a commercial claim is misleading because "it unduly emphasizes trivial or relatively uninformative facts."¹⁶⁶ We are left to wonder what degree of emphasis upon the relatively trivial is due.

Further muddying the water is that in most deceptive advertising cases, the crucial question is not whether a given advertising claim is misleading, but whether the presumably misleading claim can fairly be

159. *Id.* at 566.

160. See *Ibanez v. Florida Dep't of Business & Professional Regulation*, 114 S. Ct. 2084, 2089 n.7 (1994); *Edenfield*, 113 S. Ct. at 1800; *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 n.20 (1983).

161. See *Central Hudson*, 447 U.S. at 566.

162. Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1192 (1988).

163. Robert Pitofsky, *First Amendment Protections and Economic Activity*, 11 GEO. MASON U. L. REV. 89, 91 (1988).

164. See Robert B. Reich, *Preventing Deception in Commercial Speech*, 54 N.Y.U. L. REV. 775, 783 (1979).

165. See Shiffrin, *supra* note 134, at 1219; see also *Gammon v. GC Servs. Ltd. Partnership*, 27 F.3d 1254 (7th Cir. 1994) (discussing the inherent unworkability and indeterminacy of any "least sophisticated consumer" standard in the consumer protection area); *Clomon v. Jackson*, 988 F.2d 1314 (2d Cir. 1993).

166. *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 479 (1988) (citations omitted).

ascribed to the claimant.¹⁶⁷ The speaker may thus simply dispute the government's interpretation of the meaning or meanings of the ad for particular audiences.¹⁶⁸

These sorts of complications often are played out through judicial subdivision of the concept of misleading commercial speech. For example, the Court has been known to consider merely whether the speech at issue is misleading "in the abstract,"¹⁶⁹ without explaining what is meant by such a qualifier. Courts have varied their degree of scrutiny of commercial speech depending upon whether the speech at issue is variously deemed actually,¹⁷⁰ inherently,¹⁷¹ potentially,¹⁷² necessarily,¹⁷³ demonstrably,¹⁷⁴ or possibly¹⁷⁵ misleading.¹⁷⁶

None of these characterizations, however, bypasses the need for loosely constrained judgments about the extensiveness, degree, and consequences of misleading speech. In some cases, the misleadingness of the speech is reducible by means such as a disclaimer. But courts must then judge, somehow, whether the phrasing, prominence, and clarity of the disclaimer are sufficient, or whether the disclaimer, if sufficiently conspicuous, tends unduly to create confusion.¹⁷⁷

Once any issues of misleadingness are somehow resolved, the court must consider whether the government can identify a substantial interest

167. See Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. REV. 657, 659 (1985); see also *ITT Continental Baking Co. v. FTC*, 532 F.2d 207, 213 (2d Cir. 1976) ("For the most part the petitioners admitted that Wonder Bread did not have the nutritional qualities alleged to have been claimed for it in the challenged advertisements, but they denied that the advertisements represented that the bread did have those qualities.").

168. See *ITT Continental Baking Co.*, 532 F.2d at 214 ("children below the age of seven would generally tend to accept the 'fantasy growth sequence' in Wonder Bread advertising as literal truth"); see also *id.* at 218 ("it is fair to suppose that the commercials in question were designed to avoid making any specific nutritional misrepresentations while at the same time conveying the general idea that Wonder Bread would somehow significantly contribute to growth in children"). Relying on free speech cases from other contexts, though, an advertiser might wish to argue that its free speech rights must not be held hostage to speech standards appropriate for children. See, e.g., *Butler v. Michigan*, 352 U.S. 380, 383 (1957); see also *Sable Communications v. FCC*, 492 U.S. 115, 126-27 (1989).

169. See *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 341 (1986).

170. *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91, 111 (1990).

171. *Id.*

172. *Id.*; see also *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 472 (1988).

173. See *In re R.M.J.*, 455 U.S. 191, 202 (1982).

174. *Id.*

175. *Friedman v. Rogers*, 440 U.S. 1, 13 (1979); *SEC v. Wall Street Publishing Inst., Inc.*, 851 F.2d 365, 374 n.9 (D.C. Cir.), *cert. denied*, 489 U.S. 1066 (1988).

