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COMMERCIAL SPEECH, PROFESSIONAL SPEECH, AND THE CONSTITUTIONAL STATUS OF SOCIAL INSTITUTIONS

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INTRODUCTION

Current First Amendment analysis lacks a coherent view of speech in the professions. Classic cases address the street-corner orator, lone pamphleteer, newspaper editor, broadcaster, cable operator, public employee, grant recipient, vendor, corporation, and, most recently, Internet content provider. And an abundance of theory accompanies these speakers along the way. Although some of these actors may be professionals, both theory and practice generally meet their roles as members of a profession with silence. Despite the century-old recognition of the regulation of professions, we still have, for example, no paradigm for the First Amendment rights of attorneys, physicians, or financial advisers when they communicate with their clients.

Unlike the street-corner speaker, who addresses whomever walks by about whatever is on the speaker's mind, a professional fulfills a more defined social role by offering specific knowledge and expertise to an audience that deliberately seeks access to such information and often to the professional's judgment about a particular issue. Clients seeking a professional's counsel expect the professional to adhere to this social role, and professionals generally hold themselves out as doing so. In this sense, professional and client share a predefined relationship that runs far deeper than the relationship between pedestrians and soapbox orators who share the same physical space. The communication in the latter case is generally determined only by the ensuing conversation, whereas that in the former case is understood as bearing certain regularities that transcend any particular dialogue. For example, although members of any given learned profession may differ in their individual judgments about particular issues, their role as professionals traditionally implies their subscription to a body of knowledge that is shared among their peers. A learned professional mediates between an open, often formal and structured system of learning and the client's de-

sire to draw upon it to make personal life choices. A professional thus straddles both the public and private realms by adhering to a defined social role while assisting individuals in making personal choices based on the cumulative knowledge of the profession.

The function and scope of government regulation mirrors the social role of professionals. The State may ensure professionals' faithfulness to the public aspects of their calling, but it may not usurp their role or determine independently the bodies of knowledge that may be accessed or the individual judgments that may be rendered in a given case. Government regulation thus plays a complementary role in maintaining the profession by reflecting and implementing this balance between the public and the private. In part nurtured by, and in part protected from, government regulation, professions serve a vital informational function in our society because they promise citizens access to a realm of shared knowledge that is neither state propaganda nor private fancy.

The Supreme Court has only once issued a holding expressly confronting the First Amendment protection of professional speech. In *Planned Parenthood v. Casey*,¹ a decision not generally thought of as a First Amendment case, the Court addressed a state requirement that physicians pass along certain information to their patients about the gestational age of the fetus and social services that may function as alternatives to abortion. In upholding the regulation, the lead opinion, authored by Justices O'Connor, Kennedy, and Souter, noted:

To be sure, the physician's First Amendment rights not to speak are implicated, see *Wooley v. Maynard*, 430 U.S. 705 (1977), but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, cf. *Whalen v. Roe*, 429 U.S. 589, 603 (1977). We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.²

The passage tells us that physicians enjoy First Amendment rights, but provides little guidance about the weight given to the First Amendment interests involved. The application of *Wooley* would demand a compelling governmental interest to overcome the physician's First Amendment rights, or at least a substantial interest that was unrelated to the content of the speech.³ It would require that the regulation be narrowly tailored to that in-

¹ 505 U.S. 833 (1992).

² *Id.* at 884.

³ See *Wooley*, 430 U.S. at 715-17 (striking down a state's requirement that noncommercial license plates bear the motto "Live Free or Die" on the grounds that easy identification of passenger vehicles could have been achieved by more narrow means and that promoting appreciation of history, individualism, and state pride was insufficient to outweigh the individ-

terest as well.⁴ The passage cited from *Whalen*, on the other hand, would appear to import only the basic due process limitations on nonspeech regulations of professionals.⁵ To fuse these two models in a shorthand formulation provides little indication of how to resolve any professional's First Amendment claim other than the precise one at issue in *Casey*. It does suggest, however, that the State sometimes may coerce a person, whose choice to remain silent would otherwise be protected from state interference by the First Amendment, to speak when the communication takes place in the context of a professional relationship with a client. *Casey* thus would appear to point to the conclusion that, in some respects, a professional's rights under the First Amendment are diminished as compared to those of, for example, the street-corner speaker engaged in a similar conversation.

Even this minimal conclusion, however, seems to run squarely counter to the tenor of a prior discussion by the Court in which it famously avoided the question of professional speech. In *Rust v. Sullivan*,⁶ the Court upheld a Title X rule preventing federally-funded family planning clinics from advising recipients of services relating to "abortion as a method of family planning."⁷ In upholding the administrative interpretation of the statute, the Court principally reasoned that the government had merely refused to fund, as part of a federal program promoting a specific government policy, an activity of which the government disapproved. The Court nevertheless emphasized that it was not suggesting "that funding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify Government control over the content of expression."⁸ After referring to the traditional public forum and the government-funded university as arenas of free expression that the government may not regulate by attaching conditions to grants of property or money, the Court noted that the same might be true of subsidizing the practice of medicine: "It could be argued by analogy that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government."⁹ In other words, the existence of a "traditional relationship" between the interlocutors might engender special protection from selective government funding. The Court found no

ual's countervailing First Amendment right to avoid becoming the conduit for such a message).

⁴ See *id.*

⁵ See *Whalen*, 429 U.S. 603.

⁶ 500 U.S. 173 (1991).

⁷ *Id.* at 180.

⁸ *Id.* at 199.

⁹ *Id.* at 200.

need to decide that question in *Rust*, however, because the restrictions in question did not “significantly impinge upon the doctor-patient relationship.”¹⁰ The Court found that a physician was not required to “represent as his own any opinion that he does not in fact hold.”¹¹ Moreover, the Court held, “the doctor-patient relationship established by the . . . program [is not] sufficiently all-encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice.”¹² In short, according to the Court, the physician in *Rust* was not acting as a comprehensive professional, but rather as a limited service provider in a program defined by the government.

The *Rust* majority’s recognition, at least in principle, of the protected status of physician-patient communications, comports with the Court’s judgment elsewhere in the legal and medical contexts that professionals play a special role in assisting individuals in the exercise of personal autonomy and the vindication of basic rights.¹³ This conclusion, however, counsels against the simple deduction from the lead opinion in *Casey* that professional speech is generally entitled to only “minimal” or “reduced” protection under the First Amendment. Reading *Rust* and *Casey* together, then, suggests that professional speech is subject to a more complicated balance of First Amendment protection.

In examining government limitations on professional speech, some lower courts have occasionally looked to the tests developed by the Supreme Court for analyzing commercial speech restrictions. These courts have, however, done so without delving into why such tests should be applicable in the professional context. A serious consideration of both *Casey* and *Rust* seems to render the comparison curious at first, because the Supreme Court has historically presented communications between buyer and seller as occupying a clearly “subordinate position in the scale of First Amendment values,”¹⁴ not a position deserving of any special protection. Conventional First Amendment doctrine holds that the Constitution protects com-

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ See, e.g., *Washington v. Glucksberg*, 117 S. Ct. 2258, 2288-89 (1997) (Souter, J., concurring in the judgment) (noting that “the Court [has] recognized that the good physician is not just a mechanic of the human body whose services have no bearing on a person’s moral choices, but one who does more than treat symptoms, one who ministers to the patient,” and that “[t]his idea of the physician as serving the whole person is a source of the high value traditionally placed on the medical relationship”); *In re Primus*, 436 U.S. 412, 426 (1978) (“Collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment.” (quoting *United Transp. Union v. Michigan Bar*, 401 U.S. 576, 585 (1971))).

¹⁴ *Orhalik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978).

mercial speech only to enable listeners to receive valuable "information" about the market.¹⁵ The caselaw presents the constitutional protection of commercial speech as not born out of true regard for the communicative interaction between a buyer and seller, but as almost a by-product of the real concern about the important information that just happens to be conveyed in the course of loud selling tactics. Commercial speech is thus generally presented as subject only to "limited protection" commensurate with its subordinate informational function.¹⁶ On the theory that professional speech is similarly "less protected" than nonprofessional (and noncommercial) speech, the analogy to conventional commercial speech doctrine would surely be plain. The analogy to the conventional conception of commercial speech becomes strained, however, as soon as professional speech is viewed as especially valuable and, at times, subject to some form of special protection.¹⁷

Before dismissing the analogy between commercial and professional speech, however, one might examine whether the Court's dominant presentation of commercial speech as "subordinate" on the scale of First Amendment values and useful only for the conveyance of "information" to potential customers might obscure a deeper kinship between the two forms of communication. Indeed, there has recently been some movement in the position traditionally occupied by commercial speech in the First Amendment hierarchy. In several cases the Court may be read as having challenged the assumption that commercial speech is simply of lesser value than noncommercial speech,¹⁸ or that commercial speech can readily be suppressed in the furtherance of pressing social goals.¹⁹ In *44 Liquormart*, for example, in which the Supreme Court unanimously struck down a restriction on com-

¹⁵ See, e.g., *Friedman v. Rogers*, 440 U.S. 1, 12, 16 (1979) (upholding a state law prohibiting optometrists' use of trade names, noting that a trade name "has no intrinsic meaning" and "conveys no information about the price and nature of the services . . . until it acquires meaning over a period of time by associations formed in the minds of the public between the name and some standard of price or quality" and that any such information about the price and quality could be communicated directly); see also *infra* Part II (discussing the Supreme Court's commercial speech doctrine in greater detail).

¹⁶ See, e.g., *Ohralik*, 436 U.S. at 456.

¹⁷ Cf. *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989) (distinguishing tutoring, legal advice, and medical consultation provided for a fee from commercial speech because the former "do not consist of speech that proposes a commercial transaction" and noting that "[s]ome of our most valued forms of fully protected speech are uttered for a profit").

¹⁸ See, e.g., *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430-31 (1993) (striking down a city ordinance that banned commercial, but not noncommercial, newsracks to promote the safety and aesthetics of public streets).

¹⁹ See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 515 (1996) (striking down a ban on price advertising for alcoholic beverages).

mercial speech, four Justices noted their skepticism of the Supreme Court's governing framework for commercial speech,²⁰ and a fifth concurred in the judgment noting that he refused to consider abandoning that framework only because the parties had not briefed the issue.²¹ Thus, change in the commercial speech doctrine is on its way, we just do not yet know what path it will take.²²

This Article considers the common thread between the Court's approaches to commercial and professional speech in the hope of developing a viable theory for the constitutional analysis of each. Drawing on tensions in the Court's jurisprudence on commercial speech, it will criticize the dominant view of the "subordinate" status of commercial speech as both theoretically inadequate and obscuring a deeper connection between commercial and professional speech. In attempting to make sense of the current upheaval in the Court's commercial speech cases as well as the occasionally assumed analogy between commercial and professional speech, this Article will elaborate a constitutional approach to both commercial and professional speech based on the social relationship between the interlocutors.

In cases such as professional speech, this Article argues, the Court refrains from applying basic rules that usually govern restrictions on street-corner speech, such as the rule against content regulation. Instead, the Court may be understood as attempting to ascertain whether the conversation between the interlocutors takes place within defined social relationships and as seeking to afford such speech the constitutional protection necessary to preserve its particular social function. The core notion of professional speech will be developed primarily in the context of the learned professions, such as medicine and law, where professionals have an exceptionally deep relationship with their clients (including, for example, fiduciary-type obligations). This Article further suggests that other professionals (including vendors), who stand in a less richly defined communicative relationship with their interlocutors, may find themselves in a similar situation in which their speech is subject to both heightened protection and regulation. This Article puts to one side, *inter alia*, the questions whether (or under what cir-

²⁰ See *id.* at 502 (Stevens, J., joined by Kennedy & Ginsburg, JJ.) ("The special dangers that attend complete bans on truthful, nonmisleading commercial speech cannot be explained away by appeals to the 'commonsense distinctions' that exist between commercial and non-commercial speech."); *id.* at 528 (Thomas, J., concurring) (refusing to "continu[e] to apply a test that makes no sense").

²¹ See *id.* at 517 (Scalia, J., concurring) (stating that "[t]he briefs and arguments of the parties in the present case provide no illumination" of the scope of First Amendment protections for commercial speech).

²² See generally Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 SUP. CT. REV. 123.

cumstances) the reliance on existing social practices in constitutional adjudication is normatively justified and, if such reliance is justified, whether (or the extent to which) a social practice must be coherent and regular to be taken into account in the adjudication of constitutional rights.

The principal object of this Article is to reveal and flesh out the manner in which current constitutional adjudication of First Amendment rights draws on what is presumed to be the social practice of vendors and of learned professionals. In other words, because the Court is opposed to applying an abstracted paradigm of the detached street-corner speaker (about whom both listeners and courts know very little), the Court may be seen as implementing a constitutional theory of bounded speech institutions, based on its perception of various socially defined relationships between interlocutors and, accordingly, rendering contextual judgments about the extent of government intervention that is both necessary for and compatible with the preservation of the particular institution. This approach, this Article notes, is neither unique to the learned professions nor to First Amendment law but often informs other constitutional judgments that protect individuals in their relations within recognized social institutions.

To explore these ideas, this Article begins in Part I with a critical review of the development of the Court's governing commercial speech framework, arguing that the Court's traditional commercial speech doctrine is in dire need of reform. Parts II and III then turn to the literature on the Court's doctrine, identifying several major themes in the commentary, discussing several contributions within each category, and concluding that the scholarship neither provides a theoretical justification for the Court's dominant approach to commercial speech nor justifies a blanket denial of First Amendment protection to commercial or professional speech. Part IV suggests a different reading of the Court's decisions in the areas of commercial and professional speech. This Part explores the existence of a paradigm of bounded speech institutions, which provide fora for the valuable exchange of ideas within predefined communicative projects that are fostered by government regulation and subject, at times, to special protection. This Part will also very briefly discuss the implications of such an approach for two recent controversies: the regulation of tobacco and liquor advertising and physicians' recommendations that their patients use illegal drugs, such as marijuana, to alleviate the symptoms of physical ailments. In closing, this Article suggests the existence of parallel contextual approaches protecting individuals in their relationships based on recognized social roles in other areas of First Amendment law and beyond.

I. THE COMMERCIAL SPEECH DOCTRINE IN THE SUPREME COURT

Instead of treating commercial speech as presumptively protected by the First Amendment, the Court tends to proceed on the theory that any protection of such speech must be justified. As a basis for First Amendment protection, the Court has settled on the idea that commercial communications are valuable to the listener:

The listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking.²³

Although the speaker is not entirely disqualified from claiming First Amendment protection under this approach, the justification for the protection is based not on the expressive liberty of the speaker, but on the importance of the information to the audience.²⁴

The focus on an affirmative argument for the protection of commercial speech was largely the product of historical circumstances surrounding the doctrine's birth. In 1942, the Court in *Valentine v. Chrestensen*²⁵ determined that the First Amendment categorically did not apply to restrictions on "purely commercial advertising." The wisdom of suppressing such advertising was said to be a "matter[] for legislative judgment."²⁶ Even Mr. Chrestensen's ingenious act of affixing a protest against the legal prohibition on commercial handbills to the back of his advertising circular could not bring the First Amendment into play. "If that evasion were successful,

²³ *Bates v. State Bar*, 433 U.S. 350, 364 (1977) (citations omitted).

²⁴ *See Zauderer v. Office of Disciplinary Counsel of the Supreme Court*, 471 U.S. 626, 651 (1985) ("Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in *not* providing any particular information in his advertising is minimal." (citation omitted)); *cf. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980) ("The First Amendment's concern for commercial speech is based on the informational function of advertising."). This listener-based focus has recently come under attack. *See Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 479 (1997) (Souter, J., dissenting) ("[S]o long as self-interest in providing a supply is as legitimate as the self-interest underlying an informed demand, the law could hardly treat the advertiser's economic stake as 'utterly without redeeming social importance' and isolate the consumer's interest as the exclusive touchstone of commercial speech protection.").

²⁵ 316 U.S. 52, 54 (1942).

²⁶ *Id.*

every merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve immunity from the [prohibition on commercial handbills]."²⁷ It was this sweeping ruling that the Court's new commercial speech doctrine would have to set aside.

The first decisions limiting *Chrestensen* did so by focusing on whether the communication involved was indeed "purely" commercial. *New York Times v. Sullivan*²⁸ was simple in this regard. The Court noted that the NAACP's paid advertisement complaining of civil rights abuses by the Montgomery, Alabama, police department and seeking financial contributions to the organization "was not a 'commercial' advertisement in the sense in which the word was used in *Chrestensen*," because the appeal "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern."²⁹ The fact that the advertisement was paid for and sought a financial contribution did not place it within the *Chrestensen* category of speech.³⁰ Although this step away from commercial speech precedent may have seemed insignificant, by distinguishing *Chrestensen* based on the public interest of the communication at issue, *New York Times* laid the foundation for the erosion of *Chrestensen* itself. If a "purely" commercial communication could be said to be of "public interest and concern,"³¹ *New York Times* offered a basis for according First Amendment protection to that communication as well. In other words, commercial speech would be protected as long as there was sufficient interest in its content.

The first significant break with *Chrestensen* along these lines came in *Bigelow v. Virginia*,³² which involved an advertisement that clearly proposed a commercial transaction. At issue was a notice in a Virginia newspaper about the availability of legal abortion services in New York and a Virginia law prohibiting the advertising because it "encourag[ed] . . . the procuring of [an] abortion."³³ The Court concluded that the announcement "did more than simply propose a commercial transaction" because it "contained factual material of clear 'public interest,'"³⁴ and, taken as a whole,

²⁷ *Id.* at 55.

²⁸ 376 U.S. 254 (1964).

²⁹ *Id.* at 266.

³⁰ *See id.*

³¹ *Id.*

³² 421 U.S. 809 (1975).

³³ *Id.* at 812-13.

³⁴ *Id.* at 822.

conveyed information of potential interest and value to a diverse audience—not only readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia.³⁵

Without addressing whether every conjunction of political and commercial speech would be protected, the Court held that the valuable opinion and information accompanying this proposal in *Bigelow* were entitled to First Amendment protection. The Court further held that because Virginia had no legitimate interest in shielding its citizens from information about legal activities beyond its borders and regulatory reach, the State's ban on the advertising was unconstitutional.³⁶ Thus, for the first time, the Court held that a legislative prohibition on commercial speech violated the First Amendment. Much as in *New York Times*, however, it had done so primarily on the basis of the opinion and information surrounding the proposal, without deciding whether the same result would obtain if the only item of interest was the commercial proposal itself.

When the Court finally was confronted with a regulation of a bare-bones offer to sell certain pharmaceuticals at a specified price in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,³⁷ the previously adopted distinction between important ancillary information and important commercial information revealed itself as being extremely weak. The two-page *Chrestensen* decision already had been denounced as “casual, almost offhand,”³⁸ and the final departure from *Chrestensen* seemed easily explained by noting the value to the audience of even this minimal offer to sell. Writing for the Court, Justice Blackmun pointed out that, as a general matter, “the consumer's interest in the free flow of commercial information . . . may be as keen [as], if not keener by far[] than[,] his interest in the day's most urgent political debate,” and noted more specifically that “no line between publicly ‘interesting’ or ‘important’ commercial advertising and the opposite kind could ever be drawn,” because all advertising informs consumers of “who is producing and selling what product, for what reason, and at what price.”³⁹ In a democracy and a free-market economy, he concluded, even this minimal amount of information was definitely of public interest. *Chrestensen* was, therefore, finally overruled.

³⁵ *Id.*

³⁶ *See id.* at 827-28.

³⁷ 425 U.S. 748, 769-70 (1976) (holding that a statutory ban on advertising prescription drug prices could not be justified by a state's interest in upholding “the professionalism of its licensed pharmacists”).

³⁸ *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring).

³⁹ *Virginia Bd. of Pharmacy*, 425 U.S. at 763, 765.

Once the Court phrased the value of commercial speech in such concrete functional terms, however, it became an almost imperceptible step to add that the First Amendment would not prevent the government "from insuring that the stream of commercial information flow cleanly as well as freely."⁴⁰ Thus, the Court in *Virginia Board of Pharmacy* assumed, without finding it necessary to point out, that the consumer would have no interest in false or misleading proposals to enter into commercial transactions.⁴¹ Having focused on the affirmative justification for protecting commercial speech (which the Court felt required to supply in light of *Chrestensen*), the Court ultimately evaded making the affirmative case for regulation. Because commercial speech was not protected as a prima facie matter, but only insofar as it conveyed certain valuable information to the consumer, the Court did not find the need to elaborate on why false or misleading commercial information could be suppressed when false or misleading political speech could not. Only valuable commercial information was protected and false or misleading commercial speech simply did not fall within that category. Thus, Justice Stevens could summarize succinctly more than twenty years later:

Virginia Pharmacy Bd. reflected the conclusion that the same interest that supports regulation of potentially misleading advertising, namely the public's interest in receiving accurate commercial information, also supports an interpretation of the First Amendment that provides constitutional protection for the dissemination of accurate and nonmisleading commercial messages.⁴²

According to the governing view, the justifications for protecting and restricting commercial speech are thus ultimately the same. Because the affirmative argument for the protection of commercial speech provides, *sub silentio*, a natural justification for regulation, the Court has declined to elaborate a specific rationale for restricting commercial speech. In *Virginia Board of Pharmacy*, it simply noted that "[u]ntruthful speech . . . has never been protected for its own sake," and that "commonsense differences" between commercial and noncommercial speech, that is, that the former is "more easily verifiable by its disseminator" and "more durable" on account of the disseminator's economic motivation, account for the diminished "need to tolerate inaccurate [commercial] statements for fear of silencing the speaker."⁴³

⁴⁰ *Id.* at 771-72.

⁴¹ Justice Blackmun did point this out in a later case. See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 431 (1993) (Blackmun, J., concurring).

⁴² *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496 (1996).

⁴³ 425 U.S. at 771-72 & n.24.

The failure to focus more carefully on the reasons for regulating commercial speech has stunted the development of the standards that are applied to analyze such restrictions. In several opinions for the Court after *Virginia Board of Pharmacy*, Justice Powell simply appealed to the general notion that the government may regulate commercial speech because such speech is incidental to otherwise regulable commercial activity.⁴⁴ Drawing on cases involving Securities Exchange Commission rules, the Sherman Act, and the National Labor Relations Act, he concluded that "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity."⁴⁵ Without further inquiry into the nature of, or justification for, the regulation of speech in those contexts, he developed the governing framework for the analysis of commercial speech restrictions by striking a quantitative compromise. Balancing the government's interests in regulating the underlying activity against the speech interests that would be recognized if the speech were noncommercial, Justice Powell devised a uniform mode of analysis under which commercial speech is "afforded . . . a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values."⁴⁶ As most clearly articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the now familiar test provides first, that commercial speech that is false, misleading, or proposes an illegal transaction does not even pass the threshold of First Amendment protection and may be banned,⁴⁷ and second, that the government may impose restrictions on commercial speech even if the speech is neither misleading nor relates to an unlawful activity, as long as the restriction is reasonably tailored to, and directly advances, a "substantial" government interest.⁴⁸ The test, then, is a purely quantitative modification of the noncommercial speech test, in that it simply provides commercial speech "less" protection than its noncommercial counterpart without substantively describing the nature of permissible regulation of commercial speech.

The Court has frequently applied the test developed in *Central Hudson*, including in cases in which the government, going beyond mere prohibition of false and misleading advertising, had created prophylactic rules to protect

⁴⁴ See, e.g., *Friedman v. Rogers*, 440 U.S. 1, 10 n.9 (1979) (stating that "commercial speech is linked inextricably to commercial activity"); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978) (noting the "distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech").

⁴⁵ *Ohralik*, 436 U.S. at 456.

⁴⁶ *Id.*

⁴⁷ See 447 U.S. 557, 563-64 (1980).

⁴⁸ See *id.* at 564.

against the risk that certain kinds of advertising might mislead consumers. Accordingly, the Court has upheld, for example, a prohibition on in-person solicitation by lawyers,⁴⁹ a requirement that lawyers advertising certain fee schedules disclose potential court fees,⁵⁰ and a prohibition on the use of trade names by optometrists.⁵¹

The *Central Hudson* standard, however, does not limit the justifications for restrictions on commercial speech to the prevention of deception. In *Central Hudson* itself, for example, the Court struck down New York's ban on state utilities' promotional advertising for electricity, not because the policy failed in directly advancing the State's substantial interest in reducing the demand for electricity,⁵² but because the complete ban on advertising was an excessively broad measure to accomplish that goal.⁵³ The implication of the holding was that a narrower regulation suppressing such advertising might have been sustained despite the fact that there was no claim that the advertising was untruthful or deceptive. Indeed, soon thereafter, in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, the Court upheld the prohibition of truthful, nondeceptive speech about lawful activity in order to suppress demand.⁵⁴ There, then-Justice Rehnquist, who had dissented in *Virginia Board of Pharmacy*, wrote for the Court that Puerto Rico could ban advertising for casino gambling directed at the residents of Puerto Rico in order to reduce the demand for such gambling by that potential audience.⁵⁵ The Court deemed the legislature's interest in preventing excessive casino gambling by local residents substantial, and found that the restriction directly advanced that interest because, as the Court had already

⁴⁹ See *Ohralik*, 436 U.S. at 467-68 (holding that lawyers may be disciplined by the state bar for certain types of in-person client solicitations). *Ohralik*, written by Justice Powell, was decided before *Central Hudson*, but essentially applied the *Central Hudson* test. See, e.g., *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (discussing *Ohralik* throughout as consistent with *Central Hudson*).

⁵⁰ See *Zauderer v. Office of Disciplinary Counsel of the Supreme Court*, 471 U.S. 626, 650-53 (1985) (upholding an Ohio law requiring that potential court costs be disclosed in advertising for contingent fee cases).

⁵¹ See *Friedman v. Rogers*, 440 U.S. 1, 15-16 (1979) ("It is clear that the State's interest in protecting the public from the deceptive and misleading use of trade names is substantial and well demonstrated."). *Friedman*, like *Ohralik*, was written by Justice Powell before *Central Hudson* was decided, but applied essentially the same framework.

⁵² See *Central Hudson*, 447 U.S. at 568-69 (discussing the validity of the Commission's argument that an increase in demand for electricity would undermine energy conservation, a state interest that the court viewed as "substantial").

⁵³ See *id.* at 569-70 (stating that a more limited restriction on the content of promotional advertising for electricity would still serve the State's legitimate interest in energy conservation).

⁵⁴ See 478 U.S. 328, 344 (1986).

⁵⁵ See *id.* at 344.

held in *Central Hudson*, there was an “immediate connection between advertising and demand.”⁵⁶ The Court further rejected the notion that a narrower governmental measure to discourage gambling was constitutionally required, noting that “it is up to the legislature to decide whether or not such a ‘counterspeech’ policy would be as effective in reducing the demand for casino gambling as a restriction on advertising.”⁵⁷ Although certain aspects of the holding appear to have since been repudiated by a majority of the Justices,⁵⁸ the Court has since upheld other commercial speech restrictions imposed for reasons unrelated to the protection of potential consumers from false or deceptive advertising.

In *United States v. Edge Broadcasting*, for example, the Court upheld a federal prohibition on advertising for lotteries by broadcast stations that are licensed in states where lotteries are illegal.⁵⁹ Because North Carolina was a nonlottery state, the Court upheld a regulation that prohibited the North Carolina broadcaster located close to the state border from advertising Virginia’s state lottery to a mostly Virginian audience. Despite the fact that the Virginia lottery was, of course, legal in Virginia, and Edge was not advertising the purchase of lottery tickets in North Carolina, the Court upheld the prohibition. The asserted federal policy was not to protect consumers but to accommodate competing states’ interests in legalizing or proscribing lotteries. This reasoning flatly contradicted the Court’s earlier holding in *Bigelow v. Virginia*.⁶⁰ As Justice Stevens (joined by Justice Blackmun) pointed out in dissent, after *Bigelow* one would not have thought it one state’s legitimate interest to suppress information about a practice that was legal in another.⁶¹ *Central Hudson*, however, somehow allowed this interest to be bootstrapped into legitimacy by invoking the federal government’s role as

⁵⁶ *Id.* at 342 (quoting *Central Hudson*, 447 U.S. at 569).

⁵⁷ *Id.* at 344.

⁵⁸ After holding that the prohibition survived *Central Hudson* review, the Court in *Posadas* noted that, in any event, because Puerto Rico had the power to ban gambling altogether, it could take the “lesser” step of banning advertising for that activity. See *Posadas*, 478 U.S. at 345-46. This greater-includes-the-lesser argument, discussed further in Part III.A *infra*, appears to have been subsequently rejected by the Court. See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 510 (1996) (Stevens, J., joined by Kennedy, Thomas, & Ginsburg, JJ.) (rejecting the “greater-includes-the-lesser” argument); *id.* at 531 (O’Connor, J., joined by Rehnquist, C.J., & Souter & Breyer, JJ., concurring) (stating that, since *Posadas*, the Court has “examined more searchingly” the State’s goal in restricting commercial speech); *cf.* *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482-83 & n.2 (1995) (rejecting the State’s reliance on *Posadas*’s “greater-includes-the-lesser” argument on the basis that “the Court [in *Posadas*] reached this argument only *after* it had already found that the state regulation survived the *Central Hudson* test”).

⁵⁹ See 509 U.S. 418, 436 (1993).

⁶⁰ 421 U.S. 809 (1975).

