



The First Amendment and Commercial Speech

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Victor Brudney

Harvard Law School, brudney@law.harvard.edu

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THE FIRST AMENDMENT AND COMMERCIAL SPEECH

VICTOR BRUDNEY*

Abstract: This Article examines the constitutionality of regulating commercial speech. Keeping in mind traditional First Amendment values, this Article squares the regulation of commercial speech with the justifications that accompany the regulation of noncommercial speech. After providing a definition of commercial speech, this Article inspects the First Amendment values that have been applied to commercial speech. This Article explains why commercial speech is different from other types of speech and further explains how these differences have led to inconsistent “autonomy” concerns regarding the First Amendment coverage of commercial speech. This Article argues that autonomy concerns of speakers and listeners are not enough alone to justify First Amendment protection for commercial speech, but there are certain occasions when commercial speech may warrant First Amendment protection. The context of commercial speech is paramount to the First Amendment analysis. This Article explains how the context of commercial speech affects this analysis, specifically focusing on expression engaging matters of self-government or public policy and expression engaging in other matters of societal import.

INTRODUCTION

Because not all expression is included in the speech whose freedom the First Amendment prohibits Congress from abridging,¹ the constitutionality of regulation of commercial speech turns, in fair part, on whether and why that speech is determined to be “covered” by the First Amendment—and if covered, how extensively or vigorously the freedom to speak is, or should be, “protected” against abridgement (compared with other varieties of covered speech).²

* © 2012, Victor Brudney, Robert B. and Candice J. Hass Professor in Corporate Finance Law, Emeritus, Harvard Law School.

¹ U.S. CONST. amend. I.

² See Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1, 23 (suggesting that “some speech acts . . . lie wholly outside the coverage of the First Amendment”); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769 (2004) (elucidating the distinction between the “coverage” and the “protection” of the First Amendment); Frederick Schauer, *Categories and the First Amendment: A Play*

Commercial speech differs from speech specially protected under the First Amendment because commercial speech is less likely to be confronted by counter or corrective speech, or “more speech,” which is an essential predicate for the protection of speech by the First Amendment. Assessing the constitutionality of regulation of commercial speech in light of underlying First Amendment values requires a definition of commercial speech.

I. FRAMING THE QUESTION

A. *Defining Commercial Speech*

The uncertain content of the commercial speech that is subject to government regulation, and the lack of clarity of U.S. Supreme Court opinions addressing the restraints imposed by the First Amendment on such regulation, has generated considerable discussion of the unavoidable ambiguity of the concept of commercial speech³ and some inco-

in *Three Acts*, 34 VAND. L. REV. 265, 281 (1981) (explaining that the U.S. Supreme Court’s commercial speech jurisprudence is premised on the questionable assumption that “all communication is covered” by the First Amendment and so one must “create areas of non-coverage” to justify regulation of speech acts). *But cf.* Rodney Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777, 780 (1993) (“Commercial speech, as speech, should presumptively enter the debate with full First Amendment protection.”).

³ See generally C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989); C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976); Edward L. Barrett, Jr., “The Uncharted Area”—*Commercial Speech and the First Amendment*, 13 U.C. DAVIS L. REV. 175 (1980); Henry N. Butler & Larry E. Ribstein, *Corporate Governance Speech and the First Amendment*, 43 U. KAN. L. REV. 163 (1994); Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372 (1979); Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615 (1987); Charles G. Geyh, *The Regulation of Speech Incident to the Sale or Promotion of Goods and Services: A Multi-factor Approach*, 52 U. PITT. L. REV. 1 (1990); Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990); Ronald J. Krotoszynski, Jr., *Into the Woods: Broadcasters, Bureaucrats, and Children’s Television Programming*, 45 DUKE L.J. 1193 (1996); Tamara R. Piety, *Free Advertising: The Case for Public Relations as Commercial Speech*, 10 LEWIS & CLARK L. REV. 367 (2006); Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249 (1995); Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971) [hereinafter Redish, *First Amendment in the Marketplace*]; Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) [hereinafter Redish, *The Value of Free Speech*]; Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181 (1988); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1983); Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55 (1999); Jason A. Cade, Note, *If the Shoe Fits: Kasky v. Nike and Whether Corporate Statements About Business Operations Should Be Deemed Commercial Speech*, 70 BROOK. L. REV. 247 (2004); David F. McGowan, Comment, *A Critical Analysis of Commercial Speech*, 78 CALIF. L. REV. 359 (1990); Thomas W. Merrill, Note, *First*

herence in the Court's efforts at delineation of it. In the bulk of the Court's commercial speech cases, the regulation at issue seeks to avert harmful consequences to consumers from heeding communications made as part of an effort of a for-profit enterprise to induce purchase of specified commodities or services.⁴

Grounded in that effort, a workable concept of commercial speech may fairly be said to entail two sorts of expression. One is expression that may be called "narrow" commercial speech. It consists of a communication that (1) proposes or offers explicitly or "implicitly"⁵ a sale or exchange transaction in a specified commodity or service, and is made by the proposer (or its agents) as part of its business of profiting from such transactions,⁶ and (2) does no more than describe the terms

Amendment Protection for Commercial Advertising: The New Constitutional Doctrine, 44 U. CHI. L. REV. 205 (1976).

⁴ Some regulation of commercial speech rests on the government's interest in protecting society (or individuals) against injury other than that from receiving and heeding the content of the sales message in the speech. Such regulation is not aimed at limiting the "persuasiveness" of the speech or the recipient's absorption of, and response to, its sales message—that is, at encouraging or discouraging the sale. The regulation distinguishes between commercial speech and other speech in prescribing methods of access or distribution, presumably because the regulation ascribes different values to the two categories of speech and to their respective social benefits. *See, e.g.,* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 418 (1993) (striking down a "categorical prohibition on the use of news racks to disseminate commercial messages"); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 493 (1981) (striking down a municipal ordinance "imposing substantial prohibitions on the erection of outdoor advertising displays"); *cf. Lehman v. City of Shaker Heights*, 418 U.S. 298, 301–02 (1974) (upholding a municipal ordinance barring political advertising on public transit). The target of the regulation is the method of distributing the speech and the costs it imposes on society—much like time, place, and manner regulation of speech otherwise covered by the First Amendment. *Cf. Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 93 (1977) (striking down a municipal ordinance prohibiting the posting of residential "For Sale" and "Sold" signs and holding that such a restriction cannot be characterized as a permissible time, place, or manner regulation of speech).

⁵ *See, e.g.,* *Friedman v. Rogers*, 440 U.S. 1, 11 n.10 (1979) (characterizing use of a trade name as an implicit "solicitation of patronage"). "Implicitly" is a flexible term that expands the notion of commercial speech to include selling efforts that do not expressly offer particular items or prices in the communication, without necessarily extending to ads or communications that mention only the seller's name. That the boundary between implicit commercial speech and noncommercial speech may be sufficiently permeable to tempt the ingenuity of sellers and advertising agencies to invoke opaque formulae does not make it an unnecessary or "impractical" boundary. *Cf. Garcetti v. Ceballos*, 547 U.S. 410, 417–20 (2006) (articulating the boundaries of protected "public" speech by government employees).

⁶ *See* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 495–97 (1996); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976). Excluded from commercial speech are communications by non-profit enterprises that only discuss products or services (and possibly also non-profits that offer products for sale). *Compare* *Perma-Maid Co. v. FTC*, 121 F.2d 282, 284 (6th Cir. 1941) (upholding an FTC cease and desist order barring Perma-Maid, a

of such proposal or simply identify the putative seller's products.⁷ Notwithstanding the Court's contrary view,⁸ it is hard to find any plausible links between narrow commercial speech and expression that relates to matters "of import to significant issues of the day"⁹—at least linkage that is strong enough to support First Amendment protection for commercial speech.¹⁰

company that used steel food containers, from claiming that the aluminum food containers used by its competitors caused negative health effects), *with* *Scientific Mfg. Co. v. FTC*, 124 F.2d 640, 641 (3d Cir. 1941) (dismissing an FTC cease and desist order and allowing Scientific Manufacturing, a public interest group, to continue spreading pamphlets explaining the dangers of aluminum because the company had no economic interest in the sale of aluminum).

Commercial speech in the service of sales of "speech products," otherwise covered by the First Amendment, such as books, theatrical performances, movies, musical performances, or art exhibitions, should, but might not, enjoy the protection to which the covered speech is entitled. *Compare* *Bolger*, 463 US at 64–68 (holding that a federal statute prohibiting unsolicited mailing of contraceptive ads was unconstitutional), *and* *Bigelow v. Virginia*, 421 U.S. 809, 818–21 (1975) (holding that a Virginia statute making it illegal to encourage an abortion was unconstitutional as applied to a newspaper editor advertising the existence of legal abortion facilities in New York), *with* *Breard v. Alexandria*, 341 U.S. 622, 641–45 (1951), *abrogated by* *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980) (holding that a city ordinance banning unsolicited door-to-door advertising was constitutional).

⁷ This delineation modifies somewhat the classic formula: "speech which does 'no more than propose a commercial transaction.'" *Citizens Consumer Council*, 425 U.S. at 762 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)). But, it is narrower than some of the suggestions in Supreme Court opinions, and broader than others. *See* Geyh, *supra* note 3, at 1 n.2. The narrow commercial communication may, in addition to proposing a transaction, contain statements about the manner in which the seller's products are produced and distributed, or about warranties and repairs, or about the identity or quality of distributors of products or services, or compare the seller's products or services with those of competitors with regard to price. Moreover, to propose a transaction, no specific item need be offered so long as the communication proposes or suggests some transaction involving the seller's identified products or services. *See* *Friedman*, 440 U.S. at 11 n.10; *see also* *Nat'l Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157, 163 (7th Cir. 1977) (indicating that the Supreme Court's expressions on the subject of commercial speech "were not intended to be narrowly limited to the mere proposal of a particular commercial transaction").

⁸ *Citizens Consumer Council*, 425 U.S. at 766–70. It is possible that the Court linked all commercial speech to matters of societal interest because of uncertainty as to how, and whether, courts would be able to draw lines identifying and separating commercial speech that might be of public interest.

⁹ *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977).

¹⁰ *See generally* Thomas H. Jackson & John C. Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979) (arguing that governmental regulation of commercial speech does not implicate effective self-government or individual self-fulfillment through free expression, and therefore should not be vindicated under the First Amendment); Piety, *supra* note 3 (arguing that the commercial speech doctrine extended the scope of the First Amendment to areas outside of its original justifications).

Much, if not the bulk of, commercial speech, however, is “enriched,” in that it does more than simply articulate the terms of the proposed transaction or describe the identified products or services. It contains *additional* expression, such as portrayals of the benefits and joys (personal or social) of owning or using the offered product or the pleasures of the attractive lifestyle it offers. Or it may promote the seller’s products or services by highlighting their health and safety benefits, or ego-enhancing features, or public policy benefits for society.¹¹ In short, it may contain expression that might be, or would be, covered by the First Amendment if it were freestanding. Attachment to an effort to sell an identified product or service is a necessary,¹² but may not be a sufficient, condition for the expression to be commercial speech.¹³ The absence of a selling effort (explicit or implicit¹⁴) pre-

¹¹ See, e.g., *Fur Info. & Fashion Council, Inc. v. E. F. Timme & Son, Inc.*, 364 F. Supp. 16, 21 (S.D.N.Y. 1973), *aff’d*, 501 F.2d 1048 (2d Cir. 1974). In the language of *Citizens Consumer Council*, it may discuss or editorialize on “cultural, philosophical or political” matters or contain “generalized observations even about commercial matters.” 425 U.S. at 761. Such speech may (or may not) be commercial; its message may (or may not) be tied closely enough to a proposal to transact or its context may (or may not) suggest a sales proposal.

¹² The Court has characterized the “[proposal of] a commercial transaction” as “the test for identifying commercial speech.” *Bd. of Trs. v. Fox*, 492 U.S. 469, 473–74 (1989). The elusiveness of an adequate definition and coverage of the First Amendment is illustrated in the Court’s opinions in cases involving labor relations. See, e.g., *Edward J. DeBar-tolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575–76 (1988) (involving speech by organized workers urging customers to refrain from shopping at a mall in Florida); *NLRB v. Fruit & Vegetable Packers, Local 760*, 377 U.S. 58, 60 (1964) (involving speech by organized workers urging Safeway customers to refrain from buying Washington State apples); *Thomas v. Collins*, 323 U.S. 516, 531–32 (1945) (involving speech by labor organizers seeking to induce workers to form or join a union).

¹³ It does not aid the analysis to discuss separately each of the characteristics that are said to be components of commercial speech, such as profit motive or advertising form, among others. Indeed, no single characteristic fits all cases treated as commercial speech, and some only fit noncommercial speech. The concept, as used in the decisions and for analytic purposes, is a confluence of necessary conditions. There is room to debate whether any particular communication is attached to a sales effort. *Compare Egg Nutrition*, 570 F.2d at 163 (holding that ads stating that eating eggs does not increase risk of heart disease was not protected by the First Amendment because these statements were made to induce customers to buy eggs), *with In re R.J. Reynolds Tobacco Co.*, 1988 WL 490114, at *3–6 (F.T.C. Mar. 4, 1988) (reversing the agency’s initial decision and allowing a tobacco company to advertise a study questioning the health risks associated with smoking cigarettes, because the study was not designed to sell cigarettes).

¹⁴ How closely “attached” any particular communication must be to a proposal of a commercial transaction in order for it to be commercial speech will vary with the context. Continuous trading on securities markets suggests that speech by publicly traded corporations and their executives (and speech by putative sellers) that will more or less systematically affect the prices of securities in the market should be characterized as commercial speech—even though no particular proposal to transact is made. Thus, the connection

cludes the communication from being commercial speech, but need not imply that the speech is otherwise covered or protected by the First Amendment.¹⁵ The presence of such an effort may convert otherwise fully protected expression—whether of fact, opinion, or rumination—into commercial speech.¹⁶

with securities and, therefore, with the sale or purchase of securities, is close enough to bring the speech within the scope of the concept of commercial speech. Three examples of speech that has such a close connection are (1) the pricing information required by securities laws to be disclosed by a corporation that is issuing or purchasing its own securities, (2) periodic disclosures about the corporation's affairs required by the securities laws, and (3) proxy materials. *But cf.* Butler & Ribstein, *supra* note 3, at 163–64 (arguing that First Amendment protection should attach to all proxy and non-proxy securities-related speech). Similarly, expression on the packaging of a product explaining its use or contents is part of the sales proposal.

¹⁵ See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 20–25 (2000). *But cf.* *Dun & Bradstreet*, 472 U.S. at 774–96 (Brennan, J., dissenting) (arguing that speech about commercial matters should be granted First Amendment protections because it is an important part of the public discourse). For example, the Northrop Corporation ads discussed by one scholar may have been enjoinable (to protect the judicial process) even though they may not have been “commercial.” McGowan, *supra* note 3, at 398; *cf.* *United States v. Freeman*, 761 F.2d 549, 553 (9th Cir. 1985) (holding that speech, whether commercial or not, will not be given First Amendment protection if it is intended to incite another to break the law). Nothing in the Court's decisions (as distinguished from the language in its opinions) or in policy requires the concept of commercial speech to cover expression that is not part of a selling effort. Such expression may, or may not, be covered by the First Amendment, regardless of its “commercial” or “economic” import. Compare Shiffrin, *supra* note 3, at 1228–29 (arguing that current Supreme Court doctrine makes it impossible to distinguish between corporate speech that is political and corporate speech that is not deserving of free speech protection), with *Dun & Bradstreet*, 472 U.S. at 762 (holding that certain corporate speech is not deserving of free speech protection if it is “solely in the individual interest of the speaker and its specific business audience”).

As Professor Robert Post notes, some expression is properly treated as nonspeech, such as a marriage proposal, a private conversation among two or three persons about renting a home, or a physician's advice to a patient. See Post, *supra* note 3, at 1272; see also KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 57–59 (1989) (discussing “situation-altering utterances”). Is protection of such expression better found in some conception of “privacy,” and if so, how immune to regulatory interference is “privacy” and based on which constitutional provision or theory? See *Fox*, 492 U.S. at 481–86 (holding that the petitioner's claim that the university regulation at issue was overly broad and restricted private activities that should have free speech protection was not ripe for resolution).

¹⁶ This analysis applies equally to communications by *B*, for example, if uttered on behalf of *A* or at *A*'s request and expense, notwithstanding the fact that the speech is formally created and uttered by *B*. In each case, the cost of the speech is borne by *A*, and its function is to stimulate its addressees to purchase *A*'s products for their personal benefit. That a communication also urges a public good (for the economy, for the public's health, or for the nation's well-being) does not preclude the communication from being “only” commercial speech, unless that message dominates the listener's attention and incentive to make the purchase. Nonetheless, commercial speech may be entitled to First Amendment

To be sure, virtually every public pronouncement by a seller of products or services that mentions or calls attention to those products or services can plausibly be portrayed as part of a sales effort that constitutes commercial speech,¹⁷ including efforts designed to enhance the image of the seller as a good citizen in the production or distribution of its products.¹⁸ But efforts of a business to engender goodwill for itself and its products by referring only to matters of public policy or of societal interest in communications to which it attaches its name, but in which it does not suggest that it would be desirable to purchase its products, may not be commercial speech.¹⁹ To categorize as commercial speech expression that suggests only the benefits of use of the product for the welfare of society, or for the state of the nation, or the world,²⁰ presents troublesome problems if it is the kind of expression that the First Amendment would protect if it were freestanding.²¹ The

protection if the product whose purchase it urges is itself so entitled. See *infra* notes 212–233 and accompanying text.

¹⁷ The mere mention of the seller's name can be said to call attention to its products, and in some contexts to suggest their purchase. In other contexts, however, the seller's name does not have such an effect. Communications that merely mention the seller's name, and deal only with matters of public interest, but not the sale or commercial virtues of the seller's products, need not always be characterized as merely commercial speech.

¹⁸ See, e.g., *Nike, Inc. v. Kasky*, 539 U.S. 654, 656 (2003) (Stevens, J., concurring) (reviewing Nike's use of press releases to respond to allegations about the mistreatment of its employees in foreign facilities, which resulted in lawsuits for unfair and deceptive practices).

¹⁹ Comparable problems are raised by corporate public relations efforts, which aim to generate desirable publicity by stimulating the media to report favorably on their image or products. See *Piety, supra* note 3, at 400–10 (discussing how public relations campaigns should be treated under the First Amendment). To be sure, to narrow the concept of commercial speech may be to broaden the range of instances of speech that are likely to be covered by the First Amendment and therefore not easily regulable.

²⁰ See, e.g., *Egg Nutrition*, 570 F.2d at 158–60.

²¹ Cf. *Kasky*, 539 U.S. at 676–78 (Kennedy, J., dissenting) (stating that although Nike's press releases involved commercial speech, they concerned a matter of great public interest and therefore warranted First Amendment protection). There are line-drawing problems in differentiating commercial speech, as described above, from noncommercial speech that the First Amendment unquestionably covers. Focusing on the aspiration of the communication to sell a specific, identified product or service, however, will bring differentiation within the range of the feasible. Thus, one may designate as commercial speech certain attempts by businesses, including investor-owned corporations, to integrate their efforts to sell their products (or securities) with expressions of societal import (whether political or cultural) in ads directed to consumers or communications directed to investors. If the communication offers a product for sale, there is little reason to treat the communication as other than commercial. See, e.g., *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537 (1980); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980). If the communications do not expressly mention their products, it is less likely that they should be treated as commercial speech. How to treat communications that implicitly aim to sell products is problematic, but not more difficult

case for denying First Amendment protection to narrow commercial speech is strong. Enriched commercial speech, however, may contain expression that would be covered by the First Amendment if it were not part of the selling effort. The presence of the transactional or promotional message urging purchase of the product raises the question whether to preclude coverage by the First Amendment for the entire communication, or at least to deny the full First Amendment protection that the nontransactional component of the expression might otherwise receive.²²

These questions involve more than an abstract problem in categorization and are not limited to an abstract determination of the necessary and sufficient conditions for expression to be classified properly as commercial speech. In practice, the question arises only in response to a particular regulatory effort—as by a statute *ex ante* (e.g., forbidding fraud) or by a judicial decision *ex post* (e.g., imposing liability for libel or other tortious behavior). The impact of the First Amendment on the constitutionality of the regulation may vary with the kind of harm that

than other line-drawing problems that courts address in determining First Amendment coverage. *Cf. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 35–40 (1986) (Stevens, J., dissenting) (arguing that First Amendment protection should extend to the company's distribution of political editorials to customers in billing envelopes).

²² Before examining those questions, it is worth noting that Congress's constitutional authorization to regulate copyrighted or trademarked expression, has little, if any, relevance to whether the expression is commercial speech. If the copyrighted or trademarked expression proposes a sale of products or services (other than the expression), then it is likely to be commercial speech, and its coverage by the First Amendment is not affected by a copyright or trademark. The tension between the command of the First Amendment and regulation of the exercise of the monopoly embodied by a copyright or trademark is generated only if the expression involved is otherwise covered by the First Amendment. That question of coverage is not affected by whether the expression is, or is not, copyrighted or trademarked, or indeed treated as part of an intellectual property regime.

Copyright protection is authorized in order "to promote the Progress of Science and useful Arts." U.S. CONST. art. I, § 8, cl. 8. Its protection is made available, in fair part, to encourage individuals to create expression for the benefit of society. That such creations may also benefit the creator, or the consumer, as an individual, as well as a participating member of society, does not alter or detract from the societal function of copyright. Trademark protection is provided to benefit the user by aiding in the sale of products or services to members of society as individual consumers. Trademark protection does not serve the copyright policy of benefiting society collectively—except insofar as readers' enjoyment or enrichment from seeing and considering a work aesthetically may affect society's "culture." In any event, whether the expression protected by copyright or trademark is commercial speech turns on its content and context; the expression is not made commercial speech because it is trademarked or copyrighted. To be sure, it is difficult to find any trademarked expression that does not function to propose a sale of products or services. A copyrighted expression, however, may or may not entail a proposal to transact. If it does, it is commercial speech, and it is not made more or less protectable under the First Amendment by its copyright.

the government seeks to avert in regulating the speech, and how much abridgement of what kind of speech is required in order to avoid the harm.²³

B. *The Values Served and the Speech Protected by the First Amendment*

Others have pointed out that no single principle underpins the answer to the question: What speech does the First Amendment cover?²⁴ And no grand theory justifies invoking its special protection for all expression claiming, or possibly entitled to, such protection. As often has been suggested, different values underlie the special treatment that courts have crafted under the First Amendment to protect against government infringement of freedom of speech in different contexts. To seek answers to the question of First Amendment coverage or protection requires examination of the values underlying the First Amendment and their import for the interests that the government seeks to serve in regulating speech in varied societal contexts.

Much of the discussion of those values centers on the question of whether the special protection that the First Amendment offers for speech derives more from concern with the autonomy interests of individual speakers or listeners in their personal or private affairs²⁵ than from concern with the communal interests of the society. Those communal interests include (1) the making of (or declining to make) collective decisions in electoral matters, or more broadly in matters of public policy,²⁶ and (2) the generation of the society's collective values,

²³ Government abridgement may take the form of compelling speech in sales efforts, as well as restraining speech. In the case of libel, regulation may be designed to protect the target of the speech from reputational or financial injury by reason of the audience heeding the communication. On occasion, regulation of commercial speech is not aimed at the uses of speech to persuade a listener or to induce a transaction. The basis for subjecting a regulation to First Amendment scrutiny in such cases is unclear and uncertain. See, e.g., Shiffrin, *supra* note 3, at 1267–68.

²⁴ See, e.g., Farber & Frickey, *supra* note 3, at 1627; Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2365 (2000); Shiffrin, *supra* note 3, at 1214–15.

²⁵ See Robert C. Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1122–23 (1993). The notion of individual autonomy that Professor Post ascribes to the First Amendment appears to be the autonomy of the person as citizen; that is, the autonomy that a citizen exercises (or invokes) when selecting a government, its structure, and its process, or participating in the formation of society's values, as distinguished from the autonomy of the individual exercised in choosing among personal preferences disconnected from matters of self-government or societal interest or import.

²⁶ See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 93–94 (1980); ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWER OF THE PEOPLE* 27, 79 (1965);

tastes, and vision of itself in matters capaciously characterized as “cultural.”²⁷ The notion of autonomy that is urged as the basis for precluding government restraint on an individual’s freedom of speech is thus difficult to cabin. Varying content is given to this notion of autonomy by philosophers and legal commentators.²⁸ But the range of conduct that respect for a person’s autonomy precludes the government from regulating is not unlimited.²⁹ For instance, such respect does not pre-

Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 300–01 (1978); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22–23 (1971).