176. In addition, different degrees of support are required by the Federal Trade Commission depending upon whether the commercial claim includes an assertion of support by scientific tests or not. See *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1492 n.3 (1st Cir. 1989). Importantly, the FTC then goes on to subdivide the former category into "specific" or "non-specific" claims, usually requiring "two well-controlled scientific studies" in non-specific claim cases. *Id.*

177. See *id.* at 1497. For a case illustrating the indeterminacy of these sorts of inquiries, see *Kraft, Inc. v. FTC*, 970 F.2d 311, 315-16 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1254 (1993) (discussing the proper characterization of ads relating Kraft Singles to milk and calcium content).

underlying the regulation.¹⁷⁸ This is not a trivial inquiry. The government's burden in this respect "is not satisfied by mere speculation or conjecture; rather, a government body . . . must demonstrate that the harms it recites are real."¹⁷⁹ Depending upon their degree of sympathy for the state regulation, courts may identify the interest, or combination of interests, at stake in more and less favorable ways.¹⁸⁰ The idea of "demonstrating" the reality of a harm is daunting; it is not clear that even a criminal case requires the prosecutor to "demonstrate" literally the existence of the charged harm. Whatever the term "demonstrate" is taken to mean, it is available for use in derailing any reasonable regulation of commercial speech.

Taken together, the Supreme Court's decisions "leave little insight as to what criteria the Court used"¹⁸¹ in specifying the relevant state interests, or in determining their substantiality. The combination of literally rigorous language and the lack of judicial guidance invites litigation of any governmental regulation of commercial speech.¹⁸²

The problem is made worse at the next stage of the inquiry, during which the government must "demonstrate"¹⁸³ that the regulation at issue will "in fact" advance the specified substantial interest "in a direct and material way."¹⁸⁴ In this context, directness has been associated with "an immediate connection between the prohibition and the government's asserted end."¹⁸⁵ On the other hand, directness has been contrasted variously with connections that are tenuous,¹⁸⁶ highly speculative,¹⁸⁷ ineffective,¹⁸⁸ only remotely supportive of the government interest,¹⁸⁹

178. *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980).

179. *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993); see also *Ibanez v. Florida Dep't of Business & Professional Regulation*, 114 S. Ct. 2084, 2089 (1994).

180. For an example of a generous characterization, see *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 342 (1986) ("the legislature's interest . . . is not necessarily to reduce demand for all games of chance, but to reduce [local] demand for casino gambling"). The Court could, of course, have insisted on something like a "substantial" reduction in casino gambling.

181. *Kansas v. United States*, 16 F.3d 436, 443 (D.C. Cir. 1994).

182. The Seventh Circuit has noted that "[c]oncrete evidence of past effects is likely to be difficult and expensive, if not impossible, to obtain in most deceptive advertising cases." *National Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157, 165 (7th Cir. 1977).

183. *Ibanez*, 114 S. Ct. at 2089; *Edenfield*, 113 S. Ct. at 1800; see also Philip B. Kurland, *Posadas de Puerto Rico v. Tourism Company*: "Twice Strange; Twice Passing Strange; Twice Pitiful, Twice Wondrous Pitiful", 1986 SUP. CT. REV. 1, 7 (1987) (endorsing a requirement of demonstrating, as opposed to merely asserting, the efficacy of promoting the government interest).

184. *Ibanez*, 114 S. Ct. at 2089; *Edenfield*, 113 S. Ct. at 1800.

185. *Adolph Coors Co. v. Bentsen*, 2 F.3d 355, 357 (10th Cir. 1993), cert. granted, 114 S. Ct. 2671 (1994).

186. *Id.*

187. *Id.*

188. *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980); *Cal-Almond Inc. v. United States Dep't of Agriculture*, 14 F.3d 429, 437 (9th Cir. 1993).

189. *Central Hudson*, 447 U.S. at 564.

conditional,¹⁹⁰ or involving only limited incremental,¹⁹¹ speculative,¹⁹² or marginal¹⁹³ support for the government interest.¹⁹⁴

The potential for these concepts, which are largely just opposing end points on progressive continua, to serve as merely conclusory labels for opposing outcomes is obvious. More interestingly, the focus on "directness" or "immediacy" itself seems misconceived. If the idea is taken literally, why should we care whether the regulation advances the government interest directly or indirectly, as long as the advancement itself is substantial? The Court's choice of the "directness" terminology is surprising, in that the Court has, in a famous line of Commerce Clause cases, learned to focus on the substantiality of relationships, as opposed to their directness or indirectness.¹⁹⁵

Finally, under *Central Hudson* the government must show that the regulation "is not more extensive than is necessary"¹⁹⁶ to promote the government interest at stake. Literally, this test would allow courts to strike down reasonable regulations of commercial speech on the basis of the existence, real or supposed, of some slightly less restrictive and available alternative regulation. It need not be difficult for courts to envision such alternatives,¹⁹⁷ with or without¹⁹⁸ sufficient evidence of their practicality or cost in other values, including the speech rights of other persons.