⁶¹ See *Edge Broad.*, 509 U.S. at 437-38.

mediator between lottery and nonlottery states. In the end, the suppression of speech was upheld for reasons unrelated to the protection of the consumer.⁶²

In *Florida Bar v. Went For It, Inc.*,⁶³ the Court similarly did not resort to a consumer protection rationale in upholding the Florida Bar's rule that its members must refrain from soliciting accident victims within thirty days of the accident. Based on evidence that such solicitation was perceived by some members of the public as an intrusion on their privacy and evidence that the solicitation led, more generally, to diminished respect for the profession, the Court held that the rule directly and materially advanced the Bar's substantial interest in protecting the "flagging reputations of Florida lawyers."⁶⁴

Not everything survives the *Central Hudson* test, however. In several cases since the development of that test, the Court held that some prohibitions were not reasonably tailored or did not directly advance the asserted governmental interest in preventing fraud and deception.⁶⁵ In other cases, the Court struck down restrictions that were based on a state interest other than the prevention of fraud or deception because they did not sufficiently advance a state's asserted goals. In *Edenfield v. Fane*,⁶⁶ for example, the Court held that Florida's interests in protecting the privacy of potential cli-

⁶² Quite extraordinarily, the Court in *Edge* also noted in passing that "Congress might have continued to ban all radio or television lottery advertisements, even by stations in States that have legalized lotteries." *Id.* at 428. Any speculation based on this passage as having established a so-called vice activity exception to commercial speech, however, would appear to have been put to rest by the Court's subsequent decisions in *Coors* and *44 Liquormart*. See *44 Liquormart*, 517 U.S. at 512 (Stevens, J., joined by Kennedy, Thomas, & Ginsburg, JJ.) (rejecting the State's reliance on a "'vice' exception"); *Coors*, 514 U.S. at 482 n.2 (rejecting reliance on *Edge* and *Posadas* as establishing a vice exception to commercial speech).

⁶³ 515 U.S. 618 (1995).

⁶⁴ *Id.* at 624.

⁶⁵ See, e.g., *Coors*, 514 U.S. at 479-80 (concluding that prohibiting the display of alcohol content on beer labels did not further the government's substantial interest in preventing "strength wars" in light of the absence of a similar prohibition in advertising and the existence of alternative, less-restrictive means of achieving the same result); *Ibanez v. Florida Dept. of Bus. & Prof. Reg.*, 512 U.S. 136, 144-45 (1994) (noting that the State did not proffer any evidence that the use of Certified Public Accountant and Certified Financial Planner designations created a risk of deception); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court*, 471 U.S. 626, 650-53 (1985) (stating that a broad prophylactic rule against the use of legal advice and information as well as illustrations in attorney advertising did not advance the government's stated interest in preventing false and misleading advertising or confusion on the part of potential clients); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 (1983) (recognizing the State's interest in aiding parental efforts to guide children on birth control but striking down a ban on contraceptive direct-mail advertising as too broad a measure to advance that goal).

⁶⁶ 507 U.S. 761 (1993).

ents of certified public accountants (“CPAs”) and in maintaining the independence of CPAs, as well as its interest in preventing fraud and overreaching, were substantial for purposes of the *Central Hudson* inquiry, but the Court struck down the ban on in-person CPA solicitation because Florida had offered no evidence that the prohibition would directly and materially advance those goals.⁶⁷

Central Hudson’s standard has increasingly come under attack. In *Central Hudson* itself, Justices Brennan and Blackmun concurred separately to mark their disagreement with the implication that the suppression of truthful, nondeceptive speech about a lawful activity was “ever a permissible way for the State to ‘dampen’ demand for or use of the product,”⁶⁸ noting that “[n]o differences between commercial speech and other protected speech justify suppression of commercial speech in order to influence public conduct through manipulation of the availability of information.”⁶⁹ Allowable restraints, the concurrence noted, are “limited to measures designed to protect consumers from fraudulent, misleading, or coercive sales techniques.”⁷⁰ Justice Blackmun has reiterated that view in numerous concurrences and dissents, arguing each time that under the doctrine he helped launch in *Virginia Board of Pharmacy*, restrictions on commercial speech that serve other interests should be subject to conventional First Amendment scrutiny.⁷¹

Although the Court has refrained from adopting Justice Blackmun’s suggested approach, there have been some rumblings of change. The initial blow against Justice Powell’s purely quantitative approach was struck in *City of Cincinnati v. Discovery Network, Inc.*, in which the Court considered a city ordinance banning the placement on public sidewalks of newsracks that distribute free magazines consisting mainly of commercial advertising while allowing newsracks that distribute newspapers.⁷² In invalidating the law, the Court did not consider whether the ordinance, which was not in-

⁶⁷ See *id.* at 767 (“Though we conclude that the Board’s asserted interests are substantial, the Board has failed to demonstrate that its solicitation ban advances those interests.”).

⁶⁸ *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 574 (1980) (Blackmun, J., joined by Brennan, J., concurring in the judgment).

⁶⁹ *Id.* at 578 (Blackmun, J., joined by Brennan, J., concurring in the judgment); see also *id.* at 572 (Brennan, J., concurring in the judgment) (quoting Blackmun’s concurrence).

⁷⁰ *Id.* at 574 (Blackmun, J., joined by Brennan, J., concurring in the judgment).

⁷¹ See, e.g., *Edenfield*, 507 U.S. at 777-78 (Blackmun, J., concurring) (“I again disengage myself from [any claim] . . . that commercial speech that is free from fraud or duress or the advocacy of unlawful activity is entitled to only an ‘intermediate standard’ . . . of protection under the First Amendment’s proscription of any law abridging the freedom of speech.”); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 431 (1993) (Blackmun, J., concurring) (expressing the same view).

⁷² See *Discovery Network*, 507 U.S. at 415.

tended to protect consumers from harm due to the content of the handbills, should accordingly be subject to noncommercial speech standards.⁷³ The Court presented its decision instead as an application of *Central Hudson*, holding that the regulation's distinction between newspapers and commercial handbills was entirely unrelated to the city's asserted interest in aesthetics and therefore lacked the reasonable fit required by that test. It did not suffice for the city to assert that it sought to protect its aesthetic interest to the maximum extent possible without sacrificing truly important, political speech. The relatively "low value" of commercial speech, in other words, could not justify the distinction between permissible and impermissible newsracks, and the city would have to point to the peculiar attributes of commercial speech that relate to the city's regulatory interest. As Chief Justice Rehnquist noted in dissent, however, this holding was in clear tension with a strict interpretation of *Central Hudson* that commercial speech was of lower value than noncommercial speech.⁷⁴ Had the Court truly believed that commercial speech was of lesser moment, it would be far from clear that the city could not have preferred noncommercial over commercial speech in allocating a scarce resource. Thus, although *Discovery Network* still professed to play by *Central Hudson*'s rules, it was the first signal of a possible reconsideration of that doctrine.

44 *Liquormart, Inc. v. Rhode Island*, in which the Court struck down Rhode Island's ban on liquor price advertising, continued the trend. In that case, four members of the current Court noted their skepticism about applying the relaxed *Central Hudson* scrutiny automatically whenever commercial speech is involved.⁷⁵ Although Justice O'Connor, joined by the Chief Justice and Justices Souter and Breyer, voted to invalidate the law based only on a strict application of *Central Hudson*,⁷⁶ Justice Stevens, joined by Justices Kennedy, Thomas, and Ginsburg, was willing to go further and wrote:

The mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them.

When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent

⁷³ See *id.* at 416 n.11 (stating that because the challenged regulation does not survive the more lenient commercial speech standard, the Court does not need to decide whether the policy should be "subjected to more exacting review").

⁷⁴ See *id.* at 440 (Rehnquist, C.J., joined by White & Thomas, JJ., dissenting).

⁷⁵ See *supra* note 20 and accompanying text.

⁷⁶ See 44 *Liquormart, Inc. v. Rhode Island* 517 U.S. 484, 501 (1996) (O'Connor, J., joined by Rehnquist, C.J., Souter & Breyer, JJ., concurring in the judgment).

with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review. However, when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of the fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.⁷⁷

Thus, although even the Stevens four are still operating under the uniform theory of protection and regulation identified earlier, these four Justices have taken a decisive step away from Justice Powell's quantitative view of the commercial speech doctrine and towards a qualitative approach that focuses on the nature of the justification and its relation to the commercial aspect of the speech.⁷⁸ Recently, the Court granted certiorari in a case in which the lower court upheld a renewed First Amendment challenge to the same statute that was upheld in *Edge*.⁷⁹

The qualitative approach that appears to be emerging echoes that of two pre-*Central Hudson* decisions issued during the term immediately following *Virginia Board of Pharmacy*. In the first, *Linmark Associates, Inc. v. Township of Willingboro*,⁸⁰ the Court invalidated a township ordinance prohibit-

⁷⁷ *Id.* at 501 (Stevens, J., joined by Kennedy, Thomas, & Ginsburg, JJ., concurring) (citation omitted); see also *id.* at 516 (Thomas, J., concurring). Justice Stevens was the first member of the current Court to express his basic agreement with the Brennan/Blackmun position. See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 492-93 (1995) (Stevens, J., concurring in the judgment). Justice Stevens wrote:

In my judgment . . . [a] prohibition is just as unacceptable in a commercial context as in any other [when] . . . it is not supported by the rationales for treating commercial speech differently under the First Amendment: that is, the importance of avoiding deception and protecting the consumer from inaccurate or incomplete information in a realm in which the accuracy of speech is generally ascertainable by the speaker.

Id.; see also *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 83 (1983) (Stevens, J., concurring in the judgment). In this case Justice Stevens wrote:

Any legitimate interests the statute may serve are unrelated to the prevention of harm to participants in commercial exchanges. Thus, . . . I have scrutinized this statute as in the same manner as I would scrutinize a prohibition on unsolicited mailings by an organization with absolutely no commercial interest in the subject.

Id.
⁷⁸ Justice Scalia joined the judgment of the Court while refusing to commit to either *Central Hudson* or a more searching review of the legislation. He expressed sympathy with Justice Thomas's rejection of *Central Hudson* but withheld judgment on the issue because the question of abandoning *Central Hudson* had not been briefed. See *44 Liquormart*, 517 U.S. at 516 (Scalia, J. concurring in the judgment).

⁷⁹ See *Greater New Orleans Broad. Ass'n v. United States*, 69 F.3d 1296, 1302 (5th Cir. 1995) (rejecting a First Amendment challenge), *vacated and remanded*, 519 U.S. 801 (1996), *on remand*, 149 F.3d 334 (5th Cir. 1998), *cert. granted*, 119 S. Ct. 863 (1999); cf. *Valley Broad. Co. v. United States*, 107 F.3d 1328, 1336 (9th Cir. 1997) (striking down the statute upheld in *Edge*), *cert. denied*, 118 S. Ct. 1050 (1997).

⁸⁰ 431 U.S. 85 (1977).

ing "For Sale" and "Sold" signs from residential property in an effort to prevent the flight of white homeowners from the area. After explaining that the ordinance failed to pass review under *Virginia Board of Pharmacy* because there was no evidence of the need for the regulation, Justice Marshall, writing for the Court, pointed out that the "constitutional defect in this ordinance . . . is far more basic."⁸¹ The township council had passed the ordinance to prevent truthful, nondeceptive information about lawful activities from reaching local residents because the council believed that residents would act on such information against the public interest:

The Council's concern, then, was not with any commercial aspect of "For Sale" signs—with offerors communicating offers to offerees—but with the substance of the information communicated to Willingboro citizens. If dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that disclosure would cause the recipients of the information to act "irrationally."⁸²

The teachings of both *Virginia Board of Pharmacy* and Justice Brandeis's concurrence in *Whitney v. California*⁸³ counseled squarely against allowing such restrictions. Because nothing about the signs and the council's reasoning appeared to limit the justification for such a ban on commercial speech, the ban violated the First Amendment.

In the second case, *Carey v. Population Services International*,⁸⁴ the Court was even more explicit in rejecting the application of relaxed commercial speech standards to restrictions that are not based on the commercial aspect of the speech. In that case, the Court examined restrictions on the advertising, sale, and distribution of contraceptives to minors, and struck down a complete advertising ban on the grounds that it violated the First Amendment. Writing for the Court, Justice Brennan rejected the State's argument that the restriction was justified to protect those exposed to the ads from embarrassment or offense, or to prevent the legitimation of sexual activity by young people.⁸⁵ Justice Brennan reviewed the restrictions and the State's justifications under traditional First Amendment standards, citing *Cohen v. California*⁸⁶ and *Brandenburg v.*

⁸¹ *Id.* at 96.

⁸² *Id.*

⁸³ 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

⁸⁴ 431 U.S. 678 (1977).

⁸⁵ *See id.* at 701.

⁸⁶ 403 U.S. 15, 22-26 (1971) (holding that the State may not criminalize public protest containing expletives).

Ohio,⁸⁷ instead of commercial speech cases and, in a footnote, expressly rejected the significance of the fact that the restriction targeted speech that might be considered to be commercial:

[The State] suggest[s] no distinction between commercial and noncommercial speech that would render these discredited arguments meritorious when offered to justify prohibitions on commercial speech. On the contrary, such arguments are clearly directed not at any commercial aspect of the prohibited advertising but at the ideas conveyed and form of expression—the core of First Amendment values.⁸⁸

Although neither *Carey* nor *Linmark* explains the contours of the peculiarly commercial reasons for regulating commercial speech, these pre-*Central Hudson* cases evince a more nuanced approach that has since been lost. The only time the Court applied the teachings of these cases after *Central Hudson* was in a case involving virtually the same facts as *Carey*. In *Bolger v. Youngs Drug Products Corp.*,⁸⁹ the Court confronted a prohibition on direct mailing of contraceptive advertising and stood by its refusal in *Carey* “to recognize a distinction between commercial and noncommercial speech that would render this interest [in shielding recipients from offense] a sufficient justification for a prohibition of commercial speech.”⁹⁰ But as soon as the Court left the four corners of precedent to examine the State’s second asserted interest in furthering parental control over discussions about birth control, the Court added the commercial speech standard to the mix. Although the Court examined the scope of the restriction using such non-commercial precedents as *Butler v. Michigan*⁹¹ and *FCC v. Pacifica Foundation*,⁹² and ultimately held that the regulation was excessive, it did so only after concluding that the government had satisfied the requirement that its interest rise to a “substantial” level.⁹³ Justice Stevens disagreed with this mixed approach and concurred separately to emphasize that in voting to in-

⁸⁷ 395 U.S. 444, 447 (1969) (holding that the State may not punish mere advocacy absent a showing that the advocacy is “likely to incite” imminent lawless action and is “directed to inciting” such action).

⁸⁸ *Carey*, 431 U.S. at 701 n.28.

⁸⁹ 463 U.S. 60 (1983).

⁹⁰ *Id.* at 71-72; see also *id.* at 66-71 (citing noncommercial speech cases to reject the State’s argument that the direct mailings at issue in *Bolger* differed from the general advertising in *Carey*).

⁹¹ 352 U.S. 380, 381 (1957) (striking down a prohibition on “publish[ing materials] tending to the corruption of the morals of youth” (internal quotations omitted)).

⁹² 438 U.S. 726, 750-51 (1978) (upholding an FCC sanction based on an afternoon radio broadcast of “indecent” language).

⁹³ See *Bolger*, 463 U.S. at 73.

validate the restrictions, he had followed *Carey* and reviewed the case only under standards applicable to ordinary, noncommercial speech.⁹⁴

To summarize, the history of First Amendment protection for commercial speech as a retreat from *Chrestensen* has led to a focus on the affirmative justification for the protection of such speech largely based on the listener's interests. Although a few early decisions examined whether the restrictions on commercial speech were justified by the government's specific interest in protecting consumers from commercial harms, the still-dominant test devised by the Court is simply a quantitatively-reduced protection afforded to commercial speech, as compared to noncommercial speech. Several members of the Court have begun to return to a qualitative view of commercial speech, according to which government intervention must be justified by peculiarly "commercial" reasons, but neither these Justices, nor the early cases that took a similar approach, have fleshed out the contours of that inquiry or the motivation for assuming that commercial speech can be restricted more than its noncommercial counterpart. Parts II and III, therefore, turn to the scholarly work that has examined the justifications for the restriction, as well as protection, of commercial speech. In discussing the academic contributions to the debate about commercial speech, these next two Parts will also include an assessment of the applicability of these theories to professional speech.

II. FOUNDATIONAL THEORIES OF COMMERCIAL SPEECH

Commercial speech has been studied in light of first principles about the social and legal organization of society. The constitutional protection of commercial speech has been examined, for example, from the point of view of law and economics,⁹⁵ the creation of a common culture,⁹⁶ political self-government,⁹⁷ and personal autonomy.⁹⁸

As the following discussion of the scholarship attempts to show, radical approaches to commercial speech, whereby such speech would lose protection altogether or be treated just as noncommercial speech, ought to be rejected either as flawed even from the point of view of these foundational approaches or as too remote from current First Amendment practice. The more modest proposals that have been advanced for the distinction between commercial and noncommercial speech, on the other hand, frequently fail to

⁹⁴ See *id.* at 83 (Stevens, J., concurring).

⁹⁵ See *infra* Part II.A.

⁹⁶ See *infra* Part II.B.

⁹⁷ See *infra* Part II.C.

⁹⁸ See *infra* Part II.D.

capture a truly distinctive feature of commercial speech and end up proving applicable to both commercial and noncommercial speech alike, without offering a satisfactory explanation for the Court's different treatment of the two.

Although these theories were conceived of in the context of the commercial speech debate, it is useful to examine whether they shed any light on the constitutional protection of professional speech. This Part concludes, however, that insofar as these contributions might be applied to professional speech, they would neither justify denying First Amendment protection to such speech altogether, nor serve as a basis for according it the same treatment as nonprofessional speech, nor provide an explanation for a kind of mixed approach like the one the Court appears to have pursued so far.

A. Economics

The original motivation for relating the economics of advertising to the constitutional doctrine of commercial speech had more to do with the treatment of goods than it did with the restriction of ideas. Aaron Director and Ronald Coase, who first bridged the gap between law and economics in this area, were principally concerned with criticizing the fact that "[t]he claim which is made [by mainstream liberal thinkers since John Milton and John Stuart Mill] for complete laissez faire in the area of discussion is not part of the main tradition of liberalism in the area of economic life."⁹⁹ There is little basis, they argued, for the assumption that consumers are less knowledgeable about the goods they buy than the ideas they consume, that those who disseminate ideas are more honest than those who sell goods, or that the government is less susceptible to interest-group capture when regulating the market for goods than when regulating the market for ideas.¹⁰⁰ The primacy of a free exchange of ideas, they claimed, is a historical accident; perhaps due to the relative complexity of the theory of a free market for goods, the latter emerged only after the desirability of a free exchange in ideas had been recognized.¹⁰¹ Coase and Director attribute the persistence of the disparity in treatment of goods and ideas to the selfish elitism of "intellectuals," who systematically exaggerate the importance of their calling and undervalue trade in goods or services and ignore that, for "the bulk of mankind[,] . . . freedom of choice as owners of resources in choosing within

⁹⁹ Aaron Director, *The Parity of the Economic Market Place*, 7 J.L. & ECON. 1, 1 (1964); see also R.H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1 (1977) [hereinafter Coase, *Advertising*]; R.H. Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. (PAPERS & PROC.), at 384 (1974) [hereinafter Coase, *Market for Goods*].

¹⁰⁰ See Coase, *Advertising*, *supra* note 99, at 2.

¹⁰¹ See Director, *supra* note 99, at 3.

available and continually changing opportunities, areas of employment, investment, and consumption is fully as important as freedom of discussion and participation in government."¹⁰² Director and Coase would regulate the market for goods and the market for ideas by reference to the same principle, that is, "whether the necessary organization is of a type which can be arranged on a competitive basis."¹⁰³

Director and Coase did not originally ground this economic argument in constitutional law and, thus, did not address the First Amendment's specific textual protection of speech. In his subsequent article, *Advertising and Free Speech*, however, Coase sought to make this economic analysis constitutionally relevant by focusing on the Court's treatment of commercial speech.¹⁰⁴ Writing before the Court's decision in *Virginia Board of Pharmacy*, Coase found the Court's denial of protection to commercial speech a convenient vehicle for applying these economic principles.¹⁰⁵ Commercial speech seemed to fall within the literal terms of the First Amendment, and yet it was accorded less protection than noncommercial speech. Moreover, the Court's distinction between commercial and noncommercial speech was essentially derivative of its view that the market for goods needed less protection from government interference than the exchange of ideas. It simply held that speech close to the former fell within the government's ability to regulate the market for goods, while speech close to the latter was privileged. Not only did the line between commercial and noncommercial speech mirror that drawn between the market for goods and the market for ideas, but the Constitution, taken literally, appeared to apply on both sides.

Coase begins his defense of commercial speech by noting that individual autonomy and the reliance on competition in the market for discovery of the truth, which he sees as the basic values underlying the First Amendment, would counsel against government regulation in the field of economic activity, just as they do in the realm of free speech. Further, he claims that even the values of self-fulfillment, truth-discovery, public participation in decision making, and maintenance of a balance between stability and change would seem to apply with the same force to the market for goods as

¹⁰² *Id.* at 6; see also Coase, *Advertising*, *supra* note 99, at 3 (quoting the same).

¹⁰³ Director, *supra* note 99, at 2; see Coase, *Market for Goods*, *supra* note 99, at 389. Coase would ultimately apply in both cases the principle that rights should be assigned to those to whom they are most valuable, which is developed in his seminal article, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). See Coase, *Advertising*, *supra* note 99, at 32 (arguing that this principle should be used to assign "what are termed personal rights or civil liberties, the kind of activity covered by the First Amendment").

¹⁰⁴ See Coase, *Advertising*, *supra* note 99.

¹⁰⁵ See *id.* at 15-23.

they do to the exchange of ideas.¹⁰⁶ Thus, advertising, which “tends to make the [economic] system more competitive”¹⁰⁷ and “takes the form of speech or writing,”¹⁰⁸ should be afforded the same protection as noncommercial speech under the First Amendment. The regulation of “false and misleading” advertising is, says Coase, antithetical to the First Amendment, just as an official decision that a political statement is false or has no reasonable basis in fact would be considered inconsistent with free speech values.

This basic economic approach to commercial speech would have broad-reaching effects on current First Amendment practice. Government intervention based on market failure would appear to lead to more frequent interventions in the market for ideas than in the market for goods, because, as Coase himself points out, the property regime that would be required for speakers to reap the benefits and bear the costs of their speech would be highly intricate and likely to engender substantial market failure. The relatively greater incidence of consumer ignorance and fraud in the market for social and political ideas than in that for goods would also lead to more intervention in the former than in the latter.¹⁰⁹ Thus, commercial speech, insofar as it is associated with the market for goods, would generally receive greater protection than noncommercial speech. Indeed, Coase nearly says as much when, for example, he criticizes the courts’ allegedly paradoxical position of prohibiting questionable scientific claims made by manufacturers (whose bias, says Coase, should be well known to the audience) but allowing the same claims when made by an unorthodox scientist (who, according to Coase, is far more likely to fool the audience).¹¹⁰ Similarly, on a purely economic approach to commercial speech, one would expect distinctions between false advertising for goods involving repeat customers (such as groceries) and infrequent purchases (such as real estate and car sales). Because the projected value of the deception to the advertiser must be offset against the serious potential for diminished future sales to repeat customers, and because the repeat customers would appear to be more knowledgeable than the occasional buyer, the former advertiser would be less likely to engender market failure than the latter. Such considerations do not, however, currently prompt heightened First Amendment protection for the first kind of falsehood.

¹⁰⁶ See *id.* at 14-15.

¹⁰⁷ *Id.* at 11.

¹⁰⁸ *Id.* at 15.

¹⁰⁹ See Coase, *Market for Goods*, *supra* note 99, at 389-90 (comparing examples of consumer ignorance and fraud in both markets).

¹¹⁰ See Coase, *Advertising*, *supra* note 99, at 28-29.

Richard Posner offers a considerable refinement of this basic economic approach, suggesting an economic explanation for both the special treatment of speech and for the lesser protection of commercial speech.¹¹¹ According to Judge Posner, the economic reason for privileging speech over other activities in general is that the social benefit of speech frequently cannot be captured by its producers. As a result, speech tends to be underproduced relative to its social value and the government should refrain from imposing additional disincentives (such as regulations) on the production of speech. This incentive structure, Posner argues, does not hold true for commercial speech, because here the speaker generally reaps the benefit of product-specific speech through the ultimate sale of the product.¹¹² Hence, commercial speech needs less protection. Much the same might be said of professional speech. Because the professional's advice tends to be specific to the client's situation and the professional is paid for rendering his judgment in a particular case, the speaker will usually reap all the benefits of the speech. A physician, for example, who for a fee diagnoses a patient with a cold, presumably reaps all the benefits of having disseminated that information. Unlike more general information, such a specific judgment will not usually engender further dissemination benefiting third parties who fail to compensate the speaker for the value derived from that knowledge. Thus, in the case of professional speech, as in the case of commercial speech, there should be, according to Posner's theory, no danger of underproduction and no need for any special, hands-off policy. Posner adds that commercial speech should be more heavily regulated because commercial claims are more easily verifiable, more likely to result in harm to consumers due to their lack of sophistication, and less likely to be corrected by competing speakers.¹¹³

If we apply Posner's discussion of the robustness of the market for commercial speech to the social harm, as well as the benefit, occasioned by such speech, his conclusion favoring greater regulation of commercial or professional speech becomes less clear. If social harm, as well as benefit, is considered, and the general incentive model is taken seriously, one must

¹¹¹ See generally Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1 (1986). Judge Posner is careful not to suggest an adjustment of free speech law based on the economic principles he puts forth "[w]ithout a fuller examination of the background of the first amendment and the principles of constitutional interpretation." *Id.* at 53.

¹¹² See *id.* at 22-23, 39-40.

¹¹³ See *id.* at 39-40. Under Posner's approach, speech could be suppressed whenever $V + E < P \times L/(1+i)^n$, where V is the cost of suppressing the targeted speech, E is the cost of legal error, P is the probability of harm resulting from the speech, L is the magnitude of the harm, n is the number of temporal periods between the utterance of the speech and the anticipated harm, and i is an interest or discount rate so that $L/(1+i)^n$ is the present value of the anticipated future harm. See *id.* at 8.

consider not only whether in the noncommercial, nonprofessional sector beneficial speech is underproduced, but also whether harmful speech is overproduced. Similarly, in the commercial and professional sectors, one must consider whether the proper incentives for the healthy production of beneficial speech might carry over to prevent the overproduction of harmful speech. A judgment must be made, not about the general externality of speech, but about the relative overproduction of harm versus the benefit to choose where to place the government's regulatory thumb.

To perform this calculus, moreover, one must examine the conclusion that noncommercial, nonprofessional speech is underproduced. Consider, for example, partisan political speech. Reminiscent of Vincent Blasi's "checking value" of political speech,¹¹⁴ Judge Posner posits that the most important aspect of freedom of political speech is not that it is the only way to determine the truth, but that it confers "the right to disseminate information that may affect how people vote in the next election."¹¹⁵ Partisan political speech thus seems to be the kind of speech that can reap all the social benefits it bestows and more. Every citizen who hears and believes a given speaker's partisan speech (whether rightly or wrongly) will be more inclined to vote for that speaker's party in the next election. The value of the speech to the author, as with commercial speech, for example, lies not in the audience's recognition of authorship but in its belief in the propositions propounded by the speech and subsequent action in conformity with those ideas.¹¹⁶ As compared to scientific discovery, for example, which absent a special regime of property rights confers no tangible benefit upon the author by virtue of the world's recognition of the new discovery (other than the satisfaction in the progress of science), partisan political speech appears as robust as commercial speech. The same may hold true for religious proselytizing, where the speaker is concerned not with credit for authorship of the idea, but with its effective dissemination. The robustness of the markets for partisan political speech and religious speech undercuts the economic argument for generally lessened protection of commercial and professional speech on account of its attendant incentives preventing underproduction.

¹¹⁴ See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (examining free expression as a valuable check on the abuse of official power).

¹¹⁵ Posner, *supra* note 111, at 11.

¹¹⁶ Of course, the partisan speaker will want the audience to recognize that Party A is a party of rascals and that Party B holds virtuous beliefs, but that sort of recognition of authorship is no different from recognizing that Brand X is the better sneaker. In both cases, the benefit is bestowed upon the speaker when the audience acts in accordance with the proposed idea, regardless of whether the audience knows who was the originator of that idea.

Nor does a risk of error in distinguishing between false and truthful commercial or professional speech justify a categorical distinction between such speech and noncommercial, nonprofessional speech. Whether a statement is made in support of a product or in the course of giving professional advice, as opposed to in favor of a particular candidate, need not affect the reliability of proving it false. Broken promises by political candidates abound, and there can be little question about the ease with which one could prove at least some of their statements to have been false. Similarly, the audience's lack of sophistication *vel non* as a justification for heightened regulation fails to account for the general disregard of the state of knowledge of the audience in First Amendment law. Although the average consumer is perhaps less sophisticated about scientific claims than are scientists, the dissemination of questionable ideas is not generally restricted whenever the audience would appear to lack the capacity to assess their merit. Indeed, citizens who are not scientists must often come to their own assessments of competing scientific theories that have implications for social policy and, ultimately, for their voting behavior, such as competing claims about energy sources, pollution, and technology. The relative sophistication of the audience does not control the protection afforded the noncommercial speaker and should not control that afforded the commercial speaker either.

As for the correction of misinformation disseminated by a competitor, it is not clear whether a principled distinction can be drawn between commercial and noncommercial speakers. As Robert Pitofsky has argued, competing producers do not always have the proper incentives to point out the misimpressions created by their competitors.¹¹⁷ Sellers may exert their

¹¹⁷ See generally Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661 (1977). One of the chief advocates of market-based solutions for consumer fraud problems was then-Professor Posner who, in a 1969 study of the Federal Trade Commission, wrote that

[g]ood preventives against deception are to be found in the incentive of the consumer to exercise reasonable care and common sense in purchasing, in the incentive of sellers not to antagonize customers, and the incentive of competitors of deceptive advertisers to give consumers prompt and accurate information in order to correct any misrepresentation that might cause a substantial diversion of their sales.