²⁷ Protection for freedom of speech as the predicate for a tolerant society informs both the individual’s autonomy interests and the interests of an optimal society. See generally LEE C. BOLLINGER, *THE TOLERANT SOCIETY* (1986) (arguing that the true value of tolerating extremist speech stems from the respect of antisocial behavior that it elicits); STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* (1990) (arguing that a major purpose of the First Amendment is to protect those who dissent against traditional values and societal norms).

²⁸ See NOMY ARPALY, *UNPRINCIPLED VIRTUE: AN INQUIRY INTO MORAL AGENCY* 117–48 (2003); Thomas I. Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1963) (“The right to freedom of expression is justified first of all as the right of an individual purely in his capacity as an individual. It derives from the widely accepted premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being.”); Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 879 (1994) (arguing that autonomy deserves status as a First Amendment value but it must be “conceived dualistically” with both descriptive and ascriptive components); Brian C. Murchison, *Speech and the Self-Realization Value*, 33 HARV. C.R.-C.L. L. REV. 443, 445–46 (1998).

The function of freedom of speech in enriching or fulfilling the person’s “self” may be envisioned as enhancing her ability freely to make decisions about her choices in life and her role in the world. This enrichment and enhancement of decision-making capacity (i.e., self-control) can be understood either as serving the personal benefit or satisfaction of the individual, or as serving and amplifying the individual’s civic role as an active participant in determining the quality and operation of society, or both. Cf. Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court’s First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159, 186 (1997) (discussing the compatibility of Immanuel Kant’s concept of autonomy with the Supreme Court’s First Amendment jurisprudence).

To cast the concept of autonomy in terms of “freedom of the mind” is not to equate the immunity from regulation of the operation or functioning of a person’s mind with immunity from regulation of a person’s speech. Nor do the considerations that support the former immunity from regulation require or justify the latter. However necessary speech may be to the operation of a person’s mind, the impact on society of a person’s exercise of the one differs from that of a person’s exercise of the other and *pro tanto* affects the level of deference to be paid to the individual’s autonomy claim in each case. See, e.g., *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (invoking the First Amendment to protect a person’s possession and exhibition of obscene movies in his own home, for only private use, but apparently permitting regulation interdicting the sale or distribution to the public of similarly obscene movies).

²⁹ It does not diminish the notion of autonomy, or the imperative for organized society’s respect for an individual’s autonomy, to recognize that the freedom from government restraint that autonomy claims may vary with the context in which it is claimed—and it

clude the State from restricting or abridging the freedom of individuals to engage in many forms of conduct other than speech. The government can—and often does—impose restrictions on such conduct, both *ex ante* and *ex post*, consistently with the harm principle.³⁰

Similarly, if the behavior that the government seeks to regulate entails speech, that fact does not preclude the government from regulating either the acts of speaking or listening, or the conduct that the speech discusses or urges—even though the government's power to regulate the acts of speaking or listening may be weaker or more limited than its power to regulate the conduct that the speech describes, urges, or embodies. The strength and quality of the person's autonomy claim in matters of speech, like that of the government's countervailing regulatory power, will vary with the content and context of the speech involved.

In ascertaining whether any particular speech is covered or protected by the First Amendment, the values served by the possibly protected speech may be examined along two different, contrasting axes. Along one axis, the purpose of the First Amendment is to protect speech that enables, or enhances, the “self-fulfillment” of the individual.³¹ Along the other axis, whether cast in terms of impingement on an individual's autonomy or in terms of society's concern with protecting communal interests, the function of the First Amendment is to protect speech that enables or facilitates the operation, and enriches the quality, of a democratic, open society, and the role of its members in the collective process of creating and maintaining it. The special protection of the First Amendment serves to enable individuals to discuss, consider, and decide how a democratic society should be structured and function—both in terms of its government and in the broader terms of the character and quality of its values and the attitudes and societal life it embodies. An open society, in which freedom of speech is essential for conducting and organizing collective matters and sharing values and attitudes, is presumed to embody the optimal atmosphere in which individual citizens are free and able to enrich their personal lives.³²

does not require the same level of deference to the individual's choice in every context. Determining how far societal imperatives must yield to individual preferences or autonomy claims is a never-ending problem, at least in a democratic society.

³⁰ See, e.g., JOHN STUART MILL, *ON LIBERTY* 50–52 (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859).

³¹ The concepts of “self-fulfillment” and “self-realization” are often used by commentators, along with the concept of autonomy. See, e.g., Emerson, *supra* note 28, at 879.

³² See BOLLINGER, *supra* note 27, at 164–74; William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 26 (1995). The First Amend-

Regulation of commercial speech thus raises interpretive questions as to whether the First Amendment should protect only speech that addresses or affects an individual's participation in the structure and operation of society or should also protect expression that enables individuals to develop or enrich their personal lives, apart from their roles as participants in the operation and development of the society.³³

In attempting to answer these questions and in assessing the constitutionality of government regulation of commercial speech, it is appropriate to consider *why* the government so acts. Government generally regulates commercial speech in order to avert one or both of two

ment can be said to serve the individual's autonomy interest in personal self-realization only derivatively, by enabling an open, democratic society that is the predicate for living a full, rich personal life. It can also be argued that the First Amendment protects speech that more directly engages an individual's autonomy interest in personal self-realization by protecting utterances and receipt of expression that serve any and all personal interests.

Considerable authority suggests that the First Amendment may serve either function, not only the societal function. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 577 (1978) (discussing speech as "an expression of self" that "enhances personal growth and self-realization"); Redish, *The Value of Free Speech*, *supra* note 3, at 593-94 (positing that free speech protection serves only to enhance "individual self-realization," which includes both the development of an individual's power and abilities and an individual's control of his own destiny); Rodney A. Smolla, *Academic Freedom, Hate Speech, and the Idea of a University*, 53 *LAW & CONTEMP. PROBS.* 195, 197 n.12 (1990) ("Freedom to speak without restraint provides the speaker with an inner satisfaction and realization of self-identity essential to individual fulfillment."). See generally T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 *U. PITT. L. REV.* 519 (1979) (suggesting that the developmental function of the First Amendment is directed more towards facilitating and protecting individuals' activities as participants in sharing, structuring, and coloring the quality of the society than in private self-development or decision making in matters of merely personal import).

³³ Commentators debate whether predicating First Amendment protection on the autonomy interests of individual speakers or listeners may preclude government regulation that is necessary to assure freedom of expression in matters of communal interest. Compare, e.g., Owen M. Fiss, *Free Speech and Social Structure*, 71 *IOWA L. REV.* 1405, 1418-20 (1986) (arguing that although regulation based on autonomy is designed to enrich public debate, it might have the opposite effect of narrowing choices and information available to the public), with Redish, *The Value of Free Speech*, *supra* note 3, at 630-35 (positing that a focus on individual autonomy could lead to protection for commercial speech because information from the marketplace is necessary for individuals to make the best choice as consumers), and Martin H. Redish & Abby Marie Mollen, *Understanding Post's and Meiklejohn's Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 *Nw. U. L. REV.* 1303, 1306-07 (2009) (theorizing that because of the danger of a majority regulating and censoring speech that others might value, government regulation should be minimal to ensure all parties have access to all the information they need). But if the First Amendment's protection of speech can be read to serve the individual's autonomy interest only (1) as the individual may be a participant in matters of public policy or communal concern and (2) as the regulated commercial speech implicates those matters, the controversy is of small import. Similar considerations would govern the government's obligation to provide, or a person's entitlement to receive, First Amendment protection in either case.

sorts of injury to consumers and resulting costs to society from addressees heeding the commercial message: (1) harm from being induced (by deception) to purchase a commodity or service that differs materially from what the speech reasonably leads them to believe, and (2) quite apart from that harm, injury from consuming, using, or possessing the proffered product or service. Commercial speech encourages (or seeks to persuade) its addressees to engage in commercial exchange transactions, and to do so in a context in which there is often a large asymmetry between the speaker and the addressee or audience in relevant and knowledge about (and a comparably large asymmetry in the ability to comprehend) the transaction and its import. That asymmetry is especially significant in a seller's efforts at sales offered en masse to dispersed retail consumers; these efforts rarely attract (or invite) critical responses or questions from competitors or third parties. It is difficult and costly (and sometimes impossible) for the consumer to overcome the consequences of that asymmetry.

Apart from the government's interest in preventing the consumer from being misled by the seller's speech to purchase a good or product that he does not desire, the government may seek to discourage consumers from acquiring or consuming products or services, or engaging in activities that are more or less accurately described in the commercial speech, because the government (reasonably) believes such consumption or activities will injure the consumer or others physically or emotionally, or otherwise impose costs on society—and the government has the constitutional power to regulate, and indeed forbid, that consumption or activity.

II. INSTITUTIONAL CONSIDERATIONS

Before examining the sufficiency of autonomy-based considerations to support First Amendment coverage or protection of commercial speech, it is appropriate to examine the institutional considerations that differentiate commercial speech from speech that is protected by the First Amendment.

The U.S. Supreme Court brings commercial speech within the coverage of the First Amendment by imputing to the speech a content and function relevant to those constitutional values that focus on self-government, public policy, and other matters of societal import.³⁴ But

³⁴ Commercial speech is purportedly covered by the First Amendment precisely because such speech is functionally part of the same public discourse that the First Amend-

the narrow contours of protection that the Court offers for commercial speech are not sufficient to serve those values. Instead, the lesser protection offered for commercial speech engages only an entirely different constitutional value—an individual's autonomy in conducting his (or her) personal life. Indeed, the protection offered is not compatible with the protection that would be required to promote the societal values that the Court formally relies upon to justify First Amendment protection for commercial speech.³⁵

This suggests why false, misleading, or even only debatably accurate commercial speech is not protected by the First Amendment, in contrast to the tolerance required by the First Amendment for putatively false or misleading expression in speech that addresses matters of public policy or self-government or otherwise engages matters of cultural or societal interest.³⁶ The tolerance for such false or misleading

ment otherwise covers. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 363–65 (1977); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 764–65 (1976).

³⁵ This incongruity results from the difference between the commercial communication's sales message, which generally engages only personal interests in the sales transaction, and its non-commercial expression, presumably in aid of that message, that engages societal values. If the First Amendment's role is to address essentially societal interests, then the First Amendment protection for speech must be contoured differently than if the Amendment's role is to advance merely the autonomy interests in the sales transaction of the seller or consumer of the proffered products. Justice Harry Blackmun does not address the problem when he says of his effort to equate commercial speech to public discourse in *Citizens Consumer Council* that "even if the First Amendment were thought to be primarily an instrument to enlighten public decision making in a democracy, we could not say that the free flow of information does not serve that good." 425 U.S. at 765.

³⁶ See *In re R. M. J.*, 455 U.S. 191, 203 (1982) ("Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. . . . Misleading advertising may be prohibited entirely."); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974) ("Under the First Amendment there is no such thing as a false idea. . . . But there is no constitutional value in false statements of fact."); see also *Edenfield v. Fane*, 507 U.S. 761, 765 (1993) (holding that a ban on in-person solicitations by Certified Public Accountants (CPAs) was unconstitutional and that CPAs are entitled to First Amendment protection when soliciting customers with "truthful, non-deceptive information proposing a lawful transaction"); *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (holding, in a case involving public statements against public officials, that "the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection"); David Shelledy, *Autonomy, Debate, and Corporate Speech*, 18 HASTINGS CONST. L.Q. 541, 557 n.52 (1991) (arguing that if courts focused on the autonomy interests of the speaker, then they would have reason to protect defamatory falsehoods made maliciously, because "falsehood involves moral choice, especially when intended"). Compare *Citizens Consumer Council*, 425 U.S. at 772 (stating that the First Amendment "does not prohibit the State from insuring that the stream of commercial information flows cleanly as well as freely" when the State is regulating false or misleading speech), with *id.* at 773 (holding that the State may not completely suppress truthful information about wholly lawful activities). See generally Christopher P. Guzelian, *True and False Speech*, 51 B.C. L. REV. 669 (2010).

expression in speech in the latter cases is driven by the needs of a self-governing, open³⁷ society to leave “breathing space” for speakers who otherwise might be deterred from expressing uncertain or contestable truths.³⁸ Such inhibition would deprive listeners and society of the “uninhibited, robust, and wide open”³⁹ debate that is necessary for generating appropriate solutions for differences among participants in collective affairs and would eliminate the constructive role of error in the truth-seeking process.⁴⁰

Indeed, crucial conditions that justify some tolerance for false and misleading expression in the marketplace of ideas and the development of the culture of a society are generally lacking in the context of commercial speech. The remedy of “more speech”⁴¹ that is necessary for productive debate, and is an essential premise underlying the concept of freedom of speech, is not likely to be offered by a commercial speaker’s competitors, the constituency that has the most active interest in the matter. Competitors may claim to furnish a better, cheaper, or more attractive product or service; but they are unlikely to offer admonitory comments on the safety or health characteristics or other risks or functional costs of their competitor’s offerings—with which their own products, or offered services, often share so many characteristics.⁴² The small likelihood of productive responses by competing sellers or other speakers to the expression in commercial speech may change, so that the remedy of more speech may become a viable component of the practice of commercial speech. In recent years sellers have begun to challenge the accuracy of competitors’ claims, in court

The focus on falsehood suggests that First Amendment protection is addressed primarily to the transactional impact of speech. See Farber, *supra* note 3, at 386–89. Autonomy values are asserted in claims to protect non-commercial speech. But protection of speech to serve self-government or the pursuit of truth values requires a tolerance for falsehood that respect for the autonomy of listeners may preclude.

³⁷ An open society is one whose members participate in determining societal values and attitudes, as well as government policies. See *supra* note 32 and accompanying text.

³⁸ *Brown v. Hartlage*, 456 U.S. 45, 60–61 (1982) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964)).

³⁹ *New York Times Co.*, 376 U.S. at 270.

⁴⁰ See generally MILL, *supra* note 30 (explaining the importance of freedom of thought and discussion in creating a fully democratic society); John Milton, *Areopagitica: A Speech of Mr. John Milton for the Liberty of Unlicenc’d Printing. To the Parliament of England* (1644), in *THE PROSE OF JOHN MILTON* 265 (J. Max Patrick ed., 1967) (describing the societal harms inherent in restrictions on a free press).

⁴¹ See *Whitney v. California*, 274 U.S. 357, 375, 377 (1927) (Brandeis, J., concurring) (“[T]he fitting remedy for evil counsels is good ones.”).

⁴² See Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 663–67 (1977).

and otherwise.⁴³ But such challenges are infrequent, and likely to address peripheral (and only commercial) aspects of those claims. And, the prospect of consumer challenges in response to sellers' advertisements ("ads") is an even less likely source of more speech than competitor challenges. This accentuates the troublesome effect of the inequality in knowledge, comprehension, and wealth between speaker and dispersed listeners in much commercial speech; it thus calls for government power to attempt to achieve fairness for the consumer and the level playing field that is presumed as the basis for the efficient market in commercial transactions.

Moreover, in much commercial speech, the speaker's concern is primarily, or only, with the choices to be made by individual consumers for their personal benefit, rather than for the benefit of society as a whole. The question that each consumer is presumed to ask in making his choice is: "What is good, or best, for me?" The speaker's (seller's) interest in society's concern with such decisions is with *aggregate* choice rather than with *collective* choice.⁴⁴ In the latter case, the question the addressee or member of the audience is presumed to ask is: "What is good, or best, for the community or society?" Such an inquiry is not of central concern to the speaker-seller or indeed to the listener-buyer.

The quality or quantity of speech that can fairly be said to respond or relate to speech engaged in sales efforts (by competitors, by consumers, or by commentators or observers, such as the Consumers' Union) is not remotely comparable to that of the sales literature. That disparity is so great, as Professor Steven Shiffrin long ago pointed out,⁴⁵ as to preclude such responsive expression from offering up the more speech, the availability of which the special protection of freedom of speech by the First Amendment rests. Unless the Internet or other development modifies that balance significantly, the institutional difference between the availability of more speech in the domains of commercial speech and of noncommercial speech (whether on matters of policy or politics or culture) deprives commercial speech of a necessary condition for invoking the First Amendment.

⁴³ See Stuart Elliott, *In a Battle for Turf, Sears Revs Up the Riding Mower*, N.Y. TIMES, Mar. 18, 2011, at B3 (illustrating the popular trend among corporations, such as Coca-Cola and Starbucks, to challenge directly their competitors' claims within their own advertising campaigns).

⁴⁴ To be sure, when a consumer product becomes fashionable, the resulting accumulation of consumers' choices may be deemed more a collective choice than an aggregate of individual choices. But the products are offered by the seller for individual choice and benefit, in the hope of aggregate, not collective, success.

⁴⁵ See Shiffrin, *supra* note 3, at 1229.

The reader verifiability⁴⁶ of commercial speech, and the more powerful and durable incentives for speaker-sellers in the commercial or transactional context, have been suggested by the Court as justifying limits on First Amendment protection for commercial speech.⁴⁷ But those considerations are disputable. Possibly a seller who knows more about the quality of his product or service will be more truthful or informative in urging its purchase. But the likelihood of that possibility producing sufficiently well-informed consumers remains to be demonstrated—at least before restricting government regulation of commercial speech in the interest of serving the parties' autonomy. Neither the autonomy of the speaker or of the consumer is well-served, nor is the interest of society advanced, by unregulated commercial speech, whose essential function "derive[s] from confidence in its accuracy and reliability."⁴⁸ Indeed, if respect for a person's autonomy rarely justifies a speaker in uttering, or a listener in accepting, false or misleading communications,⁴⁹ it is hardly a concern with autonomy that supports First Amendment protection for false or misleading expression even in noncommercial matters of societal import.⁵⁰ The autonomy predicate for protecting the addressee or audience leaves little room for the "breathing space" that is advanced in support of First Amendment pro-

⁴⁶ Prohibiting misleading commercial speech is said to be less chilling because the misleading character of such speech is more readily understood by, and known to, the speaker (who knows all the relevant "facts") than in the case of opinionated non-commercial expression. Therefore, the speaker is less likely to remain silent for fear of mistakenly uttering a prohibited falsehood. Moreover, it is suggested that the greater verifiability of commercial speech operates to reduce the likelihood of perverse government prohibition of speech that is not misleading. See Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech*, 1996 SUP. CT. REV. 123, 152. The possibility that sometimes commercial speech may be more likely to be chilled than some non-commercial speech does not alter the general proposition of a lesser likelihood of chilling the former. See C.C. Laura Lin, Note, *Corporate Image Advertising and the First Amendment*, 61 S. CAL. L. REV. 459, 489–93 (1988).

⁴⁷ See, e.g., *Bates*, 433 U.S. at 379–81; *Citizens Consumer Council*, 425 U.S. at 777–78.

⁴⁸ *Bates*, 433 U.S. at 383.

⁴⁹ See C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 910 (2002); David A.J. Richards, *Free Speech and Obscenity Law: Toward A Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 353–54 (1991).

⁵⁰ The notions that "there is no such thing as a false idea," and that "there is no constitutional value in false statements of fact," *Gertz*, 418 U.S. at 339–40, reflect the significant difference between the values underlying protection of speech addressed to self-government matters or to pursuit of truth, for which some falsehood needs to be protected, and those protecting commercial speech, whose benefits "derive from confidence in its accuracy and reliability." *Bates*, 433 U.S. at 383; see *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776–77 (1986).

tection of misleading or debatable expression on matters of public policy or self-government, or of more general import to society.⁵¹

III. AUTONOMY CONSIDERATIONS

The autonomy for which the First Amendment's special protection against regulation of commercial speech is claimed may be that of the speaker or that of the listener, or both. In any case, the claim is that utterance or receipt of the expression may enrich the person's mind, psyche, or persona and thus facilitate her self-realization or self-fulfillment.⁵² That enrichment is made possible only if some notion of freedom of speech protects the speaker's freedom to express his or her thoughts or wishes to another, and protects the listener's freedom to receive and consider them.⁵³

It is largely in the posture of the listener that the case law and commentators advance the First Amendment as a ground for protection of freedom of commercial speech.⁵⁴ The notion is that any regula-

⁵¹ The role of commercial speech, and the function generally served by regulating it, may also explain why content-based regulation of commercial speech need not offend the First Amendment, in contrast to its fatal impact on regulation of "covered" non-commercial speech. See, e.g., Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 55-56 (1987) (discussing the societal considerations that underlie First Amendment hostility to content-based regulation of speech); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 655 (1991) (explaining that content discrimination is one of the most serious First Amendment concerns). Similarly, the First Amendment vagueness and overbreadth doctrines have little application in assessing First Amendment challenges to regulation of commercial speech.

But societal considerations are less important, if indeed they are relevant, to fulfilling the only autonomy value that may fairly claim to be protected in commercial speech. Indeed, that value may actually be disserved by failure to regulate falsehood broadly enough or by insistence upon forbidding content-related regulation of such speech. Similar considerations may explain why compelling commercial speech to avoid misleading, or otherwise injuring, the consumer does not suffer from the same vices as may comparably compelling noncommercial speech. The permissible focus of regulation of commercial speech on protecting the individual consumer diminishes or eliminates the role of the principles that preclude First Amendment protection of compelled speech. See Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 870 (2005).

⁵² Emerson, *supra* note 28, at 879-81. Professor Thomas Emerson, who emphasized the autonomy value underlying the First Amendment's protection for speech, suggested that the First Amendment did not protect commercial speech. See THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 311, 447, 640 (1970).

⁵³ It is not clear how enhancing the range, or the understanding of the range, of choices by consumers, which is said to be a significant aspect of the listener's autonomy in receiving commercial speech, is a relevant aspect of the speaker's autonomy.

⁵⁴ Consider, however, the seller-speakers' interest in, or right to make, choices. Cf. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564-65 (2001) (focusing on the burden that outdoor advertising restrictions would place on cigar manufacturers with smaller advertising budgets).

tion limiting the quality or the quantity of the expression in commercial speech that the listeners may receive from a willing and able speaker is an impermissible interference with the listener's autonomy. Yet the conception of autonomy, which appears to be the dominant premise on which the Court rests First Amendment protection of commercial speech, may have more than one import. In matters of expression, its focus may be on speech that concerns enrichment or fulfillment of one's personal life⁵⁵ rather than on speech that involves one's more or less conscious participation as a member of society in affecting societal decisions or values.⁵⁶ Indeed, if the claim of autonomy as the predicate for First Amendment protection of commercial speech were based on the latter aspect, measuring its validity should test the claim by the proposition that protection should be available only for expression addressed to, or discussing, communal decisions or attributes and comparable subjects of societal interest—whether by way of participation in public policy or self-government, or in “pursuit of truth” on matters of “culture.” On that premise, it would require contours of protection that such claims receive, but that the Court properly denies for commercial speech.

Whether First Amendment protection of commercial speech does (or should) serve one aspect of autonomy or the other (or both, or neither), requires examination of: (A) whether (and why) autonomy considerations require greater protection of individuals against regulation of commercial speech than against regulation of the transactions the speech discusses or proposes, or of comparable commercial exchange

The listener's right is an interest in learning from expression, whatever its source; but the listener does not have a right to demand a speaker where none appears. *Cf.* *Va. State Pharmacy Bd. vs. Va. Citizens Consumer Council*, 425 U.S. 748, 756 (1976). The First Amendment “is a protection enjoyed by . . . recipients of the information, and not solely, if at all, by the advertisers themselves.” *Id.* It “presupposes a willing speaker.” *Id.* It has been suggested that because freedom of commercial speech rests more on listeners' than on speakers' rights, the strictures against falsehood are justified. *See* Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at “The Greater Includes the Lesser,”* 55 *VAND. L. REV.* 693, 720 (2002); Burt Neuborne, *A Rationale for Protecting and Regulating Commercial Speech*, 46 *BROOK. L. REV.* 437, 453–54 (1980).

⁵⁵ If the commercial speech being regulated contains only expression that is designed solely or principally to facilitate the transaction it proposes, the autonomy claim for its protection lacks the predicate of speech that engages or affects the listener's interest in matters of self-government or public policy or other communal interests.

⁵⁶ More than occasionally, it has been suggested that the notion of autonomy engages both (1) reflecting and deciding how to live one's own life as an individual human being and (2) reflecting and deciding one's conduct or role as a participant in a self-governing society. *See generally* JAMES E. FLEMING, *SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY* (2006).

transactions, and (B) whether (and why) such commercial speech should, or should not, receive the same protection as does speech otherwise covered by the First Amendment or indeed receive any First Amendment protection at all.

