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**The Constitutional Status
of Commercial Speech**

by

Robert Post[†]

In 1976 the Supreme Court reversed its longstanding conclusion that "the Constitution imposes no . . . restraint on government" regulation of "purely commercial advertising."¹ The announcement spawned what has since become known as "commercial speech" doctrine, a notoriously unstable and contentious domain of First Amendment jurisprudence. No other realm of First Amendment law has proved as divisive. Some adamantly support the Court's original position depriving commercial speech of constitutional protection,² whereas others are unable to

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¹ *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942). *Chrestensen* was reversed in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (hereinafter "*Virginia Pharmacy*").

² See, e.g., Thomas H. Jackson and John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 *Va. L. Rev.* 1 (1979); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 *Stan. L. Rev.* 299, 352-55 (1978); C. Edwin Baker, *Commercial Speech: A Problem in the*

discern any "philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech."³

Striving to preserve a middle ground between these two extremes, the Court has sought to fashion a doctrine that "rests heavily on 'the common-sense distinction between speech proposing a commercial transaction . . . and other varieties of speech.'"⁴ This distinction is said to justify the conclusion "that 'commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is

Theory of Freedom, 62 Iowa L. Rev. 1 (1976); Vincent Blasi, The Pathological Perspective and the First Amendment, 85 Colum. L. Rev. 449, 484-89 (1985); *Virginia Pharmacy*, 425 U.S. at 787-90 (Rehnquist, J., dissenting); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 598-99 (1980)(Rehnquist, J. dissenting)(hereinafter "*Central Hudson*"); cf. *Valentine v. Chrestensen*, 316 U.S. 52 (1942); Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 812-818 (1999).

³ 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996) (Thomas, J., concurring) (hereinafter "*44 Liquormart*"). See Alex Kozinski and Stuart Banner, *Who's Afraid of Commercial Speech*, 76 Va. L. Rev. 627 (1990); Rodney A Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 Tex. L. Rev. 777 (1993); Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 Geo. Wash. L. Rev. 429 (1971); cf. Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 Sup. Ct. Rev. 123.

⁴ *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 636 (1985) (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978)) (hereinafter "*Zauderer*").

subject to `modes of regulation that might be impermissible in the realm of noncommercial expression.'"⁵

Although the Court has persistently adjudged commercial speech to be "subordinate," it has never explained why this might be true.⁶ Lacking firm jurisprudential foundations, commercial speech doctrine has veered wildly between divergent and inconsistent approaches. A 1986 decision by the Court was so solicitous of government restrictions as to suggest to commentators that commercial speech doctrine was "left for dead,"⁷ whereas a 1996 decision was so protective as to render it "unclear why `commercial speech' should continue to be treated as a separate category of speech isolated from general First Amendment principles."⁸

⁵ Board of Trustees v. Fox, 492 U.S. 469, 477 (1989)(quoting Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 456 (1978)).

⁶ "[T]he still-dominant test devised by the Court is simply a quantitatively-reduced protection afforded to commercial speech, as compared to noncommercial speech." Daniel Halberstam, Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions, 146 U. Pa. L. Rev. 771, 792 (1999). For a recent spirited defense of the Court's commercial speech jurisprudence, as well as a full account of the critical dissatisfaction that it has engendered, see Nat Stern, In Defense of the Imprecise Definition of Commercial Speech, 58 Md. L. Rev. 55 (1999).

⁷ Sullivan, supra note 3, at 123. The decision was in *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328 (1986). For contemporaneous commentary, see Philip B. Kurland, *Posadas de Puerto Rico v. Tourism Company: ``Twas Strange, `Twas Passing Strange, `Twas Pitiful, `Twas Wondrous Pitiful,*" 1986 Sup. Ct. Rev. 1.

⁸ Sullivan, supra note 3, at 126. The decision is *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

The Court has proved susceptible to such wide swings of perspective because its "common-sense" attitude to commercial speech has systematically obscured two critical questions. These were concisely stated, appropriately enough, by William Van Alstyne in his 1995 Nimmer Memorial Lecture: "What *is* 'commercial' speech, and, ... how, if at all, may commercial speech be treated *differently*, or less favorably, than other speech . . . ?"⁹ In this Nimmer Memorial Lecture, the first of the 21st Century, I propose to pursue the two inquiries posed by Van Alstyne.

In Part I of this Lecture, I discuss how the constitutional category of "commercial speech" should be defined for purposes of the First Amendment. A definition of the category must explain, first, how commercial speech differs from forms of expression that receive "core"¹⁰ First Amendment protections. And it must explain, second, how the category of commercial speech should be distinguished from the innumerable kinds of commercial communications, ranging from professional speech to product safety

⁹ William Van Alstyne, Remembering Melville Nimmer: Some Cautionary Notes on Commercial Speech, 43 UCLA L. Rev. 1635, 1637 (1996).

¹⁰ Frederick Schauer, Commercial Speech and the Architecture of the First Amendment, 56 U. Cin. L. Rev. 1181, 1185 (1988). On the First Amendment contrast between "core" and "periphery," see David F. McGowan, A Critical Analysis of Commercial Speech, 78 Calif. L. Rev. 359, 430-36 (1990).

warnings, that do not receive even the First Amendment protections of commercial speech.