Richard A. Posner, *Report of the ABA Commission to Study the Federal Trade Commission*, [July-Sept.] *Antitrust & Trade Reg. Rep.* (BNA Special Supp.) No. 427, at 92, 104 (Sept. 16, 1969). Drawing an analogy to political speech, Posner urged that if citizens could be trusted to sort out political ideas for themselves, consumers similarly ought to be sent out alone into the world of advertising. See *id.* To be sure, he acknowledged that only those producers who stood to gain from attacking their competitors had an incentive to disclose the fraud of others. Posner, however, argued that most competitors did have such an incentive, even if only due to the fact that competitive pressures induce participants in industries with a shared blemish to work towards creating a product that has nothing to hide. See, e.g., *id.* at 107-08 (arguing that

market power or collude to deprive consumers of valuable information. Even in a market with numerous sellers, there is little incentive to disclose misleading information that either disadvantages all sellers or inures to the benefit of rivals of the firm investing in the disclosure. Counter-advertising by a rival firm may lead to lawsuits by the named competitor, government prosecution for false advertising, or an image backlash by consumers.¹¹⁸ At the same time, however, a competitor will certainly have a great incentive to engage in specific counter-advertising that will attract consumers of the competing product. This phenomenon, however, is not peculiar to commercial speech.

From an economic point of view, a speaker, whether scientist, producer, professional, or political candidate, would appear to have the incentive to debunk the myths of a competitor only if the speaker can capture the benefit of the purported revelation. A political candidate or party would have as little incentive as a manufacturer would to highlight the failures of a competitor unless doing so would encourage a switch of allegiance on the part of the audience. To be sure, the field of science is special because proving someone wrong may in itself bring fame to the challenger, absent the presentation of an alternative theory or solution to a problem. But even here, the exploration of the competitor's claims will only be worth something to the challenger whose career is not based on the false assumption as well. In every speaker's case, then, there must be something like a cross-elasticity of the audience's demand between what the speaker has to offer and the challenged assertion of the competitor. The audience must be willing to switch from the exposed idea to the new idea in a manner that benefits the speaker. Only then does the speaker have an incentive to debunk the competitor's myth. Thus, although an economic model along the lines suggested by Judge Posner could be crafted and perhaps modified to take account of the additional variables outlined above, such a model might serve the purpose of examining commercial, professional, and political speech more generally, but not as a method of distinguishing among them.

in the case of cigarette advertising, competition may force companies to disclose the relationship between smoking and health that those companies naturally try to withhold).

¹¹⁸ See Pitofsky, *supra* note 117, at 663-67. Accordingly, some argue for the constitutional protection of commercial speech to ensure the robust exchange of information so that consumers can make informed decisions in commercial as well as political matters. See BURT NEUBORNE, *FREE SPEECH—FREE MARKETS—FREE CHOICE* 17-18 (1987) (urging protection for commercial speech to ensure functioning of economic, as well as political, democracy); Burt Neuborne, *A Rationale for Protecting and Regulating Commercial Speech*, 46 *BROOK. L. REV.* 437, 448-53 (1980) (urging greater protection for commercial speech in order to provide necessary information for political and economic decisions); Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 *GEO. WASH. L. REV.* 429, 431 (1971) (urging protection for informational advertising).

B. Culture

The second major theme in commercial speech literature focuses on the cultural value of commercial and noncommercial speech. Those criticizing the protection of commercial speech view advertising as a corruption of culture and therefore as unworthy of protection.¹¹⁹ On closer inspection, this cultural critique may be seen as directed not at commercial speech as such, but at a form and method of discourse that is not unique to commercial speech. Viewed in this manner, the critique fails to justify categorically different treatment of commercial and noncommercial speech. The critique also would not support diminished protection for professional speech because of the generally rational and substantive style of professional discourse.

The standard reply to the cultural critique rejects the latter as precisely the sort of content-based regulation of speech forbidden by the First Amendment.¹²⁰ The reply, however, accepts traditional regulation of commercial speech for fraud and deception without serious consideration of the justification for this different treatment of commercial and noncommercial speech.¹²¹ The reply thus ultimately fails to explain the special treatment of commercial speech or to offer an avenue for the analysis of professional speech.

“On the eve of the twenty-first century,” Collins and Skover write, “America’s marketplace of ideas has largely become a junkyard of commodity ideology.”¹²² At fault, in their view, is commercial speech. Early forms of commercial speech, which featured ads placed by sellers to inform potential buyers about the price and qualities of the goods, were still in tune with the ideals of a rational democratic development of cultural values and, thus, with the values the First Amendment ought to protect. The twentieth century, however, has seen the rise of lifestyle advertising, which shifted the focus of the advertisement from information to image. Products are no longer sold by explaining how they work, but instead by promising “new

¹¹⁹ See, e.g., RONALD K.L. COLLINS & DAVID M. SKOVER, *THE DEATH OF DISCOURSE* (1996); Ronald K.L. Collins & David M. Skover, *Commerce & Communication*, 71 TEX. L. REV. 697 (1993).

¹²⁰ See, e.g., Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747 (1993) [hereinafter Kozinski & Banner, *Anti-History and Pre-History*] (arguing that since people value speech differently, preventing First Amendment protection for “valueless” speech makes little sense); Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990) [hereinafter Kozinski & Banner, *Who’s Afraid?*] (arguing that the commercial/noncommercial distinction makes no sense).

¹²¹ See *infra* notes 126-27 and accompanying text.

¹²² Collins & Skover, *Commerce & Communication*, *supra* note 119, at 707.

and improved' ways of life" from using goods that are, at bottom, "yesterday's functional equivalents."¹²³ This new form of peddling commodities appropriates culturally significant people and events, infuses them into a commercial message, and thereby degrades our cultural values by harnessing them for commercial purposes. Advertising has successfully moved individuals to base their self-understanding on their habits of consumption, driving the media to focus on providing audiences to advertisers instead of information to audiences.¹²⁴ Finally, this method of influencing individuals has met with such success that even noncommercial speech, such as political campaigns, is beginning to resemble commercial speech.

Collins and Skover harbor little hope for change. First, applying current law to police advertising to ensure its truthfulness would be futile in light of lifestyle advertising's reliance on imagery that essentially has no truth value.¹²⁵ Second, the perils of advertising cannot be divorced from those of capitalism itself, because corruption of the self is as much due to the power of the profit system as due to our submission to profit's charms. Thus, not only would the conception of the First Amendment have to be changed to place mass advertising beyond protection as a matter of law, but capitalist culture would also have to change as a matter of politics. Collins and Skover conclude by calling for constitutional candor: "If commercial communication is safe, it is not because it *actually* furthers the First Amendment's traditional values of rational decision-making and self-realization," but because it protects "speech in the service of selling."¹²⁶

Thus, the cultural critique is directed at least as much at capitalism itself as at our current conception of commercial speech. The alleged corruption of values that lies at the heart of this objection can take place within and without the realm of speech. Collins and Skover do not identify any problematic characteristics of communication that appear to be unique to advertising. The objectionable aspect of advertising is purportedly its seductiveness, its imagery, and its lack of informational value. On this view, ironically, most literature that indulges the reader's imagination about heroic deeds of virtuous characters and their resulting fame, personal happiness, or social recognition, ought to be considered with suspicion unless it provides accurate information about the workings of the world and enables

¹²³ *Id.* at 723.

¹²⁴ On the latter point, see generally C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097 (1992).

¹²⁵ See Collins & Skover, *Commerce & Communication*, *supra* note 119, at 738-39.

¹²⁶ *Id.* at 745.

the reader to make rational life choices. Homer's *Iliad* becomes as questionable as Nike's "Just Do It."¹²⁷

Answering this cultural humanist view are scholars like Burt Neuborne, Rodney Smolla, Alex Kozinski, and Stuart Banner. Burt Neuborne maintains that advertising is both powerful and democratic, and, reminiscent of Coase and Director, he argues against the cultural elitists' denigration of the role of advertising in the creation of culture.¹²⁸ "As a means of expressing shared values and a common national ideology," he contends, "advertising dwarfs any other genre of communication."¹²⁹ Rodney Smolla similarly argues that advertising interprets and digests culture much as literature does, and that advertising contributes to the transformation of culture just as any other form of creative expression.¹³⁰ Whether such advertising propagates "a lifestyle, fantasy, ethos, identity, or attitude that happens to be regarded by most as socially corrosive," Smolla says, does not justify governmental

¹²⁷ In his pre-*Virginia Board of Pharmacy* article, Professor Redish conceived of advertising as protected either for its informational value to the consumer or for its artistic expression on the part of the advertiser. See 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, *The First Amendment in the Marketplace*]. Although he expressed skepticism about distinguishing among advertising based on its artistic qualities, he thought "[t]he distinction between informational and persuasive promotion, at least in a broad sense, would not seem to be an overly difficult one to draw." *Id.* at 447. Describing the distinction broadly, he noted: "'Informational' commercial speech is communication that provides rational enlightenment to the consumer concerning the merits of a product or brand, so that he may make a more intelligent choice in the marketplace. The more rational information conveyed, the more 'informational' the advertising can be considered." *Id.* Accordingly, courts should be more or less reluctant to strike a balance in favor of the State's concerns, depending on whether "the expression conveys significant factual information that will be of real service to the consumer." *Id.*; cf. Daniel Hays Lowenstein, *"Too Much Puff": Persuasion, Paternalism, and Commercial Speech*, 56 U. CIN. L. REV. 1205, 1231-35 (1988) (arguing for a similar distinction). As an initial matter, it would seem difficult to distinguish between persuasive and informational advertising. Especially when viewed against the backdrop of today's products and services, the appeal of which to consumers depends on image as well as more tangible qualities, it would seem that persuasive advertising could only be restricted on the paternalistic assumption that certain features of a product or service should not be considered qualities. Perhaps more importantly, however, the exclusion of persuasive advertising from the ambit of the First Amendment is as little justified by this model of speech as would be the removal of persuasive electioneering. If "rational" self-fulfillment is the goal, persuasive political speech should be on no better footing than persuasive advertisements. Indeed, Redish later abandoned this distinction. See Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 630 n.135 (1982) [hereinafter Redish, *The Value of Free Speech*] (noting that "recognition of the individual's unencumbered right to make life-affecting decisions" makes a distinction between informational and persuasive advertising "unacceptable").

¹²⁸ See NEUBORNE, *supra* note 118, at 13, 19.

¹²⁹ *Id.* at 19.

¹³⁰ See Rodney A. Smolla, *Information, Imagery, and the First Amendment*, 71 TEX. L. REV. 777, 786-87 (1993).

regulation of advertising any more than it does censorship of other types of speech.¹³¹

The most provocative rebuttal of the cultural criticism of commercial speech, however, is provided by Kozinski and Banner.¹³² Responding to Collins and Skover, they find it "odd to argue that a particular form of speech shouldn't receive First Amendment protection solely because that speech has little value."¹³³ As did Smolla, they note that "[t]his is exactly the type of argument the First Amendment should foreclose."¹³⁴ Kozinski and Banner explain the commercial speech doctrine as a historical fluke.¹³⁵ Due to the uncertainty of incorporation of the First Amendment as a shield against the states prior to *Stromberg v. California*,¹³⁶ the predominant conceptualization of advertising as business, the early First Amendment doctrine that held that the speech clause protected only against prior restraints, and the fact that most regulation of speech occurred at the state level, state regulation of advertising was framed as implicating only substantive due process, equal protection, or the commerce clause.¹³⁷ Thus, a challenge to a state law restricting the dissemination of commercial handbills, such as that brought in *Valentine v. Chrestensen*, was far from the core of early First Amendment jurisprudence. In addition, Mr. Chrestensen brought his suit for freedom to advertise after the New Deal ratification of restrictions on commerce, readily explaining the casual ruling against the commercial handbills.¹³⁸

According to Kozinski and Banner, neither *Chrestensen's* nor *Virginia Board of Pharmacy's* treatment of commercial speech is justified. Indeed, Kozinski and Banner even challenge the possibility of defining commercial

¹³¹ *Id.* at 780-81.

¹³² See Kozinski & Banner, *Anti-History and Pre-History*, *supra* note 120; Kozinski & Banner, *Who's Afraid?*, *supra* note 120, at 628.

¹³³ Kozinski & Banner, *Anti-History and Pre-History*, *supra* note 120, at 752.

¹³⁴ *Id.*

¹³⁵ See *id.* at 754-73.

¹³⁶ 283 U.S. 359 (1931). *Stromberg* finally noted that it had been "determined [by prior cases, which had assumed incorporation without deciding it] that the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech." *Id.* at 368 (citing *Gitlow v. New York*, 268 U.S. 652, 666 (1925), *Whitney v. California*, 274 U.S. 357, 362, 371, 373 (1927), and *Fiske v. Kansas*, 274 U.S. 380, 382 (1927)); see also *Meyer v. Nebraska*, 262 U.S. 390, 399 (1922) (noting in dicta that the Due Process Clause protects the right "to acquire useful knowledge"). Incorporation of the First Amendment had been expressly ruled out by the Court as late as 1922. See *Prudential Ins. Co. of Am. v. Cheek*, 259 U.S. 530, 543 (1922) ("[N]either the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about 'freedom of speech.'").

¹³⁷ See Kozinski & Banner, *Anti-History and Pre-History*, *supra* note 120, at 759-61.

¹³⁸ See *id.*

speech in a meaningful way. The Court's narrow understanding in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*¹³⁹ of commercial speech as speech that does "no more than propose a commercial transaction,"¹⁴⁰ they maintain, does not provide a working definition for the modern world of communication.¹⁴¹ Nor, they claim, are there ready alternatives, since today's commercials take the form of mini-dramas and music videos, and opine on everything from science, health, and technology to politics, religion, and constitutional law. Contrary to Collins and Skover, Kozinski and Banner are drawn to the conclusion that advertising increasingly resembles classic noncommercial speech and that, therefore, it ought to receive the same degree of protection.¹⁴²

The cultural debate ultimately leads Professor Smolla to retain an enclave of reduced protection for "that subclass of advertising that does 'no more than propose a commercial transaction,'" though he recognizes that it may be a shrinking realm in the modern world.¹⁴³ Smolla uses the cultural debate to explore the contours of the realm of commercial speech, while locating the reason for treating commercial speech differently elsewhere.¹⁴⁴ Kozinski, Banner, and Neuborne, on the other hand, use the cultural libertarian response to urge abandoning the distinction between commercial and noncommercial speech altogether.¹⁴⁵ Yet they do not propose to abandon the common sense notion that the government may engage in certain forms of regulation for the protection of consumers. Neuborne, for example, agrees with restrictions on speech that prevent false advertising,¹⁴⁶ noting that "a consumer has no interest in receiving false information."¹⁴⁷ Kozin-

¹³⁹ 413 U.S. 376 (1973).

¹⁴⁰ *Id.* at 385.

¹⁴¹ See Kozinski & Banner, *Anti-History and Pre-History*, *supra* note 120, at 756-57.

¹⁴² See *id.* at 775.

¹⁴³ Smolla, *supra* note 130, at 780 (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (citation omitted)); see also *id.* at 782.

¹⁴⁴ Smolla ultimately believes that "[b]ecause government has virtually unchecked constitutional power to regulate transactions, government may legitimately claim some special prerogative to regulate speech about transactions." *Id.* at 780 (footnotes omitted). With Professor Farber, Smolla maintains that "[i]t is only the linkage between commercial speech and a commercial transaction that gives government the theoretical leverage to presume to regulate the speech at all." *Id.* (citing Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 374 (1979)). For a discussion of this theory, see *infra* note 200 and accompanying text.

¹⁴⁵ See NEUBORNE, *supra* note 118, at 17; Kozinski & Banner, *Who's Afraid?*, *supra* note 120, at 628.

¹⁴⁶ See, e.g., NEUBORNE, *supra* note 118, at 46.

¹⁴⁷ *Id.*; see also, e.g., Ronald D. Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U. ILL. L. REV. 1080, 1081 n.3 ("Falsehoods and deceptive speech do not

ski and Banner contend more generally that abandoning the distinction between commercial and noncommercial speech would not change all that much,¹⁴⁸ because fraud statutes would still be justified by a "governmental interest [that] is unrelated to the suppression of expression; the seller is free to say whatever he likes about the product, true or not, as long as he doesn't induce sales in reliance on what he says."¹⁴⁹

The cultural libertarian reply still leaves us with questions regarding the different treatment of commercial and professional speech, on the one hand, and political speech, on the other. For example, the consumer's lack of interest in false commercial information deserves further analysis in light of the protection of false political speech in which the voter, presumably, would have no interest either. If a candidate's false and deceptive political speech to garner votes may not be regulated, it must be something other than the simple existence of a connected transaction that justifies regulation in the case of commercial or professional speech. Indeed, with respect to professional speech, the attendant transaction is no different from the sale that is connected with the dissemination of a newspaper or a book. And if a concern about chilling protected speech explains the lack of regulation of political speech, why are we not similarly concerned about chilling professional and commercial speech? Finally, with regard to professional speech, regulation, such as that upheld in *Casey*, appears to be permissible even absent a government interest in the prevention of fraud or coercion.

C. Democracy

Perhaps the most prominent challenge to the protection of commercial speech comes from the political theory of free speech, which finds its classic articulation in Alexander Meiklejohn's lecture series, *Free Speech and Its Relation to Self-Government*,¹⁵⁰ and which was later championed (albeit in slightly different forms) particularly by Robert Bork and Lillian BeVier.¹⁵¹ At its core, this vision of the First Amendment sees only speech

contribute to the free flow of information and have long been regulated *whether or not* the speech is labeled "commercial." (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) and *Konigsberg v. State Bar*, 366 U.S. 36, 49 & n.10 (1961)).

¹⁴⁸ See Kozinski & Banner, *Who's Afraid?*, *supra* note 120, at 651.

¹⁴⁹ *Id.* Commercial speech, they argue, would thus be treated much like libel. See *id.* at 651-52.

¹⁵⁰ ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 120 (1948), reprinted in ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 8 (1960) [hereinafter *FREE SPEECH*].

¹⁵¹ See Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 *STAN. L. REV.* 299, 302 (1978); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 26 (1971). For

about issues of political significance as protected under the Constitution. As will be discussed below, on closer inspection this theory provides an insufficient basis for the exclusion of commercial (or professional) speech from the ambit of the First Amendment. The debate about this theory, too, leaves us without an answer concerning the different treatment of commercial, professional, and political speech.

As first explained by Professor Meiklejohn, the political principle of free speech does not protect any "private right" of the individual, but serves only to nurture and support the Constitution's central project of government by the people. In this model, the main focus of protection is on the audience, that is, on voters who must make up their minds about matters of public policy.¹⁵² The extension of protection to speech that is not strictly relevant to political decisionmaking, according to Meiklejohn, is a mistake arising from a confusion of liberty of speech, which is a personal right protected under the Due Process Clauses of the Fifth and Fourteenth Amendments from undue infringement, with freedom of speech, which is a public, political right absolutely protected under the First Amendment.¹⁵³ The private liberty of speech, Meiklejohn asserts, is correlated with that of life and property over which the government has a measure of control, whereas freedom of speech allows us to engage in public discussion and is correlated with the freedoms of religion, press, assembly, and petitioning the government, which are entirely beyond the government's reach.¹⁵⁴

Commercial speech, according to Meiklejohn, would fall on the private side of the line. "The constitutional status of a merchant advertising his wares," Meiklejohn notes in passing, is derived from the vindication of rights of individual possession and is therefore "utterly different from that of a citizen who is planning for the general welfare."¹⁵⁵ In short, the First Amendment protects only the search for political truth:

We listen, not because they desire to speak, but because we need to hear. If there are arguments against our theory of government, our policies in war or in

similar views of the First Amendment and concomitant rejection of standard protection for commercial speech, see FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 103 (1982) and CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993).

¹⁵² See, e.g., MEIKLEJOHN, *FREE SPEECH*, *supra* note 150, at 26-27, 57, 75 ("The primary purpose of the First Amendment is . . . that all the citizens shall, so far as possible, understand the issues which bear upon our common life.").

¹⁵³ See *id.* at 36-37.

¹⁵⁴ See *id.*

¹⁵⁵ *Id.* at 37.

peace, we the citizens, the rulers, must hear and consider them for ourselves. That is the way of public safety. It is the program of self-government.¹⁵⁶

As a result, only "speech which bears, directly or indirectly, upon issues with which voters have to deal" is protected by the First Amendment,¹⁵⁷ leaving commercial speech, as well as speech motivated by private financial gain, open to restriction.¹⁵⁸

Meiklejohn later retreated from the severe implications of his theory by expanding his view of the connection between speech and self-government. Recognizing that the citizenry could not make informed choices about public policy unless voters were educated, Meiklejohn came to read the First Amendment as extending to "expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express."¹⁵⁹ As examples of such expression, Meiklejohn was willing to recognize not only public discussions of public issues, but also education, philosophy, and the sciences, as well as literature and the arts more generally.¹⁶⁰ This shift acknowledged that even on a political theory of speech protection, these forms of communication

¹⁵⁶ *Id.* at 57; *see also id.* at 77.

¹⁵⁷ *Id.* at 79.

¹⁵⁸ Indeed, as originally formulated, the political speech principle would even allow for the restriction of "private" scientific research as well as of much literature and art. *See id.* at 84. As is well known, Meiklejohn's model was enormously influential with the Warren Court. *See generally* William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191. What is particularly interesting for purposes of the present examination, however, is that Meiklejohn's focus on the listener and on the importance of free speech for democratic government continued to influence the Court even where the Justices were willing to abandon the political speech principle's exclusion of commercial speech from the ambit of First Amendment protection. Cases such as *Virginia Board of Pharmacy*, *Bates*, *Bolger*, and *Zauderer* all demonstrate a focus on the importance of the availability of information about the stream of commerce for democratic self-governance regarding economic affairs. In other words, not only was the focus on the content of the speech a consequence of the pressure to distinguish precedent as described above, but it was also a result of the Court's general partiality to Meiklejohn's view of the First Amendment and its relation to self-government. With the rise of free speech justifications based on individual autonomy, then, we would be well advised to revisit the reasons for conventional commercial speech doctrine's near-exclusive focus on the listener. *See supra* note 24 and accompanying text.

¹⁵⁹ Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 256. Although Meiklejohn expanded his view of First Amendment protection in part as a response to critics, the germ of this expansion can be found in the closing lines of the publication of his lectures. *See* MEIKLEJOHN, *FREE SPEECH*, *supra* note 150, at 89 ("I suggest that we pay heed to the saying[] . . . of Epictetus, 'The rulers of the state have said that only free men shall be educated; but Reason has said that only educated men shall be free.'").

¹⁶⁰ *See* Meiklejohn, *supra* note 159, at 256-57.

contribute to democratic government and thus should fall within the protected zone.

Other proponents of the political theory of the First Amendment, however, have been less willing to follow Meiklejohn's expansive interpretation of the political speech principle. Both Bork and BeVier have rejected Meiklejohn's later views on the grounds that such an enlargement of the scope of the First Amendment cannot be limited on principled grounds and will lead to the inclusion of virtually all speech.¹⁶¹ In his 1971 article, Judge Bork adhered to the narrower view that the First Amendment protects only "criticisms of public officials and policies, proposals for the adoption or repeal of legislation or constitutional provisions and speech addressed to the conduct of any governmental unit in the country."¹⁶² The free speech principle, according to Bork, protects only what one might loosely call the political process, that is, discussions about concrete legislative proposals as well as the closely related issue of the current performance of government institutions.¹⁶³

Professor BeVier, on the other hand, would extend protection to much of the nonpolitical speech that the Court has held to be within the amendment's reach, but she would do so out of institutional concerns about crafting rules that implement the political speech principle effectively, not out of concern for speech that lies beyond that principle.¹⁶⁴ For example, to prevent the chilling effect on political speech, the difficulty of teasing out the political from the nonpolitical in mixed utterances, and the risk of majoritarian bias on the part of juries, BeVier argues the Court is justified in providing some measure of protection to libel and to some art and literature.¹⁶⁵ The Court should not, however, abandon all attempts to limit the sphere of

¹⁶¹ See BeVier, *supra* note 151, at 316-17; Bork, *supra* note 151, at 27.

¹⁶² Bork, *supra* note 151, at 29. Bork would further exclude from protection speech advocating violation of the law or the violent overthrow of the government. See *id.* at 29-30.

¹⁶³ Although Judge Bork has more recently expressed the view that commercial speech is protected under the First Amendment, that change in position appears as an exception to his earlier defense of the narrow political speech principle due to particular evidence about the colonial practice regarding commercial advertisements. See Robert H. Bork, *Activist FDA Threatens Constitutional Speech Rights*, 11 LEGAL BACKGROUNDER No. 2 (Washington Legal Foundation, Jan. 19, 1996). Because of the prominence of Bork's 1971 piece and the absolute position it takes on the spectrum of political speech principles, it will briefly be discussed as it stood before the recent change.

¹⁶⁴ See BeVier, *supra* note 151, at 322-31.

¹⁶⁵ See *id.* at 347-52 (discussing libel); *id.* at 357 (discussing art and literature). Professor BeVier's main example is *Brandenburg v. Ohio*, 395 U.S. 444 (1969), which, in her view, was correctly decided not because advocacy of unlawful activity should be protected based on substantive First Amendment principles, but because "[t]he *Brandenburg* rule responds to pragmatic and institutional concerns more successfully" than alternative approaches to such speech. See *id.* at 341.

protection to political speech, and should not place all literature and art within the ambit of the First Amendment. As for commercial speech, Professor BeVier believes that it should be excluded from protection because "the proposals of commercial transactions are so far removed from the context of political debate that the public's keen interest in the messages is totally irrelevant to first amendment values."¹⁶⁶ In addition, she argues, commercial speech cases do not present the institutional concerns about implementing the political speech principle that would allow for an overprotective rule based on strategic concerns. In each of the commercial speech cases decided by the Court, the advertiser, in BeVier's view, could easily have cast any political commentary expressly as such to avoid regulation and to come clearly within the political speech principle.¹⁶⁷ Indeed, the Court, according to BeVier, did not even attempt to present the commercial speech doctrine as a prophylactic rule for the protection of political speech, but instead focused squarely on the importance of commercial information to private decisionmaking, which is not a protected value under the political speech principle.¹⁶⁸

Due to the lack of direct evidence of the Framers' understanding of the amendment,¹⁶⁹ political speech advocates draw on structure and principle in support of their basic position. As a structural matter, the Constitution must protect political speech because such speech is essential to the functioning of a representative democracy.¹⁷⁰ If citizens are to govern themselves, they must be free to arrive at their own beliefs about issues of public policy and free to cast their votes according to their best lights. Indeed, the necessity of this kind of freedom for a functioning democracy led Judge Bork to argue that "[f]reedom for political speech could and should be inferred even if there were no first amendment."¹⁷¹ As a matter of principle, Judge Bork argued, no other values regarding speech can be derived from the Constitution in a way that would justify judicial invalidation of legislative value choices. Moreover, other values purportedly served by the Amendment would not

¹⁶⁶ *Id.* at 353.

¹⁶⁷ *See id.* at 354-55.

¹⁶⁸ *See id.* at 355.

¹⁶⁹ For Robert Bork's recent views regarding the Framers' intent, see Bork, *supra* note 163.

¹⁷⁰ *See, e.g.,* MEIKLEJOHN, *FREE SPEECH*, *supra* note 150, at 27 ("The principle of the freedom of speech springs from the necessities of the program of self-government."); BeVier, *supra* note 151, at 309 ("The constitutional establishment of a representative democracy implies certain conclusions about the type of speech the amendment must protect from abridgment."); Bork, *supra* note 151, at 23 ("[T]he entire structure of the Constitution creates a representative democracy, a form of government that would be meaningless without freedom to discuss government and its policies.").

¹⁷¹ Bork, *supra* note 151, at 23.

justify privileging speech over many other forms of activity that serve the same goals. Self-realization (whether of the speaker or of the listener), for example, would be served by a host of other activities from price fixing to playing sports, and there is no principled route for judges to select some but not others as central to that goal.¹⁷² The frequently acclaimed "safety-valve" function of speech is grounded, according to Judge Bork, in pedestrian considerations of "expediency or prudence," and it is thus similar to a host of factors regarding social safety and tranquility that are best weighed by the political branches of government in the exercise of their general managerial responsibility.¹⁷³

The political theory of speech, then, comes in three variations: Meiklejohn's expansive model, BeVier's strategic model, and Bork's and Meiklejohn's initial strict model. On closer inspection, it appears that only the last model is incompatible with First Amendment protection for commercial and professional speech, and that the first and second can and should be viewed as bringing commercial as well as professional speech within the Amendment's scope.

The expansive model of political speech embodies a conscious move beyond the preservation of the core parliamentary process to the protection of the integrity of the relevant input into that process. Indeed, the expansive view goes even further to hold that citizens must not only have access to information as input for their private calculus about the public good, but that they must also be exposed to thoughts, beliefs, and ideas about the human condition in order to develop the critical faculties necessary to perform that calculus. Without this form of individual self-realization, the democratic process would not achieve its goal of self-determination but would only serve as a mechanical form of aggregating individual, ill-formed conclusions.

Once the value of individual self-realization is recognized as a prerequisite to a meaningful democratic process, however, the argument that commercial and professional speech do not serve the values of the First Amendment seems weak. At the heart of self-realization lies the power to reach one's own understanding of what is just and good, and to participate in the decisions affecting one's liberty and well-being based upon one's values and view of the world.¹⁷⁴ Both commercial and professional speech assist in that endeavor. As Martin Redish has most prominently argued with

¹⁷² See *id.* at 25.

¹⁷³ See *id.* at 25-26.