A. *Commercial Speech and Commercial Transactions*

It is claimed that a vital component of a person's autonomy interest in freedom of commercial speech that seeks to enable or encourage an exchange transaction⁵⁷ is the enrichment of the person that comes from the secondary process of uttering, receiving, considering and discussing information or views about possible uses or enjoyment of the speaker's products or services, and reflecting about them and their relation to satisfying or enjoying primary preferences.⁵⁸ Uttering and receiving expression that thus enhances the range of a person's knowledge and ability to make choices about producing, selling, or buying goods, or freely exercising one's will in such matters, is said to be a good that in itself fulfills the person as a moral agent entirely apart from the good of achieving the satisfaction of the primary preferences urged in commercial speech.⁵⁹ Any government curtailment of the good involved in participating in that secondary process (which process is assumed to require, and expected to be a consequence of, freedom of commercial speech) is said to disrespect the humanity of the listener and improperly to interfere with the person's autonomy more profoundly than by directly regulating satisfaction of the primary preference.⁶⁰ Of these two different aspects of the relationship of commercial

⁵⁷ Quite apart from considerations special to commercial speech, it is urged that "[t]he linkage of speech to thought, to each person's central capacity to reason and wonder, is what places it above other forms of fulfillment." Smolla, *supra* note 32, at 200 n.22. It is puzzling to learn that the autonomy that precludes state regulation of speech because doing so "manipulate[s] people by, in part, taking over their thinking process," Strauss, *supra* note 49, at 356, equally precludes regulation of commercial speech to avert similar manipulation by sellers of commercial products. It does not help to solve the puzzle to be told that autonomy "forbids that [one] cede to the state the authority to limit [one's] use of [one's] rational powers," but apparently denies to the State the power to protect one from involuntarily ceding it to private power holders. Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992); see Fallon, *supra* note 28, at 893-99.

⁵⁸ See DANIEL A. FARBER, *THE FIRST AMENDMENT* 4 (2003). This process of experience in making rational choices is said to require access to the widest range of information and ideas in order to enrich the person and to facilitate choices and acquisition of products, and thus to enjoy the full range of possibilities in one's life. See Redish, *The Value of Free Speech*, *supra* note 3, at 491.

⁵⁹ McGowan, *supra* note 3, at 411-29.

⁶⁰ Redish, *The Value of Free Speech*, *supra* note 3, at 616-19.

speech to autonomy,⁶¹ participation in the secondary process is the “good” urged most strongly to support the special protection of the First Amendment for commercial speech.

The differences between the two goods reflect relevant differences between the subjects of the recurring metaphoric references to “the market” and “the marketplace of ideas”—and the different roles of speech in each.⁶² The market operates functionally as a medium for the exchange of the property of its participants. Speech in that market is simply instrumental in effecting the exchange of that property. The benefit from exchanges of speech in the market accrues privately to individuals as sellers (generally speakers) and buyers (usually viewers or listeners). The market is famously said to transform the private benefit that individuals seek (from pursuit of personal gain by exchange of private property) into public benefit to society by operation of the invisible hand.⁶³ That market’s “proper” functioning in promoting the public interest can be modeled and measured,⁶⁴ however contestably. Its failure to function properly is a dominant justification for regulatory

⁶¹ Commentators suggest that narrow commercial speech serves more than the individual’s possessive interest in self-improvement from merely considering the speech and its contents—for instance, that the experience of learning about and making choices among commercial products may develop one’s capacity to make rational decisions. See McGowan, *supra* note 3, at 411–16, 443–44. It may also enrich one’s capacity to participate as a member of society in the process of making choices on matters of self-government or pursuit of truth. See Redish, *The Value of Free Speech*, *supra* note 3, at 618–19. Yet these suggestions are problematic on two grounds. First, as an empirical matter, it is unproven that skill and experience in rationally and fruitfully selecting consumer goods for personal enjoyment is, or can be, of any assistance in rationally and fruitfully selecting legislators or executives, or in deciding or appreciating matters of ideology, aesthetics, or collective societal values or attitudes. *But cf.* McGowan, *supra* note 3, at 411–16 (arguing that all commercial speech, even at its most basic level, aids the rational decision making of individuals and thus contributes to rationality). Second, even if there is some carryover from the one to the other, the question is whether the cost of thus protecting freedom of narrow commercial speech is more than the cost of failing to do so by regulation. See ROGER A. SHINER, *FREEDOM OF COMMERCIAL EXPRESSION* 230 (2003). Respect for autonomy neither requires nor extends the same protection against government regulation of the opportunity to learn about each and every kind of choice.

⁶² The failure to appreciate those differences may explain the incoherence in the rhetoric of “the marketplace of ideas.” See David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857, 879 (1986).

⁶³ See generally ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (Edwin Cannan ed., Modern Library 1937) (1776) (introducing the concept of the invisible hand).

⁶⁴ Whether a market is functioning well or poorly may be determined by drawing on price equilibriums, quantifications, competition, and other such concepts. A market functions properly when it comports with a model description or when it functions in accord with notions of efficiency in the production and distribution of goods.

intervention by the State and the resulting constraints on individual freedom to act in it.

In contrast to the market, the marketplace of ideas⁶⁵ functions as a medium in which goods that are effectively public⁶⁶ are exchanged or distributed, such as the content of speech containing the information or notions expressed. It transforms private action, often taken solely for private benefit, into public benefit, not derivatively by the operation of the invisible hand on gain-seeking exchanges of private property, but directly by the impact of the speech—speech regarding the collective decisions, values, or attitudes of society—on members of the public.⁶⁷ It is difficult, perhaps impossible, to find a model by which to identify particular failures or defects in such an exchange process or a metric by which to measure defects as in the market, or to fashion appropriate regulatory responses. The societal benefit that is thought to emerge from the exchanges by individuals of the public good; that is, speech in the marketplace of ideas is part of, as well as the result of, the process of sharing that the exchanges entail, such as the collective tolerance for, and communal accommodation of, different (often conflicting) notions of fact or ideas, or values or attitudes expressed.⁶⁸ That societal benefit

⁶⁵ See Cole, *supra* note 62, at 879 (discussing the theory that the First Amendment protects a “free trade of ideas,” which justifies intervention by the government to save the “marketplace of ideas”); see also Fiss, *supra* note 33, at 1408–13.

⁶⁶ As an economic matter, the speaker cannot capture the full gain from the content of her speech. See, e.g., Farber, *supra* note 3, at 379–81.

⁶⁷ Speech works its effect directly on other individuals who are members of the society. To say “this is good for me because others choose it, and I want to look or act like others” is a form of participating in a collective choice, but not in initiating or formulating it, notwithstanding that the choice is driven by the desire to “fit,” and thus helps to effectuate a collective preference expressed by other individuals. The aspiration is to benefit individuals, not the collective.

⁶⁸ See C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 967–81 (1978); Strauss, *supra* note 49, at 352–53. That there may not be any model by which to calculate, or metric to measure, a “perfect” market in ideas, as there may be to measure a perfect market for securities or for commodities or services, is not a justification for government refraining from intruding in, or regulating, the former, or for regulating both markets equally, or for neglecting to regulate either market. The First Amendment suggests that there are different constitutional limits on government efforts to remove or limit imperfections or defects in one market than in the other. Enriched commercial speech certainly functions in the latter market even if it may only sometimes function in the former. “Let the buyer beware” is not a divine admonition for all interchanges among people. There is little obstacle in the U.S. Constitution, or indeed in any broader understanding of morality, economics, philosophy, or politics, to inhibit application of that admonition with respect to commercial speech as it is inhibited in the market for commodities or services in the interest of making such markets less imperfect, even if there may be a constitutional objection to similarly inhibiting that admonition in the market for ideas. Commercial expression is constitutionally regulable as it functions in the former market,

may itself offer enrichment to the individual, both as she participates in the shaping of society and as a recipient personally of the benefit from living in a society with so varied an array of tolerated inputs and opportunities.⁶⁹ But its essential function is to enable (authorize?) appropriately informed and discussed collective action (or inaction)—a function that is not touched by commercial speech unless (as may occasionally happen) that speech contains content that is more than necessary to serve the transactional interests of the participants, and touches matters of political, public policy, or other societal interest.⁷⁰

Commercial speech functions (and addresses an audience) principally in the market in which individuals seek to sell or acquire products or services for their own personal profit or benefit. It was long ago suggested that there is good reason to treat commercial speech (at least narrow commercial speech) as simply part of the transaction, but not as speech,⁷¹ or at least not as speech covered by the First Amendment.⁷²

even if that same expression is not equally identically regulable in the latter. *Compare In re Primus*, 436 U.S. 412, 431 (1978) (holding that the state's action against the American Civil Liberties Union (ACLU) for soliciting legal clients violated the First Amendment because "[t]he ACLU engages in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public"), *with Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 458–59 (1978) (holding that the state's action to discipline a practicing lawyer for soliciting accident victims as clients did not violate the First Amendment because his solicitations did not involve "political expression or an exercise of associational freedom"). The essential problem under the First Amendment is to identify the circumstances in which regulation of the commercial speech affects permissible restraints in the one market and has no constitutionally cognizable effects, or imposes no constitutionally impermissible restraints, in the other—that is, when speech driven by speakers' efforts to sell services or commodities or services can be found to be nonregulable because its regulation implicates First Amendment values.

⁶⁹ See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., dissenting) ("Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means."); Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 46 (2004).

⁷⁰ The aggregated or collective decisions of the participants in the one market need not reflect comparable considerations or the same allocation and weighting of the preferences of individuals in the other market.

⁷¹ See, e.g., *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003); *United States v. Wenger*, 427 F.3d 840, 846 (10th Cir. 2005); Ronald A. Cass, *Commercial Speech, Constitutionalism, Collective Choice*, 56 U. CIN. L. REV. 1317, 1334–35 (1988); Farber, *supra* note 3, at 381–90; Geyh, *supra* note 3, at 43–52; Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 39–40 (1986); Strauss, *supra* note 49, at 353–68; Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1323–24 (2005).

It can be argued that the incidental impact of the regulation on covered aspects of enriched commercial speech dilutes the imperative of the First Amendment and embeds the

The notion that the regulated commercial speech is simply part of the commercial transaction, and not speech or expression at all, may rest on the content of any particular instantiation of commercial speech,⁷³ or may be more broadly based on the nature of all commercial speech, whose essential (and generally only) function is to enable or assist effectuation of the secondary process. Unless the commercial speech contains expression that alludes to, or touches on, matters of collective or public interest to the society and engages the interest of members of the audience in considering such matters in addition to (or other than) making the purchase, it is simply part of the commercial transaction it proposes. It offers its audience little more than does the transaction as a fulcrum on which to ratchet up special protection against government regulation.⁷⁴ That the commercial speech enables a listener to realize that he can choose among an array of products, in contrast to merely facilitating his acquisition of a particular product, does not significantly alter its function, in serving the autonomy of the listener—unless the experience of learning to make choices among such products enhances one's capacity to participate in the marketplace of ideas or in societal matters.

It is strongly argued that experience in uttering, receiving, and considering commercial speech has such value—for example, enhanc-

inquiry in the softer soil of “time, place, and manner” analysis or “incidental effects” analysis. See Farber, *supra* note 3, at 381–82; Volokh, *supra*, at 1328; cf. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 78 (1976) (Powell, J., concurring) (arguing that an ordinance prohibiting adult movie theaters or bookstores from being within 500 feet of a residence did not violate the First Amendment because it mainly impacted commercial interests and only incidentally implicated speech concerns). Some regulatory efforts are driven by considerations that engage both concerns, such as offers or advertising by professionals, or by medical pharmaceuticals sellers who lack U.S. Food & Drug Administration approval, or possibly by tobacco or alcohol purveyors. Emphasis in regulation is on the failure of the advertising fully to overcome import of information disparities between seller and buyer, even when there is no overt falsehood. Disparities in comprehension, as well as in information, result in incomplete information or admonition, such that the consumer is harmed by consuming products or services by reason of her excusable and unremediable ignorance. See *Madigan*, 538 U.S. at 606. In that connection, it is irrelevant whether content discrimination has communicative impact narrowly defined or more broadly envisioned. See Heidi Kitrosser, *From Marshall McLuhan to Anthropomorphic Cows: Communicative Manner and the First Amendment*, 96 Nw. U. L. REV. 1339, 1340 (2002); Williams, *supra* note 51, at 618.

⁷² See BAKER, *supra* note 3, at 196–197; CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 234–40 (1993); Farber & Frickey, *supra* note 3, at 1621.

⁷³ See *Randall v. Sorrell*, 548 U.S. 230, 279–80 (2006) (Stevens, J., dissenting).

⁷⁴ See Farber, *supra* note 3, at 383. That members of the audience may derive pleasure or enrichment, either emotional or intellectual, from the process of receiving and viewing, or hearing, the content of the commercial speech, neither detracts from this conclusion nor implicates more than personal enrichment of, or enjoyment by, the individual.

ing one's ability to make prudent choices in living one's life in matters other than, or in addition to, making purchases for personal consumption or enjoyment of proffered commercial products or services.⁷⁵ There is little support for that argument, in theory or in fact. The differences between the focus of commercial speech and that of otherwise protected speech⁷⁶ leave little room to assume such transfer of training. In the absence of service to such broader values, commercial speech disconnected from its instrumental role in aiding a purchase for the benefit of the seller or the purchaser offers simply the opportunity to contemplate the information (including images) it contains, and to consider or enjoy the portrayal of the choices it offers and the receipt of its message.⁷⁷ That focus is on the same kind of possessive individual interest that is served by actual acquisition and use of the products or services (albeit in enjoying the expression rather than enjoying the product or service).

In that view, the autonomy basis of the individual's claim for protection of commercial speech rests on his or her entitlement to enjoy the benefit or enrichment that he or she obtains as an individual from uttering or receiving expression about selling or consuming products or services. Enjoyment of that speech consists in benefit to the individual (as speaker or as listener) personally, as owner and possessor of a kind of property (information, images, ideas or visions) whose characteristics and enjoyability may be thought to be more enriching or nec-

⁷⁵ See BAKER, *supra* note 72, at 195; Post, *supra* note 3, at 1270–78; Redish, *The Value of Free Speech*, *supra* note 3, at 606–07; Richards, *supra* note 49, at 76–77; Strauss, *supra* note 49, at 345.

⁷⁶ This refers to the difference between seeking answers to the questions: “Is it good (or better) for me?” and “Is it good (or better) for the community or society?” The tendency to rely on considerations of private gain or benefit in answering the latter does not alter the significance of the difference between the two questions or the responses for which they call. Undoubtedly, protecting freedom of commercial speech in a society can enhance the capacity of individual members to acquire many sorts of information and understand opportunities that affect their personal values and attitudes in choosing how to conduct and enjoy their lives. Speech that offers to the individual an enhanced understanding of the commercial world in which she lives, and its impact on her, may indeed affect her interests as a member of society and her ability, as such, to participate in generating collective decisions, values and attitudes. Nevertheless, the aim of speakers in uttering commercial speech and the likely import of such speech for listeners suggests that any expression it contains will neither seek nor have such impact on the audience. Unless the particular instance of commercial speech that government seeks to regulate invites, or implicates, such participation, it is doubtful that the speech offers the kind of self-fulfillment or enrichment for which the First Amendment specially protects speech. *Cf.* McGowan, *supra* note 3, at 411–15.

⁷⁷ 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481–82 (1995).

essary for self-realization or self-fulfillment as a human being⁷⁸ than the possession and use of the material property whose purchase is advocated.⁷⁹ The listener is simply a consumer of (1) the expression about the desirability of acquiring the commodity, rather than of (2) the commodity itself, but in either case he is concerned with only his own benefit or pleasure. The enjoyment of the content of the expression may satisfy the possessive private interests of the individual intellectually, emotionally, or otherwise; it touches only obliquely, if at all, the individual's capacity or interest in connecting with other members of the community in matters such as the development or sharing of common interests or views of the world, or communal values or ways of life.⁸⁰ It does not alter this conclusion to formulate the benefit to the individual as enriching his mind or his psyche⁸¹—except as doing so is shown to enable an enhanced role as a participant in collective decisions or shared attitudes or values.

But if the commercial speech serves only an individual's private, personal interest—either in acquiring or selling a product, in uttering

⁷⁸ Or, the enjoyment of this speech might be more closely related to an untrammelled capacity to exercise one's will in making life's choices.

⁷⁹ The First Amendment protects the individual listener's interest in receiving speech on matters of public policy or otherwise of public interest. See *Kleindienst v. Mandel*, 408 U.S. 753, 775–76 (1972) (Marshall, J., dissenting); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 305 (1965).

⁸⁰ *Citizens Consumer Council* appears to reject this distinction, explaining that the commercial speech is to be specially protected even though it is no more than a proposal of an exchange and involves no broader ambience. 425 U.S. at 760–761; see SUNSTEIN, *supra* note 72, at 141. It is possible analytically to differentiate the process of speaking or listening from the role of the content of the speech in affecting the listener's more complete self-identity or enjoyment of freedom of the mind. But the autonomy interest of the listener in learning about and considering the content of the proposal contained in narrow commercial speech cannot be served unless she receives that speech. Interference with her receipt of that speech (even though the interference consists only in regulating its content) is then interference with her autonomy interest in learning about and considering that content. It is the claim for special protection of the latter that implicates the claim of First Amendment protection for her receipt of speech. Her autonomy interest in learning about and considering that content, or experiencing it, may be different; it is not, however, significantly greater than her autonomy interest in acquiring and using the offered product if it is simply an interest in possessory private enjoyment of the content of the speech. Thus, it is no more protectable by the First Amendment against regulation than is acquisition and use of the product. In any event, the First Amendment enters the act only when the speech enhances participation in matters that may be of collective or public interest. But cf. *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (holding that prohibiting the mere possession of obscene material violates the First Amendment).

⁸¹ If such enrichment deserves greater protection against government regulation than does enrichment of the person's lifestyle, it must be found in some other provision than the First Amendment.

an expression, or in receiving, digesting, and enjoying its content and the presentation of the choices it suggests—it is legitimate to ask, as have Professors R.H. Coase, Aaron Director and others: What justifies giving greater speech protection to the liberty interest of the speaker as purveyor, or the listener as consumer, than to the liberty interest of the person as seller, possessor, acquirer, or consumer of the proffered property?⁸²

B. *Different Content and Different Contexts of Speech*

On the assumption that commercial speech cannot properly be regarded as simply the equivalent (or part) of the transaction, it has been suggested that because it is speech and serves a communicative function of speech, commercial speech is entitled to the same special protection against government regulation as is other, protected speech—both morally and under the First Amendment. As a predicate for special First Amendment protection, however, commercial speech's communicative function may not be sufficient to justify such protection. Like the question raised by Professors Coase and Director on the assumption that commercial speech is only the equivalent of transacting; it can be asked, on the assumption that commercial speech is speech and not simply the equivalent of transacting: What, if anything, justifies according less First Amendment protection for commercial speech than is accorded the noncommercial speech it otherwise protects, and indeed any First Amendment protection for the former?

To attempt to answer these questions requires recognition and understanding of different kinds or contents and functions of speech—and the differing reach of the First Amendment for those different contents and functions. The utterance or hearing of meaningless sound is no more related to autonomy than are any other physical acts

⁸² See R.H. Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384, 384–85 (1974); Aaron Director, *The Parity of the Economic Marketplace*, 7 J.L. & ECON. 1, 6–7 (1964). The argument is that receipt and consideration of speech, including commercial communications, stimulates a person's imagination and capacity to reflect and choose, and it enhances a person's capacity as a moral agent to understand one's self and one's existence. Speech, including commercial speech, is thus unique to, and of special value to, human individuals, in contrast to other, nonhuman, sentient beings. The relationship of communication with others to the human capacity to think, imagine, understand, and exercise "will," is said to require special protection of communication. Smolla, *supra* note 32, at 199; Redish, *The Value of Free Speech*, *supra* note 3, at 591–92. But unless that proposition is self-evident, which it plainly is not, it remains to be demonstrated. Until then, and possibly even then, it is too fragile a premise on which to rest special First Amendment protection for commercial speech, given the resulting costs and risks to society.

in which a human participates as initiator, recipient, or bystander. Speech differs from meaningless sound, *inter alia*, in that it is an attempt to communicate meaningfully by one person with another, or is so heard by an audience, so that it enables people to relate to one another by affecting each other's understanding and their actions or will to act. But not all such communication entails the speech that the First Amendment does, or should, protect.

1. Self-Regarding Speech and Other-Regarding Speech

To recognize that exchange of various sorts of speech, in different contexts or with different content, may specially enhance a human being's moral agency is not to say that each sort or instantiation of speech is equally entitled to special constitutional protection, either morally or legally to that provided by the First Amendment.⁸³ In seeking to identify moral differences among the acts of speaking or listening, and the relationship of different kinds of speech to the autonomy of the participants, one may proceed along more than one axis of inquiry, as noted earlier in this Article.⁸⁴

Thus, speech can facilitate a person's understanding of herself and enhance her capacity to fulfill herself personally—quite apart from its service in enabling her to function as a participant in communal activities or decisions, or in affecting communal values. The process (or fact) of contact and discussion with others can nurture (and help to fulfill) the same individual both as a private person (by, *inter alia*, relating to other individuals and experiencing both the benefits and costs of the relationship) and as a participant in determining societal decisions, values, and attitudes. The two kinds of service of speech often overlap, but speech can be parsed as serving humans in each capacity and serving them distinctly.⁸⁵ It often is difficult to separate and identify expression

⁸³ Not every instance of speech engages a person's autonomy equally or entails behavior of the same moral weight. See Smolla, *supra* note 32, at 197–98; Redish, *The Value of Free Speech*, *supra* note 3, at 604.

⁸⁴ See *supra* notes 52–82 and accompanying text (explaining the autonomy considerations of First Amendment protection in the context of commercial speech).

⁸⁵ To be sure, speech serves to facilitate relationships and experiences that contribute to the process of self-discovery and self-fulfillment; indeed, speech is itself an essential part of that process. For this reason, special protection of speech against government restriction or intrusion may be justified. But the fact that expression encourages self-fulfillment or self-discovery through relationships with others does not, without more, bring the speech within coverage of the First Amendment. To be sure, a person who is thus enriched by expressive contact may be more likely to participate, or to participate differently, in the determination of the structure or quality of society than one who is not so enriched. But

that serves only individual development or only matters of societal interest, or that contributes to both.⁸⁶ Whether that difficulty is sufficient to require special protection of *all* such speech or none is debatable.

Of relevance in this connection is the fault line, occasionally referenced by legal commentators on autonomy and freedom of speech, which distinguishes between the notion of individual autonomy that is served by “self-regarding” speech⁸⁷ in the interest of “atomistic selfish individuals”⁸⁸ and the notion of individual autonomy that concerns the individual acting as a participant in the collective determinations of the society. The latter aspects of autonomy are said to be served by “other-regarding” speech offered by, or to, “people with different ideas and strong disagreements coming together as members of a community to discuss, and effectively to decide on, matters of interest to the community.”⁸⁹ The distinction tracks the difference between (a) linking a person’s autonomy claim for First Amendment protection⁹⁰ to her uttering or receiving speech as a participant in the sharing and the development

that result may follow as much from other acts that contribute to her self-fulfillment. The distinctive and specially protected function of speech in connecting the person to a participatory role in the society is performed only by expression that addresses or stimulates interest in such participation.

⁸⁶ See, e.g., Lyman Johnson, *Individual and Collective Sovereignty in the Corporate Enterprise*, 92 COLUM. L. REV. 2215, 2226–29 (1992) (reviewing FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991)) (discussing the interplay of societal and individual interests in individual decisions on personal matters).

⁸⁷ See Balkin, *supra* note 69, at 46.

⁸⁸ See Wells, *supra* note 28, at 186.

⁸⁹ *Id.* Compare FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 57 (1982) (noting that “[c]ommunication informs us of the choices and hypotheses made or suggested by others while also allowing us to refine our own thoughts through the necessity of articulating them”), Post, *supra* note 25, at 1116 (describing public discourse as “an arena within which citizens are free continuously to reconcile their differences and to (re)construct a distinctive and ever-changing national identity”), and Stone, *supra* note 51, at 55–57 (explaining how removing certain points of view can dramatically alter the public debate), with Murchison, *supra* note 28, at 503 (describing the listener as citizen as virtually indistinguishable from the listener as “individual”), and Fried, *supra* note 57, at 233 (detailing how free speech interests boil down to protecting the individual’s ability to make rational decisions for his own best interests).