In *Board of Trustees v. Fox*, the Court specified that the "not more extensive than necessary" requirement was not to be taken literally, in the sense of a requirement that the government utilize the supposedly least restrictive means to further the state interest at issue.¹⁹⁹ While *Fox* in this respect lightened the burden on government regulation of commercial speech, it also required that the costs of the government regulation be "carefully calculated."²⁰⁰ The discretion of judges was then enhanced by requiring that the reasonableness²⁰¹ of the degree of fit between the gov-

190. *Id.* at 569.

191. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 73 (1983).

192. *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2706 (1993).

193. *Id.*

194. *Id.*

195. *See, e.g.*, *Perez v. United States*, 402 U.S. 146, 152 (1971) (clearly repudiating any reliance in the commerce clause cases upon the direct versus indirect distinction); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 40-41 (1937) (distancing itself from reliance on such a distinction); *Carter v. Carter Coal*, 298 U.S. 238, 307-08 (1936) (relying upon the direct versus indirect distinction).

196. *Central Hudson*, 447 U.S. at 566.

197. *See, e.g.*, *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988) (filing of attorneys' client solicitation letters with a state agency); *In re R.M.J.*, 455 U.S. 191, 206 (1982) (filing with state of copies of all attorney general mailings); *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 356-57 (1986) (Brennan, J., dissenting) (listing wide range of unacknowledged alternatives to the state's regulatory scheme); *see also* John M. Blim, Comment, *Free Speech and Health Claims Under the Nutrition Labeling and Education Act of 1990*, 88 Nw. U. L. Rev. 733, 766 (1994) (noting the typical judicial assumption that misleading commercial ads can best be dealt with by mandated warnings and disclosures).

198. *See, e.g.*, *In re R.M.J.*, 455 U.S. at 206.

199. *Fox*, 492 U.S. at 480-81.

200. *Id.* at 480. *But see* *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 (1993) (placing the burden of proof on the government).

201. *See Fox*, 492 U.S. at 480.

ernment interest and the scope of the restriction be determined through a balancing process. The scope of the restriction must be "in proportion to the interest served."²⁰²

Thus the current test at this stage invites a judge to determine whether the scope of the regulation is, through some unspecified measuring process, worth its costs. Whether one restriction is actually more burdensome to freedom of speech than some envisioned alternative, however, may not be clear to begin with. An alternative regulation might affect more speakers, or affect fewer speakers more severely. The simplest calculation will involve determining whether some assumedly slight or moderate loss in fulfilling the government interest at stake outweighs, say, some reduced overall burden on freedom of commercial speech. Trading off the degree of promotion of a partially indeterminate state interest, under two alternative regulatory schemes, against the overall degree of burden on freedom of commercial speech under both regulations simply invites the expression of a court's predisposition.

The story is thus much the same at every stage of the established judicial test of restrictions on commercial speech. Any court unsympathetic with any reasonable regulation of commercial speech may, without undue strain, apply current case law to strike down the regulation at issue.

CONCLUSION

Overall, as a broad cultural institution, commercial speech can more than take care of itself without special constitutional protection under the Free Speech Clause. In our cultural context, the broad, often unintended implications underlying commercial speech are not constrained by any significant vector of cultural forces. Reasonable regulations of commercial speech, whatever their more particular and immediate justifications, would tend at least minimally to reduce the cultural dominance, within its sphere, of commercial speech. There is no reason in the Free Speech Clause not to pursue this course, in which the largely inadvertently accrued power of commercial speech would be fairly reduced for the sake of greater cultural freedom, and of the values underlying freedom of speech itself. A democratic government should at least be allowed to accept such an approach.