¹⁷⁴ See ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY: AN INAUGURAL LECTURE DELIVERED BEFORE THE UNIVERSITY OF OXFORD 25-29 (1966) (reprinted in Oxford at The Clarendon Press).

regard to commercial speech, this aspect of self-realization is as much implicated in the realm of "private" decisionmaking in the market as it is in "public" decisionmaking in the political arena.¹⁷⁵ Quite apart from the non-commercial aspects of advertising, which may contain ideas, criticism, and aesthetic offerings as relevant to personal development as news, arts, and literature, basic information about the availability of products and services enables citizens to develop an awareness of the choices they have. Not only will individual market decisions thereby be better informed, but the opportunity to make decisions in the light of full information will itself serve as a lesson in democracy.¹⁷⁶ Finally, because the free flow of information about

¹⁷⁵ Redish, *The First Amendment in the Marketplace*, *supra* note 127, at 430; Redish, *The Value of Free Speech*, *supra* note 127, at 596-611.

¹⁷⁶ Cf. Rotunda, *supra* note 147, at 1098 ("The state was really using the advertising prohibition in *Virginia Pharmacy* to implement hidden policy decisions that Virginia citizens should have decided by free and open debate."). Professor Vincent Blasi, who rejects the idea that commercial speech comes within the First Amendment as a matter of free speech principles, also rejects the suggestion that commercial speech be given protection as a prophylactic. See Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 484-89 (1985). Blasi argues that recognition of the antipaternalism principle with regard to commercial speech would ultimately lessen citizens' appreciation for free speech principles, because the Court has not and will not adhere to the antipaternalism principle with regard to commercial speech. See *id.* at 484. Blasi points to the fact that courts routinely censor commercial speech when it is misleading and that the Supreme Court has endorsed (in dictum in *Central Hudson*) restricting truthful, nonmisleading speech because it may lead listeners to act against the public interest. See *id.* at 487-88. Once the antipaternalism principle has been violated with impunity in the area of commercial speech, similar violations of the principle may be feared with regard to noncommercial speech. See *id.* at 488-89. Blasi thus essentially opts for a two-tier theory of speech, under which some forms of speech (including commercial speech) are not protected at all, while all others receive full protection. It is not immediately clear, however, why a two-tier theory would provide for a better prophylactic against tyranny in pathological times than a more nuanced theory that recognizes different degrees of legitimate regulation for different kinds of speech. In essence, Blasi suggests that raising the costs of doctrinal spillover (by increasing the difference in treatment of speech in various categories) will render judges less willing to shift speech from one category to another. It is unclear as a matter of strategy, however, whether the added protection from the increased costs of spillover outweighs the greater damage that results when spillover ultimately occurs in such a two-tier system. Indeed, it might be said that a large second tier of unprotected speech, increases the danger that more speech will be placed into that category. For example, when political speech critical of the government was suppressed with judicial approval earlier this century (at a time when commercial speech received no protection at all), Judge Learned Hand had no difficulty doing so by adding to the nonprotected tier speech that does no more than counsel a violation of the law. See *Masses Publ'g Co. v. Patten*, 244 F. 535 (S.D.N.Y. (Hand, J.), *rev'd*, 246 F. 24 (2d Cir. 1917)). I would suggest, in contrast to Blasi, that the most important safeguard against doctrinal spillover is a clear definition of, and good justification for, the doctrinal categories that are to be kept distinct. Respect for free speech principles, whether on the part of judges or citizens, is unlikely to erode if the protection afforded to any given category of speech is properly calibrated to reflect its social role. For a discussion of the role of categories in First Amendment analysis generally, see Frederick

the marketplace will render both available and prohibited options more conspicuous, the protection of commercial speech will enable citizens to mobilize in favor of, as well as against, allowing certain commercial transactions to take place.¹⁷⁷ Commercial speech thus appears to further the goals of the expanded political speech principle and to come within the protection of the First Amendment. Similarly, professionals provide individuals with access to information that enables the latter to come to important decisions affecting their lives. Professionals assist individuals in understanding threats to their well-being that may require collective action to change rights and responsibilities in society. Indeed some professionals, such as attorneys, take an active part in assisting in the vindication of existing legal and constitutional rights in courts and other government fora. Professional speech thus, too, would appear to fall within the expanded political speech principle.

Professor BeVier's strategic model similarly should accommodate the constitutional protection of commercial and professional speech. BeVier does not offer a substantive view of where prophylaxis should end and rules must accord with principle as opposed to strategy. With regard to literature, art, and the sciences, for example, BeVier explains that the inclusion of all but obscenity within the realm of protection is too generous and that the Court should not abandon efforts to "draw the line of protection in terms that are relevant to the political speech principle."¹⁷⁸ Having recognized the problem of chilling effects, mixed utterances, and majoritarian bias, the strategic model does not guide courts in ascertaining when a given statement bears no relation to citizens' conception of liberty or to other aspects worthy of consideration in the political process. Even from the point of view of citizens concerned about the political process, it is not clear, for example, why a truthful statement about the price for prescription drugs should be subject to complete suppression when uttered as a proposal for a commercial transaction and protected only when conveyed as general information. That a statement bears the characteristics of a proposal seems to provide neither a substantive reason for the irrelevance of the statement to the political process nor a valid proxy for that conclusion. While a proposal arguably tends to indicate the speaker's concern not about the political process and collective deliberation, but primarily about profit,¹⁷⁹ BeVier, as

Schaer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981).

¹⁷⁷ See *Virginia State Bd. of Pharmacy v. Virginia Citizen Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) ("And if [commercial speech] is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered.")

¹⁷⁸ BeVier, *supra* note 151, at 357.

¹⁷⁹ See Baker, *supra* note 124, at 2139-68.

well as the Supreme Court, have rightly eschewed the notion that the presence or absence of a profit motive is relevant to whether speech implicates First Amendment values.¹⁸⁰ And although Professor BeVier does not specifically discuss professional speech, such speech, too, cannot be excluded from protection based on the general judgment that it bears no relation to citizens' conceptions of liberty or other concerns that are relevant to the political process. To be sure, professionals tend, in general, to speak about matters that are of personal interest to their clients, but that does not rule out the possibility that individuals take political action based on the knowledge gained from consulting with a professional about an issue that was initially of a particularly personal concern. As a result, even on a strategic model, commercial and professional speech should be protected.

The strict model Bork developed in 1971 has been frequently criticized.¹⁸¹ As Redish and Shiffrin, for example, have noted, although the currently available evidence on original intent about the First Amendment is sparse, Bork's mode of inquiry ignores the little original evidence that does exist. First, the text, when read in light of the Fifth Amendment, singles out some realm of "speech" for special protection, leaving other forms of liberty subject to deprivation of due process of law. Redish therefore rightly concludes that "[w]hether or not the constitutional language must be read to provide absolute protection to speech, there can be little doubt that it was intended to provide greater protection to speech than to conduct."¹⁸² Accordingly, as a matter of interpreting the constitutional text, complete agnosticism about whether speech or conduct is protected by the First Amendment is simply misplaced. Second, the Framers were motivated by at least one specific concern: the rejection of prior restraints. This concern, albeit raised with regard to restraints of the press, did not appear to vary with the topic of the speech, and was certainly not limited to an abhorrence

¹⁸⁰ See, e.g., *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 123 (1991) (holding that New York's prohibition on the receipt of money for stories about one's own crimes violated the First Amendment); *Virginia Bd. of Pharmacy*, 425 U.S. at 761 (holding that speech is protected even if "carried in a form that is 'sold' for profit"); BeVier, *supra* note 151, at 353 & n.249 (noting the well established principle that profit is irrelevant to questions of free speech).

¹⁸¹ Others before me have criticized Bork's view as incomplete. The following works offer the most systematic rejections of the narrow political speech principle. See Kent Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645, 734 n.344; Redish, *The Value of Free Speech*, *supra* note 127, at 596-611; Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1232-39 (1983); see also Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 120 (1989) (arguing that one need not identify a single reason, or even one reason that is unique to speech, to justify special protection of speech).

¹⁸² Redish, *The Value of Free Speech*, *supra* note 127, at 600.

of prior restraints only on speech that was strictly limited to the political process as, indeed, Bork himself has more recently acknowledged.¹⁸³ Thus, instead of considering only first principles about a representative democracy to ascertain the kind of speech that is protected by the Constitution, any substantive theory of the First Amendment must take account of the American reaction to the British experience with prior restraints.

Moreover, the rejection of Meiklejohn's expanded version of the political speech principle on the ground that it fails to account for the distinction between self-realizing speech and conduct is misplaced. To be sure, conduct may also serve the value of self-realization, but since the text of the First Amendment favors at least some speech over conduct, "we need not find a logical distinction between the value served by speech and the value served by conduct in order to justify protecting only speech."¹⁸⁴ Indeed, the challenge of justifying the distinction between self-realizing speech and action can be turned back on the strict principle of political speech itself. A narrow political speech principle suffers from the analogous failure to account for the distinction between political speech (which it protects) and political conduct (which it does not). Some forms of conduct, such as, for example, working for a unit of government, working in a regulated industry, or working in a sector of the economy that is not currently being regulated as it should be, serve to create an awareness of the quality of government officials and government regulation and, thus, would appear to further the political speech principle as any speech about the conduct of government officials would.¹⁸⁵

¹⁸³ See Bork, *supra* note 163; Benjamin Franklin, *An Apology for Printers*, reprinted in 2 WRITINGS OF BENJAMIN FRANKLIN 172 (1907) (defending free speech principles in connection with printing an advertisement for voyages to Barbados); Shiffrin, *supra* note 181, at 1234-35 (citing David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 463-64 (1983)) (noting that prior restraints were regarded as an interference regardless of the political character of the publication). To be sure, to the extent that there may be a difference between the protection afforded by the speech and press clauses, reliance on this history may be less warranted as a matter of interpreting the speech clause, but Bork's 1971 argument was based on first principles, not on any textual difference between the various clauses of the First Amendment.

¹⁸⁴ Redish, *The Value of Free Speech*, *supra* note 127, at 600.

¹⁸⁵ Professor Redish presses this point, noting that "there are countless actions—such as a bombing . . . to protest oppression . . . —that can be thought to convey very significant political messages." *Id.* at 599. These actions, though political, would not, however, support or promote the legal process of self-government in a representative democracy. But there are other actions, also discussed by Professor Redish, *see id.* at 600, that are both political in character (at least in the sense in which Bork uses that term) and consistent with a peaceful process of self-government. Thus, working in an industry that is currently regulated by the government or may be in need of regulation would further the attainment of knowledge about governmental actors that Bork sees as relevant to the political process. Similarly, working for

The political models of the First Amendment, then, do not provide good reasons for excluding commercial or professional speech from constitutional protection. A strict theory of political speech is historically unfounded and does not seem justified on the basis of first principles. Any strategic considerations for protecting nonpolitical speech developed to account for the discrepancy between current court decisions and the strict political model would apply to commercial and professional speech. Finally, insofar as the political speech principle presents a viable interpretation of the First Amendment, that is, on the expansive theory of political speech, it should include commercial and professional speech within its reach, contrary to the claims of its principal advocate. Commercial and professional speech serves to educate the citizenry, is integral to the workings of self-government, and may even itself form part of a lesson in democracy.¹⁸⁶

Reconciling commercial and professional speech with the viable prong of the political speech doctrine, however, fails to justify the state's ability to restrict certain commercial and professional speech, when it could not similarly restrict other speech. If commercial and professional speech fall within the political speech principle because they aid the process of educating citizens and fostering their autonomy, the justification for special restrictions on commercial and professional speech must lie beyond the political speech principle. If the expansive and strategic political speech models shield seditious libel from being banned despite the fact that the content of such speech is antithetical to democratic government, why not protect commercial speech that challenges the idea of informing consumers or professional speech that challenges the fundamental assumptions of the profession? For the answer to our basic question, then, we must look elsewhere.

a governmental unit would further the process of acquiring and, ultimately, disseminating information about the quality of government officials.

¹⁸⁶ Cass Sunstein's "Madisonian conception" of the political speech principle is at once more generous than Meiklejohn's and Bork's original positions and more selective in its coverage than Meiklejohn's later theory. See SUNSTEIN, *supra* note 151, at 18-23. Professor Sunstein would place at the core of First Amendment protection all speech that is "both intended and received as a contribution to public deliberation about some issue," *id.* at 130 (italics omitted), and, next, recognize a lesser degree of protection for other forms of expression, including commercial speech, *see id.* at 155. Because many of the same criticisms that are raised with regard to the political speech principles discussed in the text (and some that are discussed with regard to the cultural critique discussed in the previous section) may be applied to Sunstein's theory, the text has focused on some of the original archetypes of the political speech principle without providing a specific response to Professor Sunstein's version of the principle. For the most recent critique of Sunstein's theory and a related First Amendment theory that also places commercial speech at the margins of constitutional protection but is based more specifically on the importance of dissent, see STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* (1999).

D. Liberty

The fourth major theme running through foundational commercial speech scholarship focuses on the protection of reasoned communicative interactions between rational, autonomous individuals who treat each other with dignity and respect. On this view, the basic argument against commercial speech is, unsurprisingly, that commercial speech does not attain this goal and that it is therefore beyond the Constitution's protection.

Professor Baker's paradigmatic challenge to the constitutional standing of the commercial speaker begins by re-calibrating First Amendment theory to reflect the value of self-expression of the autonomous individual.¹⁸⁷ Only so understood can the First Amendment promote self-realization, truth discovery, political participation, and a healthy balance between stability and change.¹⁸⁸ In a nutshell, his well-known thesis is as follows. First, "as long as speech represents the freely chosen expression of the speaker while depending for its power in the free acceptance of the listener, freedom of speech represents a charter of liberty for noncoercive action."¹⁸⁹ Next, Baker argues that our society has separated individual values of persons, which are pursued in the private sphere, from the pursuit of profits, which is the goal of every enterprise.¹⁹⁰ And because Baker views the latter as the necessary structural consequence of our market society, in which the value of a good is its exchange value, he concludes that only the former is a manifestation of individual freedom.¹⁹¹ The Constitution nonetheless protects the profit-seeking press (under the Press Clause) not for the reasons that speech is protected, but for instrumental reasons, that is, to provide a counterbalance to the government by securing a source of information free from government control.¹⁹²

¹⁸⁷ See C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 194-224 (1989) [hereinafter BAKER, *HUMAN LIBERTY*] (discussing commercial speech); C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 6-9 (1976) [hereinafter Baker, *Commercial Speech*] (arguing that because of existing economic structures, commercial speech does not serve the interests of individual liberty that the First Amendment was designed to protect).

¹⁸⁸ See Baker, *Commercial Speech*, *supra* note 187, at 7.

¹⁸⁹ *Id.*; see also BAKER, *HUMAN LIBERTY*, *supra* note 187, at 197.

¹⁹⁰ See BAKER, *HUMAN LIBERTY*, *supra* note 187, at 196, 200-02.

¹⁹¹ See *id.* at 197-206; Baker, *Commercial Speech*, *supra* note 187, at 9-14 (describing commercial speech in modern America); cf. Richard M. Alderman, *Commercial Entities' Noncommercial Speech: A Contradiction in Terms*, 1982 UTAH L. REV. 731, 760-61 (arguing that the speech of commercial entities is by its very nature commercial and should be classified as such).

¹⁹² See Baker, *Commercial Speech*, *supra* note 187, at 30-32.

Baker has been criticized for limiting the value of free speech to that of self-expression and thereby ignoring audience-based values.¹⁹³ Indeed, Baker himself says that "the liberty theory focuses on the speaker and the speaker's choice to speak, not the listener and the usefulness of the content."¹⁹⁴ Baker's approach might be modified to incorporate audience values by positing that an audience could only be interested in the expressions of sincerely-held beliefs by fellow autonomous individuals.¹⁹⁵ Speech that ultimately results from market considerations might be said to be of no communicative value because it is not the product of a rationally autonomous individual's attempt to communicate something to another person. On this view, the commercial speaker is driven by impersonal market forces, any "informational value" is merely an illusion, and any correspondence to objective reality is purely accidental.¹⁹⁶

The existence of press freedom, however, makes it difficult to argue for this kind of incorporation of audience-based values. If the press is to be protected for the instrumental value of providing citizens with information that is free from government control, then it must be valuable for the audience to receive information that has been disseminated for purposes of profit.¹⁹⁷ If that is the case, however, then commercial speech's communi-

¹⁹³ See Redish, *The Value of Free Speech*, *supra* note 127, at 619-22; Shiffrin, *supra* note 181, at 1243.

¹⁹⁴ BAKER, HUMAN LIBERTY, *supra* note 187, at 197.

¹⁹⁵ This theory of audience interests would add to Baker's basic argument that the listener only has the right that the government not interfere with the speech of a willing speaker. See, e.g., Baker, *Commercial Speech*, *supra* note 187, at 8.

¹⁹⁶ Even this view would have to distinguish this form of control of the actor by an outside force from that of the politician by a primary concern about being elected to office. Cf. Redish, *The Value of Free Speech*, *supra* note 127, at 621 ("[I]f we accept Baker's analysis, what protection do we give to the political candidate who tailors his public positions to what he thinks will lead to his election . . .?"). Baker responds to this challenge by suggesting that politicians are not primarily concerned with maximizing electoral support and that politicians are otherwise motivated to speak their mind truthfully. See, e.g., C. Edwin Baker, *The Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 996 n.102 (1978).

¹⁹⁷ To be sure, the business of the press is communication, and therefore any manipulation of wants and desires will be in the service of stimulating greater need for communication. See Baker, *Commercial Speech*, *supra* note 187, at 30. But this should not render such manipulation any less objectionable than Baker argues it to be in the context of the commercial distribution of products. In both cases, one would expect the relevant producers to seek the stimulation and creation of wants and desires that are easily satisfied. In both cases, the driving force would be profit, not the substantive value of communication. To the extent that a criticism of commercial speech is based on the evils of the market, then, such skepticism should carry over to the profit-seeking press generally (and not just to the influence of commercial advertising).

Baker argues that the press is specifically protected by the Press Clause for the instrumental reason of safeguarding an information source that is not controlled by the government. The Press Clause thus, in his view, serves a fundamentally different function than the Speech

cation of valuable information is not purely accidental, and the audience's interest in receiving that information ought to be protected. Thus, either the profit motive is not thoroughly corrupting or the existence of the profit motive does not decrease the value of the speech to the audience. Either way, however, the reason for treating commercial speech differently from other speech motivated by a desire for profit cannot be based on the profit motive itself if the audience is to be taken into account.¹⁹⁸

As with the other foundational approaches to commercial speech, this last theory appears insufficient to distinguish between commercial and non-commercial speech or to account for the Court's different treatment of the two. Along with the other approaches discussed in this Subpart, Baker's does not justify either excluding commercial or professional speech altogether from the realm of constitutional protection, nor does it provide reasons for regulating commercial and professional speech in ways that would be unacceptable in the case of noncommercial, nonprofessional speech. A second group of theoretical approaches, however, which are based largely on a contextual examination of the function of speech, will point the way toward the theoretical framework that will be explored in Part IV. They will be discussed briefly in the following Part.

III. FUNCTIONAL APPROACHES TO COMMERCIAL SPEECH

In contrast to the foundational theorists, who approach the question of commercial speech based on first principles of economics, culture, democracy, or liberty, a second group of scholars focuses primarily on the function of speech.¹⁹⁹ Some view commercial speech as inextricably linked with, and thus subordinated to assisting in the consummation of, a material transaction. Others urge a distinction between the ordinary use of language for communicating ideas by means of presentation and persuasion, and the use of language in the context of a commercial transaction, where language im-

Clause. See BAKER, HUMAN LIBERTY, *supra* note 187, at 225-49; Baker, *Commercial Speech*, *supra* note 187, at 29-34. Baker's theory in this sense bears some resemblance to Blasi's "checking function" of speech, except that Baker would apply this theory only to the interpretation of the press clause. See BAKER, HUMAN LIBERTY, *supra* note 187, at 233. Regardless of the foundation of the protection, however, any recognition of press rights ultimately entails the idea that profit-motivated speech is of value to the audience.

¹⁹⁸ Cf. MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 64 (1984); Smolla, *supra* note 130, at 782. But compare *Breard v. Alexandria*, 341 U.S. 622, 641-43 (1951) (finding a profit motive relevant), with *Time, Inc. v. Hill*, 385 U.S. 374, 397 (1967) (noting the irrelevance of a profit motive).

¹⁹⁹ See, e.g., Farber, *supra* note 144; Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 14-25 (1979); Smolla, *supra* note 130.

mediately affects the norms and conditions that characterize the relationship between speaker and listener. Each of these functional visions shall be briefly addressed in turn.

A. *The Centrality of the Economic Transaction*

The transactional approaches are not a fundamental reconception of the communicative action. They observe, instead, that the communication is inextricably intertwined with a regulable economic transaction, such as a contract between buyer and seller. Communication that falls within the Supreme Court's definition of commercial speech is viewed as bound up with that transaction, so that little reason exists to preclude the government from regulating such ancillary speech.²⁰⁰ Professional speech, in contrast, would unlikely be viewed as ancillary to an economic transaction. One might argue that certain speech, such as medical advice, should be viewed as ancillary to the performance of a particular material service, such as a medical procedure. This would not provide much guidance, however, for the treatment of professional communications that are divorced from all material transactions other than payment for the advice rendered. Professional speech in the latter case, such as medical or legal consultations, are quintessential professional communications regardless of their further connection to a material service. A theory of professional speech must function without regard to the connection with an underlying material transaction, because, at its core, professional speech encompasses communications that have no more connection to a material transaction than does a newspaper that is sold at a stand. With regard to commercial speech, however, the transactional arguments cannot be ignored.

Professors Jackson and Jeffries present the most categorical transactional argument, suggesting that because the government can prescribe drug prices, it should be able to forbid advertising of prices as well.²⁰¹ According to Jackson and Jeffries, since the significance of commercial speech lies exclusively in its relation to the contemplated transaction, the government ought to have the same power to regulate commercial speech that it has over the transaction itself.²⁰² Indeed, Jackson and Jeffries argue that the power to

²⁰⁰ Several scholars have remarked that the regulation of commercial speech is permissible only because of its connection to the underlying transaction. See, e.g., Smolla, *supra* note 130, at 780 ("Because government has virtually unchecked constitutional power to regulate transactions, government may legitimately claim some special prerogative to regulate speech about transactions."). Those discussed here have proceeded from this intuition to craft a particular vision of constitutional protection of commercial speech.

²⁰¹ See Jackson & Jeffries, *supra* note 199.

²⁰² See *id.* at 35-36.

regulate the transaction is greater than, and includes, the lesser power to regulate any communication about the transaction.²⁰³ Thus, the Constitution should allow the government to refrain from outlawing the sale of a particular product, while prohibiting advertising for that product.

Jackson and Jeffries's greater-includes-the-lesser argument ultimately depends on their subscription to the political speech principle. This dependence becomes evident when one proceeds from the opposite assumption, that is, that the First Amendment cannot be limited to the political sphere. If the First Amendment cannot be limited to the political sphere, or if commercial speech has value beyond its effect on the underlying transaction, then suppressing commercial speech does more, not less, than restricting the underlying transaction. This seeming tautology bears emphasis only because the greater-includes-the-lesser rationale is frequently criticized without prominently identifying that the real source of the disagreement is whether the First Amendment protects only political speech. Professor Redish, for example, stresses that "the fallacy of [this] rationale as a justification for speech suppression can be demonstrated by examining its conceivable application in the noncommercial speech context."²⁰⁴ In that context, advocacy of unlawful conduct is protected under the Supreme Court's *Brandenburg v. Ohio*²⁰⁵ decision, even where the government "actually has prohibited such conduct, by making it criminal."²⁰⁶ Redish then states categorically that "no reason exists to believe that the logic is somehow more compelling as a rationale for commercial speech regulation than for non-commercial speech regulation."²⁰⁷ If, however, Jackson and Jeffries were right to conclude that the First Amendment protects only political speech and that the only value of commercial speech lies in its significance to the underlying transaction, then it might, indeed, make sense to apply their rationale in the commercial speech context while, at the same time, reject it in the political speech context. Similarly, Redish points to the text of the Constitution, which protects speech more than it protects conduct.²⁰⁸ Here, too, the decisive premise is that commercial speech lies within the realm of First Amendment protection. And, when Rotunda criticizes the regulation of speech (as opposed to conduct) because it adds an unknown cost of restricting speech or because it obscures the legislature's accountability for

²⁰³ See *id.* at 35.

²⁰⁴ Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 599-600 (1996).

²⁰⁵ See 395 U.S. 444, 447 (1969).

²⁰⁶ Redish, *supra* note 204, at 600.

²⁰⁷ *Id.*

²⁰⁸ See *id.* at 601 & n.56.

substantive policy choices,²⁰⁹ he, too, is arguing from First Amendment premises. Without recognizing commercial speech as significant apart from its effect on a transaction, its suppression would not be an added cost. The recognition that commercial speech is valuable to the autonomous deliberation and self-realization of the citizen is the nub of the disagreement with an argument like the one Jackson and Jeffries present. It is a disagreement not about logic, but about the premise of the First Amendment. With regard to First Amendment premises, however, the political speech principle, as discussed above, does not justify placing commercial speech beyond the reach of the First Amendment.

Professor Farber, too, seizes upon the link between commercial speech and the underlying transaction, but he affords the government far less regulatory leeway than do Jackson and Jeffries.²¹⁰ Farber observes that contract liability frequently attaches to communication without raising First Amendment concerns, and he argues that “[s]imilar to the language of a written contract, the language in advertising can be seen as constituting part of the seller’s commitment to the buyer.”²¹¹ To Farber, advertising, as part of this contractual function, should be subject to regulation without special scrutiny. Because the language of advertising performs an additional, informative function, which implicates the core concerns of the First Amendment, the task becomes one of distinguishing between government rules that regulate the contractual function of language, and those that impinge on the informative purpose of advertising. To this end, Farber offers the following test: “A justification for regulating the seller’s speech relates to the contractual function of the speech if, and only if, the state interest disappears when the same statements are made by a third person with no relation to the transaction.”²¹²

Government regulation backed by justifications that meet this test would be judged under the standard of *United States v. O’Brien*²¹³ on the

²⁰⁹ See Rotunda, *supra* note 147, at 1081-83; see also Redish, *supra* note 204, at 601; Matthew L. Miller, Note, *The First Amendment and Legislative Bans of Liquor and Cigarette Advertisements*, 85 COLUM. L. REV. 632, 643 (1985).

²¹⁰ See Farber, *supra* note 144, at 374.

²¹¹ *Id.* at 387.

²¹² *Id.* at 388-89.

²¹³ 391 U.S. 367 (1968). The court held that where speech and nonspeech elements are combined in the same course of conduct, an incidental burden on speech is justified if it is within the power of the Government; if it furthers a substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *Id.* at 377.

grounds that contractual regulations are unrelated to the suppression of ideas and are concerned, instead, with the regulation of conduct.²¹⁴

Farber's contract-based approach is attractive, especially because it discriminates between different kinds of regulation of speech uttered in a commercial context. The Supreme Court's various formulas triggering the commercial speech doctrine risk being either too narrow,²¹⁵ in that we conceive of much modern advertising as doing more than strictly proposing a commercial transaction, or being vague and too broad,²¹⁶ in that they contemplate diminished protection whenever speech is classified as commercial, even where the state's reason for regulation is based squarely on what David Strauss calls the "persuasiveness of the speech."²¹⁷ Farber's test, instead, asks about the government's reasons for regulating the communicative interaction, thus weeding out government regulation based on impermissible motives.²¹⁸

²¹⁴ See Farber, *supra* note 144, at 389 ("[C]ommercial speech is somehow more akin to conduct than are other forms of speech."). Farber retains the label of commercial speech to refer to the kind of speech that can be regulated under his model, even though his model does not pick out the object of the regulation—that is, the speech. Instead, his model identifies the nature of the regulation by looking to its justification. His test does not distinguish commercial from noncommercial speech, but does distinguish between regulation aimed at the contractual function of the speech and regulation aimed at the noncontractual aspect of the speech.

²¹⁵ Cf. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973) (defining commercial speech as speech that does "no more than propose a commercial transaction").

²¹⁶ Cf. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561-62 (1980) (defining commercial speech as speech that "propos[es] a commercial transaction" or "relate[s] solely to the economic interests of the speaker and its audience").

²¹⁷ David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 334 (1991); see also *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 340 (1986). For a good discussion of ways to define commercial speech, see Thomas W. Merrill, Note, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 228-34 (1976). Merrill discusses defining commercial speech as (1) speech proposing a commercial transaction, (2) speech that is of interest only to a nondiverse consumer audience, and (3) speech about a brand name or product. Merrill concludes that the best approach is a refinement of the third definition, limiting commercial speech to "speech referring to a brand name product or service that is not itself protected by the first amendment, issued by a speaker with a financial interest in the sale of the product or service or in the distribution of the speech." *Id.* at 254; cf. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983) (discussing characteristics of commercial speech).

²¹⁸ By focusing on the purpose of the regulation, as opposed to the type of speech to which the regulation applies, Farber's test reflects the Court's approach in *Carey v. Population Services International*. See 431 U.S. 678, 701 & n.28 (rejecting the application of commercial speech standards because regulation was not aimed at any "commercial aspect of the . . . advertising"). Farber's test was also cited with approval by Justice Stevens in *Bolger*. See 463 U.S. at 82-83 (Stevens, J., concurring in the judgment) ("Because significant speech so often comprises both commercial and noncommercial elements, it may be more fruitful to

Farber, however, does not suggest why the contractual function of speech eliminates its First Amendment protection. Instead, he simply posits that the reason “appears to be that the use of language to form contracts is not the sort of ‘speech’ to which the first amendment applies.”²¹⁹ He adds only the following to explain the distinctive characteristic of commercial speech:

The unique aspect of commercial speech is that it is a prelude to, and therefore becomes integrated into, a contract, the essence of which is the presence of a promise. Because a promise is an undertaking to ensure that a certain state of affairs takes place, promises obviously have a closer connection with conduct than with self-expression.²²⁰

Although Farber’s “intuitive belief that commercial speech is somehow more akin to conduct than are other forms of speech”²²¹ is compelling in the sense that issuing a promise seems different from publishing a novel, the nature of that difference remains to be fleshed out. The next Subpart explores one possible basis for this intuition.