⁹⁰ The notion that a person’s autonomy requires First Amendment protection of speech to, or by, her as an individual appears later in the development of First Amendment discourse. See Emerson, *supra* note 28, at 878; Redish, *The Value of Free Speech*, *supra* note 3, at 593. This is said to constitute a shift in the theory of free expression from a focus on the quality of society in the pursuit of truth to fulfillment of the individual, in part by enabling receipt of information and ideas that facilitate a broader and richer conception of one’s personal life. See Richard Moon, *Lifestyle Advertising and Classical Freedom of Expression*, 36 MCGILL L.J. 76, 90 (1991).

of the society's values and attitudes,⁹¹ and (b) linking it to speech that serves to enhance her own personal growth or development as an individual human being⁹² capable, among other things, of knowledgeably and freely making choices in life with respect to acquiring, using, and disposing of property or services, or attending to other matters that do not focus on, or indeed concern, a participatory role for her in collectively developing, or sharing in, society's values or attitudes.⁹³ It is the latter aspect that drives the autonomy claims for First Amendment coverage of the commercial speech whose content may not relate either to self-government values or to other matters of import for the society or its culture.⁹⁴

⁹¹ A democratic culture is not "self-regarding." Balkin, *supra* note 69, at 46 ("Communication is interaction, sharing, influencing and being influenced in turn. . . . [D]evelopment of the self is a project that one shares with others."). That such sharing may enhance development of the self in more or less personal terms need not implicate its impact on one's role as a participating member of society or justify First Amendment protection.

⁹² *Id.*

⁹³ An example of this is narrow commercial speech that serves only to enable individual listeners satisfactorily to give effect to (or decline) the transaction that the speech describes or proposes.

⁹⁴ The most articulate (and an early) explication of that claim is offered by Professor Martin Redish. See Redish, *The Value of Free Speech*, *supra* note 3, at 605–07; see also MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 45–48 (1984) (explaining the marketplace of ideas concept and arguing that to achieve self-realization an individual requires an unrestricted flow of information); Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 593–98 (1996) (arguing that the public's interest in receiving commercial information is often as important as its interest in receiving political information and therefore commercial speech should not be treated differently across the board); cf. R.H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1, 9 (1977) (detailing the effects of commercial advertising, including the incidental effects that individuals' behavior might have on public policy); Coase, *supra* note 82, at 385 (explaining that commercial advertising is typically an expression of opinion that does not contribute to a national political conversation and therefore it is strange that it would be protected by the First Amendment); Redish & Mollen, *supra* note 33, at 1332–50 (outlining the theory that commercial speech deserves less protection than other forms of speech because it only conveys information and does not inform public discourse); Richard Schiro, *Commercial Speech: The Demise of a Chimera*, 1976 SUP. CT. REV. 45, 94–95 (explaining that the Court's willingness to protect commercial speech stems from the individual's "right to know" in the marketplace of ideas); McGowan, *supra* note 3, at 431–36 (arguing that commercial speech should be protected on the basis of enhancing rationality and self-realization).

A different conception of the autonomy interest that drives the First Amendment, and which would deny protection to commercial speech, is offered by Professor Edwin Baker. See Baker, *supra* note 49, at 936–37 (arguing that it is important to protect speech from corporate bodies because doing so preserves independent sources of information); Baker, *supra* note 68, at 967–81 (arguing that the protection of commercial speech stems from the need to protect the collective sharing of ideas); see also BAKER, *supra* note 72, at 207 (explaining the argument that commercial speech is value-laden for those who desire such information and these values should be protected); cf. SCHAUER, *supra* note 89, at 15–72

As Professor Robert Post has pointed out, First Amendment coverage of speech depends upon whether the speech is “situated in a social practice” that has special constitutionally protected value.⁹⁵ It has indeed been suggested that other constitutional norms than the speech clauses of the First Amendment, such as those that implement an individual’s autonomy interest against government intrusion into privacy or intimate association,⁹⁶ may house the only appropriate mechanism to

(arguing that the most consistent and steadfast justification for free speech is that it leads to the “discovery of truth”); Emerson, *supra* note 28, at 879–81 (suggesting two justifications for protecting commercial speech, including individual autonomy interests and a free communication of ideas in a democratic society); Eugene Volokh, *Speech Restrictions That Don’t Much Affect the Autonomy of Speakers*, 27 CONST. COMMENT. 347, 351–54 (2011) (arguing that extending First Amendment protection to commercial speech could be justified on the basis of protecting access to information and preserving the free flow of ideas in the marketplace).

⁹⁵ See Post, *supra* note 3, at 1270–78. This implicates the question whether the First Amendment protects “privately uttered speech”—that is, expression that is not made to the public, but that is addressed to, or received by, another person in one’s home or business, or otherwise non-publicly. Whether such expression attracts First Amendment coverage even if it engages public policy or matters of interest to society is uncertain in doctrine and difficult to answer in principle. Compare *Bartnicki v. Vopper*, 532 U.S. 514, 518 (2001) (holding that the First Amendment protects publicizing the contents of an illegally intercepted phone conversation regarding a collective bargaining agreement), with *Stanley*, 394 U.S. at 568 (holding that the First Amendment prohibits criminalizing the mere possession of obscene material). But there is no reason to extend First Amendment coverage to such privately made communication about matters of no public interest, such as narrow commercial speech or other expression on non-public matters. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757–61 (1985); cf. *Garcetti v. Ceballos*, 547 U.S. 410, 420–24 (2006) (holding that the First Amendment does not protect a public employee from discipline based on speech made within her official duties); *Connick v. Myers*, 461 U.S. 138, 154 (1983) (holding that an employee’s First Amendment rights were not violated when the employee was fired for circulating a questionnaire concerning internal office affairs); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968) (holding that statements made by public officials regarding public matters must be provided First Amendment protection even if directed at superiors); Christine Elzer, Note, *The “Official Duties” Puzzle: Lower Courts’ Struggle with First Amendment Protection for Public Employees After Garcetti v. Ceballos*, 69 U. PITT. L. REV. 367, 387–88 (2007) (criticizing the Court’s lack of guidance on First Amendment protection pursuant to official duties). Similarly, there is little reason to protect commercial speech to which the speaker attaches expression on a matter of public interest merely in order to aid the sale of its products or services.

⁹⁶ The Court’s reliance on the First Amendment (rather than other constitutional provisions) to justify special protection of the enjoyment in one’s home of the content of allegedly obscene speech is quite incongruous if the protected enjoyment is of speech that is denied First Amendment protection in the market or in the marketplace of ideas. See, e.g., *Stanley*, 394 U.S. at 564. The incongruity disappears if the speech privately enjoyed is protected by the First Amendment in the marketplace of ideas. See Rodney A. Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking in Speech*, 96 NW. U. L. REV. 1099, 1121–22 (2002); Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After Eldred*, 44 LIQUORMART, and *Bartnicki*, 40 Hous. L. REV. 697, 706–12 (2003); Howard M. Wasserman, *Bartnicki as Lochner: Some Thoughts on First Amendment Lochnerism*,

provide special protection against government regulation of commercial speech.⁹⁷ If speech proposing a commercial sale of products or services is to be entitled to more protection than the Constitution offers for consummating the proposed commercial transaction,⁹⁸ it must be found elsewhere in the Constitution than in the First Amendment.⁹⁹ It is speech's persuasive or informative function for facilitating society's collective actions (or interests or decisions) or nurturing social attitudes and values that the First Amendment (and indeed democratic political theory) aims to protect specially against government regula-

33 N. KY. L. REV. 421, 435 (2006); cf. *Bartnicki*, 532 U.S. at 534 (holding that the First Amendment does not protect private speech that deals with matters of public concern).

⁹⁷ See Gregory P. Magarian, *Substantive Due Process as a Source of Constitutional Protection for Nonpolitical Speech*, 90 MINN. L. REV. 247, 285-94 (2005). For example, in determining which associations are entitled to special protection against government regulation, intimate association commands special protection, but as part of the liberty of which a person may not be deprived without due process of law. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984). We may assume that the good that commercial speech offers is enrichment of the mind about, and fuller knowledge or appreciation of, possible ways of living one's life, and enhanced capacity to make choices in such matters freely and rationally. We may also assume that that good is closer to the core of individual autonomy than is the fulfillment that comes from acquisition and enjoyment of the products or services offered. Its centrality to one's being entitles it to especially rigorous protection against government restriction. But the First Amendment may not be the appropriate mechanism for providing that protection if the good to be protected does not reach beyond the personal fulfillment embodied in private possession and use of the content of the commercial speech. In that case, the commercial speech, however essential, does not implicate the person's autonomy interest as a participating member of society. Indeed, in apparent recognition of this limitation on First Amendment protection of commercial speech, it is suggested that enhancing a person's capacity to make private, personal choices for his own benefit enhances his capacity to make choices about collective decisions for society. See McGowan, *supra* note 3, at 420. The argument appears to be that "learning to think rationally" in making commercial choices transfers to, and enhances, rationality in decision making in non-commercial contexts that implicate societal values or attitudes, or even matters of politics or public policy. See Redish, *The First Amendment in the Marketplace*, *supra* note 3, at 432-37; Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191, 1194-95 (1965); Robert B. Holt, Jr., Comment, *Corporate Advocacy Advertising: When Business' Right to Speak Threatens the Administration of Justice*, 1979 DET. C.L. REV. 623, 646-47; John S. Werts, Comment, *The First Amendment and Consumer Protection: Commercial Advertising as Protected Speech*, 50 OR. L. REV. 177, 188-89 (1971).

⁹⁸ See Farber, *supra* note 3, at 386-91; see also GREENAWALT, *supra* note 15, at 211-12 (noting the significance of the Court's extension of free speech protection to commercial advertising in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, but arguing that certain forms of commercial speech should be awarded less than full protection).

⁹⁹ See Magarian, *supra* note 97, at 285-94; cf. *Pell v. Procunier*, 417 U.S. 817, 829-35 (1974) (holding that a state regulation banning the media from access to prisoners did not violate the First Amendment because this was not information available to the general public); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 844-50 (1974) (holding that a prison regulation denying the media face-to-face interviews with inmates did not violate the First Amendment because this was not publicly available information).

tion. But commercial speech's persuasive or informative function is only to induce the purchase or sale of the products it proposes by or to individuals for their own consumption or enjoyment. Speech with so limited a function focuses only on individuals' private or personal good,¹⁰⁰ not on matters of public interest or the societal values or attitudes with which the First Amendment is concerned.¹⁰¹

In sum, self-regarding speech (of which commercial speech is a kind) relates the individual (speaker or listener) to others and to society differently than does other-regarding speech.¹⁰² The two kinds of speech implicate different aspects of the notion of autonomy in determining the individual's appropriate relationship to the State.¹⁰³ Commercial speech, except as it contains expression engaging matters of societal interest, is narrowly focused on personal benefit or fulfillment—

¹⁰⁰ See Post, *supra* note 15, at 321–35; Strauss, *supra* note 49, at 343–45; David A. Strauss, *Rights and the System of Freedom of Expression*, 1993 U. CHI. LEGAL F. 197, 206–07; see also Sarah C. Haan, Note, *The “Persuasion Route” of the Law: Advertising and Legal Persuasion*, 100 COLUM. L. REV. 1281, 1284–96 (2000) (debunking the notion that commercial speech should be protected because of its function of providing information to the consuming public). It does not detract from this conclusion that individual choices driven by conceptions of self-benefit may result in imitative, or even aggregate, communal choices by individuals.

¹⁰¹ See *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 469–72 (1997) (noting this difference explicitly); see also ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 7–8 (1995) (arguing that the ability to participate in public discourse is the foundation of democracy because it allows an individual to gain a sense of “democratic legitimacy”); Vincent Blasi, *Free Speech and Good Character*, 46 UCLA L. REV. 1567, 1571–74 (1999) (explaining the relationship between free speech and individual character); Post, *supra* note 15, at 7 (“Within public discourse, citizens forge, in the words of Learned Hand, the ‘public opinion which is the final source of government in a democratic state.’” (citation omitted)); Post, *supra* note 24, at 2361–62 (explaining how Justice Oliver Wendell Holmes’ dissent in *Abrams v. United States* shaped First Amendment considerations for criminal attempts).

¹⁰² See Wells, *supra* note 28, at 159–61. The service of freedom of speech to a person’s autonomy interest may refer simply to the communication’s import to one’s self as an individual who owns the content of the expressed or received speech and enjoys its content solely for her own self-regarding, development, or growth—an interest that may be characterized as a “liberty” interest. See BAKER, *supra* note 72, at 198; Balkin, *supra* note 69, at 46. Or the good served may refer to the benefit to the individual as a participating member of society for whom the (commercial) speech opens visions of choices and channels of information and communication with others about common interests in self-government or other matters of societal import—an interest that may be characterized as a “fraternity” interest.

¹⁰³ That interest is served by such benefits as the speech offers to the individual as a participant in society; it necessarily entails the societal good, or benefit, that comes from the sharing of speech by individuals—a sharing that is made possible by, and attributable to, the fact that, in more than one sense, speech is a public good. See SCHAUER, *supra* note 89, at 50–52; David A.J. Richards, *Toleration and Free Speech*, 17 PHIL. & PUB. AFF. 323, 334 (1988); Shelledy, *supra* note 36, at 548–553; cf. Emerson, *supra* note 28, at 879–80 (acknowledging the two similar yet different interests entailed in “self-fulfillment,” but according priority of importance to the first mentioned interest and little significance to the latter).

a focus that suggests it has no greater claim to special protection of the First Amendment on grounds of autonomy than does a person's sale, acquisition, or consumption of the goods or services that the speech proposes to sell. It is the relevance of speech to a human being as a social animal participating in generating the collective decisions, activities, attitudes, or values of society that points to the special role of freedom of speech and the particular function of the First Amendment.

2. The Limits of First Amendment Protection

The claim for First Amendment protection of commercial speech thus raises the interpretive questions: (1) whether the First Amendment protects freedom for speech that entails only a private possessory interest of the speaker or listener, or (2) whether for the First Amendment to cover it, the speech must (also, or only) engage the person's interest as a participating member of society—such as, in connecting with other individuals in discussion and appreciation, or development, of societal decisions, interests, attitudes or values.¹⁰⁴ In answering those questions, it is not necessary to deny that a role of speech or expression in society may entail satisfying or vindicating an individual's private, personal interest in enriching her mind and enhancing her capacity to make choices in such matters—as if it were an item of personal property. But the function of the speech that the First Amendment covers in protecting individuals' autonomy interests is essentially to facilitate or encourage the individual in connecting with the other members of the society as participants in effecting decisions by, and developing values, attitudes and tastes of, the communal enterprise.¹⁰⁵ As others long ago pointed

¹⁰⁴ See, e.g., *Cohen v. California*, 403 U.S. 15, 26 (1976) (indicating that speech is protected by the First Amendment because its expression enriches the speaker not only as an individual, but also as a participant in the creation of societal values); see also JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 147 (1994) (arguing that censoring expression of certain ways of life prevents counter-majoritarian preferences from gaining public recognition and acceptability); Balkin, *supra* note 69, at 29–33 (explaining the connection between First Amendment protection and democracy); Vincent Blasi, *Free Speech and Good Character: From Milton to Brandeis to the Present*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 60, 63 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) (arguing that a strong protection of free speech will foster a multitude of collective goals through impacting the character of the society); Wells, *supra* note 28, at 161 (arguing that the Court has attempted to balance individual concerns and community values in its First Amendment jurisprudence).

¹⁰⁵ See SUNSTEIN, *supra* note 72, at 130–44; Baker, *supra* note 3, at 6–7; Jackson & Jeffries, *supra* note 10, at 5–6; cf. C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* 3 (1962) (positing that in the context of speech protection, “[t]he individual was seen neither as a moral whole, nor part of a larger social whole, but an owner of

out, the First Amendment cannot be read simply (or at all) to rest on extension of the *Lochner v. New York* (and Locke) notions of individual possessive interests that preclude government restrictions on human freedom of behavior, except as a case is made for the necessity of such restrictions to avoid harming others or society.¹⁰⁶ Rather, if the First Amendment's special protection is to be offered, the speech involved must entail matters of societal interest and the speakers' or audience's participation (or capacity to participate) in such matters—such as, for example, in matters that engage the individual's (fraternity?) interest in connecting with others in considering, discussing, fashioning, and enjoying shared communal decisions, values, ideas, and attitudes.¹⁰⁷

himself"). There is a different "liberty" interest in receiving commercial speech than in receiving ideas that are not part of a solicitation of purchase. See Post, *supra* note 15, at 45–48. It does not detract from this conclusion that a proposal of a transaction in an ad may not be an offer whose acceptance makes it part of a contract. See McGowan, *supra* note 3, at 439–41; cf. Farber, *supra* note 3, at 373–76 (explaining that content-based regulation takes place with ads as well because the information in the ads is exactly what is being regulated). Nor is it necessary to measure or rank the relative "values" of many different kinds of speech. It is enough to recognize that speech may serve different values and that the First Amendment should not protect speech that serves only individual interests in buying or selling property or services. It is also not relevant that, in the past, protection of freedom of speech was on occasion tied to the Due Process Clause of the Fourteenth Amendment. See Kozinski & Banner, *supra* note 3, at 761.

¹⁰⁶ See PAUL G. KAUPER, CIVIL LIBERTIES AND THE CONSTITUTION 119–20 (1962); Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1441–43 (1962); Jackson & Jeffries, *supra* note 10, at 5–6; Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 626–33 (1990); Post, *supra* note 15, at 9; Post, *supra* note 24, at 2365; Fred C. Zacharias, *Flowcharting the First Amendment*, 72 CORNELL L. REV. 936, 952–57 (1987). But cf. *Citizens Consumer Council*, 425 U.S. at 760–61 ("Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any newsworthy fact or to make general observations even about commercial matters."). An essential premise on which First Amendment protection for commercial speech rests is the value to society of the free flow of ideas. That premise is too opaque. To start to unpack it, one may ask: Why is the free flow of commercial information to be protected more than the free flow of commerce? Inevitably, one must consider not only the speech's effect on an individual's personal development and enrichment, but also the speech's function for individuals as participants in the development and growth of a society's values and attitudes.

¹⁰⁷ See Charles L. Barzun, *Politics or Principle? Zechariah Chafee and the Social Interest in Free Speech*, 2007 B.Y.U. L. REV. 259, 262–68; Post, *supra* note 101, at 119–78; Post, *supra* note 15, at 15–18. Compare Fiss, *supra* note 33, at 1408–11 (arguing that only speech that "enrich[es] public debate" should be protected under the First Amendment to ensure that true collective identity is created), with Post, *supra* note 25, at 1120–23 (arguing that all speech must be protected under the First Amendment to ensure that the notion of a collective identity is open-ended and not distorted by government interference).

Nothing in the text, structure, or history of the Constitution¹⁰⁸ requires, or suggests, that the interests that the First Amendment protects are the same as the liberty or property interests of the person to speak or hear that the Due Process Clauses of the Fifth and Fourteenth Amendments have been interpreted to protect.¹⁰⁹ To be sure, libertarian “radicals” tried to weave such an understanding of freedom of speech into the constitutional design during the nineteenth century. As Professor David Rabban has pointed out, the autonomy claim to special protection against government restraints was urged for many kinds of individual behavior,¹¹⁰ on the ground that, as an integral component of the individual liberty protected by the Due Process Clauses, “speech on virtually any subject should be protected from legal regulation by the state.”¹¹¹ When such views were pressed in the courts, however, they were scanted, without serious consideration.¹¹² It is worth noting that

¹⁰⁸ The history of the Constitution gives no clear answer to this question. Although commercial speech was known to the Founders, it is hard to find anything in their writings that suggests its inclusion in, or exclusion from, protected speech. See William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 466–67 (2005) (describing the ideological background of the Founders and suggesting a “public” function for the speech that the First Amendment protects); see also RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 28 (1992) (explaining the difficulty of discerning the original intent of the Founders regarding free speech interests); David A. Strauss, *Freedom of Speech and the Common Law Question*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA*, *supra* note 104, at 32, 33 (explaining that the views of the drafters and Framers of the Constitution are unclear as they pertain to the underpinnings of the First Amendment); Thomas I. Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 U. PA. L. REV. 737, 738 (1977) (illustrating the disagreement among constitutional scholars regarding the Framers’ understanding of free speech); Richards, *supra* note 103, at 330–31 (arguing that it would be historically myopic to not attempt to implement the Founders’ understanding of free speech rights into our own construction of First Amendment jurisprudence); cf. Kozinski & Banner, *supra* note 3, at 631–34 (explaining that the Framers’ commentary on freedom of speech focused entirely on political speech and did not mention commercial speech).

¹⁰⁹ See *Adamson v. California*, 332 U.S. 46, 90 (1947).

¹¹⁰ Support for freedom of speech was repeatedly urged by abolitionists, freethinkers, proponents of freedom for women from assorted legal and related restrictions, proponents of free love and free sexual activity (including advertising of contraceptives) and, by the last quarter of the nineteenth century, freedom for labor and anarchist ideas. See DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 23–128 (1997).

¹¹¹ *Id.* at 2.

¹¹² See, e.g., *In re Rapier*, 143 U.S. 110, 133–34 (1892); *Ex Parte Jackson*, 96 U.S. 727, 736–37 (1877). Doctrinally, the court dealt with the claim for freedom of speech as part of the liberty whose restriction required due process of law from the States. That may account for the result that the legislation generally upheld was state, not federal, legislation. See Adam Winkler, *Free Speech Federalism*, 108 MICH. L. REV. 153, 156–57 (2009). World War I brought the First Amendment to the scene. Therefore, variations appear in the strictness of the protection that due process and the First Amendment provide against regulation—

this discourse, often relying on the liberty protected by the Fourteenth Amendment, did not distinguish between the autonomy value of speech and the value of freedom to conduct the many other aspects of life to which speech might be attached.¹¹³

The jurisprudence and scholarly discussion that produced the special protective power of the First Amendment developed in the twentieth century.¹¹⁴ It developed from an emphasis on protecting the values of democratic self-government and the pursuit of truth.¹¹⁵ To be sure, in 1947, the Court eloquently and powerfully invoked personal autonomy to require First Amendment protection of freedom of speech, albeit in a case involving compelled expression that was claimed to impinge upon religious beliefs.¹¹⁶ The Court expanded that protection, and its premise, to speech about matters of public interest, including

albeit in results rather than in doctrine. These distinctions do not appear to affect the protection to be accorded to commercial speech.

¹¹³ The broad focus matched John Stuart Mill's classic statement that did not single out speech for special protection. See MILL, *supra* note 30, at 15–52 (incorporating the notion of individual autonomy into an understanding of the importance of free speech). But the assimilation of the speech to other libertarian-supported behavior may have resulted from the perception that the First Amendment applied only to federal regulation, and due process was the only available shield against state regulation. The flavor of the arguments is demonstrated in a brief in an early Supreme Court case, in which the government argued that “the right to talk is no more sacred than the right to work.” Brief of Appellee at 22, *United States ex rel. Turner v. Williams*, 194 U.S. 279 (1904) (No. 561); see RABBAN, *supra* note 110, at 135. It is not material, but not irrelevant, that the author of the observation was Attorney General James McReynolds. As Professor David Rabban points out, the great sanctity of the freedom to work as a “right” that precluded government regulation before the 1930s was not matched by the sanctity of the freedom to speak. RABBAN, *supra* note 110, at 135. And the reversal of those relative sanctities in the last half of the twentieth century does not appear to have been driven by consideration for a person's autonomy as a private individual (i.e., apart from as a participant in societal matters). *Id.*

¹¹⁴ RABBAN, *supra* note 110, at 175 (“The overwhelming weight of judicial opinions in all jurisdictions before World War I offered little recognition, and even less protection, of free speech interests.”); *cf. id.* at 185 (discussing individualism in American law).

¹¹⁵ It is interesting, if not entirely relevant, to note the continuing dispute among commentators over whether pre-twentieth century commentators on freedom of speech rested its special protection on individuals' autonomy claims or on societal claims. See Barzun, *supra* note 107, at 259–62.