I argue, in brief, that core First Amendment protections extend to those forms of communication that are deemed necessary to ensure that a democratic state remains responsive to the views of its citizens.¹¹ The Court has called these forms of communication "public discourse,"¹² and it has endowed them with constitutional value because they are regarded as constituting participation in the process of democratic self-governance. Commercial speech, by contrast, consists of communication about commercial matters that conveys information necessary for public decisionmaking, but that does not itself form part of public discourse.

Commercial speech thus differs from public discourse because it is constitutionally valued merely for the information it disseminates, rather than for being itself a valuable way of participating in democratic self-determination. Commercial speech doctrine protects only certain kinds of commercial communications that disseminate

¹¹ See Robert Post, "Between Democracy and Community: The Legal Constitution of Social Form," *NOMOS XXXV* ("Democratic Community") 163-90 (1993).

¹² See, e.g., *Rosenberger v. University of Virginia*, 515 U.S. 819, 831 (1995); *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988).

information, however, and I argue that these are communications distributed through an impersonal public communicative sphere in which persons are understood to be independent and rational. Commercial communications that do not receive the First Amendment protections of commercial speech doctrine, by contrast, typically occur in social settings that are personal, or that involve persons who are deemed dependent, vulnerable or not fully rational.

In Part II of this Lecture, I argue that the particular constitutional values that define commercial speech illuminate many of the doctrinal rules that apply to it. Ironically, the "subordinate" status of commercial speech is a consequence of the fact that commercial speech doctrine expresses the theory, first articulated by Alexander Meiklejohn, that the constitutional function of communication is to inform an *audience* of citizens about matters pertinent to democratic decisionmaking. First Amendment protections of public discourse, by contrast, tend to focus on safeguarding the capacity of *speakers* to participate in the process of self-governance. This contrast between a Meiklejohnian account of self-determination and what might be called a participatory

theory of self-governance¹³ illuminates why commercial speech doctrine does not prohibit compelled speech, overbroad government regulations, or prior restraints.

The fundamental flaw in contemporary commercial speech doctrine, however, is that its primary doctrinal standard, the so-called *Central Hudson* test,¹⁴ is so vague and abstract as entirely to fail to express any specific constitutional values. Allegiance to the formal terms of the *Central Hudson* test has masked growing differences within the Court about the rationale and purpose of commercial speech doctrine. In recent years these differences have grown so sharp that they threaten the very coherence of the doctrine. I conclude this Lecture by assessing these differences and suggesting possible reformulations of the *Central Hudson* test that might enable it more accurately to reflect the theoretical justifications of commercial speech doctrine.

¹³ On the distinction between Meiklejohnian and participatory theories of democratic self-government, see Robert C. Post, Constitutional Domains: Democracy, Community, Management 268-89 (1995); Robert Post, "Equality and Autonomy in First Amendment Jurisprudence," 95 Michigan Law Review 1517 (1997) (hereinafter "*Equality*").

¹⁴ *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980). For a full statement of the test, see text at note 151 *infra*.

I. Defining Commercial Speech

Commercial advertising comprises the core of the constitutional category of "commercial speech." But sometimes advertising is deemed to be public discourse rather than commercial speech,¹⁵ and sometimes expression that would not ordinarily be regarded as advertising is included within the category of commercial speech.¹⁶ The boundaries of the category are thus quite blurred.

It might be thought that we could sharpen our apprehension of the category by identifying particular characteristics uniquely shared by all communicative acts within it. But efforts to pursue this line of analysis have proved frustrating. Commercial speech can not be defined by a set of characteristics uniquely shared by its speakers, because no such characteristics can be specified. Although it is true that commercial speakers are typically paid for their speech and that they communicate in order to earn profits, so also do many speakers whose communications receive the "full" protection of the First Amendment earn recompense for their speech and publish for profit.¹⁷

¹⁵ See, e.g., *New York Times, Inc. v. Sullivan*, 376 U.S. 254, 256-57 (1964).

¹⁶ See, e.g., *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983).

¹⁷ *Smith v. California*, 361 U.S. 147, 150 (1959) (books); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (motion pictures).

Although it is true that commercial speakers seek to "solicit" for the sale of goods, so also do many speakers who engage in fully protected forms of speech.¹⁸

If we instead seek to define commercial speech by its content, rather than by the attributes of its speakers, we confront the paradox that the classification of any particular communication can sometimes depend entirely upon the identity of its speaker. A pharmacist who advertises drug prices is said to engage in commercial speech,¹⁹ but the publication of these same prices by *Consumer Reports* would likely merit full First Amendment protection.²⁰ Certainly the pamphlet describing venereal disease and condoms, which the Court deemed commercial speech when distributed by a condom manufacturer,²¹ would receive full protection if published by an AIDS prevention group.²²

¹⁸ See, e.g., *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 630-32 (1980); *Thomas v. Collins*, 323 U.S. 516, 531 (1945) (First Amendment protection can not be denied merely because "an organization for which the rights of free speech . . . are claimed is one 'engaged in business activities' or that the individual who leads it in exercising these rights receives compensation for doing so.").