B. *The Different Uses of Language*

Commercial speech, as Professor Farber has noted, differs systematically from noncommercial speech in that it is inextricably bound up with a commercial transaction. It either proposes a commercial transaction or provides the context within which an agreement regarding a commercial transaction is supposed to take place. The paradigmatic case, of course, is the offer of sale, which upon acceptance by the buyer with the proper consideration becomes a legally binding commitment on the part of the offeror. If the conventional rules for entering into a contract are satisfied, offerors cannot argue that enforcement of the contract violates their rights to free speech. The offeror not only communicates to the offeree but also appeals to a set of rules that impose rights and responsibilities when certain conditions, some of which are based on speech, are met.

focus on the nature of the challenged regulation rather than the proper label for the communication.”). A concern for weeding out restrictions aimed at certain aspects of speech would not be unusual in First Amendment analysis. See generally RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 3.02[2] (1994); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996); Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1260-70 (1995).

²¹⁹ Farber, *supra* note 144, at 387.

²²⁰ *Id.* at 389.

²²¹ *Id.*

The notion of doing things with words goes back to the philosopher J.L. Austin, who, most notably in his famous lecture series in 1955, distinguished between performative utterances (which he also called "illocutionary acts") and non-performative utterances (which he termed "locutionary acts").²²² Austin's classic examples of performative utterances (or performatives, for short) are naming a ship, taking a marriage vow, making a will, or entering into a bet.²²³ In each case, the utterance of statements achieves more than communicating a message to the audience. Given the right context and satisfaction of prerequisites, uttering the words "I name this ship the *Queen Elizabeth*" not only communicates facts about the world, but also changes the relation between that object and those apprehending it (if only in a relatively minor way).²²⁴ Similarly, under the proper circumstances, uttering the words "I will" not only states a proposition, but changes the social relation, including the legal rights and responsibilities, of the parties at a wedding ceremony. The same is true for stating, under the appropriate circumstances, "I hereby bequeath my house to you" or "I bet you a dollar for your nickel that you're wrong." Each of these acts is performed in the medium of language and accomplishes something that seems different from what statements such as descriptions or reports achieve. One need only take the first-person singular declarative statement of a promise and compare it to the third-person report of the statement to witness the illocutionary dimension of the statement change. Performatives also tend to be neither true nor false, at least in the ordinary sense of those terms. By contrast, a performative may be unsuccessful, such as in a situation where no convention exists that recognizes the utterance as constituting a particular act, where the application of an existing convention to the circumstances at hand is inappropriate, or where the procedure for invoking the convention has not been followed properly. A performative may also be insincere (even though it triggers the convention and its consequences), if the person issuing the performative did not have the proper intention with regard to the utterance.²²⁵

²²² J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (J.O. Urmson ed., 1962). The idea goes back even further to Wittgenstein, who had already noted: "Words are deeds." L. WITTGENSTEIN, CULTURE AND VALUE 46e (P. Winch trans., 1980).

²²³ See AUSTIN, *supra* note 222, at 5.

²²⁴ The utterance communicates some facts, though perhaps not as the literal "meaning" of the sentence. In addition to naming the ship, the sentence implicitly conveys, for example, the speaker's perception of the fact that the object being named is a ship. This may or may not be the speaker's intention. Cf. AUSTIN, *supra* note 222, at 47-52 (regarding presuppositions).

²²⁵ The distinction between these two kinds of problems with the performance of an illocutionary act is not absolute. Insincerity may in certain cases render the act itself unsuccessful, depending on the convention.

It turns out, however, that these characteristics do not sufficiently distinguish so-called performative utterances, such as making a bet or giving an order, from other types of utterances, since descriptive utterances ultimately seem to be governed by similar principles. For example, conventions assign meaning to particular series of sounds or characters (by providing a common language); a descriptive statement can be inappropriately invoked (such as saying "All of John's children are bald" when John, in fact, has no children); and descriptive sentences may be properly, yet insincerely, invoked (such as saying "The cat is on the mat" without the belief that it is, regardless of whether it, in fact, is or is not).²²⁶ The observation that uttering a descriptive statement is as much a performative as uttering one of the "classic" (for lack of a better word) performative utterances, such as naming a ship, was perhaps Austin's greatest insight in this area.

The insight that even descriptive statements and pure assertions have illocutionary force has dissuaded legal scholars from seeking to harmonize principles of linguistic philosophy with those of free speech. Kent Greenawalt, for example, who in discussing criminal law has produced a sustained treatment of the relevance of different uses of language to the law of free speech, focuses not on illocutionary acts but on what he calls "situation altering utterances."²²⁷ These utterances "purport to change th[e] world," and often "actually alter the normative world, shifting rights or obligations or both."²²⁸ Although "many of [Austin's] early and striking examples, such as the wedding vow and the christening of a ship, have the situation-altering aspect"²²⁹ that Greenawalt wants to consider, Austin's

²²⁶ See AUSTIN, *supra* note 222, at 50-52; see also JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* 157-62 (1969). Similarly, the statement "You feel good today," is simply an inappropriate descriptive, since, regardless of its truth, people are not able to make definitive pronouncements about other people's emotions. See J.L. AUSTIN, *Performative Utterances*, in *PHILOSOPHICAL PAPERS* 220-39 (J.O. Urmson and G.J. Warnock eds., 1966). One might argue that the falsehood of a sentence is due to the fact that the convention surrounding the sounds has been inappropriately invoked, such as saying "The cat is on the mat" when it is not. But this kind of inappropriate invocation is not the same as the inappropriateness that can attach to the invocation of the naming statement "I hereby name you the *Queen Elizabeth*." The naming statement can be neither true nor false, but can be inappropriate by, for example, lacking a referent (such as, there being no ship at hand) or lacking a necessary convention (such as, there being no procedure by which people standing before ships name them). Austin appears not to have distinguished between statements and the act of stating, which caused him to view the true/false distinction as converging with the felicitous/infelicitous distinction. See SEARLE, *supra*, at 29 (discussing this distinction).

²²⁷ KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 59 (1989). For a study with a similar focus, see FRANKLYN S. HAIMAN, "SPEECH ACTS" AND THE FIRST AMENDMENT (1993), examining utterances such as fighting words and hate speech.

²²⁸ GREENAWALT, *supra* note 227, at 59 (footnote omitted).

²²⁹ *Id.* at 58.

analysis and terminology have ceased to be useful for Greenawalt because "Austin also includes among performative utterances 'I apologize' and 'I bid you welcome,' and he speaks of 'conclude' and 'argue' as being performative verbs."²³⁰ Utterances such as these, Greenawalt concludes, "do not change the world in the significant way that . . . characterizes situation-altering utterances."²³¹

In creating an alternative taxonomy of situation-altering utterances to distinguish between speech acts that are protected by the free speech principle from those that are not, Greenawalt examines his own intuitions about whether listeners and speakers would commonly perceive an utterance as altering their social, moral, or legal environment. Only "significant change[s] in the environment," however, count in that enterprise.²³² For instance, although every assertion changes the speaker's and the listener's situation because the speaker espouses the asserted proposition, this kind of alteration does not suffice for purposes of Greenawalt's principle. Especially in light of the fact that the free speech principle was designed to protect precisely this sort of interaction, an utterance must do more than merely make an assertion to forfeit protection. Among the utterances that effect significant changes in the environment, and thus deserve Greenawalt's "situation-altering" label, are offers, orders, permissions, and threats. "Among the most important situation-altering utterances" are agreements and promises, which affect people's moral obligations "even if they are not legally binding."²³³ To ascertain whether a particular speech act qualifies as a situation-altering utterance, Greenawalt essentially inquires into the ordinary "meaning" of the utterance.²³⁴ If the utterance properly conveys an of-

²³⁰ *Id.* (footnote omitted). Greenawalt portrays Austin's inclusion of assertions in the category of performatives as an indication of Austin's doubt of his own theory. But Austin's conclusion that assertions are performatives seems, to the contrary, to be the major point of his discovery, as he himself appears to acknowledge. See AUSTIN, *Performative Utterances*, *supra* note 226, at 251.

²³¹ GREENAWALT, *supra* note 227, at 58.

²³² *Id.* at 61.

²³³ *Id.* at 63.

²³⁴ This is not to say that Greenawalt locates requests, orders, threats, or other situation-altering utterances in the meanings of sentences, which would be questionable as a matter of basic interpretation. The meaning of a sentence (that is, its propositional content) is, instead, to be distinguished from the meaning of the utterance of the sentence. The utterance, which is the act of saying a sentence, can take on meanings that depend on more than the propositional content of the sentence itself. Thus, for example, to say "Can you pass the salt?" means one thing when said during a neurological exam and another when said at the dinner table. The polite request does not inhere in the meaning of the sentence, but in the meaning of the utterance of the sentence under certain conditions. See JOHN R. SEARLE, *EXPRESSION AND MEANING* 30-57 (1996). The details of how the meaning of an utterance may be formally

fer, threat, or promise, for example, it is less protected by the principles of free speech.

As an alternative to focusing on the specific meaning of the communication itself, it may prove helpful to examine the broader context of the communication and, in particular, the relevant relationship that is implicated by the utterance. As an initial matter, such an analysis promises to provide a fuller understanding of the special characteristics of professional communications, which Greenawalt's approach appears to miss. For example, having set his aim on the meaning of the utterance, Greenawalt concludes that "[i]f a doctor tells George he has measles, she gives him information about what is already present; her comment does not itself change the actual circumstances of George's life."²³⁵ The statement, then, does not qualify as a situation-altering utterance and would, according to Greenawalt's general theory, be fully protected. This view, however, comes up short in explaining the existence of medical malpractice suits, which may be based on precisely such factual statements, if they are made within the doctor-patient relationship. Greenawalt might answer that free speech justifications are diminished when the statement is false or when it amounts to encouraging the patient to commit a crime,²³⁶ but the fact that such a statement is analyzed for its falsity (or its manifestation of an encouragement to commit a crime) indicates instead that the statement is subject to special First Amendment principles.²³⁷ Accordingly, even where the protection of a

analyzed are not at issue here. The point made in the text is simply that Greenawalt decides whether an utterance has a situation-altering effect based solely on its meaning.

²³⁵ GREENAWALT, *supra* note 227, at 59.

²³⁶ In discussing encouragements to commit crimes, Greenawalt mentions in passing that he "assume[s] that lawyers and doctors, for example, may be penalized for advising clients and patients that committing some crime is the best way to solve their problems." *Id.* at 128 n.23.

²³⁷ To be sure, the Supreme Court has noted that although "there is no such thing as a false idea[.] . . . there is no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974). Within fully protected discourse, however, even false speech is afforded a measure of protection out of an abundance of caution to avoid chilling protected speech. The constitutionally permissible prohibition of false commercial speech, then, must be justified by the commercial character of the speech, not by its falsity alone. *Cf.* Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1194 (1988) [hereinafter Schauer, *Commercial Speech*] (noting that false and harmful speech is usually protected by the First Amendment); Frederick F. Schauer, *Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter*, 64 VA. L. REV. 263, 294 (1978) [hereinafter Schauer, *Language*] (noting that "the commercial speech doctrine does not grant 'strategic' protection to factual falsity as the *New York Times* principle does for defamatory speech" (citation omitted)). It is therefore too simple to end the inquiry by noting that "[f]alsehoods and deceptive speech do not contribute to the free flow of information and have long been regulated *whether or not* the speech is labeled 'commercial.'" Rotunda, *supra* note 147, at 1081 n.3 (citing *Gertz*, 418 U.S. at 340; *Konigsberg v. State Bar*,

statement is sometimes thought to vary with its meaning, it is not the meaning that is doing the work for purposes of free speech principles. Instead, the statement, apart from its specific meaning, is not governed by ordinary free speech principles because of the peculiar characteristics of the communicative relationship.²³⁸ As the next Part will attempt to show, the Court may be viewed as implicitly relying on the specific nature of the communicative relationship between speaker and listener as a justification for the communication's regulation. This aspect of the communication is common to both commercial and professional speech.

IV. THE CONSTITUTIONAL STATUS OF BOUNDED SPEECH PRACTICES

In a series of First Amendment cases that will be discussed in this Part, the Supreme Court may be viewed as giving constitutional status to its perception of the social relationship between various interlocutors. Communicative interactions are not seen as abstract exchanges of views and ideas between persons about whom nothing is known, but instead, as context-dependent interactions with purposes that can be judicially ascertained with a reasonable degree of confidence. Instead of employing a fixed set of general First Amendment rules that are universally applicable, the Court has crafted particularized modes of analysis to sustain and protect the various speech practices involved. On the one hand, the Court welcomes government regulation as partially constitutive of the communicative interaction, that is, as assuring that communications that are dependent on predefined communicative goals remain within the boundaries of that discourse. On the other hand, the Court rejects government prescriptions as unconstitutional when they infringe on the integrity of an established framework for discourse.

A. *The Listener-Based Model of Discourse*

The Supreme Court's First Amendment doctrine is usually rife with rhetoric about the importance of preserving the ability of speakers to express themselves and communicate their views, however unorthodox, to whomever might listen. *Brandenburg v. Ohio*,²³⁹ *Cohen v. California*,²⁴⁰

366 U.S. 36, 49 & n.10 (1961)). Falsehoods are only regulated in special circumstances, one of which I attempt to describe in this Article.

²³⁸ Because Greenawalt focuses on the meaning of the communication rather than the relationships that envelop the speaker, neither fiduciary relationships nor relationships between buyers and sellers figure prominently in his book.

²³⁹ 395 U.S. 444 (1969).

²⁴⁰ 403 U.S. 15 (1971).

Terminiello v. Chicago,²⁴¹ and *National Socialist Party of America v. Village of Skokie*,²⁴² are classics in that regard, but even cases such as *New York Times Co. v. Sullivan*²⁴³ and *Hustler Magazine, Inc. v. Falwell*,²⁴⁴ which acknowledge the importance of the "public debate" of which the speaker's speech is only a part, stress the preeminent value of the "American privilege to speak one's mind."²⁴⁵ When the Court emphasizes the First Amendment rights of speakers, its focus is usually on the unbounded nature of the public debate within which the speech takes place.²⁴⁶ The soapbox orator and lone pamphleteer come to mind, disseminating their views about matters of public concern to whomever chooses to stop and listen. In these unstructured communications about public issues, speakers advocate their cultural or political norms in an attempt to support their particular vision of a community.²⁴⁷ No vision of the community is privileged, and no rules of civility or respect for commonly shared values are imposed. Not only is every individual free to choose his or her own system of beliefs that is free from government coercion,²⁴⁸ but each individual may decide what to put forth for discussion and how to present that contribution most effectively.²⁴⁹ Protected public debate, then, excludes neither profanity, nor exaggeration, nor heterodoxy.

Accordingly, whether the purpose of public debate is truth-seeking, self-expression, self-government, or a combination thereof, its central feature is that interlocutors may communicate across personal, communal, and

²⁴¹ 337 U.S. 1 (1949).

²⁴² 432 U.S. 43 (1977) (per curiam).

²⁴³ 376 U.S. 254 (1964).

²⁴⁴ 485 U.S. 46 (1988).

²⁴⁵ *New York Times*, 376 U.S. at 269 (internal quotation marks and citation omitted). On the distinction between participants, audiences, and bystanders in First Amendment law generally, see T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519 (1979).

²⁴⁶ On the concept of public discourse and the First Amendment, see generally Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603 (1990) and Richard H. Fallon, Jr., *Post on Public Discourse Under the First Amendment*, 103 HARV. L. REV. 1738 (1990).

²⁴⁷ On creating communities both within and in opposition to governing law, see generally Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); and Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 1 (1986).

²⁴⁸ See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . .").

²⁴⁹ See, e.g., *Cohen v. California*, 403 U.S. 15, 18 (1971); *Barnette*, 319 U.S. at 641-42; *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

cultural divides. Values and norms may be proposed regardless of whether they are (or ultimately will be) shared by speaker and audience. Although a minimum of shared background norms is required for such discourse to be meaningful, that is, for speaker and listener to understand what is being communicated, even background norms are subject to revision in debate.²⁵⁰ Public debate occurs among persons (and across communities) with divergent belief structures and cultural norms and allows for the continual probing of shared and diverging views. Freedom of speech in this realm, then, provides us with "the possibility of using speech to create new identities."²⁵¹

Legitimately derived norms may be imposed as constraints on action, but a liberal society attempts to preserve a separate sphere of deliberation about the validity of the norms themselves.²⁵² Unless speech incites immediate violence,²⁵³ public debate is limited only by the decentralized mechanism of libel actions to protect individuals from bearing the burden of the culpable dissemination of defamatory facts.²⁵⁴ Beyond that, neither refined discourse nor respect for national symbols is required. Even the most fundamental of values underlying our constitutional structure, such as that of orderly nonviolent political change, may not be imposed as a constraint on public discourse.²⁵⁵ As the Court succinctly stated: "The First Amendment recognizes no such thing as a 'false' idea."²⁵⁶

²⁵⁰ Cf. JAMES TULLY, *STRANGE MULTIPLICITY* 40 (1995) ("[T]he norms of rational acceptability of constitutional recognition are themselves questioned in a piecemeal fashion, in the course of [critical public] discussion [of the constitutive charters of contemporary societies].").

²⁵¹ Post, *supra* note 246, at 631; see also Schauer, *Language*, *supra* note 237, at 283-85 (discussing the constraints and opportunities inherent in the use of words to express new or unconventional concepts).

²⁵² Cf. BERLIN, *supra* note 174, at 131-34 (discussing the concept of positive liberty); CHARLES LARMORE, *THE MORALS OF MODERNITY* 134-41 (1996) (explaining political liberalism's norm of rational dialogue); JOHN STUART MILL, *On Liberty in THREE ESSAYS* 5-21 (Oxford Univ. Press 1975) (1859) (distinguishing restraints on speech from those on action). But cf. MICHAEL HALBERSTAM, *TOTALITARIANISM AND THE MODERN CONCEPTION OF POLITICS* (forthcoming 1999) (challenging the notion that political liberalism promotes deliberation in the public sphere).

²⁵³ See *Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969).

²⁵⁴ On public discourse and defamation, see Post, *supra* note 246, at 646-47. For an analysis of the values preserved by defamation law and a discussion of a possible alternative distribution of burdens, see Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321 (1992).

²⁵⁵ See *Texas v. Johnson*, 491 U.S. 397, 399 (1989); *Cohen v. California*, 403 U.S. 15, 19-22 (1971); *Brandenburg*, 395 U.S. at 448-49.

²⁵⁶ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974)); see also *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe . . .").

In marked contrast to the public debate cases, the commercial speech doctrine disclaims significant reliance on the speaker-based model and instead focuses on the listener.²⁵⁷ With respect to commercial and professional speech, the importance of the speaker is eclipsed by an emphasis on the listener's interest in receiving certain "information."²⁵⁸ In these cases, the Court finds itself able to stand in the shoes of the speaker and listener and definitively assess the communicative enterprise in narrow, functional terms. This conception of speech does not eliminate the speaker as a constitutionally relevant actor²⁵⁹ but focuses, instead, on a substantive vision of the communicative project with the result that the cognizable interests of speaker and listener are harmonized. In the case of commercial speech, it is this harmonization, in part, that allowed Justice Stevens to write that "the same interest that supports regulation of potentially misleading advertising, namely the public's interest in receiving accurate commercial information, also supports an interpretation of the First Amendment that provides constitutional protection for the dissemination of accurate and nonmisleading commercial messages."²⁶⁰

Thus when, as in the case of commercial speech, the Court speaks of listeners' interests, the Court appears to have in mind a paradigm quite dif-

²⁵⁷ See *supra* Part I; see also Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 BROOK. L. REV. 5, 20 (1989) (differentiating between a free speech model in "traditional" areas and a model for commercial speech).

²⁵⁸ As Professor Schauer rightly points out, the Court's focus on "information" cannot literally mean that commercial speech is protected because of the information it provides; everything we do provides a source of some sort of information. See Schauer, *Commercial Speech*, *supra* note 237, at 1193 n.50. For a theory that is based on weighing speakers' interests against those of listeners and the conclusion that in the case of commercial speech the listeners' interests in informed decision making trump those of the speakers in self-actualization, see Alan Howard, *The Constitutionality of Deceptive Speech Regulations: Replacing the Commercial Speech Doctrine with a Tort-Based Relational Framework*, 41 CASE W. RES. L. REV. 1093 (1991).

²⁵⁹ Contrast the Court's treatment of the listener and speaker in such cases as *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), *Kleindienst v. Mandel*, 408 U.S. 753 (1972), *Lamont v. Postmaster General*, 381 U.S. 301 (1965), *Haig v. Agee*, 453 U.S. 280 (1981), and *Procurier v. Martinez*, 416 U.S. 396 (1974), in which the speaker disappears from the realm of constitutional concern. The refusal to recognize a right of the speaker in these cases may be the result of a prudential decision that the recognition of the speaker's independent First Amendment rights is unnecessary to the decision of the case, see *Bellotti*, 435 U.S. at 775-76, or of a more principled decision that the speaker does not enjoy any First Amendment protection as a matter of constitutional law, see *Kleindienst*, 408 U.S. at 762. Whether prudential or principled, however, these cases, in contrast to the professional speech cases, for example, are marked by the ultimate focus on the listener, the disappearance of the speaker as a constitutionally recognized actor, and the lack of judgments about the nature of the discourse that takes place between the speaker and listener.

²⁶⁰ 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496 (1996) (opinion of Stevens, J., joined by Kennedy, Thomas, & Ginsburg, JJ.).

ferent from the quintessential public discourse that is usually invoked by the speaker-based model. Mention of listeners' interests indicates a notion that the discourse is bounded by a project that can be defined *ex ante*. To be sure, the Court just as easily could have described this communicative relationship between listener and speaker from the point of view of the speaker, and indeed, four members of the Court recently took issue with the Court's selection of "the consumer's interest as the exclusive touchstone of commercial speech protection."²⁶¹ Nonetheless, the Court usually reserves its speaker-based rhetoric for cases in which protection is extended to discourse about which the Court is generally agnostic. The speaker-based model is eschewed by the Court in cases, such as those involving commercial and professional speech, where the Court feels that it is able to assess authoritatively the substantive project of the communication. Thus, with regard to these communications, the Court's focus on the listener, albeit perhaps unnecessary, indicates that the State is not, and need not be, agnostic about the common interests of the speaker and listener. Implicit in the Court's listener-based rhetoric in these decisions is the view that the speech within certain relationships, such as those between buyer and seller or between physician and patient, lies beyond the traditional conception of unbounded public discourse, because it takes place as part of a predefined communicative project.²⁶²

In resting its conclusions on this conception, the Court is ultimately resorting to an interpretation of social practice or, as Professor Post once put it in a different context, to "constitutional sociology."²⁶³ Speech regarding a commercial transaction differs from unbounded public debate, in which speakers and listeners are free to construct and challenge cultural background norms, use language in novel ways, and attempt to construct new identities through speech. When speech turns to a commercial transaction, the relationship between speaker and audience is transformed from an exploration of each other's opinions and beliefs into a strategy of striking a

²⁶¹ *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 606 (1997) (Souter, J. dissenting, joined by Rehnquist, C.J., Scalia & Thomas, JJ.).

²⁶² In this sense, the communicative project of commercial speech bears resemblance to Professor Habermas's notion of strategic action. See JÜRGEN HABERMAS, *NACHMETAPHYSISCHES DENKEN* 68-75 (1988). Hannah Arendt seems to have a similar disdain for end-directed communicative action. See HANNAH ARENDT, *THE HUMAN CONDITION* 175-81 (1958) (discussing the connection between action and speech).

²⁶³ Robert C. Post, *The Management of Speech: Discretion and Rights*, 1984 SUP. CT. REV. 169, 200. See generally ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* (1995) (interpreting constitutional law in terms of systematic social ordering).

bargain that is ultimately objectified in a material transaction.²⁶⁴ Certain aspects of the communicative freedom of public debate cannot be preserved in the context of a commercial transaction because the premise of a commercial transaction is that of a socially (and legally) objectified event about which the parties are deemed to have reached a common understanding. A contract, then, does not leave much room for cultural differences or diverging beliefs about the nature of the transacted deal. By entering into a commercial transaction, buyer and seller are deemed to share the background norms and community values that make the exchange possible. Indeed, a commercial transaction could not occur without rules, such as rules governing whether a legal transfer of ownership of a piece of tangible property has occurred.²⁶⁵ This social (and ultimately, legal) practice, in turn, gives speech within the relationship special significance and places it beyond the principles of abstract public debate.²⁶⁶

This conclusion should not be understood to reduce such communication to "conduct" or "action," or to imply that such speech simply is protected "less" by the First Amendment. Instead, the recognition of a bounded speech practice should entail only the conclusion that government regulation, although content-based, may facilitate the speech practice by helping ensure that communication within these relationships satisfies the high degree of intersubjectivity that is necessary to make the social interaction possible at all. Government regulation both reflects and reinforces the common understanding about the content and purpose of the communication that speaker and listener must share in order for the particular speech practice to exist. Viewed in this way, the Supreme Court's treatment of commercial speech parallels its treatment of professional speech.

²⁶⁴ Although the relationship between buyer and seller may be viewed as the reflection of complex social arrangements, these relations are objectified in the commercial exchange by virtue of the transaction's focus on the exchange of value of goods and services. See KARL MARX, *DAS KAPITAL* 49-60 (B. Kautsky ed., Kroener Verlag 1957). Regardless of whether or not the more complex underlying social relations could theoretically be appreciated despite the exchange, as a matter of social (and legal) practice, they are lost in the objectified transaction.

²⁶⁵ These rules may therefore be called "constitutive" rules, since their fulfillment makes the legal event occur. See SEARLE, *supra* note 226, at 33-42 ("Constitutive rules constitute (and also regulate) an activity the existence of which is logically dependent on the rules.")

²⁶⁶ See generally JOHN R. SEARLE, *A Taxonomy of Illocutionary Acts*, in *EXPRESSION AND MEANING*, *supra* note 234, at 18-20 (discussing rules of extra-linguistic institutions); G.J. Warnock, *Some Types of Performative Utterance*, in *ESSAYS ON J.L. AUSTIN* 69, 70 (Isaiah Berlin et al. eds., 1973) (same).

B. *Speech in the Professions*

Professional advice that is sought by a client pertains to a predefined understanding between the interlocutors about the nature of the ensuing communicative interaction. The professional is understood to be acting under a commitment to the ethical and intellectual principles governing the profession and is not thought of as free to challenge the mode of discourse or the norms of the profession while remaining within the parameters of the professional discussion. Without this precommitment to a defined discourse, it indeed would be impossible to seek the advice of a professional in a meaningful manner. In other words, whether the relationships are ones of trust, such as those between lawyer and client or doctor and patient, or are merely common material enterprises, such as those between buyers and sellers, their presence triggers a contextual First Amendment review that is specifically centered around the social relation, as opposed to an abstract review such as that traditionally applied to the street-corner speaker.

The medical and legal professions, for example, have long been subject to licensing and supervision by the State "for the protection of society,"²⁶⁷ and the Court has indicated that such regulations would be upheld if they "have a rational connection with the applicant's fitness or capacity to practice" the profession.²⁶⁸ Although the Court has generally held that restrictions on the practice of a profession must not violate constitutional provisions such as the Due Process or Equal Protection Clauses, the Supreme Court and lower courts have rarely addressed the First Amendment contours of a professional's freedom to speak to a client.²⁶⁹ Accordingly, courts have

²⁶⁷ *Dent v. West Virginia*, 129 U.S. 114, 122 (1889); see also *Barsky v. Board of Regents*, 347 U.S. 442, 451 (1954) (noting that the State maintains regulatory authority over the practice of medicine).

²⁶⁸ *Schwartz v. Board of Bar Exam'rs*, 353 U.S. 232, 239 (1957).

²⁶⁹ Cases and commentary regarding professional speech have generally focused on the First Amendment rights of professionals to advertise their services. See generally Fred S. McChesney, *Commercial Speech in the Professions: The Supreme Court's Unanswered Questions and Questionable Answers*, 134 U. PA. L. REV. 45 (1985). Beyond that, the Court has repeatedly recognized the basic First Amendment right to consult an attorney and, conversely, the right of a third party to refer someone to an attorney. See *United Transp. Union v. State Bar*, 401 U.S. 576, 585 (1971) ("[C]ollective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment."); *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 221-22 (1967) ("We hold that the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments gives [the union] the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights."); *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1, 5 (1964) ("It cannot be seriously doubted that the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them . . ."); *NAACP v. Button*, 371 U.S. 415, 428-29 (1963) (holding that the NAACP's legal ac-

failed to develop a general method for reviewing restrictions on professional speech. The few cases that have reviewed such restrictions in light of First Amendment challenges, *Planned Parenthood v. Casey*,²⁷⁰ *Rust v. Sullivan*,²⁷¹ and *SEC v. Lowe*,²⁷² however, may be read as having applied a contextual approach centered around the social roles of speaker and listener.

In the Supreme Court, the most sustained discussion about speech in the professions has centered around physicians' speech on the subject of contraception and abortion. The First Amendment aspect of these decisions has frequently gone unappreciated, in part due to the Court's obvious focus on whether the patient was exercising a fundamental right and in part due to the Court's own statements implying that a physician's constitutional rights are to be subsumed under the rights of the patient to receive treatment.²⁷³ Properly viewed, however, these decisions bear significantly on the First Amendment protection of professional speech.

Dissents in the early contraception and abortion cases of the 1960s first noted the First Amendment protection of a physician's right to advise her patient about devices, medicines, and cures that the physician believed might be beneficial.²⁷⁴ Without much discussion or response from the Court

tivities are "modes of expression and association protected by the First and Fourteenth Amendments"). *But see* *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 335 (1985) (rejecting a First Amendment claim regarding legal representation before an administrative agency as "inseparable" from the due process claim and noting that the former was without "independent significance"). First Amendment review of restrictions on the substance of the communication between professional and client, in contrast, is seldom addressed.