¹¹⁶ *West Virginia State Board of Education v. Barnette* implicated the subject matter of the Religion Clauses, but the Court spoke in terms that rest more on the Speech Clause. 319 U.S. 624, 642 (1943); *cf. Shelledy*, *supra* note 36, at 548 (describing a new branch of scholarship that emphasizes the Speech Clause's placement among the other clauses of the First Amendment and believes that all the clauses protect “independent conscience and individual moral sovereignty”). Commentators have also considered whether First Amendment protection against compelling speech rests more on avoiding mind conditioning and preserving the integrity of the speaker or on protecting the audience from a wrong impression. See, e.g., Shiffrin, *supra* note 51, at 870–72.

but not limited to matters of religion.¹¹⁷ Indeed, the powerful rhetoric in which it encased an early invocation of the First Amendment to protect a person's autonomy addressed the freedom of speech of the individual as a participant in society, and society's collective interest in fostering that freedom.¹¹⁸ The Court has also suggested (albeit with strong dissent) that speech on subjects that do not implicate or affect matters of societal interest is not entitled to full First Amendment protection.¹¹⁹

As Professor Post has pointed out,¹²⁰ the Court's jurisprudence that entails autonomy-based claims for protection of speech involves protection of the societal values that speech has, whether those values involve matters of self-government or more broadly, pursuit of truth or culture.¹²¹ Structurally and historically, the speech that the First Amendment addresses is expression on public matters or matters of interest to members of the public, in contrast to matters concerning only personal affairs or private interests. The expression thus protected functions to relate individuals freely to one another in societal enrich-

¹¹⁷ Cf. *Wooley v. Maynard*, 430 U.S. 705, 714–17 (1977) (holding that the First Amendment prohibited the State from mandating individual participation in spreading an ideological message by displaying it on private property, such as a vehicle license plate). It is not clear to what extent the “compelled contribution” decisions rest on personal autonomy (for private beliefs) or on protection for speech entailing beliefs on public matters, or indeed on protection of the public image of the compelled contributor or avoidance of false public impression by the listener.

¹¹⁸ *Barnette*, 319 U.S. at 642 (“[F]reedom to differ is not limited to things that do not matter much. . . . The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . .”).

¹¹⁹ *Dun & Bradstreet*, 472 U.S. at 761–62 (stating that “[w]hether [any] speech addresses a matter of public concern [and therefore is entitled to First Amendment protection] must be determined by [the expression’s] content, form, and context . . . as revealed by the whole record” (quoting *Connick*, 461 U.S. at 147–48)). Speech that is “solely in the individual interest of the speaker and its specific business audience” is not covered by the First Amendment. *Id.* at 762; see Shiffrin, *supra* note 3, at 1214–15. But cf. *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring) (“They valued liberty both as an end and as a means.”).

¹²⁰ Post, *supra* note 15, at 47–48.

¹²¹ RAZ, *supra* note 104, at 146–49; SHINER, *supra* note 61, at 230; Balkin, *supra* note 69, at 46; Brett M. Frischmann, *Speech, Spillovers, and the First Amendment*, 2008 U. CHI. LEGAL F. 301, 314–21. As noted above, the Copyright Clause of the Constitution may reflect the perception that there is a constitutionally relevant difference between the private possessory value of speech and the function and value of speech covered by the First Amendment. It is not irrelevant to note that if the First Amendment covers commercial speech, dispute over the truth or falsity or misleading character of a speaker's commercial expression may become a constitutional question and affect the rigor of judicial review. See, e.g., Natasha Singer, *Foods with Benefits, or So They Say*, N.Y. TIMES, May 15, 2011, at BU 1 (discussing the FTC's effort to regulate ads of Pom Wonderful and similar ads by others).

ment or decision making, rather than to encourage or enable fulfillment in personal affairs.

The jurisprudence on freedom of association, which, like freedom of speech, derives its entitlement to special protection against government regulation from the First Amendment, does not detract from this conclusion. The First Amendment's special protection extends, apart from intimate association, only to expressive associations, or to other associations only as they utter expression on matters of public interest,¹²² but not to their expression in connection with commercial exchange transactions, or the like.

Notwithstanding the Court's enshrinement in 1976 of protection of commercial speech in the First Amendment,¹²³ language in some,¹²⁴ and teaching in others,¹²⁵ of its subsequent opinions suggest that the

¹²² *Dallas v. Stanglin*, 490 U.S. 19, 28 (1989); *U.S. Jaycees*, 468 U.S. at 631; *NAACP v. Alabama*, 357 U.S. 449, 467 (1958). This result is no less required whether the content of the First Amendment is, or is not, imported into the Fourteenth Amendment. *Cf. Adamson*, 332 U.S. at 58–59.

¹²³ *Citizens Consumer Council*, 425 U.S. at 773.

¹²⁴ *Dun & Bradstreet*, 472 U.S. at 762 (holding that the First Amendment does not cover expression that does not involve any "strong [public] interest in the free flow of commercial information").

¹²⁵ *Compare In re Primus*, 436 U.S. at 439 (holding that the solicitation of private litigants by nonprofit organizations that use litigation as a vehicle for political expression should be given First Amendment protection), with *Ohralik*, 436 U.S. at 468 (holding that a private lawyer's solicitation of a woman in the hospital soon after an automobile accident should not be given First Amendment protection). The bulk of Supreme Court cases protecting commercial speech under the First Amendment involve speech that touches on matters of public concern uttered more or less publicly. Some cases, involving speech by professionals in soliciting clients, address private solicitation (by mail or in person) of identified targets. Moreover, the speech being regulated was apparently the general practice of the professionals in such solicitations, so that it was relevantly equivalent to public utterance. The Court, however, has rejected First Amendment protection for privately uttered speech on private commercial matters. *Dun & Bradstreet*, 472 U.S. at 762. *But cf. Garcetti*, 547 U.S. at 421 (holding that when public employees make statements pursuant to their official duties they are not insulated by First Amendment protection); *Bartnicki*, 532 U.S. at 533–34 (holding that privately uttered expression on matters of public concern does implicate First Amendment protection because it involves the publication of truthful information that the public is entitled to know).

That such autonomy interest as may be the concern of the First Amendment is less individual development or self-realization than benefit in arriving at societal decisions or values is also indicated, if not suggested, by the Constitution's concern with limiting the inducement it offers to individuals in its protection of patents and copyrights. The individual development and self-realization from generating the ideas expressed in copyrighted works or the novelties embodied in patented works is limited by the restrictions in time and definition of what is protected—in order to benefit the collective public interest in response to the expression embodied in the work. The structure of those provisions reflects the concern that it is matters of public interest in the expression that are protected—even to limit the benefit to the creator in order to enhance the public benefit, and to deny such private benefit to expressers

First Amendment protects speech on public issues or matters of societal interest, but not speech concerning only an individual's (or a corporation's) commercial transactions or similar self-regarding matters.¹²⁶ The Court, however, recently reaffirmed the proposition that the First Amendment protects speech that is only commercial speech—indeed only *narrow* commercial speech.¹²⁷ Sound considerations both of public policy and of political theory oppose that notion¹²⁸—whether based on the argument that commercial speech is not speech because it constitutes only a component of a transaction that is constitutionally regulable,¹²⁹ or, more broadly, that commercial speech is not the speech that the First Amendment protects unless it contains expression on matters relating to public policy decisions, or to the public interest.

of matters in the public domain. See Recent Case, 121 HARV. L. REV. 1439, 1446 (2008) (noting that the Seventh Circuit's decision in *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.* "employed a presumption of unconstitutionality in a balancing test to hold that the First Amendment trumped a state common law right that restricted the use of information in the public domain").

Moreover, it is worth noting that notwithstanding dispute as to its importance in the common law of libel, the notion that freedom of speech is to be protected because it serves a public purpose, albeit at a cost (not fully compensable) to the autonomy interest of the private victim, is a recurring theme in common law and among nineteenth century commentators. See Barzun, *supra* note 107, at 259–62; cf. *Glickman*, 521 U.S. at 469–70 (distinguishing marketing orders from regulations that violated the First Amendment because the marketing orders did not restrain communication, did not compel speech, and did not compel producers "to endorse or to finance any political or ideological views"); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (distinguishing regulation of commercial speech by compelling contribution to its utterance or disclosure so long as its mandate did not require the compelled person to finance or endorse any political or ideological value or force orthodoxy in matters of opinion).

¹²⁶ See *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 465–66 (1995); *Waters v. Churchill*, 511 U.S. 661, 669–70 (1994); *Rankin v. McPherson*, 483 U.S. 378, 384 (1987); *Connick*, 461 U.S. at 149; *Pickering*, 391 U.S. at 573; MEIKLEJOHN, *supra* note 26, at 27, 79; BeVier, *supra* note 26, at 300–01; Cynthia Estlund, *Free Speech Rights That Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463, 1492–93 (2007). Compare MEIKLEJOHN, *supra* note 26, at 19–28 (arguing that only certain kinds of speech should be protected because this system allows the public to arrive at truth and make the best decisions about matters of public interest), with Post, *supra* note 25, at 1122–23 (arguing that no speech should be restricted regardless of content because we must consider the notion of a collective self-identity to be open-ended).

¹²⁷ *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2668 (2011); Estlund, *supra* note 126, at 1469.

¹²⁸ See *Thomas v. Collins*, 323 U.S. 516, 531–32 (1945) (explaining the blurry lines of distinction between commercial speech that should be protected and commercial speech that should not be protected).

¹²⁹ This approach requires judicial examination of the terms of the particular expression at issue to determine whether they are simply part of the transaction and not speech. See, e.g., *Sorrell*, 131 S. Ct. at 2673–2685 (Breyer, J., dissenting).

The difference between commercial speech—that relates essentially to benefits for, or development of, its recipient's (or speaker's) private self as an individual—and speech that nourishes her development as a participating member of society also has relevance in assessing regulation of commercial speech that offers or discusses sale of products or services whose offer and acceptance are independently protected by the First Amendment, such as books, movies, art, music, or theatrical performances. There is often reason to offer to such commercial speech the full protection of the First Amendment in order to respect whatever may be the audience's or "author's" special protected claim to choose or enjoy speech offerings that the commercial speaker is peddling, and that the First Amendment otherwise protects.¹³⁰ Judicial opinions are less than clear on this point,¹³¹ as commentators have noted.¹³² Similar considerations affect the scope of First

¹³⁰ See Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1057–61 (1998); Post, *supra* note 15, at 50–53 (explaining the difference between regulating speech in order to affect conduct that can be regulated, and regulating speech in order to affect public opinion). The commercial speech or speaker often functions as an agent to publish or distribute expression by a person whose proposal is entitled to First Amendment protection (or would be so entitled if uttered by that person). Such utterance by the agent derives its claim to First Amendment protection to protect the principal's claim for such protection for the utterance. Denial of protection to the agent need not preclude or limit full protection as if claimed directly by the author (as if simply uttered by her or him).

But embedding that possibility in commercial speech generates the problem of injuries that the commercial communication may cause, apart from impairment of the entitlement to First Amendment protection that its product gives it. See *infra* notes 155–167 and accompanying text (discussing narrow commercial speech).

¹³¹ See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678, 700–02 (1977) (holding that states cannot ban ads for contraceptives merely on the grounds that they might be offensive); *Bigelow v. Virginia*, 421 U.S. 809, 825–29 (1975) (holding that ads for procuring an abortion in New York were protected even though they were published in Virginia in a paid ad); *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (holding that ads supporting the right of African Americans to vote were not commercial and were entitled to First Amendment protection). Whether or not those cases were formally treated as involving commercial speech, realistically they were treated as fully protected speech. First Amendment coverage of the communication or expression thus offered by the commercial speech is determined by different considerations than are involved in determining whether the commercial message offering the expression is, or should be, covered. First Amendment protection of the private enjoyment of the speech product may not require protection of the commercial speech offering it.

¹³² McGowan, *supra* note 3, at 418–19 (discussing incongruities in, and difficulties with, such reasoning); see also *Bd. of Trs. v. Fox*, 492 U.S. 469, 473–74 (1989) (treating mixed speech as commercial and therefore not fully protected); *Bolger v. Young Drug Prods. Corp.*, 463 U.S. 60, 68 (1983) (treating ads that include otherwise fully protected expression in commercial speech as entitled to only lesser protection); Merrill, *supra* note 3, at 226–27, 235 (explaining the Court's difficulties in drawing a clear line between pub-

Amendment protection for speech soliciting contributions to religious institutions or nonprofit expressive associations.¹³³

C. Paternalism

Prohibiting or regulating truthful commercial communications about lawful activities¹³⁴ that may be of interest to the listener is said to be especially objectionable interference, in that it paternalistically precludes the listener from knowledgeably deciding whether to risk or in-

licly important advertising and publicly unimportant advertising); cf. *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 790–95 (1988) (examining the difference between an expressive charity and a service charity in determining whether the act of soliciting contributions would be covered speech). What is the difference between expression for which the expresser is paid (such as a lecture or a music lesson) and expression proposing a commercial transaction, such as ads for the lecture or music lesson? If the former is protected by the First Amendment, then so should be the latter. The authors of the products being offered have mixed interests in the process (both in the commercial speech and in the emoluments of its use, as well as in offering the expression thus sold for the enjoyment or enrichment of their fellow citizens) that are both private possessory (enabled by copyright) and fraternal. The latter is what gives the offered product and the process of offering it for sale the special protection of the First Amendment. To the extent that the offeror is a mechanism for spreading such protected products he has a comparable claim to First Amendment protection.

¹³³ First Amendment protection is granted for solicitation of contributions to charities or charitable activities. *Madigan*, 538 U.S. at 611; *Riley*, 487 U.S. at 796; *Sec'y of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 969–70 (1984); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 622, 639 (1980). First Amendment protection is also awarded to religious organizations. *E.g.*, *Jamison v. Texas*, 318 U.S. 413, 416 (1943); *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940); *Schneider v. New Jersey*, 308 U.S. 147, 164 (1939).

Arguably, if the conduct that the speech proposes is itself specially protected by the Constitution (e.g., abortion, contraception), so that the State cannot readily regulate it, there is little legitimate reason to permit the State to regulate speech proposing such conduct. Cf. *Bolger*, 463 U.S. at 69 (holding that ads for contraceptives were “clearly protected by the First Amendment”); *Bigelow*, 421 U.S. at 809 (holding that ads for abortion services in New York were protected under the First Amendment even though abortion was illegal in Virginia). Such considerations do not seem relevant for solicitations for contribution to charitable organizations that are neither religious nor expressive. Regulation designed to curb contributions to such enterprises because of the injury they may cause to the contributor or to the public seems no more subject to constitutional restriction under the First Amendment than is comparable regulation of for-profit businesses, quite apart from the problem of diversion of a portion of the contributions to solicitors. This may explain the outcome of the 1987 Supreme Court case, *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Commission*, 483 U.S. 522, 535–41 (1987) (holding that the U.S. Olympic Committee could restrict a nonprofit California corporation from using the word “Olympic” in its “Gay Olympic Games” and further holding that the First Amendment does not prohibit Congress from granting exclusive use of a word even if there is no likelihood of confusion that would result in a trademark violation); see McGowan, *supra* note 3, at 402–05.

¹³⁴ Examples of such lawful activities are legally permitted gambling, smoking, or consuming alcoholic beverages.

cur such harm in two ways. First, it denies or obstructs the opportunity to learn about, and thus obstructing his ability to make, a possibly harmful choice to satisfy a preference in personal matters (e.g., to purchase property) because the government (reasonably) believes satisfying that preference to be harmful to him or her, as well as to others. Second, alternatively, it obstructs the listener's participation in the democratic process by concealing or obscuring the substantive policy or societal interests that might be involved,¹³⁵ and on which the audience might have a legitimate collective voice. In either case, the claim of offensive paternalism, even if accurate in describing the challenged regulation or its operation, is little more than another form of the claim of impingement on autonomy, and is no more valid.

The predicate on which the charge of paternalism rests¹³⁶ (the consumers' ability to "perceive their own best interests . . . if they are well enough informed,"¹³⁷ and to act upon that perception) assumes an apperceptive base of relevant information and knowledge. In the universe of retail mass marketing, the billions of dollars spent by sellers in the aggregate to acculturate consumers to desire products or services that may (or may not) create unspecified long-term health or safety problems, or other costs, are expenditures that are not offset (and are

¹³⁵ Related to the claim of paternalism is the suggestion that such government interference with commercial speech does, or attempts to, thwart the democratic process because it seeks to prevent or discourage by indirect behavior what government lacks the popular support to prevent or discourage directly and explicitly. In that process there is also an element of deception and manipulation. Obstructing the communication deprives the listeners of their opportunity to discuss the subject in the public square or oppose (or prepare to oppose) government regulation or prohibition of such behavior. See, e.g., 44 *Liquormart*, 517 U.S. at 516 (holding that Rhode Island could not ban ads regarding liquor prices because selling liquor is not illegal and therefore consumers have a right to that information); *Carey*, 431 U.S. at 700–02 (holding that states cannot ban ads for contraceptives because, although they might be offensive, consumers have a right to that information).

¹³⁶ The charge of paternalism is wholly misplaced if leveled against regulation that functions to protect the addressees of commercial speech against misperception of the benefits of the transaction because the speech is false or misleading. The charge is also misplaced to the extent that the regulation is aimed at the consequences of the incompleteness of the tilted expression urging a purchase in a context of practically insurmountable informational asymmetry. Moreover, the charge is no less misplaced if the regulatory effort requires only informing the audience of the risks attendant upon use. Cf. Daniel Hays Lowenstein, "Too Much Puff": *Persuasion, Paternalism, and Commercial Speech*, 56 U. CIN. L. REV. 1205, 1237–47 (1988) (arguing that the Court has hinted at the government's paternalistic motivations to restrict commercial speech, but it has never explicitly accepted paternalism as a justification to uphold a government restriction); Post, *supra* note 15, at 20–26, 50–53 (arguing that the Court's justifications for First Amendment protection imply that state regulations must be followed to ensure that accurate and truthful information continues to reach the general population).

¹³⁷ *Citizens Consumer Council*, 425 U.S. at 770.

not likely to be offset without government regulation) by reasonably comparable nongovernmental expenditures for educative “debiasing” efforts.¹³⁸ It is that background, structured by government-created property rules in a market economy, that enables sellers or offerors to shape consumer tastes and preferences so as to affect a consumer’s “free” choice in responding to offers.¹³⁹ It also raises the question: Which government intervention is, or would be, “paternalistic?”¹⁴⁰ Was the consumer’s relevant knowledge for making a choice enhanced by the Court’s constitutionally rejecting Virginia’s prohibition of price advertisements (“ads”) for prescription drugs, ads that, incidentally, did not allude to the possible varying quality of the pharmacists’ services?¹⁴¹ Or was it enhanced by Virginia forbidding such ads without requiring sellers to discuss such matters with consumers? Either way,

¹³⁸ See, e.g., Ronald Collins et al., *Corporations and Commercial Speech*, 30 SEATTLE U. L. REV. 895, 917–21 (2007); Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetrical Paternalism,”* 151 U. PA. L. REV. 1211, 1219–23 (2003); Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 199–203 (2006); Richard H. Thaler & Cass R. Sunstein, *Libertarian Paternalism*, 93 AM. ECON. REV. 175, 175–79 (2003).

¹³⁹ See Ronald K.L. Collins & David M. Skover, *Commerce and Communication*, 71 TEX. L. REV. 697, 707–10 (1993) (explaining the realities of modern mass advertising in contemporary American culture); Paul Horwitz, *Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment*, 76 TEMP. L. REV. 1, 49–62 (2003) (arguing that the Court’s “acceptance of classical models of rationality” has enabled it to make doctrinal decisions that do not conform with real world decision making); Lowenstein, *supra* note 136, at 1219–23 (noting the censoring effect of publishers’ receipts from tobacco ads on publishers’ willingness to publish contradictory information); Haan, *supra* note 100, at 1285 (arguing that dicta in commercial speech cases suggests that the Court has been concerned only with information that allows for relevant product comparison when emphasizing advertising’s informational value). As has long been understood:

Consumer misperception of the costs and benefits associated with a product or service is prevalent. It can be the product of imperfect information or imperfect rationality (or both). It can be independent of any action taken by sellers. It can be instigated by sellers. And it can be mitigated by sellers.

Oren Bar-Gill, *Bundling and Consumer Misperception*, 73 U. CHI. L. REV. 33, 33 (2006). Sellers know how to, and do, create “wants” in consumers without inducing consumers to “like” what they have been induced to “want.” See *id.* at 34–38.

¹⁴⁰ In other words, how uninformed or inadequately informed must reasonable consumers be in order to justify government intervention to enable them to make the informed choice that autonomy assumes?

¹⁴¹ See *Citizens Consumer Council*, 425 U.S. at 757. Would it have been paternalism for Virginia to require the price ads to include reference to, or discussion of, the quality of pharmacists’ “services”? Would this unconstitutionally compel speech? Cf. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 16 (1986).

the government's intervention to enable the consumer "freely" to determine her own best interests is (or is not) "paternalism."¹⁴²

Regulating commercial speech in order to discourage transactional conduct that could constitutionally be prohibited (instead of regulating the conduct) is neither inconsistent with, nor a manipulation of, the democratic process. That the government does not eliminate the whole evil that it legitimately perceives, but instead proceeds piecemeal or by stages is not itself a valid constitutional objection.¹⁴³ Thus, the government may reasonably seek merely to discourage or modify consumption of truthfully described and offered products or services, whose use it both deems harmful and could legitimately re-

¹⁴² There is little or no scope for the anti-paternalism argument in areas of commerce where the asymmetry of information or knowledge between sellers and buyers that the legal system enables and protects is too great to be overcome by normally situated buyers without some further government intervention. That condition generally obtains where regulation seeks to avert ill consequences to health or safety from mass retail marketing of credence goods—as with pharmaceuticals, foods, or professional services. For the government to fail to intervene in speech offering or encouraging sales in such cases may be as "paternalistic" as would be regulatory intervention. See, e.g., Horwitz, *supra* note 139, at 51–52; Lowenstein, *supra* note 136, at 1208; Cass R. Sunstein, *Boundedly Rational Borrowing*, 73 U. CHI. L. REV. 249, 270 (2006).

Is regulation of the content of pharmaceuticals ads any more offensive paternalism than is regulating the description on the pharmaceutical packaging? See *Citizens Consumer Council*, 425 U.S. at 757; cf. Post, *supra* note 15, at 50–53 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 579–83 (1980) (Stevens, J., concurring)) (explaining that Justice John Paul Stevens' arguments suggest that government cannot regulate information transmitted to consumers even if regulators are trying to achieve a legitimate purpose like curtailing energy consumption). As the Court has pointed out, on occasion, the government's aspiration (and function) to modify citizens' behavior in acquisitory matters or possessory enjoyment of offered goods or services engages wholly different constitutional values from the aspiration to modify citizens' understanding of, and opinions on, matters of public interest. *Cent. Hudson Gas*, 447 U.S. at 579–83 (Stevens, J., concurring). The government's aspirations also engage wholly different constitutional values from the administration of justice. Cf. Farber, *supra* note 3, at 402 (arguing that the Court's rejection of paternalism in First Amendment cases is inconsistent with its acceptance of paternalism in traditional evidence law, which is rooted in the concept that some information is too misleading for juries to see).

¹⁴³ See *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002) (holding that the government could restrict commercial speech regarding prescription drug sales if such a restriction was necessary to advance a constitutionally permissible goal, such as limiting the sale of drugs to only those who clearly need them); *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 110–11 (1949) (holding that the New York state government can prohibit ads on vehicles with an exception for those for the vehicle owner's company without violating the Equal Protection Clause of the Constitution). That conclusion is equally valid whether the government so proceeds because it lacks (or believes it lacks) the popular support to affect the whole remedy it thinks appropriate and could constitutionally enact, or because it simply deems the evil to require no more than moderate regulation because, for example, the costs of a stronger remedy are not worth the gains.

strict or wholly prohibit.¹⁴⁴ It is not required totally to forbid their consumption or use, or to do nothing about the problem.

This proposition should be no less true when the lesser power thus invoked, instead of the greater, consists of regulating commercial speech instead of regulating the commercial transaction that the speech proposes.¹⁴⁵ Arguably the effect, if not the government's objective, in regulating commercial speech rather than the transaction may be to obscure¹⁴⁶ the opportunity for citizens to learn about the possibility of engaging in particular conduct, and *pro tanto* to consider or discuss the communal aspects of the conduct, including whether and how to regulate it. But, nothing in the First Amendment (or claims of improper paternalism) suggests that sellers are entitled to offer, or listeners to receive offers of, sales transactions that the government could constitutionally forbid. The sponsor of enriched commercial speech is well able to stimulate consideration of the communal values or public policy considerations entailed in the speech discussing the suggested transactions without implanting the stimulus in the commercial communication.¹⁴⁷

¹⁴⁴ For example, this might include requiring consumer protective mechanisms in products like automobiles (e.g., brakes or safety belts) or children's toys.