¹⁹ *Virginia Pharmacy*, 425 U.S. at 761.

²⁰ See *Lowe v. SEC*, 472 U.S. 181, 210 n.58 (1985); Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 *Nw. L. Rev.* 1212, 1257 (1983); Daniel Farber, *Commercial Speech and the First Amendment*, 74 *Nw. U. L. Rev.* 372, 381-83 (1979).

²¹ *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). The eight page pamphlet discussed "at length the problem of venereal disease and the use and advantages of condoms in aiding the prevention of venereal disease." *Id.* at 63 n.4.

The impossibility of uniquely identifying the attributes of commercial speech has been much noted. In 1976 Justice Blackmun asserted that the very obscurity of the category of commercial speech meant that it could not be entirely without First Amendment protection.²³ In recent times commentators have urged that this same obscurity implies that commercial speech can not be systematically relegated to a subordinate First Amendment position.²⁴ Whatever its implications, the impossibility of specifying the parameters that define the category of commercial speech has haunted its jurisprudence and scholarship.

²² Just as it impossible uniquely to specify the attributes of commercial speech, so it is impossible to specify a set of government purposes that apply only to commercial speech. It is sometimes said, for example, that commercial speech gives rise to a special government interest in suppressing "misleading" communication. Thus Justice Stevens has written that "any description of commercial speech that is intended to identify the category of speech entitled to less First Amendment protection should relate to the reasons for permitting broader regulation: namely, commercial speech's potential to mislead." *Rubin v. Coor's Brewing Co.*, 514 U.S. 476, 494 (1995) (Stevens, J., concurring). See *44 Liquormart*, 517 U.S. at 501 (Opinion of Stevens J., joined by Kennedy, J. and Ginsburg, J.). But the danger of "misleading" communication exists in fully protected speech as well as in commercial speech. It is certainly as important to regulate misleading political advertisements as it is to police misleading commercial advertisements for eggs. *National Commission on Egg Nutrition v. FTC*, 570 F.2d 157 (7th Cir. 1977), cert. denied, 439 U.S. 821 (1978). If the First Amendment treats the two forms of regulation differently, as it surely does, Shiffrin, *supra* note 20, at 1231, it is not because the government interest in ensuring accurate information is any less for political, than for commercial speech. It is rather because commercial speech and political discourse implicate different kinds of constitutional values.

²³ *Virginia Pharmacy*, 425 U.S. at 761-62.

²⁴ See, e.g., Alex Kozinski and Stuart Banner, *supra* note 3.

On close inspection, however, this difficulty may derive from an implicit presumption about what ought to count as a satisfactory definition. We have sought to define the category of commercial speech by searching for unique characteristics possessed by speech acts included within the category. But the issue may be approached from a different angle. We might seek to define the category by reference to the constitutional values it is designed to serve. It is not uncommon for First Amendment categories to be defined in this way.

I have argued elsewhere, for example, that the boundaries of "public discourse" are normatively defined. Public discourse is composed of those processes of communication that must remain open to the participation of citizens if democratic legitimacy is to be maintained.²⁵ The basic idea is that democratic legitimacy depends upon citizens having the warranted belief that their government is responsive to their wishes. Public discourse consists of the various kinds of communication to which citizens must have unrestricted access if this belief is to be

²⁵ See, e.g., Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 *Colorado Law Review* 1109 (1993) (hereinafter "*Meiklejohn's Mistake*"); Robert Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 *Harv. L. Rev.* 601 (1990) (hereinafter "*Constitutional Concept*").

sustained. Within public discourse citizens forge, in the words of Learned Hand, "that public opinion which is the final source of government in a democratic state."²⁶ The possibility of participating in the formation of public opinion authorizes citizens to imagine themselves as included within the process of collective self-determination.²⁷ This is what I have called the "participatory" model of democratic self-governance.

Just as the participatory model suggests that the definition of the category of public discourse is determined by reference to constitutional values,²⁸ so I shall argue in this Lecture that the category of commercial speech should also be defined by reference to constitutional values. The question, therefore, is what constitutional values the category of commercial speech might be designed to serve.

When he invented the contemporary category of commercial speech in his opinion in *Virginia Pharmacy*,

²⁶ *Masses Pub. Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y.), reversed, 246 F. 24 (2d Cir. N.Y. 1917).

²⁷ For an argument that the right to vote is by itself insufficient to maintain this sense of inclusion, see Post, *Equality*, supra note 13, at 1525-28.

²⁸ For a full discussion, see Post, *Constitutional Concept*, supra note 25, at 667-84.

Justice Blackmun proposed that the category was necessary to implement two distinct constitutional values:

Advertising . . . is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. . . . And if it 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. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.²⁹

Blackmun's first suggestion is that commercial speech ought to be constitutionally protected in order to ensure "the proper allocation of resources in a free enterprise system." Generalizing from the needs of consumers who may urgently require information about drug prices, Blackmun in *Virginia Pharmacy* concludes that "society may also have a strong interest in the free flow of commercial information."³⁰ He argues, in effect, that "the efficient allocation of resources" depends "upon informed consumer

²⁹ *Virginia Pharmacy*, 425 U.S. at 765.