²⁷⁰ 505 U.S. 833 (1992).

²⁷¹ 500 U.S. 173 (1991).

²⁷² 472 U.S. 181 (1985).

²⁷³ *See Casey*, 505 U.S. at 884 ("Whatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman's position."); *Whalen v. Roe*, 429 U.S. 589, 604-05 n.33 (1977) (noting that nothing in prior abortion case law "suggests that a doctor's right to administer medical care has any greater strength than his patient's right to receive such care"); *see also Doe v. Bolton*, 410 U.S. 179, 197-99 (1973) (striking down a state abortion statute because it "substantially limited" a patient's "right to receive medical care in accordance with her licensed physician's best judgment and the physician's right to administer [care]"). *But cf. Roe v. Wade*, 410 U.S. 113, 165-66 (1973) (recognizing the "right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention").

²⁷⁴ *See Griswold v. Connecticut*, 381 U.S. 479, 507 (1965) (Black, J., joined by Stewart, J., dissenting).

Had the doctor defendant here . . . been convicted for doing nothing more than expressing opinions to persons coming to the clinic that certain contraceptive devices, medicines or practices would do them good and would be desirable, or for telling people how devices could be used, I can think of no reasons at this time why their expressions of views would not be protected by the First and Fourteenth Amendments, which guarantee freedom of speech.

majorities, these dissents noted categorically that a physician could not be sanctioned for expressing opinions and beliefs about a potential course of treatment.²⁷⁵ Two decades later, in *Thornburgh v. American College of Obstetricians & Gynecologists*²⁷⁶ and *City of Akron v. Akron Center for Reproductive Health, Inc.*,²⁷⁷ the Court struck down governmental interference with the exchange of information between doctor and patient. At issue were requirements that physicians inform women seeking abortions about the State's position on abortion, potential services as alternatives to abortion, and certain characteristics of the fetus at the time of the contemplated abortion.²⁷⁸ The Court struck down these requirements because (1) they were "designed not to inform . . . but rather to persuade," and (2) "a rigid requirement that a specific body of information be given in all cases, irrespective of the particular needs of the patient, intrudes upon the discretion of the pregnant woman's physician and thereby imposes [an] undesired and uncomfortable straitjacket."²⁷⁹ The Court found that these rigid mandates were "contrary to accepted medical practice,"²⁸⁰ could "infringe upon [the physician's] professional responsibilities,"²⁸¹ and that "[a]ll this is, or comes close to being, state medicine imposed upon the woman, not the professional medical guidance she seeks, and it officially structures . . . the dialogue between the woman and her physician."²⁸² Without basing its holding on the First Amendment, the Court struck down these requirements because they burdened, without sufficient justification, a woman's ability to obtain an abortion.²⁸³

Id. at 529 n.3 (Stewart, J., dissenting). "If all the appellants had done was to advise people that they thought the use of contraceptives was desirable, or even to counsel their use, the appellants would, of course, have a substantial First Amendment claim." *Id.*; see also *Poe v. Ullman*, 367 U.S. 497, 513-15 (1961) (Douglas, J., dissenting).

The right of the doctor to advise his patients according to his best lights seems so obviously within First Amendment rights as to need no extended discussion. . . . Of course a physician can talk freely and fully with his patient without threat of retaliation by the State. . . . The State has no power to put any sanctions of any kind on him for any views or beliefs that he has or for any advice he renders. These are his professional domains into which the State may not intrude.

Id.

²⁷⁵ Perhaps due to the focus of these decisions, the dissents did not attempt to reconcile their broad statements with the unchallenged existence of malpractice suits.

²⁷⁶ 476 U.S. 747 (1986), *overruled in part by Casey*, 505 U.S. 833.

²⁷⁷ 462 U.S. 416 (1983), *overruled in part by Casey*, 505 U.S. 833.

²⁷⁸ See *Thornburgh*, 476 U.S. at 760-61 (elaborating on the informed consent provision).

²⁷⁹ *Id.* at 762 (internal quotation marks and citations omitted).

²⁸⁰ *Id.*

²⁸¹ *Id.* at 763.

²⁸² *Id.*

²⁸³ See *id.* at 771-72.

The Court substantially retreated from *Thornburgh* and *Akron* in *Casey*, when it rejected an argument that a similar informational requirement imposed by the State of Pennsylvania was unconstitutional as well. Attempting to retain the central holding of *Roe*, while recalibrating the abortion balance to allow for greater expression of the State's interest in averting the abortion, the plurality retreated from the breadth of its earlier holdings that had prohibited the State from intervening in the informational dialogue between physician and patient.²⁸⁴

To the extent *Akron* and *Thornburgh* find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the "probable gestational age" of the fetus, those cases go too far, are inconsistent with *Roe*'s acknowledgment of an important interest in potential life, and are overruled.²⁸⁵

With regard to the more specific claim about the infringement on physicians' First Amendment rights, as noted above, the lead opinion of Justices O'Connor, Kennedy, and Souter tersely concluded:

To be sure, the physician's First Amendment rights not to speak are implicated, see *Wooley v. Maynard*, 430 U.S. 705 (1977), but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, cf. *Whalen v. Roe*, 429 U.S. 589, 603 (1977). We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.²⁸⁶

As noted above, we should approach this brief pronouncement with some caution and refrain from concluding lightly that the plurality meant to appeal to the kind of rationality review used for economic regulations under the Due Process Clause. *Casey*'s main focus on the constitutional protection of the abortion procedure itself did not permit a wide ranging discussion of First Amendment issues. Without committing to a particular test, the plurality appears to have imported a more stringent rationality review with some consideration of the First Amendment values "implicated" in the communications between professional and client. Ultimately, it left the development of a coherent framework for the analysis of professional speech for another day.

²⁸⁴ See *Planned Parenthood v. Casey*, 505 U.S. 833, 881 (1992).

²⁸⁵ *Id.* at 882.

²⁸⁶ *Id.* at 884. For a similar shorthand formulation in state court, see *People v. Jeffers*, 690 P.2d 194, 198 (Colo. 1984) (en banc), upholding a felony conviction for the unlawful practice of medicine where an individual knowingly recommended, prescribed, and administered medical treatment without a valid license, and noting that "[t]he practice of medicine itself is not protected by the first amendment," and that "[t]herefore, reasonable regulation of medical practice does not conflict with first amendment protections."

Indeed, the Chief Justice's opinion, which spoke for four members of the Court, did not refer to the First Amendment and simply noted that the information requirement "is rationally related to the State's interest in assuring that a woman's consent to an abortion be a fully informed decision."²⁸⁷ Chief Justice Rehnquist's approach thus echoed the due process analysis elaborated by Justice White's dissenting opinion in *Thornburgh*. There, Justice White had argued against "the possibility that the Constitution provides more than minimal protection for the manner in which a physician practices his or her profession or for the 'dialogues' in which he or she chooses to participate in the course of treating patients."²⁸⁸ Thinking it "clear that regulation of the practice of medicine, like regulation of other professions and of economic affairs generally, was a matter peculiarly within the competence of legislatures," Justice White concluded "that such regulation was subject to review only for rationality."²⁸⁹

Justice White's rationality review, as adopted by four members of the Court in *Casey*, fails to give professional speech its due. At a minimum, professional speech should be accorded no less protection than commercial speech. Neither the subject matter of the speech, nor the preexisting understanding between physician and patient about the boundaries of the conversation, nor the fact that physicians are paid for advice that they render based on a public body of knowledge, should suffice to deprive professional speech of protection under the First Amendment. None of the arguments based on economics, culture, democracy, liberty, or the centrality of any physical or economic transaction suffices to displace protection for a communicative exchange that would otherwise be covered by the First Amendment. Indeed, as compared to commercial speech, we might even expect the deeper relationship between physician and patient to lead, at least in some cases, to protection beyond that afforded to commercial speech.

²⁸⁷ *Casey*, 505 U.S. at 967 (Rehnquist, C.J., joined by White, Scalia, & Thomas, JJ., concurring in part and dissenting in part). Justices Stevens and Blackmun would have struck down the information requirement as unconstitutional without expressly discussing the First Amendment question. See *id.* at 917 (Stevens, J., concurring in part and dissenting in part); *id.* at 936 (Blackmun, J., concurring in part and dissenting in part).

²⁸⁸ *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 746, 802 (1986) (White, J., joined by Rehnquist, J., dissenting), *overruled in part by Casey*, 505 U.S. 833.

²⁸⁹ *Id.* (citing *Williamson v. Lee Optical*, 348 U.S. 483 (1955)). *Williamson* was decided when commercial speech was still subject to only rational basis review, and it is somewhat unclear why Justice White, who appears to have accepted *Virginia Pharmacy Board's* protection of commercial speech, would so cavalierly cite *Williamson* for a proposition that had been disavowed by the Court 10 years before hearing *Thornburgh*. Perhaps, though, the citation was not intended to appeal to precedent for analyzing commercial speech under rational basis review, but simply as a reference to the standard governing rational basis review.

1. Identifying Professional Speech

The issue of when speech should be considered to have taken place in a professional setting is well illustrated by *SEC v. Lowe*, which concerned an SEC order prohibiting the publication of a securities newsletter by a former investment adviser who had lost his license due to fraudulent conduct.²⁹⁰ The various opinions issued in that case also underscore the relationship between the commercial speech doctrine and the constitutional protection of professional speech. As did the court of appeals in *Casey*, the court of appeals in *Lowe* analyzed the case as involving commercial speech.²⁹¹ When *Lowe* reached the Supreme Court, however, the Court analyzed the SEC's restriction as the regulation of a profession.²⁹²

Discussion about the relevant standards used was fairly extensive. The Second Circuit assumed that the commercial speech doctrine could serve to analyze restrictions on speech in the professions²⁹³ and the court was divided mainly over whether the speech at issue fell within the commercial (and hence, professional) sphere.²⁹⁴ The discussion regarding whether the speech was commercial focused primarily on the content of the publication instead of the relationship between Lowe and his readers.²⁹⁵ Writing for the majority, Judge Oakes relied on *Central Hudson's* second definition of commercial speech, "expression related solely to the economic interests of the speaker and its audience,"²⁹⁶ and held that the definition encompassed

²⁹⁰ 725 F.2d 892 (2d Cir. 1984), *rev'd*, 472 U.S. 181 (1985).

²⁹¹ *See id.* at 901 ("That commercial speech is involved leads to no different result."). In *Casey*, the court of appeals reviewed the disclosure requirement under commercial speech standards, noting that "[t]his case involves commercial speech, and the clinics do not dispute this point." *Planned Parenthood v. Casey*, 947 F.2d 682, 705 (3d Cir. 1991).

²⁹² *See Lowe v. SEC*, 472 U.S. 181, 190 (1985) ("We . . . review . . . with a particular focus on the legislative history describing the character of the profession that Congress intended to regulate.").

²⁹³ *See Lowe*, 725 F.2d at 900 n.6 ("[W]hether we view this case as one involving commercial speech or the regulation of the professions, the [Act] does not conflict with the First Amendment.").

²⁹⁴ *See id.* at 905 (Briant, J., dissenting).

²⁹⁵ *See id.* at 900 (noting that commercial speech must be distinguished "by its content" (quoting *Bates v. State Bar*, 433 U.S. 350, 363 (1977)) (citations omitted)); *id.* at 906 (Briant, J., dissenting) ("Enough has been said concerning the contents of the Lowe newsletters to demonstrate that they do more than 'propose commercial transactions.'"). Although the majority acknowledges the district court judge's analysis, which was based on the distinction between personal and impersonal investment advice, *see id.* at 895-96, and the dissent mentions in passing that the advice contained in the newsletter was not "individualized" and was "immediately known to all" upon publication, *id.* at 903-04, this mode of analysis is not developed further in the opinions of the judges on appeal.

²⁹⁶ *Id.* at 900 (quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980)).

Lowe's sale of advice about the value of securities and the wisdom of purchasing or selling securities.²⁹⁷ Judge Brieant, in his dissent, thought that publication of the newsletter differed from the activities of an investment adviser, much as the dissemination of a health care publication differed from the practice of medicine.²⁹⁸ Noting that the Supreme Court's commercial speech doctrine was "confined to naked advertising"²⁹⁹ and arguing that the newsletter went beyond this narrow category by including "expression of fact and opinion implicating . . . 'substantial individual and societal interests',"³⁰⁰ Judge Brieant was of the opinion that the newsletter did "more than 'propose commercial transactions'"³⁰¹ and was entitled to "full First Amendment protection."³⁰²

This debate, although understandable in light of the Court's commercial speech rhetoric, misses the point of the protection and regulation of professional speech. Even true investment advice, which both the majority and the dissent agreed could be regulated, does not always consist of proposing a commercial transaction. To be sure, investment advisers might suggest purchasing securities from the adviser, but core regulable investment advice also would presumably include advice about the value of securities or the advisability of investing in, purchasing, or selling securities, even when those transactions would take place between the client and third parties who have no financial or other relation to the adviser. That kind of communication is not captured by the phrase "propose a commercial transaction,"³⁰³ since it is not a proposal to engage in a commercial transaction with the speaker or the speaker's agent.³⁰⁴ Similarly, although a professional might be viewed as engaged in the transaction of selling his professional advice, one must, of course, distinguish between the offer of professional services, which is akin to a commercial proposal,³⁰⁵ and the actual presentation of the

²⁹⁷ See *id.* at 900-01.

²⁹⁸ See *id.* at 903 (Brieant, J., dissenting).

²⁹⁹ *Id.* at 904 (Brieant, J., dissenting).

³⁰⁰ *Id.* at 906 (citation omitted) (Brieant, J., dissenting).

³⁰¹ *Id.* (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)).

³⁰² *Id.* at 906; see also *id.* at 907 ("[A]ppellees do seek to report 'newsworthy facts' and make 'generalized observations' about economic and financial conditions as well as recommending stocks and issuers.").

³⁰³ *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973).

³⁰⁴ Cf. *Roberts v. United States Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring in part and concurring in the judgment) (noting that commercial speech is "speech intended and used to promote a commercial transaction *with the speaker*" (emphasis added)).

³⁰⁵ Cf. *McChesney*, *supra* note 269, at 69 (discussing the promotion of professional services).

professional advice, which is no more a “commercial transaction” than is the actual writing or reading of a book or newspaper that is available for sale. The simultaneity of the production and consumption of the speech in the case of professional advice should not obscure the fact that this communication is distinct from that of advertising the professional advice.

The debate in the court of appeals is reminiscent of the Supreme Court’s commercial speech decisions prior to *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,³⁰⁶ because it turned on whether the newsletter contained either different or additional information from the investment advice Lowe provided as a registered adviser. But both the Investment Adviser’s Act of 1940³⁰⁷ and common sense indicate that the crucial difference lies elsewhere. The Act defines “investment adviser” as one

who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities.³⁰⁸

The statutory exemption relevant in *Lowe* did not focus on the content of the advice, but on its form and context, excluding “the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation.”³⁰⁹ The majority reveals its contrary focus on content, however, when it attempts to pick up on this latter formulation of the exemption but transforms the exemption by noting that Lowe “is not prohibited from publishing a newspaper of general *interest and circulation*.”³¹⁰ The exemption, however, says nothing about the content of the publications or their particular “interest” to readers, but exempts “financial publications” as long as they are of general and regular “circulation.” The last sentence of the Second Circuit’s opinion, which summarizes the holding, appears to highlight the law’s true concern, but does so without explanation: “What [Lowe] is prohibited from doing is selling *to clients* advice and counsel; analysis and reports as to the value of specific securities or as to the advisability of investing in, purchasing or selling or holding specific

³⁰⁶ 425 U.S. 748 (1976)

³⁰⁷ 15 U.S.C. § 80b-1 to 21 (1994).

³⁰⁸ *Id.* § 80b-2(a)(11).

³⁰⁹ *Id.*

³¹⁰ *SEC v. Lowe*, 725 F.2d 892, 902 (1984) (emphasis added), *rev’d*, 472 U.S. 181 (1985).

securities.”³¹¹ It is thus the existence of a professional/client relationship that triggers the SEC’s legitimate regulatory authority.

By contrast, both Judge Weinstein in the district court³¹² and Justice Stevens in the Supreme Court,³¹³ focused expressly on the difference in the relationship between the speaker and the audience when comparing the traditional business of investment advisers to the business of disseminating a publication of regular circulation. The Supreme Court³¹⁴ and the district court³¹⁵ both read the statute narrowly in light of the First Amendment concerns that would be raised if the Act were extended to cover Lowe’s newsletter. Both courts held that the Act did not reach the publication of impersonal investment advisory material.³¹⁶ As Justice Stevens explained in the opinion of the Court:

As long as the communications between petitioners and their subscribers remain entirely impersonal and do not develop into the kind of fiduciary, person-to-person relationships that were discussed at length in the legislative history of the Act and that are characteristic of investment adviser-client relationships, we believe that the publications are, at least presumptively, within the exclusion and thus not subject to registration under the Act.³¹⁷

Justice White, writing separately because he was unwilling to read the statute narrowly, put the majority’s statutory holding into constitutional terms. Justice White noted that although speech and the press could not be subject to restrictive licensing schemes, Lowe’s status as a professional introduced a feature that allowed for government regulation, and it was incumbent on the Court “to locate the point where regulation of a profession

³¹¹ *Id.* (emphasis added).

³¹² *See SEC v. Lowe*, 556 F. Supp. 1359, 1371 (E.D.N.Y. 1983) (“The offer of defendants to their subscribers to provide current information by telephone goes beyond impersonal communication. It creates dangers of personal advice. The SEC may reasonably deny this right to publishers barred from giving personal advice.”), *rev’d*, 725 F.2d 892 (2d Cir. 1984), *rev’d*, 472 U.S. 181 (1985).

³¹³ *See Lowe v. SEC*, 472 U.S. 181, 210 (1985) (focusing on “[t]he content of the publications and the audience to which they are directed”).

³¹⁴ *See id.* at 210 n.58 (“[I]t is difficult to see why the expression of an opinion about a marketable security should not also be protected [by the First Amendment].”).

³¹⁵ *See* 556 F. Supp. at 1370.

³¹⁶ The District Court upheld the SEC’s order insofar as it enjoined the provision of personal advice in a telephone hotline open to subscribers of the newsletter, *see id.* at 1371, and this portion of the district court’s order was not challenged in the Supreme Court, *see Lowe*, 472 U.S. at 186.

³¹⁷ 472 U.S. at 210. The cautionary use of “presumptively” simply avoided the issue of whether the exclusion would reach an investment adviser’s newsletter to clients with whom the adviser had a trust relationship. *See id.* at 210-11 n.59 (“However, the Commission does not suggest that this ‘practice’ [of advising several clients through the newsletter] is involved here, thus, we have no occasion to address this concern.”).

leaves off and prohibitions on speech begin."³¹⁸ Seizing the analogy to commercial speech and embracing the view that it is the special relationship between professional and client that allows the government to regulate communications within that relationship, he wrote:

One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession. Just as offer and acceptance are communications incidental to the regulable transaction called a contract, the professional's speech is incidental to the conduct of the profession. . . . Where the personal nexus between the professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment's command³¹⁹

We need not accept Justice White's paradigm of the speech/conduct distinction,³²⁰ nor do we need to subscribe to his narrow conception of rationality review as outlined in *Thornburgh* in order to agree with him that speech in the professions may be regulated because of the relationship of trust between professional and client, that is, because they have established a special relationship beyond that between strangers discussing politics on the street corner.

The threshold determination for enforcement of professional norms will therefore be whether the speech is uttered in the course of professional practice and not merely whether the speech was uttered by a professional. The State's permissible interest in licensing physicians is limited to practicing physicians and does not allow the State to require a license as a prerequisite for a physician to speak about medicine outside the context of professional practice. As Justice Jackson noted in *Thomas v. Collins*, "the state may prohibit the pursuit of medicine as an occupation without its license,

³¹⁸ *Id.* at 232 (White, J., concurring in the judgment).

³¹⁹ *Id.*

³²⁰ For the classic articulation of the speech/conduct distinction, see THOMAS I. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* (1966). "The whole theory rests upon the general proposition that expression must be free and unrestrained, that the state may not seek to achieve other social objectives through control of expression, and that the attainment of such objectives can and must be secured through regulation of action." *Id.* at 115; see also THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 311 (1970) (noting that the distribution of commercial handbills is among the "*activities* [that] fall within the system of commercial enterprise and are outside the system of freedom of expression" (emphasis added)); *id.* at 405 ("Communication also tends to become action as the speaker assumes a personal relation to the listener, deals with him on a face-to-face basis, or participates in an agency or partnership arrangement.").

but . . . it could [not] make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought.³²¹ Similarly, a plaintiff in a malpractice case must demonstrate that the challenged advice not only was issued by a physician, but that it was conveyed in the context of an established physician-patient relationship.³²²

Justice Stevens's and Justice White's opinions in *Lowe* point to a view of professional speech that bears significant similarities to the Court's view of commercial speech, although not for the reasons discussed by the Second Circuit. Both Justice Stevens and Justice White emphasize the importance of the relationship to a client for whose benefit the State may regulate the communication. This is not far from the Court's examination of commercial communications with the interests of the listener in mind. Indeed, the Court remarked that professionals' interests may be subordinated to those of their clients when it noted in *Casey* that "[w]hatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman's position."³²³ As in the case of commercial speech, the focus on the listener in professional speech would again be, strictly speaking, misplaced, because a professional's interest in communicating to a client should be constitutionally relevant.³²⁴ Nonetheless, the focus on the listener would point to the existence of a professional-client dialogue as a bounded speech practice in which the communicative project can be defined *ex ante*. Here, too, and perhaps even more obviously than in the case of commercial speech, government regulation may facilitate the existence of the speech practice, because meaningful medical advice can only be gained when the patient is assured that the physician providing the advice remains true to the precepts of the profession. Government regulation and licensing of the profession as well as the legal enforcement of professional norms thus may assist in establishing the trust that patients can place in their physicians.

2. Regulating Professional Speech

Although the Court has said even less about the extent of permissible regulation of professional speech than about identifying the category of such communications, it would seem that the scope of permissible regulation of the physician-patient dialogue must be determined with a view to the nature

³²¹ 323 U.S. 516, 544 (1945) (Jackson, J., concurring).

³²² See *Bienz v. Central Suffolk Hosp.*, 557 N.Y.S.2d 139, 139-40 (App. Div. 1990).

³²³ *Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992).

³²⁴ Cf. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 478-80 (1997) (Souter, J., dissenting) (noting that the listener's interests should not be made the sole touchstone of the constitutional analysis of commercial speech).

of the underlying relationship. Apart from the recognition of a predefined communicative project, the physician-patient relationship is marked by an imbalance of authority. Patients seeking the help of a physician tend to lack the knowledge to evaluate their own medical condition or to understand fully the various treatment options apart from their careful presentation by the physician.³²⁵ They are not privy to the discourse of medical science and are not usually in a position to rely on their own evaluation of the best course of action independent from their encounters and discussions with physicians. To varying degrees, patients will "suspend their critical faculties and defer to physicians' opinions."³²⁶ Although patients may get a second opinion, the social practice of seeking treatment from a physician, or even a second opinion, is not a general unbounded scholarly investigation, but the placing of trust in, and the recognition of the authority of, one or more physicians. Undoubtedly as a result of this imbalance, the social practice surrounding medical care and advice includes the recognition that physicians assume certain fiduciary responsibilities in the context of this relationship.³²⁷ A physician generally must act in the patient's best interest³²⁸ and is expected to use his best judgment, as Robert Goldstein has said, to bring "general knowledge to bear on the unique circumstances of a particular client in the context of a professional helping relationship."³²⁹ Physicians avoid conflicts of interest and act in paternalistic ways, such as withholding information from patients where "communication of the . . . information would present a threat to the patient's well-being."³³⁰ Permissible regulation may track these concerns.

³²⁵ See *Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir. 1972) ("The average patient has little or no understanding of the medical arts, and ordinarily has only his physician to whom he can look for enlightenment with which to reach an intelligent decision."); *id.* at 782 ("His dependence upon the physician for information affecting his well-being, in terms of contemplated treatment, is well-nigh abject.").

³²⁶ Paula Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U. L. REV. 201, 226 (1994); see also CHARLES W. LIDZ ET AL., INFORMED CONSENT: A STUDY OF DECISIONMAKING IN PSYCHIATRY 3-5 (1984) (explaining the need for informed consent).

³²⁷ See *Canterbury*, 464 F.2d at 782 ("The patient's reliance upon the physician is a trust of the kind which traditionally has exacted obligations beyond those associated with arms-length transactions.").

³²⁸ Clinical trials raise difficult ethical problems, in part, because the individual patient in the control group may not be receiving the treatment that the physician would think best under the circumstances. Yet, this is an exception that proves the rule. Physicians feel the need to justify such "treatment" and must therefore obtain the informed consent of participating individuals.

³²⁹ Robert D. Goldstein, *Reading Casey: Structuring the Woman's Decisionmaking Process*, 4 WM. & MARY BILL RTS. J. 787, 862 (1996).

³³⁰ *Canterbury*, 464 F.2d at 789.

The recognition that speech in the physician-patient relationship may be regulated in a manner that speech outside that context cannot, does not mean that restrictions on professional speech do not raise First Amendment concerns. To the contrary, *Rust v. Sullivan* indicates that professional speech is an important, albeit bounded, communicative realm that is worthy of constitutional protection.³³¹ In upholding the regulation that physicians employed by federally funded family planning services could not discuss abortion as a method of family planning, the Court in *Rust*, as noted in the Introduction, did not hold that the government may dictate what federally funded physicians may say. The Court noted that with regard to traditional spheres of free expression, such as public fora and public universities, the Constitution demands government neutrality with regard to speech even when the government funds the institution, and that a similar argument might be made that "traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government."³³² The Court ultimately found it unnecessary to address that potential argument because the physician in *Rust* was acting as a service provider in a federally defined program instead of as a traditional physician.³³³

The implications of *Rust* and *Casey* may seem contradictory at first blush, in that professional speech may seem both more and less protected than nonprofessional speech. The content of speech by a person standing on the street corner generally is not subject to regulation absent a compelling interest. *Casey* suggests that the content of professional speech, in contrast, generally is subject to "reasonable regulation" by the State when it takes place without federal support.³³⁴ When the government chooses to employ the street-corner speaker and the physician, however, *Rust* implies that the government can dictate the speech of the former but not of the latter.

An initial reply might point out that this view overstates the State's ability to regulate government-funded speech outside the professional realm. *Rust* itself noted that government funding of a public forum is sub-

³³¹ See *supra* notes 6-13 and accompanying text.

³³² *Rust v. Sullivan*, 500 U.S. 173, 200 (1991).

³³³ See *id.* (observing that the relationship was not "sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice"). In other words, the Court's reference to "comprehensive medical advice" should not be read as a reference to advice with regard to all medical issues but instead as a reference to advice from a full-fledged physician acting as such. Even physicians practicing a limited specialty provide comprehensive professional services in the sense that they offer full advice within the realm of their professional expertise and provide the patient information about the limitations of their practice.

³³⁴ See *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975) ("Advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest.").

ject to a principle of neutrality.³³⁵ Thus, when the government chooses to fund the street-corner speaker's own speech, as opposed to employing the speaker as a government spokesperson, the government may not impose viewpoint restrictions on the recipient of the funds.³³⁶ Only when the government employs an individual as its mouthpiece may the government dictate what its spokesperson will say. Applying this view to the physician would appear to indicate that the physician is protected from government censure under *Rust* only when the physician is merely "subsidized" by the government, that is, when the physician's own speech is funded by the federal fisc.³³⁷ *Rust* arguably says nothing about a full-fledged government employee who happens to be a physician, and thus the opinion possibly suggests that the government's full-fledged employee, that is, the family planning counselor disseminating the government's family planning advice, may be compelled to follow a government script. Accordingly, it might be claimed that the contradiction is illusory.

This initial reply points to the resolution of the tension, but it is not yet complete. The problem lies in distinguishing the circumstances in which a government-funded physician may be said to have become the government's mouthpiece from those in which the government essentially must be viewed as funding the physician's own speech. To be sure, there is no question that the President may fire the Surgeon General for making public statements that the President determines to be contrary to public policy or even plain politics. The fact that the Surgeon General is a physician makes no difference, because in speaking about public health issues, the Surgeon General is not acting within the traditional doctor-patient relationship that defines the bounded discourse of the profession. It is far less certain, however, whether a government physician treating a patient at a Veterans Affairs hospital could be dismissed on the basis that the physician provided professionally sound advice with which the President disagreed on political grounds. Although *Rust* does not address the question of a federally employed (as opposed to a subsidized) physician, it does suggest that the physician's status as a federal grantee or full-time federal employee does not determine whether the neutrality principle should be held to apply. Instead, *Rust* focused, once again, on the listener, asking whether the physician-patient relationship was "sufficiently all encompassing so as to justify an

³³⁵ See *Rust*, 500 U.S. at 199-200.

³³⁶ See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (holding that a public university's refusal to fund a religious student newspaper violated the First Amendment).

³³⁷ See *Rust*, 500 U.S. at 200.

expectation on the part of the patient of comprehensive medical advice.”³³⁸ Again, the focus on the listener is a proxy for the recognition of a determined social practice that is protected by the First Amendment. As *Rust* notes, the expectation must be “reasonabl[e].”³³⁹ The First Amendment protects not the individual listener’s subjective desire for information, but the practice of the profession.³⁴⁰ In light of the Court’s discussion in *Rust*, it is indeed doubtful that the government could employ a physician to serve in the traditional capacity of a physician and nonetheless dictate the physician’s speech to his or her patient. When the government employs a professional to provide advice to clients, the government will be subject to the neutrality principle, unless the government has sufficiently extracted the interlocutors from the social practice that ordinarily provides the context for the advice.