¹⁴⁵ The power to regulate such speech does not rest on the "greater includes the lesser" argument. See Berman, *supra* note 54, at 709–19, 742–43, 752–53; David McGowan, *Approximately Speech*, 89 MINN. L. REV. 1416, 1417–20 (2005); Strauss, *supra* note 49, at 359–60; see also *Meyer v. Grant*, 486 U.S. 414, 427–28 (1988) (holding that Colorado's prohibition against paying circulators of initiative petitions violated the First Amendment because it suppressed political information without any reasonable justification). That commercial speech is necessarily linked to efforts to sell or exchange products whose exchange and use are regulable does not, without more, empower equivalent regulation of the speech. To be sure, it is that linkage that differentiates commercial speech from other (protected) speech. But arguably, commercial speech is different from the transaction it urges. Thus, regulation of commercial speech may impinge on different values from those that are involved in banning the transactions, so that justifying regulation of the speech requires examining considerations in addition to (or apart from) those justifying regulation of the transaction. See McGowan, *supra* note 3, at 375–76, 438. If a different, and greater, good is jeopardized by regulation of commercial speech than by regulation of the transaction offered (and therefore should be specially protected), the justification for regulating commercial speech must be found in a benefit other than that from forbidding enjoyment of the offered product or service. See *id.* at 436–39. But that other benefit is of concern to the First Amendment only as it engages a citizen's participatory interest in the society—not if it serves only the individual's private interest in learning about the opportunity to purchase (or choose among) products or services to satisfy her personal possessory needs or interests.

¹⁴⁶ The regulation may obstruct or deter the seller's expression, as by requiring supplemental disclosure. It is hard to see why, if requiring truthful disclosure of relevant facts deters the speaker, there can be any First Amendment objection in the context of commercial speech.

¹⁴⁷ See *Cent. Hudson Gas*, 447 U.S. at 562 n.5; see also *United States v. Freeman*, 761 F.2d 549, 551 (9th Cir. 1985) (holding that a defendant accused of aiding and abetting, and of

So long as the regulation of commercial speech does not preclude or discourage the speaker from such discussion other than in the commercial speech, it is hard to see why the First Amendment's special protection of speech should be required in the selling-buying effort as a condition to protecting discussion of the public interest in the transactions or in their regulation. Nothing in the values underlying the First Amendment requires the speaker's cost of engaging in, or stimulating, discussion of matters of communal interest to be subsidized, or permits its message to be correspondingly colored, by permitting its stimulus to be planted in a transactional message.¹⁴⁸

In sum, narrow commercial speech is not expression that serves any person's autonomy interest that the First Amendment's special protection can be said to reach.¹⁴⁹ And, as others have pointedly explained, enriched commercial speech does not serve such interest unless its con-

counseling violations of tax laws, was entitled to a potential First Amendment defense for his speech that pertained to matters outside the criminal activity); Berman, *supra* note 54, at 790–93; McGowan, *supra* note 145, at 1418–19. This may be less true in the case of inclusion of references in commercial speech to matters of cultural as distinguished from political interest, or matters of public policy, because many such utterances may be “inextricably intertwined” with the sales effort, meaning, inexpressible except as part of a sales pitch. See *Riley*, 487 U.S. at 795–96.

¹⁴⁸ See *Ohralik*, 436 U.S. at 458–59 (holding that the First Amendment does not prohibit a regulation that forbids the conveyance of information as the solicitation of legal clients, but which is aimed at using such conveyance “as bait with which to obtain an agreement to represent them for a fee”); cf. Post, *supra* note 15, at 52–53 (arguing that First Amendment protection should be based not on whether or not consumer autonomy has been compromised but rather on “whether the ‘informational function’ of commercial speech has been unacceptably compromised”). Nor does such regulation disrespect the consumer's autonomy interest in receiving the speech. But cf. *Schneider*, 308 U.S. at 163–65 (holding that a ban on distributing handbills violated the First Amendment because the distribution of pamphlets was an important method of disseminating information to citizens who have a right to receive such information).

¹⁴⁹ Speech about conduct that is part of, or is related functionally to, the self-government process or the truth-seeking process takes its entitlement to First Amendment protection from that relationship. Speech urging a buy-sell transaction that does not implicate such processes lacks that predicate for First Amendment protection. Regulation of such speech, even if driven by a desire to discourage the conduct it urges, does not obscure or interfere with the self-government or the truth-seeking process any more than would regulation of the transaction, because the speech's function is simply to communicate to individuals about private buy-sell decisions, not about matters of societal import. See Post, *supra* note 3, at 1272–79. That possibility may be less readily available for some cultural references in commercial speech. Compare *Ohralik*, 436 U.S. at 467–68 (holding that disciplinary proceedings administered against a lawyer for an in-person solicitation to represent an accident victim in a hospital did not violate the First Amendment), with *In re Primus*, 436 U.S. at 444–46 (holding that a private reprimand administered against a lawyer cooperating with a nonprofit organization for soliciting prospective litigants for litigation as a vehicle for political expression did violate the First Amendment).

tent and context engage the speaker's or listener's autonomy interest as a participant in the society—that is, interest in sharing with other members of society matters of self-government, public policy, or other societal concerns, attitudes, values, or interest in affecting societal choices in such matters.¹⁵⁰ Whether or not it does turns on the nature and extent of the explicit references to such matters in the communication—references which functionally are likely to be collateral, and entirely subordinate, to the sales function that drives the commercial communication.

IV. COMMERCIAL SPEECH CONTAINING EXPRESSION ON ELECTIVE MATTERS, PUBLIC POLICY, OR OTHER SOCIETAL MATTERS THAT MAY LEGITIMATELY ENTAIL THE FIRST AMENDMENT

That the autonomy claims of speakers and listeners (as potential sellers or buyers) are not strong enough alone to justify extending to commercial speech the special protection that the First Amendment provides is implicit in the U.S. Supreme Court's opinions extending First Amendment protection to commercial speech (particularly in the early cases).¹⁵¹ The opinions strain to find, in the regulated commercial speech, expression that implicates matters of self-government or public policy, or other matters of "general public interest" or "culture."¹⁵² It is the import of that expression in commercial speech that the Court seeks to entwine with the autonomy values that it believes underpin First Amendment protection.¹⁵³ If the content of the regulated commercial speech does not implicate those matters (or values), as is likely to be the case for narrow commercial speech, it is hard to see why (or how) the claimed regulatory interference with autonomy is sufficient to justify the First Amendment's special protection. On the other hand, enriched commercial speech may, and occasionally does, contain expression that, if published other than as part of commercial speech, could plausibly claim First Amendment coverage.¹⁵⁴

¹⁵⁰ See *supra* notes 83–149 and accompanying text.

¹⁵¹ See, e.g., *Bates v. State Bar of Ariz.*, 433 U.S. 350, 379–83 (1977); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770–73 (1976).

¹⁵² See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561–64 (1980); *Citizens Consumer Council*, 425 U.S. at 760–61, 764; see also Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 484–89 (1985). But see Shiffrin, *supra* note 3, at 1282; Stern, *supra* note 3, at 107.

¹⁵³ See generally *Citizens Consumer Council*, 425 U.S. 748 (holding that statutory bans on advertising prescription drug prices violated the First Amendment).

¹⁵⁴ Commercial speech may contain expression that serves not merely to attempt to induce members of the audience to purchase proffered products or services, but also to interest them in the substance (i.e., meaning or import for societal problems) of the noncom-

A. Narrow Commercial Speech

Narrow commercial speech has little, if any, connection with the self-government and related values or indeed, with matters of cultural import, that underpin the First Amendment prohibition against abridgement of freedom of speech.¹⁵⁵ In creating First Amendment protection for commercial speech in the 1976 case, *Citizens Consumer Council*, the Court suggested that the narrow commercial speech at issue in the case was expression that the First Amendment protected, because the speech served self-government values and other matters of “general public interest.”¹⁵⁶ It rested that interpretation of the reach of the speech in part on the possibility that by reason of receiving such communications,¹⁵⁷ people might reflect on prices of pharmaceuticals and become interested in government action regulating the sale of such drugs, so that the advertisement (“ad”) (and the price information it conveyed) became an instrument in societal interaction and the democratic self-government process of resolving issues of public policy.¹⁵⁸ As Kathleen Sullivan aptly put it, the Court “diluted the notion of self-government to encompass decentralized exercises of consumer sovereignty.”¹⁵⁹ That linkage, if valid, would imply extension to commercial speech of all the

mercial component of the speech, and thus to engage their autonomy not only as individual purchasers and consumers, but also as participants in creating and sharing societal decisions, values, or attitudes. *See infra* notes 212–233 and accompanying text (discussing the link between commercial speech and speech covered by the First Amendment).

¹⁵⁵ *See, e.g.,* *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (“[D]ebate on public issues should be uninhibited, robust, and wide-open, and . . . it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”); *Roth v. United States*, 354 U.S. 476, 484 (1957) (“The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”).

¹⁵⁶ *Citizens Consumer Council*, 425 U.S. at 762–65.

¹⁵⁷ The Court speculated that a consumer might have an interest in such communications that are “as keen if not keener by far, than the day’s most urgent political debate.” *Id.* at 763.

¹⁵⁸ *Id.* at 761–62, 764, 765; *see also id.* at 775–81 (Stewart, J., concurring) (arguing that factual claims within commercial advertising should be protected because these claims can be tested empirically and corrected so as not to disrupt the free flow of reliable information). As Professor Robert Post explained, “If citizens learn from commercial advertising that pharmacy drugs are too expensive, for example, they might organize politically to advocate within public discourse for the creation of national health insurance.” Post, *supra* note 15, at 11. The commercial speech thus becomes “highly relevant to the formation of democratic public opinion.” *Id.*; *see also* McGowan, *supra* note 3, at 417–18 (arguing that commercial speech implicates the “rationality value” of First Amendment protection by providing consumers with information to distinguish among products and to make decisions regarding regulation of products).

¹⁵⁹ Sullivan, *supra* note 46, at 138.

speech-protecting apparatus that the First Amendment requires for expression on matters of public policy or general public interest,¹⁶⁰ a result from which the Court quite plainly recoiled.¹⁶¹ It made little effort to reconcile its recoil with the more extensive protection that the First Amendment offers to speech on such matters, which it suggested the protected commercial speech also addresses.

The interpretive process that the Court invoked to produce the claimed linkage between narrow commercial speech and speech otherwise protected by the First Amendment leaves no stopping point.¹⁶² All published commercial expression becomes "information" that may

¹⁶⁰ A matter of general public interest would be, for example, creating "breathing space" for falsehood. *NAACP v. Button*, 371 U.S. 415, 433 (1963). Other examples would include prohibiting compelled speech or regulatory vagueness and overbreadth, or prior restraints or proposals for unlawful conduct or content regulation.

¹⁶¹ See *Citizens Consumer Council*, 425 U.S. at 771–72 & n.24.

¹⁶² In *Citizens Consumer Council*, the Court pointed out that although

not all commercial messages contain . . . a very great public interest element[,] [t]here are few to which such an element . . . could not be added. Our pharmacist, for example, could cast himself as a Commentator on store-to-store disparities in drug prices, giving his own and those of a competitor as proof. We see little point in requiring him to do so, and little difference if he does not.

Id. at 764–65. The Court also suggested, presumably as a reason for treating commercial speech as covered by the First Amendment, that "no line between publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn." *Id.* at 765. Similarly, in 1989, in *City of Dallas v. Stanglin*, the Court noted that "[i]t is possible to find some kernel of expression in almost every activity that a person undertakes." 490 U.S. 19, 25 (1989). And in *Citizens Consumer Council*, it said: "Even an individual ad, though entirely commercial, may be of general public interest." 425 U.S. at 764; see also Holt, *supra* note 97, at 632–33 ("[T]he consumer's interest in making an informed economic decision could encompass any information which might contribute to a choice of products or services, including not only facts about price and quality, but also material pertinent to the advertiser's reputation . . . or general worth to society.").

As Justice William Brennan pointed out in another First Amendment context, "because 'the stretch of [First Amendment] protection is theoretically endless,' it must be invoked with discrimination and temperance." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 588 (1980) (Brennan, J., concurring) (quoting William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States, Address at the Dedication of the S.I. Newhouse Center for Law and Justice in Newark, New Jersey (Oct. 17, 1979), in 32 *RUTGERS L. REV.* 173, 177 (1979)). "Analysis is not advanced by rhetorical statements that all information bears upon public issues; what is crucial in individual cases is whether access to a particular government process is important in terms of that very process." *Richmond Newspapers*, 448 U.S. at 589; see also *Bigelow v. Virginia*, 421 U.S. 809, 831 (1975) (Rehnquist, J., dissenting) (criticizing the majority for granting protection to commercial speech based on the content of such speech because the Court had previously not distinguished speech on the basis of content).

be “relevant to the voting of wise decisions”¹⁶³ and is thereby covered by the First Amendment.¹⁶⁴ The interpretive mechanism imputes societal aim to expression that is aimless with respect to self-government or public policy, or to matters of public or cultural interest.¹⁶⁵ The ephemeral connection asserted between such commercial speech and expression on matters of self-government or public policy or of other societal import makes the Court’s articulated linkage too frail to pull the heavy load that often entails (1) effectively limiting government power to regulate the proposed transaction (and the ambiguous expression involved in inducing it),¹⁶⁶ and (2) leveling down by diluting the protective power of the First Amendment in other contexts that

¹⁶³ Post, *supra* note 15, at 14–15 (noting that “censorship of commercial speech does not endanger the process of democratic legitimation. . . . Instead it merely jeopardizes the circulation of information relevant to the voting of wise decisions.” (internal quotation marks omitted)). That peril is said to entitle the speech to some, but not full, First Amendment protection. Cf. *McGowan*, *supra* note 3, at 420–29 (arguing that “persuasive commercial speech,” or speech attempting to sell an idea or product to a consumer, warrants First Amendment protection because this type of speech helps individuals form a more robust view of themselves and the world). For example, auto ads implicate government road building or speeding laws; clothing ads and cosmetics ads implicate safety and health concerns, as do those for food and drugs; and real estate ads may implicate zoning laws. Cf. *Cent. Hudson Gas*, 447 U.S. at 562 n.5 (“[M]any, if not most, products may be tied to public concerns with the environment, energy, economic policy, or individual health and safety.”); Post, *supra* note 15, at 15–20, 22 (arguing that the Court’s analysis of commercial speech typically “turn[s] on charting and classifying the social world in order best to serve the constitutional value of democratic self-determination”).

¹⁶⁴ Expression that influences a listener’s personal development—intellectual, emotional, or economic—may well have some effect on that person’s ultimate participation in (or impact on) the society’s collective decisions on matters of public policy, or on its “culture.” But it is too censorious to attribute to every particular array of diverse kinds of expression a basis for any subsequent particular conduct in the person’s behavior in the society, which assimilates that behavior to the expression and makes the latter (expression) unregulable. Rather, it is the total persona of the individual, which is formed by many influences, including, to be sure, assorted kinds of speech. But the First Amendment protects only speech that can be shown to connect to the addressee’s participation in (or consideration of) the society’s collective action (or restraint), or speech that engages his contribution to its culture.

¹⁶⁵ Even if, as has been suggested, it is only regulated economic activity that tends “to attract speech bans,” regulation of speech involving such activity does not preclude freely discussing the issues (if any) publicly, apart from doing so as part of commercial speech. *Neuborne*, *supra* note 54, at 449.

¹⁶⁶ See *Jackson & Jeffries*, *supra* note 10, at 14–25. This was a conclusion that the Court noted, and sought to avoid, by diluting the protection for speech that the First Amendment protects for its self-government value if uttered in a commercial context. See *Citizens Consumer Council*, 425 U.S. at 761, 764–65.

indisputably involve speech implicating matters of public policy or self-government or of other societal import.¹⁶⁷

B. *Enriched Commercial Speech*

Enriched commercial speech, like narrow commercial speech, is offered by potential sellers in order to induce individuals to purchase their products or services—as consumers concerned with only their own personal benefit from, or interest in, such goods.¹⁶⁸ On occasion, however, enriched commercial speech may contain expression that engages the audience's interest in matters of self-government, public policy, or other societal import,¹⁶⁹ and does not merely furnish information that may be of use for theoretically envisionable, if practically remote, consideration of such matters. In an effort to enhance the attractiveness of their products or services, sellers may weave such considerations into their sales communications.¹⁷⁰ They generate "image" ads,¹⁷¹ and some-

¹⁶⁷ This means diluting the strictures that regulate toleration of falsehood or proscribe vagueness in regulation or in other content-based regulation. Moreover, such speech is unlikely to trigger discussion of self-government or other matters that might be of public interest by the speaker's business competitors who, like the speaker, do not want to make waves in which interest in purchasing their products can drown.

¹⁶⁸ This includes their status or standing in the eyes of fellow citizens.

¹⁶⁹ See McGowan, *supra* note 3, at 419.

¹⁷⁰ See Nat'l Comm'n on Egg Nutrition v. FTC, 570 F.2d 157, 159 (7th Cir. 1997) (reviewing the First Amendment implications of members of the egg industry leading an advertising campaign to convey how eggs are vital for good nutrition); *In re R.J. Reynolds Tobacco Co.*, 113 F.T.C. 344, 344–49 (1986) (reviewing the First Amendment implications of a tobacco company's publication of a study on the health effects of cigarettes); Stern, *supra* note 3, at 122–23 (describing Mobil Corporation's ads regarding the "uncertainty of climate change" and Trojan's ads within pamphlets promoting safe sex); Cade, *supra* note 3, at 249–51 (citing *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002), *cert. dismissed as improvidently granted*, 539 U.S. 654 (2003)) (explaining how Nike's statements about its business operations were correctly deemed entitled to protection as free speech by the California Supreme Court in *Kasky v. Nike*, because such speech protects the integrity of the marketplace); see also *Chi. Joint Bd., Amalgamated Clothing Workers of Am. v. Chi. Tribune Co.*, 435 F.2d 470, 472 (7th Cir. 1970) (reviewing the First Amendment implications of a labor union seeking injunctive relief to compel a newspaper to publish an editorial ad produced by the union); *Fur Info. & Fashion Council, Inc. v. E. F. Timme & Son, Inc.*, 364 F. Supp. 16, 21 (S.D.N.Y. 1973), *aff'd*, 501 F.2d 1048 (2d Cir. 1974) (addressing a First Amendment challenge by major players in the fur industry to a manufacturer of synthetic furs who advertised about the inhumane practices of the fur industry).

Nike, for example, responded to critical ads about its operations with its own ads, for which it claimed First Amendment coverage and full protection. See *Kasky*, 45 P.3d at 262–63 (holding that when a corporation makes public statements about its labor practices and working conditions, those statements can be regulated to prevent deception to consumers); see also *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 20–21 (1986) (holding that a commission's order for a utility to place third-party newsletters in its billing statements interfered with the utility's First Amendment rights); *Cent. Hudson Gas*, 447 U.S. at

times even “issue” ads¹⁷² that may not be part of an explicit sales proposal. The image ads often are effectively selling efforts that can fairly be characterized as commercial speech, at least as they imply purchase of

571–72 (holding that a total ban on promotional advertising for a utility company interfered with the utility’s First Amendment rights); *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm’n*, 447 U.S. 530, 544 (1980) (holding that the commission’s refusal to allow a utility to place inserts discussing controversial issues in its billing letters interfered with the utility’s First Amendment rights); McGowan, *supra* note 3, at 371–73 (explaining how the Supreme Court has continued to provide some First Amendment protection to commercial speech but has backed away from providing full First Amendment protection to commercial speech after *Ohralik*); *cf.* Butler & Ribstein, *supra* note 3, at 170, 184–94 (arguing that proxy statements should be entitled to the utmost First Amendment protection).

In another mode, a pharmaceutical company might distribute to doctors scientific studies of its latest product explaining truthfully that the studies were made independently of the company by impartial scientists and were peer-reviewed. The U.S. Food & Drug Administration might then refuse to approve sale of the product if those studies are publicly advertised unless all comparably independent (including unfavorable) studies are similarly distributed in tandem or as soon as they become public. *See In re R.J. Reynolds*, 113 F.T.C. at 344–49; Geyh, *supra* note 3, at 52–71. *But see* Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2672 (2011) (holding that a state law restricting the disclosure of pharmacy records that reveal the practices of doctors did not advance an approved state interest and violated the First Amendment). On another level, a communication may be offered, as in the recent advertising campaign by United Colors of Benetton, with a focus on political or ideological import. *See Benetton’s Controversial Kissing Ads*, WASH. POST (Nov. 17, 2011), http://www.washingtonpost.com/lifestyle/style/benettons-controversial-kissing-ads/2011/11/17/gIQA5qxZUN_gallery.html#photo=1 (displaying different world leaders kissing each other to promote peace). Or, communications or ads might be offered to counter admonitory warnings by government, as in *In re R.J. Reynolds* and *Egg Nutrition*, or by private parties, as in *Kasky*. *See Egg Nutrition*, 570 F.2d at 572; *Kasky*, 45 P.3d at 247–48; *In re R.J. Reynolds*, 113 F.T.C. at 344–49.

¹⁷¹ Image ads are published to create a favorable image of the seller, sometimes by depiction of its operations (e.g., innovative labor policies) designed to demonstrate its reliability as a supplier of goods and services, or of some of its other activities (e.g., environmental sensitivities like conservation or waste management) or designed to show that it is a responsible citizen. *See, e.g., Benetton’s Controversial Kissing Ads*, *supra* note 170 (promoting peace through display of world leaders being affectionate); *Environment*, HONDA, <http://automobiles.honda.com/civic-hybrid/environment.aspx> (last visited Aug. 22, 2012) (showing environmental benefits of the 2012 Honda Civic hybrid); *Our Commitment Toward Sustainable Business*, BANK OF AM., <http://environment.bankofamerica.com/commitment/index.html> (last visited Aug. 22, 2012) (showing Bank of America’s commitment to environmental sustainability); *(Red) Fighting for an AIDS Free Generation*, (RED), <http://www.joinred.com/partners> (last visited Aug. 22, 2012) (showing corporate partners in the fight against AIDS). Such ads may offend some people, but the seller apparently believes that they will appeal sufficiently strongly to a sufficiently large constituency to be worth the risk of loss of some people. The term “advocacy advertising” is sometimes used to cover both image ads and issue ads. *See, e.g., Holt*, *supra* note 97, at 623–27.

¹⁷² Issue ads are less concerned with creating a favorable image of the corporation’s operations or activities than with encouraging support for public policies which the corporation presumably believes will help in its business. *See Stern*, *supra* note 3, at 122–23.

the ads' sponsors' identified products or services.¹⁷³ Issue ads on matters of public policy are likely to be less tightly tied to sales efforts, and on occasion may not be treatable as only commercial speech.

But, not every expression whose content might plausibly claim First Amendment coverage is entitled to such protection whenever it is uttered. Context may wholly disqualify such expression from, or limit its entitlement to, First Amendment protection.¹⁷⁴ In the case of commercial speech, the question is: What is the impact of that context on entitlement to First Amendment coverage of expression that would, or likely might, be covered if uttered other than as part of commercial speech—for example, on the hustings on street corners or on television, in a classroom, in a theatre or in comparable contexts?¹⁷⁵

To aid that inquiry, it is useful to divide all such expression into two categories: (1) expression engaging matters of self-government or public policy, entailing government action (or refusal or failure to act), and (2) expression engaging other matters of societal import, such as is offered in literature, art and music, or in portrayals of lifestyles in ads

¹⁷³ Compare *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–68 (1983) (holding that unsolicited mailings regarding contraceptives are entitled to speech protection), with *Egg Nutrition*, 570 F.2d at 163 (holding that restrictions on misleading or false ads regarding egg nutrition did not violate the First Amendment). No readily satisfactory criteria enable lines to be drawn between issue or image ads that are part of commercial speech and those that are not.

¹⁷⁴ For example, fighting words, obscenity, and speech by public employees may be ineligible for coverage. Sales expression need not become speech protected by the First Amendment if, or because, it is included in a statistical presentation compiled by the seller or others for use in the sales process. But cf. *Randall v. Sorrell*, 548 U.S. 230, 262–63 (2006) (holding that limits on contributions to political parties violated the First Amendment's free speech protection). Also consider, for example, speech that is part of the behavior that violates the antitrust laws. Compare *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 425–28 (1990) (reasoning that a boycott orchestrated by lawyers for indigent defendants was not entitled to First Amendment protection because the lawyers sought to increase their own compensation), with *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 909–13 (1982) (reasoning that a civil rights boycott of white merchants was entitled to First Amendment protection because it sought to “change a social order that had consistently treated [blacks] as second-class citizens”). This is not to say that use of the compilation other than in the sales process—for example, as part of general statistical information—may or may not be protected by the First Amendment. See *supra* notes 9–29 and accompanying text (defining different types of commercial speech).