³⁰ *Id.*, at 763-64.

choices,"³¹ which in turn require the free circulation of commercial information. Later cases have specifically reaffirmed this reasoning.³²

Although economic efficiency is no doubt an important consideration for government policy, it is difficult to see why it should be a specifically First Amendment concern. As Steve Shiffrin pointedly asks, "Why should allocation of resources be a First Amendment worry?"³³ The First Amendment does not require courts to scrutinize government actions that directly interfere with the efficiency of the market, as for example by setting prices or prohibiting products. Why then should the First Amendment be concerned with the more indirect effects of advertising regulations on market efficiency?

³¹ *Friedman v. Rogers*, 440 U.S. 1, 9 (1979).

³² In his opinion for the Court in *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481-82 (1995), for example, Justice Thomas cites economic efficiency as *the* reason why the First Amendment protects commercial speech:

Though we once took the position that the First Amendment does not protect commercial speech, . . . we repudiated that position in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council.*, 425 U.S. 748 (1976). There we noted that the free flow of commercial information is "indispensable to the proper allocation of resources in a free enterprise system" because it informs the numerous private decisions that drive the system. *Id.*, at 765. Indeed, we observed that a "particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.*, at 763.

³³ Steven H. Shiffrin, Dissent, Injustice, and the Meanings of America 40 (1999).

A tempting response to this question is that advertising is a form of communication, and the First Amendment is always triggered when the government regulates "speech as such."³⁴ There are, however, three reasons why this temptation ought to be firmly resisted. The first is that it is probably false to say that the First Amendment is triggered whenever government regulates "speech as such."³⁵ I have elsewhere argued this point at length,³⁶ but suffice it to say that social life is full of communicative processes that are routinely regulated without the benefit of First Amendment analysis. The process of contract formation, for example, consists entirely of communication, but its regulation does not trigger First Amendment scrutiny. Such scrutiny is brought to bear only when the regulation of communication affects a constitutional value specifically protected by the First Amendment.

Second, even if "speech as such" were to trigger some form of First Amendment protection, we would not know the nature of that protection until we could assess the

³⁴ *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 478 (1997) (Souter, J., dissenting). See Smolla, *supra* note 3, at 780.

³⁵ Frederick Schauer demonstrated this point almost two decades ago. See Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 *Vand. L. Rev.* 265, 268-73 (1981).

³⁶ Robert Post, *Recuperating First Amendment Doctrine*, 47 *Stanford Law Review* 1249 (1995) (hereinafter "*Recuperating*").

constitutional values potentially imperiled by government regulation. First Amendment safeguards vary depending upon the constitutional significance of the speech that the government seeks to regulate,³⁷ and this significance is measured by the constitutional values that we understand the First Amendment to serve. Whatever constitutional values we attribute to the First Amendment, however, will necessarily distinguish between communicative acts that are pertinent to their fulfillment and those that are not.³⁸ This is true even of the most general kinds of First Amendment values, like "autonomy" or self-realization.³⁹ It is not clear, then, what it would even mean to claim that "speech as such" is constitutionally protected, because as soon as one specifies the constitutional values necessary to give shape and substance to that protection, particular communicative acts that do not serve these values will be excluded.

³⁷ See text at notes 209-212, *infra*; Post, Constitutional Domains, note 13 *supra*, at 16-17.

³⁸ Post, *Recuperating*, *supra* note 36, at 1271-73. So, for example, if the constitutional value of speech is thought to lie in its "the truth-seeking function," *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988), then the Constitution will protect only those speech acts that facilitate this function.

³⁹ See Post, *Recuperating*, *supra* note 36, at 1272-73; Baker, *supra* note 2.

Third, even if "speech as such" were to merit some form of First Amendment protection, there is no reason whatever to believe that the constitutional value by which such protection should be measured is that of efficiently allocating resources in a free market society. To locate such a value in the First Amendment would be to justify Chief Justice Rehnquist's charge that the jurisprudence of commercial speech is really a revival of "the discredited doctrine" of substantive due process "of such cases as *Lochner* and *Tyson & Brother v. Banton*."⁴⁰ It is both implausible and damaging to the First Amendment to view it as a repository of micro-economic theory, as the champion of a particular (and contested) view of proper market functioning. Indeed the Court has itself elsewhere cautioned against relying "on the First Amendment as a basis for reviewing economic regulations."⁴¹

For these reasons, commercial speech doctrine should not be defended on the ground that commercial advertising serves the First Amendment value of market efficiency. We must turn, then, to the second constitutional principle

⁴⁰ *Central Hudson*, 447 U.S. at 591 (Rehnquist, J., dissenting). See *id.* at 589; Jackson and Jeffries, *supra* note 2, at 3-31; Cass Sunstein, *Lochner's Legacy*, 87 Colum. L. Rev. 873, 883-84 (1987); David Yassky, *Eras of the First Amendment*, 91 Colum. L. Rev. 1699 (1991).