The notion of funding a bounded speech institution is therefore both similar to, and different from, the concept in *Rosenberger* of funding “private” speech. It is similar to funding private speech in the sense that the speaker enjoys a degree of autonomy from the government despite the government funding; the government is funding speech that is ultimately controlled by the speaker, not the government. In both situations the government is funding a preexisting speech practice that is not defined by the government. Government funded medical advice is different from the speech in *Rosenberger*, however, in that the latter was truly private, in the sense that the government had no legitimate claim on the content of the funded speech. The students in *Rosenberger* were in complete control over the content of the speech and were at liberty to “us[e] speech to create new identities.”³⁴¹ The treating physician, in contrast, is acting in a “public” capacity even when not funded by the government. The physician’s speech is public in the sense that the physician is not permitted to use speech in novel ways or to challenge the basic institution of the medical dialogue between physician and patient. Despite this “public” function of the speech, how-

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ *Cf. International Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring in the judgment) (“[T]he inquiry [into whether certain government property constitutes a public forum] must be an objective one, based on the actual, physical characteristics and uses of the property.”); *United States v. Kokinda*, 497 U.S. 720, 737-38 (1990) (Kennedy, J., concurring in the judgment) (“If our public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of Government property and its customary use by the public may control the case.”).

³⁴¹ *Post, supra* note 246, at 631; *see also* Schauer, *Language, supra* note 237, at 283-85. At least this was the assumption on which the Court appears to have been operating in deciding the case.

ever, the physician retains a measure of independence from the government when the government employs the physician to act as a professional.³⁴²

Rust and, although to a lesser extent, *Rosenberger* may thus be read to suggest that in funding a bounded speech institution, the government will be held to funding the entire institution unless it extracts the actors sufficiently from their traditional roles. This extraction would be necessary to put everyone on notice that the government-funded speaker is not acting in his or her traditional role within a particular speech institution. Thus, a federally funded physician cannot be given a script, although a federally funded family planning official can. To be sure, the government may fund physicians expressly for a particular specialty and thus limit the procedures that they may perform. Such limitations are entirely compatible with the conscientious practice of the profession. The government may not, however, prohibit a government physician from providing the truthful medical advice that a conscientious private physician, who practiced a limited specialty, would nonetheless provide. Thus, the State may decide that its physicians will not perform a certain procedure, but it must not prevent a government physician (acting as a physician instead of as an official family planning counselor) from advising a patient about the possibility of obtaining such a procedure elsewhere and of the nature of the limitations on the physician's practice.³⁴³

³⁴² For valuable discussions of a context-dependent obligation of government neutrality in funding speech, see David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 743-47 (1992) (arguing for government neutrality in funding of, *inter alia*, professional fiduciary counseling); Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151 (1996) (drawing a distinction between speech within public discourse and speech within government's managerial domain, and suggesting a presumption of neutrality in subsidies of speech within the former realm); Jessica A. Roth, *It Is Lawyers We Are Funding: A Constitutional Challenge to the 1996 Restrictions on the Legal Services Corporation*, 33 HARV. C.R.-C.L. L. REV. 107 (1998) (arguing for the application of public forum analysis to government restrictions on funding of Legal Services Corporation lawyers); Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998) (arguing that a coherent approach to speech funding cases must take account of institution-specific decision making).

³⁴³ These same issues are at stake in the current round of Legal Services Corporation litigation. See *Velazquez v. Legal Servs. Corp.*, 164 F.3d 757 (2d Cir. 1999); *Legal Aid Soc'y v. Legal Servs. Corp.*, 145 F.3d 1017 (9th Cir. 1998). According to the principles discussed in the text, the government would not violate the First Amendment by limiting the legal services for which it pays, as long as private attorneys might similarly limit their practice and nonetheless ethically fulfill their professional roles. This view would reject, on the one hand, the argument that the First Amendment is entirely inapplicable in this context and, on the other, the contention that the government has created a public forum for the private expression of ideas and therefore is compelled by the First Amendment to fund the litigation of every claim. Instead, a view centered on the social practice at issue, that is, the legal profession, would recognize that when the government funds professional services, the First Amendment is implicated and requires that restrictions respect the integrity of the profession.

C. Commercial Speech

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council itself was, of course, also a case about the speech of professionals.³⁴⁴ At issue was the restriction of pharmacists' advertising, and Virginia defended the law as a regulation of professional practice.³⁴⁵ The Court recognized the pharmacists' special "expertise" and professional relationship with physicians and customers, but did not see how the ban on price advertising furthered Virginia's interest in professionalism.³⁴⁶ The State had argued that price advertising would lead to price competition, which, in turn, would lead to a reduction in the professional services that pharmacists could afford to provide to their customers. The Court rejected the notion that the advertising ban directly affected Virginia's goal in professionalism, because the provision of a certain level of services could be regulated directly without an advertising ban.³⁴⁷ Similarly, the ban did nothing to ensure that the pharmacist would respond to the reduced competition by maintaining professional standards. The ban thus unnecessarily infringed upon speech without any promise of success. Having dismissed the fit between the regulation and Virginia's asserted goal, the Court abandoned further consideration of the professional speech aspect of the case.³⁴⁸ Due to the posture of *Virginia Board of Pharmacy*, that is, the project of reconsidering *Valentine v. Chrestensen*,³⁴⁹ the premium was not on explaining why commercial speech could be restricted by some invocation of (or analogy to) regulating speech in the professions, but, instead, on why commercial speech that did nothing more than offer product *X* at price *Y* could not be suppressed entirely. The posture of the case thus appears to have skewed both the majority and the concurrence's conclusions, and we are left with little more than the *ipse dixit* of "greater objectivity and hardiness" to justify the regulation of truth and deception in commercial speech.³⁵⁰

The Supreme Court's superficial commercial speech rhetoric thus has obscured the deeper connection between commercial and professional speech as well as what appears to be the theory motivating the First

³⁴⁴ 425 U.S. 748 (1976).

³⁴⁵ See *id.* at 750-51, 766.

³⁴⁶ *Id.* at 767.

³⁴⁷ See *id.* at 769 ("The advertising ban does not directly affect professional standards one way or the other.").

³⁴⁸ Indeed, the Court expressly refused even to consider the implications of its holding for commercial advertising of other professionals, such as lawyers or physicians who "do not dispense standardized products." *Id.* at 773 n.25.

³⁴⁹ 316 U.S. 52 (1942).

³⁵⁰ *Virginia Bd. of Pharmacy*, 425 U.S. at 772.

Amendment protection of relational speech institutions. To be sure, the relationship between physician and patient and the duties attendant to that relationship are substantially deeper than those between vendor and purchaser. Nonetheless, in both situations, it is the relationship that defines the discourse within which both speakers and listeners have rights under the First Amendment.

1. Identifying Commercial Speech

The determination whether certain speech takes place within a particular bounded speech practice or beyond will differ depending on the particular speech institution involved. For example, as discussed above, when examining regulations of the learned professions, the inquiry will largely focus on whether the professional communicated personal or impersonal advice to the listener. Publication of advice for indiscriminate distribution generally will defeat a conclusion that the advice was rendered within the professional-client relationship, although confining the communication to a private conversation will not necessarily entail the conclusion that such a relationship was established. Justice White's definition in *SEC v. Lowe* succinctly captured what is perhaps the essential aspect of a communication that takes place within the professional-client relationship.³⁵¹ As with any

³⁵¹ 472 U.S. 181, 232 (1985) (White, J. & Rehnquist, C.J., concurring) ("One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession."). For a critique of this view and the suggestion that the line between specific and general advice (as a matter of substance, as opposed to the identity of the addressee) is a preferable marker for when First Amendment considerations may arise, see *SEC v. Lowe*, 725 F.2d 892, 902 & n.7 (2d Cir. 1984), *rev'd*, 472 U.S. 181 (1985), and Alfred C. Aman, Jr., *SEC v. Lowe: Professional Regulation and the First Amendment*, 1985 SUP. CT. REV. 93, 140. Justice White's definition, however, resonates with the case law concerning the unauthorized practice of law. See, e.g., *State Bar v. Cramer*, 249 N.W.2d 1, 9 (Mich. 1976) (holding that the advertisement and distribution to the general public of forms and documents used to obtain a divorce would not amount to the practice of law, but that personal advice, individual preparation of documents, and filing documents in court are considered to be aspects of professional practice).

"[F]unctionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client."

Id. at 13 (Levin, J., dissenting) (quoting CODE OF PROFESSIONAL RESPONSIBILITY EC 3-5 (1969)); see also *New York County Lawyers' Ass'n v. Dacey*, 283 N.Y.S.2d 984 (App. Div.), *rev'd*, 234 N.E.2d 459 (N.Y. 1967) (reversing the lower court's holding that publication of a legal self-help book amounted to the practice of law); *Oregon State Bar v. Gilchrist*, 538 P.2d 913, 919 (Or. 1975) (holding that the distribution of do-it-yourself divorce kits does not constitute the practice of law, but personal contact with customers in the nature of consultation, explanation, and advice would constitute such practice).

other definition, however, it will only be as good as it reflects current social practice. For example, although current social practice may be defined with reasonable hope of accuracy, the Supreme Court of Michigan cautioned that "any attempt to formulate a lasting, all encompassing definition of 'practice of law' is doomed to failure 'for the reason that . . . such practice must necessarily change with the everchanging business and social order.'"³⁵²

With regard to the regulation of commercial speech, the question of what is considered part of the bounded discourse is more difficult to answer, because we cannot rely on the relatively clear consideration of whether the speaker is reasonably understood by the interlocutors as applying considered judgment to the listener's particular circumstances for the benefit of the listener. To the contrary, most commercial speech today occurs in the impersonal realm of mass communication.

Neither of the Supreme Court's specific proposals in *Central Hudson Gas & Electric Corp. v. Public Service Commission* will suffice to define commercial speech.³⁵³ The fact that speech is "related solely to the economic interests of the speaker and its audience"³⁵⁴ does not suffice to ensure that speaker and listener are engaged in a predefined speech practice. Unless there is a preexisting understanding (whether through an explicit agreement or a traditional social practice) between speaker and listener, the determination that a particular conversation only relates to a certain subset of a person's interests does not justify legally confining the discussion to that limited realm. At the other extreme is the Court's suggested definition of speech that does "no more than propose a commercial transaction."³⁵⁵ This definition is undoubtedly too narrow, because advertising can do much more and yet retain a core of commercial speech. The fact that speech includes discussions of matters of general public concern and debate, for ex-

Dacey's book is sold to the public at large. There is no personal contact or relationship with a particular individual. Nor does there exist that relation of confidence and trust so necessary to the status of attorney and client. This is the essence of legal practice—the representation and the advising of a particular person in a particular situation.

Dacey, 283 N.Y.S.2d at 998 (Stevens, J., dissenting). *But see* Florida Bar v. Stupica, 300 So. 2d 683, 686 (Fla. 1974) (holding that distribution of divorce kits to the general public constitutes the practice of law). On the unauthorized practice of law generally, see Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981), and Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6 (1976).

³⁵² *Cramer*, 249 N.W.2d at 7 (quoting Grand Rapids Bar Ass'n v. Denkema, 287 N.W. 377, 380 (Mich. 1939)).

³⁵³ 447 U.S. 557 (1980).

³⁵⁴ *Id.* at 561.

³⁵⁵ Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973).

ample, does not preclude the regulation of such speech as commercial.³⁵⁶ Enlarging the definition to include all speech that proposes a commercial transaction (whether or not it does more) would come much closer to the mark, but would still contain the implication that the communication itself must constitute the proposal.

A more explicit reliance on the professional speech parallel would suggest a focus on whether the speech is issued between speaker and listener within their relationship as vendor and consumer, that is, whether the speech specifically pertains to the audience as potential customers. Under this view, the question would be whether the speech is directed at inducing the audience to purchase a particular product or service from the speaker. At times, this examination will depend on an extensive investigation of both the content and context of the speech in question. Following *Rust v. Sullivan*,³⁵⁷ the touchstone of the inquiry would be the perception of the reasonable person receiving the communication, but there probably would be little difference between that standard and that of a reasonable, third-party observer. The question would be whether a person, knowing all the relevant facts, would reasonably understand the communication to be directed at the audience as potential consumers.

Two cases, *Perma-Maid Co. v. FTC*³⁵⁸ and *Scientific Manufacturing Co. v. FTC*,³⁵⁹ illustrate the basic importance of context. In both cases, the Federal Trade Commission ("FTC" or "Commission") issued orders against the dissemination of false or misleading brochures containing "scientific information" about the ill effects of using aluminum cookware. In *Scientific Manufacturing*, the brochures were widely sold and distributed by an unorthodox scientist and his company who were not "engaged in any way or interested materially in the manufacture, sale or distribution of cooking utensils of any sort."³⁶⁰ Some of the brochures had been obtained by the Perma-Maid Company, which was in the business of manufacturing, selling, and distributing cooking utensils made from other metals. That company's sales force distributed the pamphlets to its prospective customers. Although the cease and desist order was upheld against Perma-Maid,³⁶¹ it was set aside with respect to the Scientific Manufacturing Company,³⁶² the producer of

³⁵⁶ See, e.g., *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 61, 68 (1983) ("Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." (citation omitted)).

³⁵⁷ 500 U.S. 173 (1991).

³⁵⁸ 121 F.2d 282 (6th Cir. 1941).

³⁵⁹ 124 F.2d 640 (3d Cir. 1941).

³⁶⁰ *Id.* at 641.

³⁶¹ See *Perma-Maid*, 121 F.2d at 284.

³⁶² See *Scientific Mfg. Co.*, 124 F.2d at 644.

the brochures. The court in *Scientific Manufacturing* rejected the FTC's argument that the Federal Trade Commission Act allowed the Commission to enjoin the distribution of material that misleads the purchasing public.³⁶³ In light of the serious First Amendment concerns raised by the Commission's broad interpretation of the statute, the court concluded that the Commission's power extended only to "the unfair acts of traders in the affected commerce."³⁶⁴ The author of the brochures "dealt in opinions and no more," and allowing the Commission to enjoin the dissemination of such material on the basis of its falsehood would install "the Commission . . . [as the] absolute arbiter of the truth of all printed matter moving in interstate commerce, even where scholars in the particular field of knowledge were in wide disagreement."³⁶⁵ The identical speech, in other words, could be prohibited when issued by the seller of the underlying (or a competing) good in the context of a sales transaction or promotion, but could not be prohibited when issued by someone who was not so connected to the purchasing public.³⁶⁶

A connection to a particular brand would not always be necessary in order to classify certain speech as commercial. *Central Hudson*, for example, viewed non-brand-specific advertising by a monopolist as commercial,³⁶⁷ and *Bolger v. Youngs Drug Products Corp.* recognized more broadly that "a company with sufficient control of the market for a product may be able to promote the product without reference to its own brand names."³⁶⁸ Similarly, a campaign by an industry association directed at inducing the audience to purchase its members' products need not mention the members' brand names to qualify as a commercial advertisement.³⁶⁹

Two additional FTC investigations make clear, however, that questions concerning the commercial nature of generic advertising are not susceptible to precise, formulaic solutions. In the first investigation, the FTC regulated as commercial speech a publication campaign by the National Commission on Egg Nutrition ("NCEN") that denied the existence of scientific evidence

³⁶³ See *id.*

³⁶⁴ *Id.* at 643.

³⁶⁵ *Id.* at 644.

³⁶⁶ See *id.* at 644-45 ("The same opinion, however, may become material to the jurisdiction of the [FTC] and enjoinable by it if, wanting in proof or basis in fact, it is utilized in the trade to mislead or deceive the public or to harm a competitor.").

³⁶⁷ See 447 U.S. 557, 561 (1980) (holding that the advertisements of an electric utility company in a noncompetitive market were commercial speech).

³⁶⁸ 463 U.S. 60, 66-67 n.13 (1983).

³⁶⁹ See *id.* ("That a product is referred to generally does not . . . remove it from the realm of commercial speech. . . . [A] trade association may make statements about a product without reference to specific brand names.").

demonstrating a link between the consumption of eggs and an increase in the risk of heart disease.³⁷⁰ The Commission's decision was upheld by the Seventh Circuit.³⁷¹ Because NCEN was a private nonprofit corporation, composed of representatives of various egg producers, and because "[t]he clear purpose of the statements in issue [was] to encourage the consumption of eggs by allaying fears the public may have about their high cholesterol content,"³⁷² the court treated the communication as commercial speech despite the fact that the campaign was undertaken by a trade association, was not brand specific, and took a position with regard to a genuine controversy.³⁷³ The court noted that the commercial speech doctrine was "not . . . narrowly limited to the mere proposal of a particular commercial transaction but extend[ed] to false claims as to the harmlessness of the advertiser's product asserted for the purpose of persuading members of the reading public to buy the product."³⁷⁴

In the second investigation, the FTC struggled much more with the question whether an advertising campaign that was not brand-specific and took a position on an issue of general debate was to be classified as commercial speech.³⁷⁵ The subject of the investigation was an advertising series entitled *Of Cigarettes and Science*, which was issued by the R.J. Reynolds Tobacco Company and discussed the procedures and results of scientific inquiries into alleged links between cigarette smoke and various ailments.³⁷⁶ The campaign did not refer to any particular cigarette brand and simply was signed "R.J. Reynolds Tobacco Company." The administrative law judge had originally ordered the case dismissed on the basis that the campaign did not involve commercial speech, but the Commission, over the objection of its chairman, reversed.³⁷⁷ In remanding the case to the administrative law judge, the Commission dismissed Chairman Oliver's argument that the campaign's direct comment on an issue of public concern sufficed for the

³⁷⁰ See *FTC v. National Comm'n on Egg Nutrition*, 517 F.2d 485, 488 (7th Cir. 1975), (finding that because "NCEN was organized for the profit of the egg industry, . . . the pronouncements . . . were advertisements"), *appeal after remand*, 570 F.2d 157 (7th Cir. 1977).

³⁷¹ 570 F.2d at 165.

³⁷² 517 F.2d at 488.

³⁷³ See *id.* at 490.

³⁷⁴ 570 F.2d at 163.

³⁷⁵ *In re R.J. Reynolds Tobacco Co.*, 113 F.T.C. 344 (consent order); 111 F.T.C. 584 (1989) (show cause order); *In re R.J. Reynolds Tobacco Co.*, FTC Docket No. 9206 (Mar. 4, 1988) (order of remand).

³⁷⁶ See *In re R.J. Reynolds*, FTC Docket No. 9206, at 3 (Mar. 4, 1988) (describing the advertisement as a discussion of "scientific hypotheses").

³⁷⁷ See *id.* at 20, 26-55.

conclusion that the campaign was not commercial in nature.³⁷⁸ Whether the speech was promotional in nature had to be examined in light of the history, form, and context of the campaign. The Commission suggested the relevance of such factors as whether the advertising made reference to a specific product, concerned an attribute of that product, was paid for by the seller of the product, and appeared to serve the speaker's economic interests in the sale of the product. But the Commission did not limit itself to these factors. The order of remand expressly authorized the administrative law judge to examine

whether [the advertising] was paid-for, where and in which publications it was disseminated, whether it was placed in editorial space (such as an [op-ed] page) or advertising space in the publication, whether it was prepared as a letter to the editor, whether it was sent to representatives of the media for selection on merit by editorial boards, and to whom it was disseminated outside the media[.] . . .

. . . .

. . . whether it was targeted to consumers or legislators; whether it was intended to affect demand for Reynolds' cigarettes or brands or to affect particular legislative or regulatory proposals; whether the advertisement was subjected to copy testing or to review by focus groups and, if so, the nature of the questions used in the copy tests or focus group sessions; and the results of those procedures both in terms of what they showed and what changes, if any, Reynolds made in response to those showings[; and any e]vidence relating to the message(s) Reynolds itself intended to convey through the advertisement[, as well as] . . . Reynolds' share of the cigarette market³⁷⁹

If we follow *Rust* and take the perceptions of the reasonable recipient of the speech as the touchstone for deciding whether the communication is commercial, or even if we simply attempt an objective evaluation of the communication from a third-party perspective, the Commission's reliance on the corporation's intent (to the extent that this concept makes sense) would retain relevance not so much as an independent factor, but as an indication of the likely perception of the speech by the listener or neutral observer. The relevant point here is not that any particular test is valid, but simply that the list of factors demonstrates the difficulty that even an agency with expertise in regulating advertising has experienced in the attempt to define precisely the parameters of promotional advertising. This accords, in turn, with the Supreme Court's refusal in *Bolger* to identify a limited set of factors for the classification of advertising.³⁸⁰ As these decisions make

³⁷⁸ Cf. *id.* at 45-48 (Oliver, Chairman, dissenting) (arguing that according to Supreme Court precedent, R.J. Reynolds's communication was not commercial speech).

³⁷⁹ See *id.* at 18-19 (order of remand). R.J. Reynolds ultimately withdrew the campaign, thereby precluding a final decision on the part of the Commission or any reviewing court.

³⁸⁰ See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983).

clear, the legal concept of commercial speech follows the social practice of the bounded discourse between the speaker and listener as vendor and consumer. The description of the boundary is as much an enterprise in sociology as it is one in constitutional law.

2. Regulating Commercial Speech

If professional and commercial speech are viewed as bounded speech institutions, then regulation of speech that pertains to the relationship between professional and client, or buyer and seller, should be permissible even when content- or viewpoint-based, insofar as it preserves the respective institution. The boundaries of the discourse thus may be policed, but, conversely, as long as the speaker remains within the boundary of the institution, the speaker would be engaged in protected speech.

Regulations protecting consumers from false or deceptive advertising, even when based on prophylactic rules that generalize about the impact of certain categories of communication, are proper means by which the government fosters the speech institution. Even the prohibition on advertising, or the suggestion to a client to pursue an illegal course of conduct, may fall within this rationale. The dialogue between buyer and seller, or professional and client, takes place as part of a social exchange that involves fundamental agreement on governing background norms. Such a dialogue is not about creating new identities or challenging each other's values and norms. Indeed, in the medical context, the Hippocratic oath and the rule of professional responsibility of the American Medical Association contain express pledges to practice one's profession within the realm of legally available remedies and to work for legal change where medicine and law diverge.³⁸¹ Viewed from the internal point of view of the speech practice, such regulation may be understood as furthering, not detracting from, First Amendment values.

According to this view, *Central Hudson's* quantitative approach to commercial speech regulation is misguided in that it simply lessens the protection afforded commercial speech as compared to noncommercial speech.³⁸² A more qualitative approach would instead examine the impact of a given regulation on the bounded discourse of the affected speech practice. *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico* is

³⁸¹ See COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, *American Medical Association Principles of Medical Ethics*, in CODE OF MEDICAL ETHICS xiv, xiv (1996) (requiring doctors to respect the law but encouraging change where necessary).

³⁸² See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562-63 (1980); see also *supra* notes 47-53 and accompanying text (discussing the *Central Hudson* decision).

the most egregious violation of this qualitative principle, since the reasons for restricting the speech in that case were to hinder, not protect, the communicative relationship between advertiser and audience.³⁸³ The restriction articulated in *United States v. Edge Broadcasting Co.*³⁸⁴ on the dissemination of information about activities, such as gambling, that are lawful in another state similarly would not be justified in terms of protecting the consumer or the integrity of the discourse, unless, perhaps, some argument were made that gambling was addictive in a manner that significantly altered the relationship between the vendor and the purchaser such that the former incurred a special duty of concern with regard to the latter. In both *Posadas* and *Edge Broadcasting*, the reason for keeping the information from potential consumers was not based on a concern about such information coming from any seller, but simply on a desire to keep such information from the audience as a general matter.

A more difficult case is *Florida Bar v. Went For It, Inc.*³⁸⁵ Due to the quantitative nature of the *Central Hudson* test, the prohibition on defense attorneys' solicitation of accident victims within thirty days of an accident appeared easily defensible. The State's interest in protecting the reputation of its attorneys indeed would strike many as "substantial," and the prohibition on soliciting accident victims within thirty days of the trauma would appear to lessen the view of attorneys as ambulance-chasers. Under the qualitative approach of *Linmark Associates, Inc. v. Township of Willingboro*,³⁸⁶ *Carey v. Population Services International*,³⁸⁷ and *City of Cincinnati v. Discovery Network, Inc.*,³⁸⁸ however, it is initially unclear what "commercial" harm Florida's regulations were aimed at preventing.³⁸⁹ There was no evidence, for example, that accident victims who received direct mailings from attorneys within thirty days of the accident perceived such contacts as coercive due to the recipients' temporary state of emotional vulnerability,³⁹⁰ which would, indeed, have raised a consumer protection

³⁸³ 478 U.S. 328 (1986); see also *supra* notes 54-58 and accompanying text (discussing the prohibition of truthful speech in order to suppress demand).

³⁸⁴ 509 U.S. 418 (1993); see also *supra* notes 59-62 and accompanying text (discussing the prohibition on advertisements for lotteries by broadcast stations licensed in states where lotteries are illegal).

³⁸⁵ 515 U.S. 618 (1995) (upholding a Florida rule against soliciting accident victims within 30 days of an accident); see also *supra* notes 63-64 and accompanying text (noting that the Court did not use a consumer protection rationale in upholding this speech restriction).

³⁸⁶ 431 U.S. 85 (1977).

³⁸⁷ 431 U.S. 678 (1977).

³⁸⁸ 507 U.S. 410 (1993).

³⁸⁹ For a discussion of these cases, see *supra* Part I.

³⁹⁰ Even this justification of the regulations would have been questionable, since the restriction operated solely on plaintiffs' attorneys and did not preclude defendants' attorneys

concern specifically related to the commercial aspect of the speech. What makes this case difficult, however, and not plainly wrong, is that the professional duties of attorneys as vendors of services cannot be examined apart from the ethics of the profession itself. Moreover, in contrast to *Virginia Board of Pharmacy*, in the case of regulating attorneys, the Supreme Court undoubtedly thought itself to be peculiarly able to evaluate whether the restrictions reflected legitimate professional norms. It was thus the confluence of the bounded speech paradigm and the Court's peculiar status within the speech practice being regulated that led to a decision allowing substantial regulation on the basis of little evidence of harm.³⁹¹

Drawing on the connection between commercial and professional speech, one must consider further the possibility that certain restrictions on the government's selective funding of speech may apply to the commercial, as well as the professional, realm. If the same principles discussed above with regard to professional speech³⁹² are to govern commercial speech, this might mean that a state-funded vendor could not be precluded from providing truthful information about its products or the services it offers for sale. The State could indeed deny advertising funds to a government vendor, as it could with regard to a physician, since a failure to advertise is compatible with the conscientious practice of each trade. Physicians and shopkeepers do not universally engage in advertising, and they may practice their trade conscientiously without doing so. A government vendor, however, may be shielded from having to follow a script for answering questions about products in the way a government spokesperson would not.

from contacting accident victims immediately following an incident. Thus, even on the assertion of a consumer protection rationale, the regulation is subject to a charge of underinclusiveness.

³⁹¹ The Court in *Gentile v. State Bar*, 501 U.S. 1030 (1991), was even more explicit in drawing on an attorney's professional role when it extended a lawyer's duties beyond the courtroom. The Court held that attorneys' out-of-court speech relating to their own pending cases could be prohibited when there was a "substantial likelihood of material prejudice" to the fair administration of justice. *Id.* at 1075. Noting that "[a]n attorney's duties do not begin inside the courtroom door," and that "[t]he role of attorneys in the criminal justice system subjects them to fiduciary obligations to the court and the parties," Justice Kennedy concluded that "[a] court can require an attorney's cooperation to an extent not possible of nonparticipants." *Id.* at 1043, 1057 (Kennedy, J., concurring). In upholding the standard of material prejudice, the majority noted that "[l]awyers representing clients in pending cases are key participants in the criminal justice system, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct." *Id.* at 1074.

³⁹² See discussion *supra* notes 332-39 and accompanying text.

D. 44 Liquormart and the Power to License Liquor Dealers

The view of commercial and professional speech put forth in this Article would help to resolve a curious discussion in *44 Liquormart, Inc. v. Rhode Island* about the inability of a state to condition the receipt of a liquor license on the promise not to advertise.³⁹³ In Section VI of his plurality opinion,³⁹⁴ Justice Stevens first disposes of the greater-includes-the-lesser argument by noting that “banning speech may sometimes prove far more intrusive than banning conduct,” since communicating knowledge about an activity is often more valuable than engaging in the activity itself.³⁹⁵ Relying on past opinions, Justice Stevens explains that “a State’s regulation of the sale of goods differs in kind from a State’s regulation of accurate information about those goods.”³⁹⁶ He then adds a brief paragraph on the question of licensing.

That the State has chosen to license its liquor retailers does not change the analysis. Even though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right. See, e.g., *Frost & Frost Trucking Co. v. Railroad Comm’n of Cal.*, 271 U.S. 583, 594 (1926). In *Perry v. Sindermann*, 408 U.S. 593 (1972), relying on a host of cases applying that principle during the preceding quarter century, the Court explained that government “may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech.” *Id.*, at 597. That teaching clearly applies to state attempts to regulate commercial speech, as our cases striking down bans on truthful, nonmisleading speech by licensed professionals attest. See, e.g., *Bates v. State Bar of Ariz.*, 433 U.S., at 355; *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).³⁹⁷

According to one view, the licensing question is identical to that regarding whether the “greater” ability to forbid the activity includes the “lesser” power to forbid communications about the activity. One might say that the government’s authority to license liquor dealers is much like its authority to license movie theaters in that the power concerns actions instead of speech. In the case of the movie theater, the licensing power pertains not to the content of the movies but to other concerns, such as the observance of occupancy limits and fire codes. In the case of liquor dealers,

³⁹³ 517 U.S. 484 (1996).

³⁹⁴ This portion of Justice Stevens’s opinion was joined by Justices Kennedy, Ginsburg, and Thomas. See *id.* at 508-14.