¹⁷⁵ The content that sellers instill in commercial speech urging purchase of their products or services varies widely, and its range is limited only by the limits of sellers' or their advertisers' fertile imaginations. It may contain allusions to matters of self-government or public policy (e.g., to claims to preferability of synthetic to natural furs, of local manufacturing to outsourcing, or of greening) as well as to matters of lifestyle (e.g., in personal appearance like clothes, jewelry, or body shape or beauty aids, or in material possessions like automobiles, houses, or athletic equipment) or more conventional notions of culture (e.g., art, literature, music, theatre, movies, athletic events). See *supra* notes 168–173 and accompanying text.

or otherwise, or other content that entails the capacious concept of the culture of the society. It does not detract from the usefulness of this division that particular instances of commercial speech may often engage both categories.¹⁷⁶

1. Matters of Self-Government or Public Policy

The seller's interest in referring to matters of self-government or public policy in its commercial speech is generally, if not indeed always, only to stimulate its audience's interest in buying the products it proffers. In some instances, its expression on policy or electoral matters may be so probing or central that (to borrow from Justice Potter Stewart) the entire communication is "integrally related to the exposition of thought"¹⁷⁷ about those matters. More often, however, the speaker's sales aspiration will not result in expression that encourages the audience to make the cerebral waves that such articulated thought might produce. On the contrary, the aim is to select for inclusion in the sales pitch only public policy subjects on which the seller believes there is little dispute and much agreement among a large audience whom it seeks to induce to buy its products or services. It will encase its presentation in terms that it expects the audience to find congenial and not subject to challenge. The rational seller rarely wants the consumer to consider the substance of the public policy matters to which its presentation may allude. Any such consideration will not only divert attention from the product and may dilute the appeal of acquiring it, but it may also create questions about the usefulness or desirability of the product which the ad seeks to stimulate. Hence if the policy expression serves as intended—that is, as undisputable "window-dressing"¹⁷⁸ in aid of the sale—it is not likely to suggest the concern with the persuasiveness of the expression on the matter of public policy or public interest at which

¹⁷⁶ For example, "green" ads that proclaim the environmental friendliness of a seller and its products may fall in both categories. See *Environment*, *supra* note 171; *Our Commitment Toward Sustainable Business*, *supra* note 171; see also *In re R.J. Reynolds*, 113 F.T.C. at 344–49 (reviewing the First Amendment implications of a tobacco company promoting that the health effects of cigarettes are still unclear).

¹⁷⁷ *Citizens Consumer Council*, 425 U.S. at 779 (Stewart, J., concurring).

¹⁷⁸ See, e.g., *Lucky Strike Green Has Gone to War*; LUCKY STRIKE (on file with author); cf. Stephanie Clifford, *On the Stump, for Consumers*, N.Y. TIMES, June 17, 2008, at C7 (discussing a Unilever advertising campaign to sell margarine by mimicking incidents in the 2008 Obama-Clinton primary contest); *Environment*, *supra* note 171 (showing the environmental benefits of owning a Honda Civic hybrid); *Our Commitment Toward Sustainable Business*, *supra* note 171 (showing Bank of America's commitment to an environmentally sustainable business model).

First Amendment protection is aimed.¹⁷⁹ In short, the seller's references to public policy are neither intended, nor likely, to illuminate or stimulate discussion of (or interest in) any matters of public policy to which they may allude.¹⁸⁰ Their form and intended function (such as to help induce the consumer to buy) discourage any reaction other than favorable (albeit passive) notice of the policy, whose adoption is presumably encouraged by owning or consuming the product or service.¹⁸¹

¹⁷⁹ In Professor Post's terms, the expression is not "dialogic," and therefore is not covered by the First Amendment. See Post, *supra* note 3, at 1254. The noncommercial component—for example, claiming that the sale of the speaker's products helps or coincides with American foreign policy—even if it is true, is being used to sell a product that (whether the claim is false or true) will not perform as promised. To proscribe that communication may silence a commercial falsehood, but it does not deter or indeed affect discussion of the public matters of foreign policy, because the expression in its context was not intended to evoke such discussion, and in any event was not likely to provoke others (like competitors) to engage in such discussion. The regulation that is otherwise constitutional, but thus incidentally impinges on a possible public consideration of a self-government matter does not offend the First Amendment. See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991).

¹⁸⁰ The problem is particularly acute if the regulation is aimed at the deceptive impact of the communication, on the assumption that the misleading expression is material to inducing the purchase. See *Egg Nutrition*, 570 F.2d at 160–61; *Fargo Women's Health Org., Inc. v. Larson*, 381 N.W.2d 176, 179–83 (N.D. 1986); *supra* notes 34–51 and accompanying text. To be "material," the misleading proposition's function in the communication must be less to implicate discussion of self-government matters than to induce purchase of the seller's goods or services. Thus, if the statement of the use of artificial rather than natural fur in *Fur Information & Fashion Council*, or the employment of American rather than foreign labor in *Chicago Joint Board*, were false, they were materially misleading. If the falsehood is not material, the likelihood of its inseparability is small and there is, therefore, no need to include the policy component of the message with the commercial proposal. Another example would be an ad claiming that Occupational Safety & Health Administration or environmental protection legislation is bad because it disadvantages all American producers, including the advertiser, as against foreign suppliers who have no "safety" obligations to their employees, or who produce coal or oil but who are not subject to similar regulation. Do such expressions have to be tied to a sales pitch? What if the foreign enterprises are subject to comparable regulation? Is the falsehood (if any) resulting from the failure to point this out? See Allen W. Bird, II et al., *Corporate Image Advertising: A Discussion of the Factors That Distinguish Those Corporate Image Advertising Practices Protected Under the First Amendment from Those Subject to Control by the Federal Trade Commission*, 51 J. URB. L. 405, 418 (1973); Merrill, *supra* note 3, at 233.

¹⁸¹ A candidate's statement that encouraging domestic production of a certain kind of product will help the economy may be protected by the First Amendment despite its falsity, and even his indifference to its falsity, particularly in light of the likelihood of response by opposing candidates. But a similar claim by a producer of the product in its sales promotion that falsely claims comparable virtues for its product in its ads should not immunize the seller from rigorous government regulation of the ad to prevent that falsity.

2. Other Matters of Societal Import

The “public discourse”¹⁸² or expression on matters of “general public interest”¹⁸³ that the First Amendment protects includes not only speech that relates to self-government and matters of public policy that should (or should not) be acted upon by the government.¹⁸⁴ The speech that helps to form society’s views of itself,¹⁸⁵ and indeed to generate its culture,¹⁸⁶ may be, and often is, remote from matters of self-government.¹⁸⁷

¹⁸² POST, *supra* note 101, at 119–78, 164–67; Post, *supra* note 106, at 604; Post, *supra* note 15, at 11–12; Post, *supra* note 24, at 2367–69; Post, *supra* note 3, at 1253–55, 1275–77.

¹⁸³ *Citizens Consumer Council*, 425 U.S. at 754, 764; see *Edenfield v. Fane*, 507 U.S. 761, 766 (1993). The Court refers ambiguously to the “societal interests in broad access to complete and accurate commercial information.” *Edenfield*, 507 U.S. at 766 (citing *Cent. Hudson Gas*, 447 U.S. at 561–62); see *Bates*, 433 U.S. at 377–78; *Citizens Consumer Council*, 425 U.S. at 762–65.

¹⁸⁴ Post, *supra* note 15, at 11 (explaining the doctrine that commercial advertising facilitates a free flow of information that “is highly relevant to the formation of democratic public opinion”).

¹⁸⁵ See BOLLINGER, *supra* note 27, at 12–42.

¹⁸⁶ As Professor Joseph Raz explains, such “acts of expression . . . fulfill important functions in contemporary societies.” Joseph Raz, *Free Expression and Personal Identification*, 11 OXFORD J. LEGAL STUD. 303, 311 (1991). Moreover, according to Professor Raz:

—They serve to familiarize the public at large with ways of life common in certain segments of the public.

—They serve to reassure those whose ways of life are being portrayed that they are not alone, that their problems are common problems, their experiences known to others.

—Finally, they serve as validation of the relevant ways of life. They give them the stamp of public acceptability.

Id.

¹⁸⁷ It is said that this type of speech helps create opposing views of the “collective identity,” which is “highly significant for the general orientation of the nation,” even though it “may not have immediate policy implications.” Post, *supra* note 15, at 11. Tracing back to the grand notion of the pursuit of truth and evolving into the discourse of the marketplace of ideas, such speech may fairly claim First Amendment protection—to support “low” culture, like portrayals of, or references to, transient fashion styles or many forms of entertainment, as well as “high” culture. See Balkin, *supra* note 69, at 35–36 (“[T]he realm of culture, for purposes of the free speech principle . . . refers to a set of historically contingent and historically produced social practices and media that human beings employ to exchange ideas and share opinions.”); Cole, *supra* note 62, at 892–94; Raz, *supra* note 186, at 321–23. The First Amendment is concerned with protecting not only speech about public issues, “but also speech that concerns popular expression in art as well as other cultural concerns such as gossip, mores, fashions and popular music.” Balkin, *supra* note 69, at 41.

The truth thus pursued is not simply the satisfaction or insight that the individual seeks in her search for some objective truth to enrich her understanding of life or her capacity to enjoy it. Its pursuit furthers the development of communal information, values, and culture. See David O. Brink, *Mill’s Liberal Principles and Freedom of Expression* 1, 12–16 (Univ. of San Diego Legal Studies Research Paper No. 07-99, 2007). That truth is not a

"Cultural" speech (that is valued for the "pursuit of truth"), like the truth pursued, is a kind of public good¹⁸⁸ that may enhance the personal development of individuals,¹⁸⁹ as well as enrich the society.¹⁹⁰ The communal benefit, whether or not connected to the process of self-government, follows because such expression and its content constitute the sharing by its participants in the society's way of life, attitudes, values, and images of itself; the content of the expression is not simply possessed or owned by individuals for themselves.¹⁹¹ The root of First Amendment protection in the communal aspects of truth-seeking is not severed by the rhetoric of "competition of the market," with its

verity; rather, it is constantly evolving, never captured. See Post, *supra* note 25, at 1120–23 (arguing that the true collective identity should always be considered open ended).

Others have advanced the notion that truth is a process as well as a (transient) product. See RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 2.02 (1994); see also G.E. LESSING, *A Rejoinder*, in PHILOSOPHICAL AND THEOLOGICAL WRITINGS 95, 98 (H.B. Nisbet ed. & trans., 2005) ("If God were to hold in his right hand all the truth and in his left the unique ever-active spur for truth, although with the corollary to err forever, asking me to choose, I would humbly take his left and say: Father give! for the pure truth is for you alone!"); Cole, *supra* note 62, at 877 & nn. 78–80 (citing John Locke, *An Essay Concerning Human Understanding*, reprinted in THE TRADITION OF FREEDOM 285 (Milton Mayer ed., 1957) (1690)). The pursuit of it is a process rooted in openness to expression of new information and ideas that are assumed to enrich the life of the society. The process helps to generate the tolerance that produces communal accommodation of varied, and sometimes conflicting, inputs (e.g., opinions, information, ideas, and values) by individuals. See Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969). It was John Stuart Mill who articulated the notion that the pursuit of truth requires freedom of speech. MILL, *supra* note 30, at 15–52; see Cole, *supra* note 62, at 877–78.

¹⁸⁸ As used here, the term "public good" refers to the nonpossessory quality of such good, a somewhat different affect than Professor Raz offers when he refers to the "public good" character of the speech to be protected. See RAZ, *supra* note 104, at 134.

¹⁸⁹ Notwithstanding cultural speech's presumed underproduction when viewed in terms of a world of rational wealth-maximizing individuals, the resulting notion that it should not be regulated is less acceptable for commercial speech. See Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 563–571 (1991); Posner, *supra* note 71, at 24–29, 39–40.

¹⁹⁰ Mill points out:

Were an opinion a personal possession of no value except to the owner, if to be obstructed in the enjoyment of it were simply a private injury it would make some difference whether the injury was inflicted only on a few persons or on many. But the peculiar evil of silencing the expression of an opinion is that it is robbing the human race, posterity as well as the existing generation

MILL, *supra* note 30, at 16. That the speech may bring pleasure to speakers but pain to listeners does not alter its value as a contribution to society, even though it may call for ameliorating intervention by government.

¹⁹¹ See Balkin, *supra* note 69, at 39–40. Even if not every consumer buys the product, the ad is imitated by individuals and absorbed by society through a passive acceptance that impacts society just as greatly as if every consumer had bought the product.

laissez-faire predicate of possessive individualism,¹⁹² a rhetoric that over time was transformed in its imagery (and its meaning) to the marketplace of ideas.

The range of expression on matters of general public interest, including matters of cultural interest that may be covered by the First Amendment, is substantially broader, and its content is significantly more varied and less cabinable, than that of speech covered by the First Amendment as expression on matters of self-government or public policy.¹⁹³ Such expression in enriched commercial speech,¹⁹⁴ if uttered

¹⁹² See MILL, *supra* note 30, at 15–52 (discussing the role of conflicts among ideas in enriching individuals); SHIFFRIN, *supra* note 27, at 90–96 (analyzing the relationship of dissenting political voices, individualism, and truth); Balkin, *supra* note 69, at 33–38; see also Cole, *supra* note 62, at 893–96 (arguing that a misreading of early case law led to the doctrine that justified government intervention to protect the rights of listeners); cf. Fiss, *supra* note 33, at 1405–08 (offering an illuminating history of the notion of pursuit of “Truth,” and its transformation in the First Amendment).

¹⁹³ The proposal of terms of sale or colorless description of products is said to constitute information that may possibly be of public interest, or that may stimulate discussion or simply consideration of matters of “significant societal interest.” See *Bates*, 433 U.S. at 364; Post, *supra* note 15, at 46–50. But narrow commercial speech does not invite, or even suggest, consideration of such matters. It functions, as Professor Daniel Farber and others have suggested, simply as a component of a potentially regulable transaction involving two or more parties. See *supra* note 188–190 and accompanying text. As with narrow commercial speech of “possible” political interest, there is little chance that its mere exposure to the listener will stimulate interest in, or discussion of, the matters of “significant societal interest” that implicate the First Amendment. See *Citizens Consumer Council*, 425 U.S. at 761 (“Our pharmacist does not wish to editorialize on any subject, cultural, philosophical or political . . . [or] to report on any newsworthy factor to make any generalized observations about commercial matters.”). It is possible that offers of some services—such as counsel to a person charged criminally—may be speech that is entitled to First Amendment protection because of what the speaker offers. Cf. *In re Primus*, 436 U.S. 412, 429–32, 438–39 (1978) (holding that solicitation of prospective clients by a nonprofit organization that utilized litigation as a vehicle for social change warranted First Amendment protection).

¹⁹⁴ Scholars have examined the number and content of such offers. See, e.g., Collins & Skover, *supra* note 139, at 698, 738–39; Kozinski & Banner, *supra* note 3, at 639–42; Lin, *supra* note 46, at 462–66. Similar effects are claimed for the expression embodied in product placement efforts in television shows, movies, or theatrical performances. See Stern, *supra* note 3, at 126. Illustrative of sales efforts for which such entitlement is suggested are the ubiquitous, more or less “still” visions of lifestyles—in matters of food, dress, cars, cosmetics, or aromas, or even medical attention—and pleasures or gratifications that are said to accompany the acquisition and use of the products or services they offer. Similarly, many enriched commercial communications (both print and electronic) offer stories, dramas, or music, or portray scenes of satisfaction, pleasure or even romance, that are suggested to accompany, or result from, use of the advertised product or service. See, e.g., Daniel Callender, *Attorney Advertising and the Use of Dramatization in Television Advertisements*, 9 UCLA ENT. L. REV. 89, 103–04 (2001); Kozinski & Banner, *supra* note 3, at 635.

Advertisers portray those lifestyles and appealing imagery for living to induce individuals to purchase the products or services they offer. But the communications create or emphasize (and occasionally alter) visions of living that may infuse the society, and may

separately, often might be entitled to First Amendment coverage as part of public expression affecting the appearance and values of our society, and changes in each; and occasionally its role, as such, in the commercial communication may dominate the presentation, and justify so treating the entire communication.¹⁹⁵ Moreover, ads for sale of products can, and occasionally do, serve an entertainment or stimulating value for the individual consumer that entails sharing in the society's culture,¹⁹⁶ or socializing individuals, by solidifying or generating behavioral patterns and associations.¹⁹⁷ Indeed, commercial communications

thus plausibly be claimed to create (or become part of) its culture—sometimes thinly, sometimes thickly. Thus, although these attractive portrayals and their imagery may be absorbing to individuals, the question is whether their role (which is to be noted and passively accepted or enjoyed to induce purchase of a product) entails speech that engages the societal interests with which the First Amendment is concerned. One must bear in mind that the First Amendment protects low culture as well as high culture, ranging from the Marlboro Man to Rembrandt, from Warhol to sales jingles, and from antique furniture and clothing to contemporary ads for furniture and fashionable clothing. "People use raw material of mass culture to articulate and express their values." Jack M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935, 1948–49 (1995). As has been noted, "[t]hose visions . . . are highly significant for the general orientation of the nation. Visions of the good life articulated within commercial ads are relevant to this process." Post, *supra* note 15, at 11.

¹⁹⁵ Expression and imagery in many, if not most, print or television ads would not be proffered by the speaker in its own interest except as part of the sales effort, and therefore can be argued to be inseparable. For example, an ad could claim that Magic Johnson enjoys riding in "brand name" autos or using "these" sneakers. A similar analysis would follow for ads for "dolphin-safe" tuna or (RED) ads, and even for photographs of clothes or jewelry on models, thought by the sellers to be attractive to viewers. See Ron Nixon, *Bottom Line for (Red)*, N.Y. TIMES, Feb. 6, 2008, at C1; see also *Egg Nutrition*, 570 F.2d at 163 (denying First Amendment protection to claims by the egg industry regarding the nutritional information of eggs); *In re R.J. Reynolds*, 113 F.T.C. at 344–49 (denying First Amendment protection for misleading and false studies published by tobacco company regarding the health effects of smoking cigarettes); Geyh, *supra* note 3, at 56 n.172 (arguing that protecting corporate speech could lead to false corporate speech being granted more protection than false commercial speech); Holt, *supra* note 97, at 623–33 (discussing the advertising campaign of an insurance company that denounced large jury verdicts).

¹⁹⁶ Balkin, *supra* note 69, at 38–50. Imagery or suggestion through pictorial portrayal or verbal beguilement may enrich an individuals' understanding or perception of the world and possibly of his place in it—and affect his views about the societal import of the matters or ideas portrayed. That process is the basis for claiming First Amendment protection of such speech—not so much to enhance an individual's growth but for its effect on the society and on his role as a member of society. See Post, *supra* note 15, at 11.

¹⁹⁷ See Lawrence O. Gostin & Gail H. Javitt, *Health Promotion and the First Amendment: Government Control of the Informational Environment*, 79 MILBANK Q. 547, 554–55 (2001); Wendy E. Parmet & Jason A. Smith, *Free Speech and Public Health: A Population-Based Approach to the First Amendment*, 39 LOY. L.A. L. REV. 363, 380–85 (2006). Advertising is as often, if not more often, persuasive as informational. Whether or not its effect is to persuade a consumer to purchase a commodity, it may also be to persuade a consumer about matters of cultural import. See McGowan, *supra* note 3, at 420–29.

on television often take on affects similar to those of the dramas shown on the programs that their commercial sponsors are subsidizing.¹⁹⁸ It is argued in support of First Amendment coverage of those enriched commercial communications that the same sorts of considerations that justify First Amendment coverage of the dramas or artistic or musical works that the commercial speaker sponsors also justify First Amendment coverage of the entire commercial communications—as contributions to matters of pervasive societal interest and to the satisfaction or development of shared interests by the individual listeners or viewers.¹⁹⁹

Against such claims is the basic posture of commercial speech or “the social practice” in which it is embedded.²⁰⁰ The transactional effort focuses the listeners’ attention on purchasing or declining to purchase the proffered goods.²⁰¹ That practice, in which the entire communication is thus embedded, makes its noncommercial import critically different than would be the import of a freestanding noncommercial presentation of the same, or similar, material—both for the speaker and for the listener.²⁰² Commercial portrayals (including the noncommercial components²⁰³) are offered to convey an unchallengeable message or image that focuses on inducing the listener’s acceptance of the proposed transaction.²⁰⁴ Noncommercial portrayals

¹⁹⁸ Their content offers imagery and dialogue that could also appear in the associated dramas (or purportedly non-commercial, more or less artistic presentations) and offer comparable pleasures or satisfaction (and sometimes enlightenment) to their viewers.

¹⁹⁹ This argument claims protection for the ads as public expression—not merely for their function in selling the associated First Amendment-protected television drama.

²⁰⁰ Post, *supra* note 15, at 15–18.

²⁰¹ See Lowenstein, *supra* note 136, at 1225–27. This is true notwithstanding that the television sponsor’s sales purposes also affect the content of the drama or artistic presentation it sponsors, which the First Amendment protects.

²⁰² The “social practice in which commercial speech is embedded” generally involves communication of “information” or efforts to persuade. Post, *supra* note 15, at 18. But not all such communication entails the speech that the First Amendment protects. Professor Post suggests that such communication properly claims First Amendment protection because it conveys information of relevance to the “voting of wise decisions,” or more generally “to democratic decision making.” *Id.* at 15, 49. But this analysis moves the inquiry to (1) delineating the criteria by which to determine if the communicated information sufficiently connects the speaker or listener to his role as a participating member of the society and (2) to applying those criteria in concrete cases. If commercial speech is viewed as the utterance of expression in order to induce listeners to buy the product, and if its societal import is designed for (and is subordinated to) that purpose, its social practice does not often implicate First Amendment protection.

²⁰³ Ready acceptance of the noncommercial expression is the aspiration of the seller, who is not benefitted by such expression if it interests the audience but dilutes the persuasiveness of the sales message.

²⁰⁴ If offered in a nontransactional context, content might be drawn more broadly because it lacks the limiting purpose of inducing a consumer, concerned only with herself, to

of the same subject matter could, and often would, offer a different presentation to the audience and suggest a more complex or challengeable meaning for the same material. The noncommercial expression, if standing alone, might well have a significantly thicker connection to emerging societal values and behavior, and a more stimulating impact on discussion and appreciation of its societal relevance by individuals than it does when part of a commercial proposal.²⁰⁵

As a nontransactional presentation, the communication would be subject to outside comment and possibly to challenge by other speakers on its import or credibility²⁰⁶—a setting that is rarely, if ever, encoun-

make a purchase. See *Connick v. Myers*, 461 U.S. 138, 147–49 (1983); RAZ, *supra* note 104, at 146–49; SHINER, *supra* note 61, at 308–10; Post, *supra* note 15, at 20–25; see also *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004) (highlighting that government employees have the right to speak on matters concerning government policies without a fear of retaliation); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (explaining that teachers may not be constitutionally compelled to relinquish their First Amendment rights to discuss the operation of schools in which they work). Indeed, the emphasis on the listener as the participant for whom the First Amendment is said to protect commercial speech underscores that passivity.

²⁰⁵ For example, using the story of the 1942 Supreme Court case, *Valentine v. Chrestensen*, Chrestensen's ads and submarine tour would not likely be conducted in the same way by a U.S. naval authority offering tours to civilians. See 316 U.S. 52–53 (1942), *overruled by Citizens Consumer Council*, 425 U.S. 748. Similarly, commercial advocacy of the use of sneakers or cuffed shirts as better modes of living than the use of shoes or uncuffed shirts is likely to differ from expository expression in speech that does not urge purchase of the products or imply that the consumer will become a better athlete or a more successful broker or lothario. *But see Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 72–73 (2d Cir. 1996) (granting First Amendment protection from a regulation requiring disclosures of contents of milk for which no potential harm was envisioned, merely to inform consumers of harmless additives). See *supra* notes 134–150 and accompanying text (discussing paternalism). If the regulation is found to be aimed more to avert harm from use of the offered product than to deceive in its offer, other First Amendment considerations may be involved. *Cf.* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504–07 (1996) (holding that a state ban on advertising liquor prices was not designed to protect against misleading information and did not effectively advance the state's interest in promoting temperance, and therefore it did not survive First Amendment scrutiny); *United States v. Edge Broad. Co.*, 509 U.S. 418, 431–35 (1993) (holding that a federal law prohibiting lottery advertising by radio stations located in states without lotteries did not violate the First Amendment because it promoted North Carolina's anti-gambling policy without greatly affecting the lotteries in other states); *In re R.J. Reynolds Tobacco Co.*, 1988 WL 490114, at *3–6 (F.T.C. Mar. 4, 1988) (allowing a tobacco company to advertise a study questioning the health risks associated with smoking cigarettes because this was not ultimately designed to sell cigarettes).