⁴¹ *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 476 (1997).

that Blackmun articulates in *Virginia Pharmacy*. This principle concerns the enlightenment of "public decisionmaking in a democracy." Blackmun contends that commercial speech facilitates a "free flow of commercial information" that "may be of general public interest."⁴² According to this approach, commercial speech should receive constitutional protection in order to safeguard "the essential role that the free flow of information plays in a democratic society."⁴³

Underlying this approach is the notion is that citizens may acquire information from commercial speech that is highly relevant to the formation of democratic public opinion. Democratic public opinion, in turn, is the ultimate source of government decisionmaking. If citizens learn from commercial advertising that pharmacy drugs are

⁴² *Virginia Pharmacy*, 425 U.S. at 764.

⁴³ *44 Liquormart*, 517 U.S. at 512 (Opinion of Stevens, J.) (joined by Kennedy, J., Souter, J. and Ginsburg, J.). The year after *Virginia Pharmacy*, Blackmun again referred to the two distinct constitutional justifications for commercial speech doctrine, but with a slightly different emphasis:

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, although 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.

Bates v. State Bar of Arizona, 433 U.S. 350, 364 (1977).

too expensive, for example, they might organize politically to advocate within public discourse for the creation of a national health insurance. If they learn from commercial advertising that the cost of gasoline is on the rise, they might organize politically to advocate within public discourse for government price controls.

Commercial speech might also be relevant to the formation of public opinion in a second and ultimately more profound sense. Although public discourse includes specific debates about potential policy decisions, it is also an arena suffused with intense and contentious articulations of collective identity.⁴⁴ Within public discourse heterogeneous and conflicting visions of national identity continuously collide and reconcile. These visions may or may not have immediate policy implications, but they are nevertheless highly significant for the general orientation of the nation. Visions of the good life articulated within commercial advertisements are highly relevant to this process. Any observer of the American scene would report that advertising deeply influences our sense of ourselves as a nation.⁴⁵ The canonical photographs

⁴⁴ Post, *Meiklejohn's Mistake*, supra note 25, at 1116-19.

⁴⁵ See, e.g., Stuart Ewen, *Advertising and the Development of Consumer Society*, in Ian Angus & Sut Jhally, eds., Cultural Politics in

of Walker Evans, for example, poignantly chronicle the significance of commercial advertisements as embodiments of personal and national ideals.⁴⁶ This kind of influence is probably as important to the formation of democratic public opinion, and hence to public decisionmaking, as the discrete price information at stake in *Virginia Pharmacy*.

This explanation of the constitutional value of commercial speech resonates with traditional First Amendment reasoning.⁴⁷ Almost from the outset of its First Amendment jurisprudence, the Court has viewed freedom of speech as serving the purpose of democratic self-government.⁴⁸ There are, however, competing theories about how this purpose should be understood.

Contemporary America 82-95 (1989).

⁴⁶ The recent Evans exhibition at the Metropolitan Museum of Art in New York, for example, illustrates the extent to which Evans was seized by manifold ways in which the utopian aspirations of mass marketing images affected the perspectives of his subjects, particularly amid the harsh realities of the Depression. See Walker Evans, et al., Walker Evans (2000).

⁴⁷ "The Court recognized that commercial advertising indirectly contributes to the ends traditionally served by the first amendment by supplying the public with information, images, and values that may enter into discussion of public issues" Comment, First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine, 44 U. Chi. L. Rev. 205, 226-27 (1976).

⁴⁸ In one of its earliest opinions, for example, the Court reasoned that "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, is a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U.S. 359, 369 (1931).

One theory, which has deeply informed the development of First Amendment jurisprudence, is the participatory model, whose outlines I have already sketched. The participatory model emphasizes the importance of preserving uncensored access to public discourse so that citizens can maintain the warranted sense that their government is responsive to them.⁴⁹ The participatory model protects public discourse in order to preserve a necessary (but not sufficient) precondition for democratic legitimation. Commercial speech, however, does not seem a likely candidate for inclusion within public discourse, because persons who are advertising products for sale are not seeking to influence public opinion. They do not invite reciprocal dialogue or discussion; their speech is not an effort to make the state responsive to them. It is instead an attempt to sell products.⁵⁰

⁴⁹ For a brief explanation of the participatory model, see text at notes 25 to 27 *supra*.

⁵⁰ To characterize commercial speech in this way is not to adjudge the actual motivations of particular speakers, but instead to articulate a categorical judgment concerning a generic class of speech acts. It is not uncommon for First Amendment jurisprudence to employ categorical judgments in this way, to decide what *kinds* of communicative acts will be included or excluded from public discourse. A similar categorical judgment is visible, for example, in the Court's effort to distinguish public discourse from obscenity: "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people, But the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter." *Miller v. California*, 413 U.S. 15, 34-35 (1973). For other examples, see *Post, Constitutional Concept*, *supra* note 25, at 676-77. Such

It remains true, however, that commercial speech affects public discourse. The impact of commercial speech on the formation of public opinion may be conceived as a by-product of the effort to sell products. To capture this insight, Blackmun appeals in *Virginia Pharmacy* to a theory of democratic self-governance that is quite different from the participatory model. Blackmun summons instead the account of Alexander Meiklejohn.