Special constitutional protection for commercial speech is thus currently bad enough. Things could, however, get even worse. Special protection of commercial speech may make reasonable state and federal regulation of business enterprises increasingly difficult in a number of areas, environmental²⁰³ and securities²⁰⁴ regulation being merely two examples. This would simply not be worth the cost in public values. As an

202. *Id.* (quoting *In re R.M.J.*, 455 U.S. at 203); see also *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2708 (1993) (Stevens, J., dissenting); *McHenry v. Florida Bar*, 21 F.3d 1038, 1041 (11th Cir.) (scope of restriction must be "in proportion to the interest served"), *cert. granted*, 115 S. Ct. 42 (1994).

203. See Peter J. Tarsney, Note, *Regulation of Environmental Marketing: Reassessing the Supreme Court's Protection of Commercial Speech*, 69 NOTRE DAME L. REV. 533, 534 (1994) ("The

admittedly extreme example, since preventing a milk producer from selling above or below a specified price obviously restricts indirectly that producer's accurate commercial speech, conceivably a business might seek to relitigate classic economic substantive due process cases, such as *Nebbia v. New York*,²⁰⁵ under the Free Speech Clause.

The Supreme Court has of late sought to emphasize the value of commercial speech.²⁰⁶ Without arguing that commercial speech is in all cases to be considered as valuable as political speech, the Court has in some respects impliedly equated their value. The Court has, for example, held that a city may not attack problems of safety or aesthetics by limiting only commercial speech and not political speech if commercial speech is no more related to the harm or to the state interests than is political speech.²⁰⁷

Thus the Court has created something of an Equal Protection Clause, metaphorically, for commercial speech. Unless commercial speech is more related to the harm to be regulated than is political speech, it cannot be disproportionately regulated. But this is actually a curious result. Imagine a ship that will sink unless two units of weight are jettisoned. On board are five weight units of commercial speech and five weight units of political speech. The Supreme Court has, in effect, forbidden us from tossing two units of commercial speech overboard, thereby saving most of the commercial speech and all of the political speech.

This result is simply not required by a reasonable view of our reasons for protecting free speech in the first place, or of our current cultural circumstances.²⁰⁸ It instead indicates the judicial tendency to protect specially commercial speech at the expense not only of the purposes underly-

1993 Court raised commercial speech to a level of protection that would likely require courts to strike down many state environmental statutes.”)

204. See Manuel S. Klausner, *The First Amendment and Commercial Speech*, 11 GEO. MASON U. L. REV. 83, 87 (1988) (“the area of federal securities legislation is ripe for the assertion of first amendment defenses”); see also *Lowe v. SEC*, 472 U.S. 181, 226-27 (1985) (White, J., concurring in result) (casting doubt on some SEC regulation of stock market newsletters by unregistered investment advisors); *SEC v. Wall Street Publishing Inst., Inc.*, 851 F.2d 365, 371 (D.C. Cir.), *cert. denied*, 489 U.S. 1066 (1988).

205. 291 U.S. 502 (1934) (upholding a criminal conviction of *Nebbia* for selling milk at prices beyond those permitted by statute). These cases admittedly would involve proposals for an illegal transaction, but in which the weight of the state's interest in regulating the underlying transaction could be balanced against the severity of the restriction on commercial speech.

206. See, e.g., *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1511 (1993); see also *id.* at 1521 (Blackmun, J., concurring) (“I hope the Court ultimately will come to abandon *Central Hudson's* analysis entirely in favor of one that affords full protection for truthful, noncoercive commercial speech about lawful activities.”).

207. See *id.* at 1516; see also *Graff v. City of Chicago*, 9 F.3d 1309, 1319 (7th Cir. 1993) (noting that under *Discovery Network*, noise regulation of speech must generally apply equally to commercial and political speech), *cert. denied*, 114 S. Ct. 1837 (1994).

208. The Court may, on this basis, eventually reconsider certain other distinctions, including its refusal to apply the overbreadth doctrine to commercial speech, or to apply de novo appellate review to all cases of commercial speech. On the overbreadth issue, see *Waters v. Churchill*, 114 S. Ct. 1878, 1885 (1994) (no application of overbreadth doctrine to commercial speech); *Board of Trustees v. Fox*, 492 U.S. 469, 481 (1989) (same); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 478 (1988) (same). For discussion of the possible application of de novo appellate review to commercial advertising cases, see *Kraft, Inc. v. FTC*, 970

ing freedom of speech in the first place, but of any democratically expressed view of freedom, well-being, and the proper scope and limits of purely commercial values.

F.2d 311, 317 (7th Cir. 1992) (citing *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 108 (1990)), *cert. denied*, 113 S. Ct. 1254 (1993).