²⁰⁶ See Jordan Kline, *Metro Food Fight, in Devil in the Details*, AM. PROSPECT (Aug. 14, 2005), <http://prospect.org/article/devil-details-88> (illustrating the competing ads between pro-vegan political groups and major meat and dairy producers in the Washington, D.C. public transit system); see also *Perma-Maid Co. v. FTC*, 121 F.2d 282, 283 (6th Cir. 1941) (enforcing a Federal Trade Commission order directing a distributor of stainless steel cooking utensils to stop misleading advertising regarding the health effects of aluminum). That the commercial communication appeals more to the listeners' emotions than to their deliberative capacity is

tered by sales communication.²⁰⁷ The societally interesting component of the commercial presentation is part of a heavily financed commercial effort, and it is rarely questioned or challenged by comparably well-financed commercial speech (or other speech).²⁰⁸ Such commercial speech offers less a process by which individuals examine, or the community chooses, communal lifestyles, tastes, values, or ideas than a process for individuals' acquisition of the commodities or services offered, and for more or less passively imitating the imagined mode of living. These lifestyles and values are framed by their sales purpose (rather than by any independent expressive or cultural concern).²⁰⁹ Speech offered to induce, and in fact inducing, such passive acceptance is unlikely to stimulate the dialogic communication that serves the "significant societal interests" that the First Amendment protects.

Nevertheless, despite the coloring effect of its encasement in sales efforts on the content and appreciation of the cultural component of commercial speech, such a communication may, on occasion, implicate sufficient addressee attention to matters of societal interest, and sufficiently affect societal attitudes and values, to be plausibly assimilable to otherwise First Amendment protected cultural speech²¹⁰—notwith-

not a significantly different vulnerability in the case of commercial speech than in the case of noncommercial, protected speech.

²⁰⁷ See *supra* notes 155–167 and accompanying text (discussing narrow commercial speech). This is apart from the intended subliminal impact of the ads. See Collins & Skover, *supra* note 139, at 703–07; Moon, *supra* note 90, at 109–12. This is also apart from the lack of "rational" persuasiveness in much commercial speech. See SHINER, *supra* note 61, at 308–09 (discussing "Lifestyle advertising and the Public Good"); Strauss, *supra* note 49, at 365–68 (discussing "ill-considered" action); see also Haan, *supra* note 100, at 1282–84 (arguing that changes in legal persuasion have mirrored changes in commercial persuasion, and both have begun to emphasize "nonrational factors . . . such as emotion and impulse"). The different treatment of transactional and nontransactional speech does not rest on the differences between informational speech and noninformational speech and their different impacts on decision making. See Lowenstein, *supra* note 136, at 1225–37.

²⁰⁸ See Shiffrin, *supra* note 51, at 841–51 (explaining the connection between implied associations and First Amendment protection). The practices of "non-challenge" may be changing, as some recent developments suggest. See Elliott, *supra* note 43 (detailing the comparative advertising that Sears used for its riding mower as well as the recent comparative ads used by other companies).

²⁰⁹ Any communal ambience that such speech may generate is more in individuals passively noting the lifestyles portrayed in the communications attached to the products offered, rather than in the discussion or consideration of the import of those lifestyles that is the concern of the pursuit of truth. It is meant to be consumed or digested in order to help induce a purchase. It is rarely meant to provoke a responsive act or thought about the societal interests that may be implicit in the ad.

²¹⁰ The lifestyles and related matters of appearance illustrated in commercial ads (both in print and on television) are more likely to be absorbed into the communal culture than public policy discourse in commercial speech is likely to engage listeners or viewers. Cf. Emily

standing the expected and likely passivity of its acceptance by the addressees²¹¹ and doubts about whether such non-dialogic communication is entitled to First Amendment coverage.

C. *Linking Commercial Speech to Speech Covered by the First Amendment*

The steep sales tilt of the commercial communication, coupled with the likely absence of any responsive discourse on such matters of societal import as it may contain, deprives the communication of the communal cast or the dialogic²¹² potential of the kind of speech that the First Amendment covers. This is no less true for commercial speech claiming First Amendment protection because of its cultural references as because of its self-government or public policy references. The cultural components of many commercial communications, particularly the portrayals of lifestyles and attitudes that are expected to result from the purchase, often produce societally adopted lifestyles and inform the society's values and attitudes. To be sure, similar portrayals made in a

Badger, *Assessing Cigarettes' Right to Free Speech*, PAC. STANDARD (Aug. 30, 2011), <http://www.psmag.com/legal-affairs/assessing-cigarettes-right-to-free-speech-35711> (comparing old cigarette ads, such as Joe Camel cartoon images, with the graphic images of rotting lungs and teeth that the U.S. Department of Agriculture attempted to compel cigarettes to put on their packaging). Such lifestyle allusions, pictorial as well as verbal, are designed to be more attractive and commanding to the viewer and are likely to function more powerfully than public policy allusions in influencing the sale. Expression thus engaging cultural considerations is likely to be more frequently injected in enriched commercial speech than is expression relating to matters of self-government or public policy, and less likely to be as effectively expressible separately from its commercial affiliation than is the latter. Ads that portray Magic Johnson as enjoying particular sneakers, or Tiger Woods wearing a particular brand of wrist watch, or other similarly public persons enjoying automobiles, clothes, or food are not likely to be matched by similar ads of political ideas or figures. It may be noted, however, that attachment to a cultural component is not necessary for sales efforts. Moreover, the criteria for determining whether any particular instance of commercial speech sufficiently implicates the First Amendment to justify coverage are generally more difficult to determine and apply in the case of speech on matters of cultural interest than of speech on matters of self-government or public policy. It is expression of the former kind that presents the most (if indeed not the only) serious problem in determining whether and how the First Amendment should protect commercial speech.

²¹¹ Not only is the desirability of the advertised lifestyle rarely questioned, but the achievability (or unachievability) by any consumer of it or its promise is not discussed any more frequently.

²¹² See Post, *supra* note 15, at 12 (arguing that commercial speech is an unlikely candidate for First Amendment protection under a participatory model of free speech protection because commercial speech does not typically create a reciprocal dialogue). The dialogic aspect may be growing. See, e.g., Clifford, *supra* note 178 (detailing politically themed ads from I Can't Believe It's Not Butter and Svedka vodka); Nixon, *supra* note 195 (explaining how companies contribute to the "(RED) Campaign" to fund HIV and AIDS research and in turn collect goodwill from consumers).

noncommercial context might similarly affect absorption of their content into the social fabric and effectively turn their presentations into cultural references that the First Amendment protects.

The question is whether inclusion of references to such matters of cultural import (or of public policy or self-government) in the speech containing the sales communication²¹³ permits or requires First Amendment coverage of regulation of any or all of the commercial communication.²¹⁴ The answer turns on whether the expression reasonably could be, or would be, understood by its addressees and audience as simply a part of a sales pitch—an undisputable or readily acceptable proposition whose presentation merely enhances the desirability (non-utilitarian) of purchasing the proffered product or service²¹⁵—or would (or reasonably could) be read (or heard) by its audience to stimulate consideration of the substance of the expression's noncommercial reference.²¹⁶ In the former case, there is no reason to invoke the First Amendment's restraining power over government regulation because the expression is little more than a part of the transaction;²¹⁷ and, often there is good reason not to do so. In the latter case, First Amendment considerations become relevant—both in interpreting the commercial expression and the regulation, and in assessing the regulation's constitutionality. In any case, consideration of the fact of the speaker's choosing the context, as well as the content, of the expression is required.²¹⁸

²¹³ A sales communication is a communication which itself would otherwise have no entitlement to First Amendment protection if it did not include those references, because its only basis for such protection would be the inadequate autonomy claims of speakers and listeners.

²¹⁴ Another way of asking this question is whether attachment of the sales message to otherwise protectable speech deprives that speech of First Amendment protection.

²¹⁵ An example of expression that could enhance the desirability of a product would be the imprint of the American flag or "Made in the U.S.A." in the ad or on the packaging. Consider another example: in the case of a now defunct, but then popular, brand of cigarettes (in the 1930s and 1940s), the seller changed the color of the packaging from bright green to white and advertised intensively and extensively the formula "Lucky Strike Green Has Gone to War." Consider also the contemporary explosion of "greening" ads.

²¹⁶ This would be the case if the audience pondered such questions as: is it good or bad for the product to be "Made in the U.S.A."? Or, is the claim true or false? Should Lucky Strike's sacrifice stimulate others to make similar moves, or at least does it stimulate discussions about such responses? Do the "greening" ads stimulate reader interest in ecological questions?

²¹⁷ Doctrinally, the expression is to be regarded as simply part of the transaction, and therefore it is not speech—or it is speech that is not covered by the First Amendment. *See supra* notes 57–82 and accompanying text (explaining the relationship between commercial speech and commercial transactions).

²¹⁸ That is, in order to justify what is effectively a presumption that commercial speech should not be covered by the First Amendment, courts must consider these two factors.

The content and the context of commercial speech are chosen by the seller, whose only purpose for including references to matters of societal import is to enhance the likelihood of the proposed sale.²¹⁹ The speaker's choice of a product-selling message, rather than a free-standing noncommercial communication, as the vehicle for making a policy pronouncement or a cultural expression suggests his (or her, or its) expectation that those components of the message will be understood as part of the sales process and in furtherance of the sale rather than as stimuli to interest the potential consumer (or others) in the substantive import of those pronouncements.²²⁰ That intended understanding is emphasized by the effort and expense generally invested in the presentation of the material so as to glamorize the reference and make it not only an undisputable proposition, but also one that supports, and indeed invites, the purchase. Although not every instance of such speech may be so cast, the structure and presentation of the expression on matters of public policy or cultural import in commercial communications suggest principally (if not indeed solely) its transaction-stimulating purport, and the personal (i.e., possessive) benefits to the parties from consummating the transaction. Hence, those who claim that any particular such communication is covered by the First Amendment, and therefore not regulable because of the inclusion of the otherwise covered expression and the likelihood of such expression stimulating consideration of the related matters of societal interest, should bear the burden of so demonstrating. In short, the function of commercial speech invites the presumption that any particular instantiation of such expression should be treated as "only" commercial speech—meaning that it is not entitled to the special protection against

²¹⁹ The seller is not likely to be interested in persuading the audience to support, or even to consider, the substance of the referenced statements. The references to matters of societal import are intended to be understood by the addressee as undisputable propositions whose only function is to help (emotionally or psychologically) to induce purchase of the proffered product. They are inevitably presented in a form, and with a content, that the seller believes will so function, and will not be doubted or questioned by the consumers whom the seller expects to attract. And as we have seen, there is little likelihood of such challenge, or even responsive discussion, by competitors or third persons, let alone by potential consumers. See *supra* notes 182–211 and accompanying text. Indeed, listener (or reader) attention to, or interest in, that substance may well disserve the sales objective of the communication both by diluting attention and by stimulating diversionary interests.

²²⁰ That the expression would engage First Amendment protection if standing alone may not be enough if the sales message dominates the audience's attention so as to trivialize or effectively subordinate the allusion to public policy matters. Insofar as such material refers to electoral matters or other matters of public policy, it is generally designed (and is uttered) to induce the purchases, not at all to stimulate debate or discussion of, or action on, the substance of the material's content.

regulation offered by the First Amendment because it is serving only the personal interest of individual buyers and sellers.

To impose that burden, which, to be sure, is not easily carried,²²¹ is not likely to result in any deprivation to the speaker, or loss to members of the audience individually (or to society collectively) of any expression that would otherwise be protected by the First Amendment.²²² If the commercial communication can plausibly be read to induce or invite the addressee to consider the substance of the incorporated expression on matters of societal import, that expression or its substance is highly likely to be utterable by the speaker separately from the commercial communication, without loss of meaning or appeal. Certainly if the allegedly covered expression, as it appears in commercial speech, is expressible without the sales message, there is no loss of expression which the First Amendment should protect, because such expression can be uttered, often equally or more effectively, without being included with the sales message.²²³ Nothing in the First Amendment or

²²¹ There is considerable judicial discretion in deciding the question. For example, is the public policy expression so articulated, and so situated in the larger communication, as to induce the attention or interest of the audience? If so, will its appeal induce enough consideration to penetrate its encasement in the sales communication? The U.S. Supreme Court's 2003 decision in 2003, in *Nike, Inc. v. Kasky* is the classic case. 539 U.S. 654, 653–65 (2003) (Stevens, J., concurring). Some of Nike's communications may actually have been "commercial speech," but because of their content and context Nike may well have overcome the presumption and carried the burden of demonstrating that they were not simply commercial speech. See *id.* The ambiguity problem is not unlike the problems generated by many other instances of First Amendment coverage, including which speech incites violence, constitutes "fighting words," or is obscene. See, e.g., Estlund, *supra* note 126, at 1464–65. But cf. *Edenfield*, 507 U.S. at 770–71 (placing the burden of persuasion on the defender of regulation of expression that has been determined to be covered commercial speech). The First Amendment problem here is not one for which "the tie goes to the speaker, not the censor." Cf. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 474, 476–82 (2007) (holding that a prohibition on the use of corporate funds to finance "electioneering communications" before state primary and general elections violated corporate free speech rights).

²²² If the policy expression is not material, but (presumably) has independent informative import, it is highly unlikely that it is (or can be) so "inextricably intertwined" with non-policy matters as to be unutterable separately. In that case, there is no occasion or reason for First Amendment coverage of the commercial communication, since the speaker is well able to make the policy expression without tying it to the sales pitch. In the rare case of commercial speech in which (1) the public policy expression is sufficiently articulated and presented to suggest or even to invite consumer consideration of the policy, and (2) the noncommercial expression cannot be uttered substantially as effectively apart from attachment to a proposal to sell a particular seller's product, adumbrations from the First Amendment may become relevant.

²²³ See *Cent. Hudson Gas*, 447 U.S. at 563 n.5 (noting that although commercial speakers are entitled to the "full panoply of First Amendment protections for their direct comments on public issues," there is no reason to extend similar protection to statements made in the context of commercial transactions); cf. *United States v. Freeman*, 761 F.2d

moral theory requires expression on such public matters to be subsidized by the speaker's customers' or by audiences' purchase of the specified products or services. If a speaker wishes to allude to matters of public policy or other societal interest in order to facilitate the sale of its products or services, the First Amendment does not require the government effectively to enable, or protect, the speaker in causing consumers to help finance such speech.²²⁴ Indeed, as this Article has noted,²²⁵ such expression that might otherwise be covered by the First Amendment is more likely to contribute to misleading, or otherwise to injuring, its audience or addressees if made in the context of commercial speech than in the context of speech discussing only matters of public policy or of cultural import generally.²²⁶

549, 552 (9th Cir. 1985) (holding that the First Amendment does not offer protection for speech that is an integral part of a crime). Indeed, it is hard to envision any instance in which "inextricable intertwining" with a sales message is necessary in order to illuminate or enhance the import of a public policy expression (or its appeal) whose content could not be uttered separately, albeit more explicitly. *See, e.g.,* *Bd. of Trs. v. Fox*, 492 U.S. 469, 473–74 (1989) (concluding that the noncommercial aspects of a Tupperware party sales message were neither compelled nor essential and therefore were not entitled to First Amendment protection); *Bolger*, 463 U.S. at 67–68 (noting that communications can "constitute commercial speech notwithstanding the fact that they contain discussions of important public issues"); *see also* Stern, *supra* note 3, at 121–23 (explaining the difficulty in classifying corporate commentary on specific political or social issues and the difficulty in deciding whether or not to award speech protection to such commentary); Cade, *supra* note 3, at 276–81 (arguing that there is an important distinction between statements made in the context of policy debates and statements regarding a specific business's operations).

²²⁴ If the speaker does not think it worthwhile to vent the policy expression or other matter of societal import in a noncommercial context, the listener is not deprived of expression that the First Amendment protects, because the listener is entitled only to such expression by a willing and able speaker. It is also relevant that the incentives of the government to misregulate are apt to be significantly weaker in the case of commercial speech than in the case of speech on matters of self-government (no entrenchment), public policy, or indeed on matters of general societal import (less stimulus to ignore or mute minority views). To be sure, impurities may infect legislative or executive decisions on regulating commercial speech, as public choice theorists tell us, but the infection from lobbies or trade-offs among competitors is not likely to be as potent.

²²⁵ *See supra* notes 34–51 and accompanying text (discussing the institutional considerations that differentiate commercial speech from speech that is protected by the First Amendment). The consequences of being misled or otherwise injured by speech of the non-commercial (e.g., political) speaker may be considerably more harmful to society than the comparable injuries from unlawful commercial speech. But the harms from the former are generally less likely to materialize (at least without prior response) than are the harms from the latter. To that extent, the societal costs of unduly restricting the latter are likely to be considerably less than the comparable costs of similar repression of the former.

²²⁶ References to cultural matters (whether freestanding or in commercial speech) may well be less likely than expression on electoral or public policy matters to engage monitoring responses. But there is more likelihood of such responses to freestanding cultural references than to such references as components of commercial speech—and by the

In sum, quite apart from the debatable claim that the content of commercial speech, even if truthful, is less worthy of First Amendment protection than is noncommercial speech,²²⁷ interpretation of the commercial communication more as a sales document than as an expression of public policy, cultural, or general societal interest is invited by the speaker's choice to encase the expression in a sales message.²²⁸ Such a reading suggests that liability or culpability for the communication's deceptiveness, or its inadequacy to alert the consumer to the not unlikely consequences (i.e., limited benefits and possible costs or perils) of use of the proffered products or services should be judged by the standards that the seller invited—those of commercial jurisprudence²²⁹—rather than by criteria derived from the First Amendment. But, they should be applied in a context that lacks the essential conditions on which First Amendment protection of speech rests.²³⁰

same token there is a much greater need for government intervention in the latter circumstance than in the former to prevent misleading the audience. It does not detract from this conclusion that such government intervention in commercial speech is less likely to be taken in the interest of entrenching or further empowering the governors (or to be comparably "fallible") than is regulation of speech that is otherwise protected by First Amendment—notwithstanding the teaching of public choice theory.

²²⁷ Cf. *Citizens Consumer Council*, 425 U.S. at 787–88 (Rehnquist, J., dissenting) (criticizing the majority for embracing the unprincipled line drawing of the Court's earlier commercial speech cases).

²²⁸ That aspiration, which alone drives the communication, does not contemplate interesting the consumer in (and indeed wishes not to divert his attention to) matters of self-government, public policy, or even of such discussable cultural import as the expression may have. References to such matters are intended to be understood by the consumer as undisputable components of a persuasive statement inserted to induce a purchase, and are inevitably presented in a form, and with a content, that the seller believes will help to induce the sale, and will not be challenged or questioned by the consumer.

²²⁹ Commercial jurisprudence generally permits courts to hold speakers liable or culpable for speech that is "misleading," "deceptive," or even legitimately "disputable," notwithstanding the ambiguity of some of those terms—conditions for which the First Amendment would preclude liability. See, e.g., *In re R. M. J.*, 455 U.S. 191, 203 (1982) ("Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. . . . Misleading advertising may be prohibited entirely."); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974) ("Under the First Amendment there is no such thing as a false idea. . . . But there is no constitutional value in false statements of fact.").

²³⁰ See *supra* notes 52–82 and accompanying text (discussing traditional autonomy considerations of First Amendment protection in the context of commercial speech). Because the function of the seller's allusion to the matters of public policy or self-government or of cultural import in commercial speech is to aid the sale but rarely to persuade the listener in those matters, or indeed to inform him about them so as to engage his interest in them, and the listener is not likely to be or become interested in those matters by reason of the commercial communication, there is good reason to test the speaker's culpability by the rules of the playing field it chooses, whether the question is one of determining substantive liability or the proper judicial process. In that connection, it is important to note that the framework

That the standard suggested for determining which instance of commercial speech containing noncommercial expression is covered by the First Amendment is porous does not distinguish it significantly from that currently invoked by the Supreme Court to determine First Amendment coverage.²³¹ To be sure, the Court's policy looks in the opposite direction than that currently faced by the Court. But its easier administrability leaves less room for the virtually unguided judicial discretion suggested in the cases dealing with that problem under the current doctrine.²³²

It is possible that greater tolerance for regulation of commercial speech by denying or "loosening" the strictures of First Amendment coverage will have the effect of diluting First Amendment protection for

for concern in assessing the constitutionality of regulating commercial speech is the adequacy of the expression accurately to inform the purchaser as to the price, utility, quality, or risk of the product or service proffered; rarely, if ever, is the problem one of the adequacy of the statement's cultural or public policy import for the addressee or the society.

Similarly, there is little reason for concern that application to commercial speech of the flexible notion of falsehood that commercial jurisprudence may accord in regulation of exchange transactions will permit government to "mutilate the thinking process of the community by censoring communication that the State believes might potentially be deceptive." Post, *supra* note 15, at 39. That suggestion scants the differences between the contestability of, or likelihood of challenge by others to, falsehood in a commercial communication, and comparable claims of falsehood in non-commercial speech that otherwise is (and should be) protected by the First Amendment—a distinction that Professor Rebecca Tushnet has noted and whose import she has cogently examined. See generally Rebecca Tushnet, *It Depends on What the Meaning of "False" Is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 LOY. L.A. L. REV. 227 (2008).

²³¹ See *Cent. Hudson Gas*, 447 U.S. at 561–66; *Citizens Consumer Council*, 425 U.S. at 761–70.

²³² See, e.g., *Edge Broad. Co.*, 509 U.S. at 429 (upholding speech restrictions so long as there is "a fit between the restriction and the government interest that is not necessarily perfect, but reasonable" under the "*Central Hudson Test*"); *Fox*, 492 U.S. at 478 (upholding speech restrictions "so long as they are narrowly tailored to serve a significant governmental interest" under the *Central Hudson Test* (internal quotations omitted)); *Cent. Hudson Gas*, 447 U.S. at 564 (creating the *Central Hudson Test* for cases involving the regulation of truthful advertising about lawful products or services, which requires balancing how significant the state interest is and how narrowly the restriction is drawn); see also ALLAN IDES & CHRISTOPHER N. MAY, *CONSTITUTIONAL LAW—INDIVIDUAL RIGHTS: EXAMPLES & EXPLANATIONS* 377–82 (5th ed. 2010) (explaining the *Central Hudson Test*, which the court currently uses to analyze restrictions on commercial speech). It is worth noting a recurring variation in context that affects the resolution of the question of First Amendment coverage for the commercial communication: whether the injury from the speech that the challenged regulation seeks to avert is imminent to utterance of the speech (e.g., because of deception in inducing a purchase) or will be caused only over some period of time (e.g., from consuming or using the proffered product) so that there is time for "more speech" to debate or discourage the harmful acquisition proposed. To that extent, there may be less need for the First Amendment's special protection. But the institutional structure of commercial speech substantially reduces the likelihood of more speech for that purpose.

noncommercial, otherwise protected speech.²³³ Understanding the import of the difference between the context of noncommercial expression, which the First Amendment would not protect if uttered in commercial speech, and the same expression to be protected if uttered as a freestanding statement, should significantly reduce the likelihood of systematic disadvantage to consumers without denying appropriate First Amendment coverage. Courts are perfectly able, if not always willing, to recognize the differences between the contexts in which the same expression appears and to find First Amendment coverage of speech appropriate (indeed required) in one context, but not in the other.

CONCLUSION

Commercial speech differs from the “speech” covered by, and specially protected under, the First Amendment. Commercial speech is much less likely to be challenged by, critically responded to, or corrected by third parties. It is the possibility, or, indeed, the likelihood, of such “more speech” that is an essential premise for First Amendment protection of speech against government regulation. The institutional conditions that obstruct the availability of more speech to respond to commercial speech argue against special protection for the latter.

Quite apart from such considerations, the context and content of commercial speech also argue against extending the First Amendment’s special protection to such speech. First Amendment protection exists to serve the interests of the community collectively rather than of individual participants in their personal affairs. Such protection is not available for commercial speech that functions only to benefit its participants individually (as speakers or as addressees)—except possibly if it contains expression that would be entitled to First Amendment protection if it were uttered other than as a component of commercial speech. In that case, the entitlement of the commercial speech to the First Amendment’s special protection depends upon whether in its commercial context the expression would be understood by the normal addressee—listeners, viewers, or readers—to involve more than consummation of the commercial transaction—that is, to engage consideration of the import of the expression for collective matters of the society.

²³³ See Schauer, *supra* note 3, at 1194–1201. To invoke strict scrutiny for judicial review of regulation of commercial speech that is regulated only in order to discourage otherwise prohibitable (albeit not prohibited) commercial transactions may suggest a path to similar review of regulation of noncommercial speech designed anticipatorily to discourage other possibly prohibitable (but not prohibited) behavior.