Meiklejohn famously argued that "the final aim" of First Amendment freedom is to ensure the circulation of opinion and information necessary for "the voting of wise decisions."⁵¹ Meiklejohn believed that constitutional protections should be focused on the rights of citizens to receive information, rather than on the rights of speakers to express themselves. That is why he concluded that "What is essential is not that everyone shall speak, but that everything worth saying shall be said."⁵² In the succinct words of a modern Meiklejohnian: "We allow people to speak so others can vote. Speech allows people to vote

categorical judgments are the means by which constitutional law distinguishes and evaluates discrete social practices. For examples, see Post, *Recuperating*, super note 36, at 1274-5; text at notes 63 to 66 *infra*.

⁵¹ Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People 26 (1960).

⁵² *Id.*

intelligently and freely, aware of all the options and in possession of all the relevant information."⁵³ Meiklejohn's influence is perceptible in various areas of First Amendment doctrine, most notably in the regulation of broadcast media, where the Court has held that "It is the right of viewers and listeners, not the right of the broadcasters, which is paramount."⁵⁴

The Court's development of commercial speech doctrine closely tracks Meiklejohn's analysis. The Court has been quite explicit that commercial speech should be constitutionally protected so as to safeguard the

⁵³ Owen Fiss, Liberalism Divided: Freedom of Speech and the Many Uses of State Power 13 (1996). Of course it is somewhat ironic to attribute protection for commercial speech to a Meiklejohnian analysis, because it was Meiklejohn himself who remarked that "The constitutional status of a merchant advertising his wares . . . is utterly different from that of a citizen who is planning for the general welfare." Meiklejohn, *supra* note 51, at 37. See Halberstam, *supra* note 6, at 805-15; Redish, *supra* note 3, at 434-38. Meiklejohn took the town meeting as the essential model for protected speech, and he thus might well have assumed that constitutional safeguards extended only to those who, unlike merchants advertising their wares, meant to participate in the public dialogue of the town meeting. But his sharp focus on the constitutional importance of the flow of information to voters is in tension with this assumption, and there is certainly a plausible Meiklejohnian logic to the position that information about commercial prices and products is necessary in order to inform democratic decisionmaking.

⁵⁴ *Red Lion Broadcasting CO. v. FCC*, 395 U.S. 367, 390 (1969). For a discussion, see Robert Post, *Subsidized Speech*, 106 Yale L. J. 151, 158-61 (1996). The speech of broadcasters is regulated in ways that would be plainly unconstitutional if applied to participants in public discourse. See, e.g., *FCC v. National Citizens' Comm. For Broad.*, 436 U.S. 775, 800 (1978); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). The difference lies in the fact that broadcasters, unlike newspapers, are constitutionally regarded as public trustees for the interests of the public, rather than as independent participants in public discourse. See, e.g. *Red Lion*, 395 U.S. at 389-90.

circulation of information. It has therefore focused its analysis on the need to receive information, rather than on the rights of speakers. Two years after *Virginia Pharmacy*, for example, the Court declared that "the First Amendment goes beyond protection of the . . . self-expression of individuals to prohibit the government from limiting the stock of information from which members of the public may draw. A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the 'free flow of commercial information.'"⁵⁵ And in the authoritative case of *Central Hudson*, the Court flatly pronounced that "The First Amendment's concern for commercial speech is based on the informational function of advertising."⁵⁶

This focus on information introduces an important point of difference from the "ordinary" First Amendment protections that apply to public discourse. It is a necessary condition for democratic legitimacy that citizens have free access to public discourse, because censoring a citizen's ability to contribute to public opinion renders the government, with respect to that citizen, "heteronomous

⁵⁵ *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978).

⁵⁶ *Central Hudson*, 447 U.S. at 563. See Farber, *supra* note 20, at 384.

and nondemocratic.”⁵⁷ Many of the First Amendment safeguards of public discourse therefore are speaker-oriented.⁵⁸ Commercial speech doctrine, by contrast, is sharply audience-oriented. From a constitutional point of view, the censorship of commercial speech does not endanger the process of democratic legitimation. It does not threaten to alienate citizens from their government or to render the state heteronomous with respect to speakers. Instead it merely jeopardizes the circulation of information relevant to “the voting of wise decisions.”⁵⁹

We may thus construct a rough and incomplete definition of commercial speech as the set of communicative acts about commercial subjects that conveys information of

⁵⁷ Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 *Wm. & My. L. Rev.* 267, 290 (1991). For a full discussion, see *id.* at 279-85.

⁵⁸ See Post, *Equality*, *supra* note 13, at 1526-28. I do not mean to imply, of course, that ordinary First Amendment protections do not also extend to audiences. For one thing, the participatory model of democratic self-governance seeks to preserve the potential for the kinds of speaker-audience relationships that constitute our concept of “participation.” See *Board of Education v. Pico*, 457 U.S. 853, 867 (1982) (Opinion of Brennan, J.); *Martin v. Struthers*, 319 U.S. 141, 143 (1943). For another, the participatory model stresses the importance of collective self-determination, which requires constitutional protection for the dialogue and exchange of information within which that self-determination can responsibly proceed. See Post, *Constitutional Domains*, *supra* note 13, at 272-76. These protections must extend to both speakers and audience.