³⁹⁵ *Id.* at 511.

³⁹⁶ *Id.* at 512; see also discussion *supra* note 204 and accompanying text (examining this debate).

³⁹⁷ *44 Liquormart*, 517 U.S. at 513.

the licensing power could be viewed as directed at the observance of such things as the required age of customers and any limitations on the quantity of certain sales, not at the speech of the dealers. Conceiving of the government's licensing authority in this way, the argument based on the licensing power adds nothing to that based on the "greater" power to ban the activity. The ability of a state to license an activity is at most the ability to forbid that activity, since it entails the power to forbid the activity under certain circumstances. Thus, if the power to prohibit the activity entirely does not suffice to suppress advertising, then neither should the power to place limitations on the exercise of an activity by requiring vendors to obtain a license. Citations to *Perry* and *Frost* would have been superfluous to make this point.

Justice Stevens's introduction of *Perry* and *Frost*, therefore, must signal a somewhat different concern. If the argument about licensing liquor dealers adds anything to the discussion of the greater-includes-the-lesser argument, it must relate to some recognition of the State's ability to license not only the actual sale of liquor, but also all of the other activities of a liquor dealer, that is, a liquor dealer's speech as well as actions. With this recognition in mind, the rebuttal of the greater-includes-the-lesser argument no longer serves to dispose of the argument that the State's power to license liquor dealers' words and deeds also entails the separate power of the State to prohibit altogether certain words, such as price advertising. According to this view, the greater power may indeed be greater than the lesser power, and is certainly no longer different "in kind," since both relate to the regulation of speech.

Having raised the licensing argument, however, the plurality fails to put it to rest. *Perry* is unhelpful here. The cases applying the unconstitutional conditions doctrine during the quarter century before *Perry* (and since) generally concerned situations in which a beneficiary of government largesse was required to relinquish what otherwise would have been a constitutional right to engage in certain action or speech in the recipient's "private capacity." *Perry* itself is illustrative of this aspect of the doctrine. The petitioner stated a successful First Amendment claim by alleging that a college board of regents failed to rehire him based on his public disagreement with the board about its education policies.³⁹⁸ *Perry* does not address the extent to which the State can control a public educator's speech in the classroom. Although *Perry* appears to preclude the State from withholding liquor licenses from applicants who, in the past, privately had voiced unorthodox opinions about alcohol consumption, *Perry* says nothing about withdrawing

³⁹⁸ See 408 U.S. at 598.

liquor licenses from dealers who, in their capacities as liquor distributors, advertise the price of their product or promote certain uses of alcohol of which the State disapproves.

Perhaps because *Perry* is inadequate to dispose of the licensing argument, the plurality invokes the professional speech analogy. To be sure, it is unhelpful to note that the "teaching [of *Perry*] clearly applies to state attempts to regulate commercial speech,"³⁹⁹ because, as just discussed, *Perry* does not address the question about the licensing of liquor dealers' speech. Nonetheless, the reference to the "speech by licensed professionals" does make sense (and does confirm the suspicion that the plurality was concerned with the argument based on the State's ability to license the speech of liquor dealers), since professionals are subject to licensing not only of their deeds, but of their words as well. Thus, in the case of professionals, we confront a situation in which the State has the power to license speech, yet may not prohibit speech altogether. *Bates v. State Bar*⁴⁰⁰ and *Virginia Board of Pharmacy*,⁴⁰¹ however, do not explain why that is so, nor do they explain why professional speech should serve as an analogy for commercial speech. Without an argument like the one fleshed out here about the permissible scope of government regulation of professional speech, the licensing argument, as a justification for government prohibition of price advertising by licensed liquor dealers, would indeed remain a formidable challenge. An argument based on the recognition of bounded speech institutions, in contrast, supplies the link as well as the limitation on the government's licensing authority. Insofar as the power to license liquor dealers includes the power to license their speech, it derives from the power to regulate the bounded speech institution which entails only such regulation as is necessary to preserve the speech institution itself. The government may neither suppress the speech entirely nor remodel the institution to its liking.

E. Tobacco Advertising and Physician Counseling

The notion of bounded speech practices may elucidate the analyses of two recent initiatives restricting commercial and professional speech. The first is the effort by the Food and Drug Administration, several states, and, now, the Congress, to limit tobacco advertising.⁴⁰² The second is the con-

³⁹⁹ 44 *Liquormart*, 517 U.S. at 513.

⁴⁰⁰ 433 U.S. 350 (1977).

⁴⁰¹ 425 U.S. 748 (1976).

⁴⁰² See generally Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396 (1996) (issuing regulations governing the access to and the promotion of nicotine and tobacco products to children and adolescents).

flict surrounding the alleged medicinal uses of marijuana, which has arisen by virtue of certain state referenda⁴⁰³ that are contrary to federal drug policy.⁴⁰⁴ In both cases, the quantitative view of commercial and professional speech provided in *Central Hudson Gas & Electric Corp. v. Public Service Commission*⁴⁰⁵ leads to the erroneous conclusion that the First Amendment is of little moment in these matters, whereas a more qualitative approach indicates the necessity of accommodating real constitutional concerns.

If applied with respect to tobacco advertising, *Central Hudson* would demand that the restrictions materially advance, and be reasonably tailored to advance, a substantial government interest. If preventing gambling by Puerto Rico residents, and assisting states in preventing their citizens from playing out-of-state lotteries each suffices to justify the restriction of commercial speech, the reduction of the number of smokers should be deemed "substantial" in this calculus as well. If we accept the government's claims about the individual health consequences and the public health costs of tobacco consumption, then the government's interest in reducing the incidence of smoking would easily seem substantial. The central question, then, under *Central Hudson* would be whether a ban on tobacco advertising (or a more limited restriction) furthers that goal and is reasonably tailored to doing so.

Both in *Central Hudson* and *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*,⁴⁰⁶ the Court was quick to recognize the connection between advertising and demand. To be sure, *Central Hudson* involved a monopoly and therefore precluded consideration of the argument that advertising is aimed solely at inducing consumers to switch brands. Neither *Posadas* nor *Central Hudson* confronted the argument that in a "mature" market advertising affects only brand choice without raising overall demand. But courts of appeals since then have considered these additional arguments and nonetheless still have confirmed the connection between advertising and overall demand, at least in the case of alcohol advertising.⁴⁰⁷ And, as long as the connection between advertising and demand does exist, a ban (or a lesser measure that is not fatally plagued by

⁴⁰³ See, e.g., Compassionate Use Act, CAL. HEALTH & SAFETY CODE § 11362.5(a) (West 1997) (attempting to ensure that "patients and their primary caregivers who obtain and use marijuana for medicinal purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction").

⁴⁰⁴ See generally 21 U.S.C. §§ 801-971 (1994).

⁴⁰⁵ 447 U.S. 557 (1980).

⁴⁰⁶ 478 U.S. 328 (1986).

⁴⁰⁷ See *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 327 (4th Cir. 1996); *Dunagin v. City of Oxford*, 718 F.2d 738, 750 (5th Cir. 1983) (en banc).

underinclusiveness) would undoubtedly "materially advance" the goal of reducing the incidence of smoking.

The main point of contention, as a matter of law (as opposed to fact), would be whether the ban was reasonably tailored to advancing that goal or whether the restriction infringed on substantially more speech than necessary.⁴⁰⁸ One might initially object to a ban on tobacco advertising by noting that if the government wishes to end smoking, or wishes to reduce its prevalence, then it must regulate the primary behavior before turning to a restriction of speech. In response, however, the government might cite reasons counseling against a total ban: the addictiveness of the product, the substantial population of current addicts, and our country's experience with prohibition (along with the attendant ills of organized crime and the more general problem of criminalizing acts that will inevitably be committed by overwhelming numbers of citizens). By banning advertisements of tobacco products, the government might respond, it seeks to reduce the incidence of smoking while avoiding the social ills of a ban on the activity itself. An advertising ban, according to this theory, would allow current smokers to continue their habit, and others to begin smoking, as long as they are acting on their own independently conceived desires and beliefs, as opposed to an "artificial" demand that may have been created or stimulated by commercial producers. Thus, the government would answer, a ban on advertising enhances liberty more than a restriction on the underlying behavior, because with the former, the primary behavior remains legal for those who autonomously choose to engage in it.⁴⁰⁹ Although the plurality in *44 Liquormart, Inc. v. Rhode Island* found that Rhode Island's ban on liquor price advertising was more restrictive than necessary (on the theory that the desired goal of dampening price competition and thereby increasing the price of alcohol could have been achieved directly by the imposition of a tax or a fixed minimum price),⁴¹⁰ here, the less speech-restrictive approach would be quite difficult to administer and could lead to substantial societal problems. At least for this particular situation, then, *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*⁴¹¹ would be revived and the regulation would not be viewed as violating the First Amendment.

⁴⁰⁸ See *Board of Trustees v. Fox*, 492 U.S. 469, 479-80 (1989).

⁴⁰⁹ Cf. MILL, *supra* note 252, at 122.

There can surely, it may be urged, be nothing lost, no sacrifice of good, by so ordering matters that persons shall make their election, either wisely or foolishly, on their own prompting, as free as possible from the arts of persons who stimulate their inclinations for interested purposes of their own.

Id.

⁴¹⁰ See 517 U.S. 484, 489 (1996).

⁴¹¹ 478 U.S. 328 (1986).

The qualitative view of commercial speech regulation, by contrast, would require a justification more specifically connected with the commercial aspect of the speech. Because the argument (so far) is not based on policing the boundaries of the communicative project between buyer and seller, it is not an argument about commercial speech, but instead, one that addresses the general interest of the government in keeping information from the public. Thus, to use Daniel Farber's test: "[T]he state interest [does not] disappear[] when the same statements are made by a third person with no relation to the transaction."⁴¹² Consequently, the hypothetical justification cannot be reconciled with the Court's holding in *City of Cincinnati v. Discovery Network, Inc.*,⁴¹³ since the government seeks to cure a problem that is posed equally by both commercial and noncommercial speech, even though the government only banned commercial speech.

If we are to consider arguments specific to commercial speech we must look elsewhere. Policing the boundaries of the commercial communication would justify controlling for false and misleading messages and for propositions of transactions that are contrary to law. As an initial matter, the government could assert, as it has, an interest in keeping advertising of tobacco products away from children, since children may not legally purchase the product. Restrictions properly tailored to furthering that goal would be constitutional. Moreover, an argument might be put forth that with regard to children, or even adults, tobacco advertising (or at least the type of advertising that exists to date) is false or misleading because it understates the hazards associated with the use of tobacco. The federally required warning labels would not necessarily defeat such a view if studies of consumers' understanding of such advertising established that a false or misleading message had nonetheless been conveyed. If copy testing would demonstrate that, despite warning labels, consumers fail to learn from any given advertisement that consumption of the product is associated with severe addiction and health risks, then such advertising could be banned. Tobacco advertising would have to be modified properly to convey the risks associated with consumption of the product.⁴¹⁴

⁴¹² Farber, *supra* note 144, at 388-89. Justice Marshall made a similar point in a different context, when he noted in *Pickering v. Board of Education*, 391 U.S. 563 (1968), that the school board's dismissal of the teacher on account of the teacher's critical letter to a newspaper would have to be reversed, since "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." *Pickering*, 391 U.S. at 573.

⁴¹³ 507 U.S. 410 (1993).

⁴¹⁴ Indeed, some courts have ordered a manufacturer to engage in "corrective advertising" to counteract the past conveyance of misleading impressions even where the manufac-

Finally, on this qualitative view, the specific element of addiction (as opposed to mere vice activity) arguably alters the social relationship between the buyer and vendor and imposes certain fiduciary-type obligations on the vendor because of the autonomy-reducing impact of the advertised goods. In other words, because of the addictive nature of the product, the vendor stands in an augmented power relationship with regard to the purchaser in a manner that is categorically different from vendors of other products that purchasers may freely refuse to buy. Whether the addictiveness of a product is (or should be) considered to have this kind of impact on the social relationship between a vendor and purchaser is, of course, subject to debate, but this kind of justification may fall within the qualitative view as being peculiar to commercial speech and as maintaining the integrity of the communication.

The second initiative of relevance here is state action to remove state law liability for certain consumers and suppliers of marijuana when the drug is ultimately consumed pursuant to a physician's recommendation.⁴¹⁵ The federal government opposed the referenda in California and Arizona on the grounds that no medicinal uses of the drug had been demonstrated and that the sale and possession of the drug remained illegal under federal law. The difficult First Amendment issue raised by this difference between the federal and state policies is whether the implementation of federal policy in the form of a restriction on the communication between doctor and patient violates the First Amendment.⁴¹⁶

If *Planned Parenthood v. Casey*⁴¹⁷ were taken at face value, the concern would seem negligible. To be sure, *Casey* involved the affirmative disclosure of truthful, clear information and not a limitation on physician recommendations, but the *Casey* test read literally would require review only for the "reasonableness" of the policy.⁴¹⁸ If a pure due process inquiry was contemplated, on the theory that physician-patient communications are "less" protected than political speech, the First Amendment concerns would

turer's current advertising would not, standing alone, be misleading. The principal case on corrective advertising, *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 762 (D.C. Cir. 1977), for example, upheld a requirement that the manufacturer of Listerine disclose in future advertising the negation of a false claim that the company had made earlier, even where that claim would no longer be asserted in the future. The company was ordered to include the disclaimer in its advertising for that product until it had expended a sum equal to the average annual advertising budget for the product in the past. See *id.* at 763-64.

⁴¹⁵ See *supra* note 403 and accompanying text.

⁴¹⁶ See, e.g., *Conant v. McCaffrey*, 172 F.R.D. 681, 701 (N.D. Cal. 1997) (concluding that "the First Amendment protects physician-patient communication up until the point that it becomes criminal").

⁴¹⁷ 505 U.S. 833 (1992).

⁴¹⁸ See *supra* note 284 and accompanying text.

be minimal. The connection between federally imposed limitations on physician-patient discussions about purported medicinal uses of marijuana and the federal government's desire to prevent the use of that drug for such purposes would presumably pass the rational basis fit analysis and the end, if viewed as that of preventing the use of an illegal drug, would thus provide ample justification for a restriction on most discussions about such uses of marijuana.

If professional speech is viewed as a valuable speech institution, however, the seriousness of the First Amendment issue comes into relief and the district court's struggle with the First Amendment issues begins to make sense. The First Amendment protects the doctor-patient dialogue as an important forum for the exercise of individual autonomy through the communication of knowledge that is generally free from government control. At the same time, however, the First Amendment allows for state regulation of the physician's statements in order to ensure the integrity of the communicative institution. The district court focused largely on the former, noting that the First Amendment prevents the government from suppressing physician speech for the reason that it incites patients to unlawful behavior. The only exception is when there is reason to believe that such discussions incite patients to immediate lawless action.⁴¹⁹ The court essentially stated the view that the State must not suppress the communication solely because the interaction is rationally related to a state of affairs that the government is otherwise legitimately entitled to prevent or in order to shape the physician-patient dialogue to accord with the government's preferred public policy. The district court failed to appreciate, however, that physicians' speech may be regulated on the basis of content to ensure that the physician abides by legitimate professional standards. The State, in short, would appear to have a legitimate interest in policing the adherence of a professional to the duty to serve the client's best interests, even when that means interfering with speech, because in the context of professional speech, it is the adherence to the professional role that renders speech within that institution meaningful. The significance of the illegality of any given drug, on this view, would be related (though not identical) to that of the illegality of any given product in the case of commercial speech. Commercial advertising that suggests an illegal transaction with the advertiser (or the advertiser's principal) violates the integrity of the communicative project because the transaction cannot be legally consummated between the speaker and listener. In the case of phy-

⁴¹⁹ See *Conant*, 172 F.R.D. at 695 ("What physicians may not do is advocate use of medical marijuana 'where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'" (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969))).

sician speech, the professional has a duty to act in the client's best interest, and the recommendation that the patient do something that has been rendered illegal on account of its ill effects on health would ordinarily appear to run counter to that duty. In the professional's situation, the incompatibility of the recommendation with the bounded speech institution need not, however, derive primarily from the illegality of the ultimate purchase or the consumption of the drug but is principally due to the ill effects of the use of the drug.

This approach recognizes that government regulation and First Amendment protection are not mutually exclusive concepts. Ordinarily, such as in the case of the traditional public forum, we think of First Amendment protection as deriving from complete state agnosticism about the content or purpose of the debate.⁴²⁰ Although public dialogue is, of course, frequently recognized as ultimately serving self-government or self-expression, the government as regulator must usually remain agnostic as to the parameters of the expression and may not step in to police the boundaries. In contrast to the traditional public forum, however, professional speech and commercial speech appear under a different speech paradigm, in that content-based government regulation may enhance, rather than compromise, the speech practice.⁴²¹ In the case of professional and commercial speech, then, this paradigm of First Amendment protection neither precludes nor allows all content-based regulation of speech. It allows govern-

⁴²⁰ *But see, e.g.,* Owen M. Fiss, Comment, *State Activism and State Censorship*, 100 *YALE L.J.* 2087, 2100 (1991) (concluding that the State should act more generally as a "high-minded parliamentarian" rather than an agnostic, "making certain that all viewpoints are fully and fairly heard").

⁴²¹ Similarly, in the public university context, some decisions that nominally restrict speech on the basis of its content (or viewpoint) might be understood as furthering First Amendment values when examining the decision from the point of view of the academic institution and its members. For example, although an outside observer might conclude that a public university's denial of tenure to professors based on the content of their writings constitutes a restriction on speech, an understanding of the purpose of universities and the goals and ideals of the social practice would lead to the recognition that tenure decisions based on academic excellence advance, rather than undercut, First Amendment values. The role that faithfulness to the social practice plays may be seen in the questions that would be raised if the power to make tenure decisions were placed in the state legislature instead of the university itself. Although the legislature may well make a decision that turns out to be true to university practice (and if it did, a tenure denial would not give rise to a First Amendment claim), the fact that the legislature would be making the decision, as opposed to the actors who are more deeply steeped in the social practice, would most likely be greeted by a court with skepticism and a more searching review of the legislators' motives. Another example is hate-speech regulation in a public university. An argument supporting such regulation, whether ultimately convincing or not, would seem to be more powerful if it attempted to explain that what may appear to the outside observer as a restriction on speech is, when considered in the setting of a university campus or classroom and in light of the values and goals of a university, ultimately speech enhancing.

ment regulation of speech on the basis of its content even when such regulation would be impermissible in other contexts, such as the speech of street-corner speakers or public demonstrators, because (and only to the extent that) in the professional and commercial speech situations, what nominally appears as a restraint on speech may be understood as enhancing the speech practice itself. This paradigm also shields professional speech (and possibly even commercial speech) from selective government funding where the government has not extracted the interlocutors sufficiently from their traditional social roles.⁴²²

CONCLUSION

This Article has attempted to reveal the significant role that existing social institutions play in the application of one seemingly abstract legal norm, the First Amendment, to specific lived situations. The reexamination of the cases in the area of commercial speech in light of the few existing decisions on professional speech reveals that the Supreme Court has shed its traditional agnosticism about the meaning and content of speech in these cases because the interlocutors occupy determined social roles. Formally, this is evidenced by a tendency to resort to listener-based rhetoric, which implies a certain regularity of the framework of the discourse, as opposed to the use of speaker-based rhetoric, which tends to be invoked in cases in which the Court remains agnostic as to the relationship between the interlocutors and, accordingly, as to the function of the communication. Substantively, the view that the speaker and listener occupy determined social roles with respect to their discourse leads to a focus on the protection of the specific communicative relationship as opposed to a general prohibition of all content-based regulation. With regard to these communications, such as discussions between professional and client, government regulation is not invariably destructive of communicative interests, but may indeed foster the communicative relationship and assist in institutionalizing the bounded discourse. Content-based government regulation that assists in maintaining the boundaries of the discourse is therefore permissible, although similar regulation would not be allowed absent the special relationship between the speaker and listener. At the same time, where the government has not extracted the speaker and listener from that relationship, selective government funding of the discourse is not allowed to compromise the integrity of the established speech institution.

⁴²² This approach says nothing about generally accepted principles of prohibiting certain kinds of speech, such as speech that would lead to an immediate breakdown of the social order. *See* *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

This approach of constitutionalizing individuals' professional roles reflects a more general approach in First Amendment law (and beyond), whereby individuals are recognized as situated within social relationships and institutions that influence the permissible scope of state regulation.

In First Amendment challenges to speech in the context of labor relations, for example, the Court has imposed duties of fairness and truthfulness on employers and union representatives in negotiations and elections based on "the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear."⁴²³ Similarly, in the context of labor unions and professional associations, the Court has proceeded on the assumption that it can assess objectively the interests of speakers and listeners within a confined realm of discourse, that is, between a union and its members.⁴²⁴ The Court did not deny that speech about collective bargaining activities or the funding of such speech amounts to protected activity under the First Amendment. And, the Court did not declare that silence, or the refusal to fund speech with which the government disagrees, is categorically beyond constitutional concern. Instead, the Court drew a distinction between speech that pertains to a particular relationship between the speaker and the person required to fund the speech and speech that lies beyond that relationship. Where the speech pertains to a limited realm of discourse with a preconceived purpose that may be characterized and assessed apart from any particular conversation, such as collective bargaining understood as pertaining to concrete negotiations with employers about working conditions, the "beneficiary" of

⁴²³ *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). See generally Derek C. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964) (discussing communication in the context of union elections); Paul D. Snitzer, *Employer Free Speech—The Emergence of a Conflict Between the Board and the Circuits*, 11 LAB. LAW. 247 (1995) (discussing employer predictions and the First Amendment); Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356 (1995). Professor Baker has recently suggested that a similar approach should govern ordinary political elections. See C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 24-26 (1998) (arguing for the constitutionality of regulating electoral speech).

⁴²⁴ See *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 524, 528 (1991) (upholding mandated assessments by a teachers' union where such monies were spent on bargaining activities and professional development, but striking down assessments insofar as they funded a general public relations campaign to raise the esteem of teachers in the eyes of the public); *Keller v. State Bar*, 496 U.S. 1, 16-17 (1990) (upholding mandatory bar fees to the extent that they were used for purposes integral to the regulation of the profession and not for political or ideological activities that fell beyond that goal); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222-23 (1977) (upholding a state requirement that every government employee pay union dues as a condition of employment regardless of whether the individual supported the union's existence or its specific bargaining activities).

the communication may be made to contribute to support the speech. As soon as the communication transcends the bounded discourse and turns to matters that are less closely linked to the particular relationship between the member and the union, the government is no longer in a position to act on its assessment of the value or harm of the speech to the contributor and, therefore, may not require that a contribution be made.

Indeed, this paradigm was recently extended to the realm of commercial speech. In *Glickman v. Wileman Bros. & Elliott, Inc.*,⁴²⁵ the Court drew on union and professional association cases to uphold a federal requirement that California fruit growers, handlers, and processors contribute to a generic advertising campaign promoting their goods. The five-member majority felt able to describe the purpose of individual and generic advertising and concluded, over the objections of the farmers, that "it is fair to presume that they agree with the central message of the speech that is generated by the generic program."⁴²⁶ As in the labor and professional union cases, the Court discarded any agnosticism about the communication that it may have had about political speech. The majority forged ahead to characterize the goals of advertisers' commercial advertising, to define the roles of the interlocutors, and to reach objective conclusions about any speech burdens that were imposed by the program. Concluding that the burdens were minimal, the Court upheld the mandated contribution.⁴²⁷

Even newspaper editors have been held to an enforceable professional obligation to respect the confidentiality of their sources, despite the fact that this obligation in some sense restricts speech.⁴²⁸ More dramatically, broadcasters, who had been subject to access rules since shortly after the regulation of the nascent industry in 1927, and therefore did not enjoy a tradition of unfettered control over their programming (as newspaper editors did), were accorded less discretion to reject unwanted contributions.⁴²⁹ In justifying the imposition of a professional duty to avoid the monopolization of the broadcast medium, the Court again resorted to listener-based rhetoric, apparently indicating the Court's ability to evaluate the communicative enterprise at issue.⁴³⁰ Finally, confidential commercial credit reporting agen-

⁴²⁵ 521 U.S. 457 (1997).

⁴²⁶ *Id.* at 470.

⁴²⁷ *Id.* at 477.

⁴²⁸ See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 665 (1991) (holding that the First Amendment does not protect newspapers from a suit for breach of confidentiality).

⁴²⁹ See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386-90 (1969).

⁴³⁰ See *id.* at 390 ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."). A similar rationale was recently invoked by Justice Breyer when he explained the basis for his deciding vote in *Turner Broadcasting*, a case concerning

cies have been held to work under a professional duty of truthfulness.⁴³¹

Professional traditions also have been a source of First Amendment protection. The Court has, for example, recognized the special role that teachers traditionally have played in our society and has shielded the exercise of that function from state political pressure.⁴³² The tradition of editorial control prevented expansion to the print media of broadcasters' duty to grant access to unwanted submissions, despite the arguably similar conditions of scarcity in the two media. Newspaper editors, in contrast to broadcasters, were thus held to enjoy the professional privilege of refusing to print "that which reason tells them should not be published."⁴³³ And, it was perhaps the difference between the distinctive professional integrity of newspaper editors, on the one hand, and the indistinct nature of the diverse group of nonprofit organizations on the other, that has allowed Congress selectively to fund the activities of the latter, but not of the former, without offending the Constitution.⁴³⁴

Beyond the First Amendment, the Court has also based constitutional rules on its assessment of professional roles. The recent physician-assisted suicide cases, for example, turned in part on whether the responsible exercise of a physician's profession included assisting a patient in committing suicide.⁴³⁵ Similarly, in Contracts Clause cases, the Court developed the

cable-casting. *See* *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 225-29 (1997) (Breyer, J., concurring) (arguing that fair competition and balance should be Congress's goals in regulating cable television).

⁴³¹ *See* *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 751 (1985).

⁴³² *See* *Keyishan v. Board of Regents*, 385 U.S. 589, 603 (1967) (discussing the importance of safeguarding academic freedom); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (same); *id.* at 261-63 (Frankfurter, J., concurring in the result) (same).

⁴³³ *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (internal quotations omitted). Thus, one might argue that it was due to the different pedigrees of the editorial traditions of the broadcast and print media that *Red Lion* did not become a general principle privileging listeners' rights in all scarce media, as had been advocated by some. *See* JEROME A. BARRON, *FREEDOM OF THE PRESS FOR WHOM? THE RIGHT OF ACCESS TO MASS MEDIA* 319-43 (1973); Jerome A. Barron, *Access to the Press: A New First Amendment Right*, 80 HARV. L. REV. 1641, 1644-47 (1967); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1406 (1986); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 793 (1987).

⁴³⁴ *Compare* *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 (1987) (striking down the selective taxation of magazines based on their content), *with* *Regan v. Taxation with Representation*, 461 U.S. 540, 551 (1983) (upholding a denial of a tax exemption to organizations, other than veterans' organizations, on account of their lobbying activities).

⁴³⁵ *See, e.g.,* *Washington v. Glucksberg*, 521 U.S. 702, 779 (1997) (Souter, J., concurring in the judgment) (discussing whether "a physician's assistance [in suicide] would fall within the accepted tradition of medical care in our society"); *cf.* *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 763 (1986) (noting requirements that were held

scope of a corporate director's protected realm of discretion based on its understanding of the "ordinary practice" of the profession.⁴³⁶

Recognized social institutions, such as professions, accordingly appear to attain a constitutional status that, on the one hand, allows the government to regulate the institution as a means of fostering the existence and integrity of the institution, and, on the other hand, will protect the institution from ready destruction at the hands of the State, whether by direct regulation or by selective funding. These institutions are thus viewed as mediating the isolated endeavors of individuals and the collective political decision making of universalizing government institutions. This type of constitutional analysis of social institutions, in general, and of bounded speech institutions, in particular, considers individuals not only as abstract, isolated repositories of the ultimate sovereignty of the polity, but also as social beings who live within a web of human and institutional relationships that are given constitutional consideration as well.

The interaction between existing social institutions and fundamental legal norms is complex and deserves further inquiry. First, the justifications for taking into account existing social institutions merit exploration. By drawing on these institutions *sub silentio*, the Court has failed to articulate a normative theory for their role in constitutional adjudication. Second, the question of the interaction and relative pull of the legal norm and the existing social institution warrants examination. Blind deference to existing social practices does not reflect their current role in constitutional adjudication.⁴³⁷ Blind deference would also not be justified if the fundamental legal norm is to retain any weight. At the same time, however, an understanding of the social practice can inform our conception of an otherwise abstract legal norm.⁴³⁸ Finally, and related to the above, is the practical question of institutional reform, which inquires into the constitutional legitimacy of the

unconstitutional because they infringe "upon [the physician's] professional responsibilities", *overruled in part by* *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

⁴³⁶ See Gregory A. Mark, *The Court and the Corporation: Jurisprudence, Localism, and Federalism*, 1997 SUP. CT. REV. 403, 433; *id.* at 430-36.

⁴³⁷ See *Bates v. State Bar*, 433 U.S. 350 (1977) (striking down a prohibition on lawyer advertising); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 478 (1976) (holding that statutory bans on advertising prescription drug prices violated the First Amendment); see also *Gentile v. State Bar*, 501 U.S. 1030, 1054 (1991) (opinion of Kennedy, J., joined by Marshall, Blackmun & Stevens, J.J.) ("We have not in recent years accepted our colleagues' apparent theory that the practice of law brings with it comprehensive restrictions, or that we will defer to professional bodies when those restrictions impinge upon First Amendment freedoms.").

⁴³⁸ See *Rust v. Sullivan*, 500 U.S. 173, 199-200 (1991) (noting that selective funding of traditional relationships may raise First Amendment concerns that selective funding of other communicative interactions would not).

legal reform of existing social institutions. Once the significant role that social institutions play in the adjudication of seemingly abstract rights is recognized, attention should be turned to these pressing normative concerns.