⁵⁹ See Burt Neuborne, *A Rationale for Protecting and Regulating Commercial Speech*, 46 *Brooklyn L. Rev.* 437, 454 (1980); Halberstam, *supra* note 6, at 831-32. I should stress that the “information” disseminated by commercial speech includes the visions of collective identity powerfully present in advertising.

relevance to democratic decisionmaking but that does not itself form part of public discourse. There are, however, two difficulties with this definition. The first is that it does not explain how speech can provide information of relevance to public decisionmaking and yet not be part of public discourse. The second is that the definition is vastly overinclusive, because there are numerous forms of speech about commercial subjects that contain information relevant to democratic decisionmaking and yet which do not receive even the weak protection afforded to commercial speech. A lawyer's discussion of the state of the stock market with her client, for example, would not be conceptualized as commercial speech.

To understand the definition I have proposed, therefore, it is necessary carefully to explore two distinctions that are implicit within it. The first concerns the difference between commercial speech and public discourse; the second concerns the difference between commercial speech and the many communicative acts about commercial subjects that are not included within the First Amendment protections of commercial speech doctrine.

A. The Distinction Between Commercial Speech and Public Discourse

It is useful to investigate how the Court constructs the boundary between public discourse and commercial speech in the context of specific cases. Consider, for example, *Murdock v. Pennsylvania*,⁶⁰ in which the Court had before it a city ordinance requiring that "all persons . . . soliciting . . . orders for goods . . . or merchandise of any kind" purchase a license.⁶¹ The Court found it unconstitutional to apply this ordinance to Jehovah Witnesses engaged in "door to door" solicitation for the purchase of "certain religious books and pamphlets."⁶² The Court stated:

The alleged justification for the exaction of this license tax is the fact that the religious literature is distributed with a solicitation of funds. . . . Situations will arise where it will be difficult to determine whether a particular activity is religious or purely commercial. . . . As we stated only the other day, in *Jamison v. Texas*, 318 U.S. 413, 417, "The states can prohibit the use of the streets for the distribution of purely commercial leaflets, even though such leaflets may have 'a civic appeal, or a moral platitude' appended. . . . They may not prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote the

⁶⁰ 319 U.S. 105 (1943).

⁶¹ *Id.* at 106.

⁶² *Id.*

raising of funds for religious purposes." But the mere fact that the religious literature is "sold" by itinerant preachers rather than "donated" does not transform evangelism into a commercial enterprise. . . . The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books. The right to use the press for expressing one's views is not to be measured by the protection afforded commercial handbills. . . . It is plain that a religious organization needs funds to remain a going concern. . . . [T]he problem of drawing the line between a purely commercial activity and a religious one will at times be difficult. On this record it plainly cannot be said that petitioners were engaged in a commercial rather than a religious venture.⁶³

The passage repays close reading. The Court poses the question of whether the Jehovah's Witnesses "were engaged in a commercial rather than a religious venture." This question does not focus on the narrow communicative act of selling a Bible, but rather on the larger "venture" or "activity" within which the particular communicative act is embedded. Constitutional characterization of the act of solicitation depends upon its context, for the Court is explicit that hawking a Bible would present a different constitutional issue if it merely involved the "venture" of retailing commercial goods.⁶⁴

⁶³ Id. at 110-11.

⁶⁴ Actually, the Court refers to the venture of retailing or wholesaling books. I have varied the reference in text because a modern understanding of commercial speech doctrine might well exclude advertisements for "activity that itself is protected by the first amendment." Comment, *supra* note 47, at 235.

Murdock therefore turns on a judgment about what may be called the social practice of religion. Essential to the case is an evaluation of what it means to be a Jehovah's Witness, as distinct from a retailer of goods. The Court concludes that the attempts of the Jehovah's Witnesses to sell religious books should be understood as part of their efforts to support and spread "their religious beliefs."⁶⁵

The conclusion that the Jehovah's Witnesses' solicitations should legally be regarded as inseparable from their engagement in religious "evangelism" exemplifies the way in which constitutional law presupposes active judicial *characterization* of the social world. The conclusion requires the Court to address the question of whether "evangelism" should be understood as a protected effort to shape public opinion. Because the Court is clear that religious dialogue is "essential to enlightened opinion and right conduct on the part of the citizens of a democracy,"⁶⁶ it holds that the solicitations of the

⁶⁵ One can only imagine what kind of a conclusion the Court would reach were it confronted with the case of a scientologist selling *Dianetics* by L. Ron Hubbard. Would the scientologist be cast as a religious speaker? as a political disputant? as a merely commercial salesman? The divide between commercial and political speech is constructed through judgments like these, which involve the characterization of social practices.

⁶⁶ *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

Jehovah's Witnesses should receive full constitutional protection.

The logic that underlies *Murdock* is thus complex and subtle. It requires the Court to determine, first, the place of the Jehovah's Witnesses' solicitations within the "venture" of religious evangelism, and, second, the place of such evangelism within the creation of the public opinion necessary for democratic self-governance. Both these judgments are thoroughly evaluative, because both ultimately turn on charting and classifying the social world in order best to serve the constitutional value of democratic self-determination.

This kind of analysis is typical in decisions where the Court has attempted to distinguish commercial speech from public discourse. Take, for example, a case like *Thomas v. Collins*,⁶⁷ where the Court had to decide whether a Texas statute requiring labor organizers to register with the state "before soliciting any members for"⁶⁸ their organizations was to be construed as a restraint on public discourse or instead as a simple regulation of "business

⁶⁷ 323 U.S. 516 (1945).

⁶⁸ *Id.* at 519, n.1.

practice,"⁶⁹ "like selling insurance, dealing in securities, acting as commission merchant, pawnbroking, etc."⁷⁰

The Court observed that "it does not resolve where the line shall be drawn . . . merely to urge . . . that an organization for which the rights and free speech and free assembly are claimed is one 'engaged in business activities' or that the individual who leads it in exercising these rights receives compensation for doing so."⁷¹

These comparisons are at once too simple, too general, and too inaccurate to be determinative. Where the line shall be placed in a particular application rests, not on such generalities, but on the concrete clash of particular interests and the community's relative evaluation both of them and of how the one will be affected by the specific restriction, the other by its absence.⁷²

The Court explicitly concludes that no simple fact, like the presence of a business interest or compensation, can distinguish commercial from political speech. Particular facts are of course relevant, but, viewed in isolation, not determinative. What is determinative is the achievement of constitutional purposes. Normative judgments of this kind, as the sociologist Philip Selznick

⁶⁹ Id. at 527.

⁷⁰ Id. at 526.

⁷¹ Id. at 531.

observes, always require "contextual thinking,"⁷³ a close attention to "textured meanings and concrete understandings."⁷⁴

Selznick's observation explains why the contemporary Court has in its commercial speech doctrine persistently gestured toward "the 'commonsense' distinction'"⁷⁵ between commercial speech and "speech at the First Amendment's core."⁷⁶ The evaluations of "commonsense" are complex, contextual, and ultimately inarticulate; the Court's appeal to common sense acknowledges that the achievement of constitutional purposes cannot be reduced to any simple rule. The appeal contrasts sharply to the Court's occasional assertion that commercial speech can be distinguished from public discourse merely on the basis of its content, as though commercial speech were any communication "that does no more than propose a commercial

⁷² Id.

⁷³ Philip Selznick, "Foundations of Communitarian Liberalism," 4 The Responsive Community 16, 21 (Fall 1994).

⁷⁴ Philip Selznick, The Moral Commonwealth 323 (1992).

⁷⁵ *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 (1995).

⁷⁶ *Florida Bar v. Went For It., Inc.*, 515 U.S. 618, 623 (1995).

transaction,"⁷⁷ or any "expression related solely to the economic interests of the speaker and its audience."⁷⁸

Murdock and *Thomas* suggest that the distinction between commercial speech and public discourse turns precisely on what it means to relate "solely" to economic interests, or to do "no more" than propose a transaction. These phrases must be understood to reflect judgments about "the character of the expressive activity" at issue,⁷⁹ judgments which necessarily entail an assessment of the larger social practice within which that activity is embedded.⁸⁰ That is why commercial speech cannot be transformed into public discourse merely by altering its content to insert assertions about matters of public concern.⁸¹

⁷⁷ *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 426 (1993); *Board of Trustees, State University of New York v. Fox*, 492 U.S. 469, 482 (1989); *Virginia Pharmacy*, 425 U.S. at 771 n. 24.

⁷⁸ *Central Hudson*, 447 U.S. at 561.

⁷⁹ *In re Primus*, 436 U.S. 412, 438 n.32 (1978).

⁸⁰ In *Primus*, for example, the Court held that the solicitation of a public interest ACLU lawyer should be regarded as public discourse. This conclusion rested on a categorical judgment that there was "no basis for equating the work of lawyers associated with the ACLU or the NAACP with that of a group that exists for the primary purpose of financial gain through the recovery of counsel fees." *Primus*, 436 U.S. at 431. In the Court's view, "The ACLU engages in litigation as a vehicle for effective political expression and association," *id.*, and public discourse includes "the opportunity to persuade to action, not merely to describe facts.'" *Id.* at 432 (Quoting *Thomas v. Collins*, 323 U.S. 516, 537 (1945)).

⁸¹ See, e.g., *Central Hudson*, 447 U.S. at 563 n.5. The point is nicely illustrated by the facts of *Valentine v. Chrestensen*, 326 U.S. 52

In *Thomas* the Court concluded that the solicitation of union members should not be regarded as a narrowly commercial communication. Just as in *Murdock* the Court had viewed the solicitation of Jehovah's Witnesses as constitutionally inseparable from the practice of religious evangelism, so in *Thomas* the Court characterized the labor

(1942), where the city of New York enforced an ordinance forbidding "distribution in the streets of commercial and business advertising matter" against a businessman who sought to disseminate "a handbill advertising" a submarine "and soliciting visitors for a stated admission fee." 316 U.S. at 53. The businessman cleverly responded by a creating "double-faced handbill."

On one side was a revision of the original, altered by the removal of the statement as to admission fee but consisting only of commercial advertising. On the other side was a protest against the action of the City Dock Department in refusing the respondent wharfage facilities at a city pier for the exhibition of his submarine, but no commercial advertising. The Police Department advised that distribution of a bill containing only the protest would not . . . be restrained, but that distribution of the double-faced bill was prohibited.

Id. The businessman, in other words, sought to transform commercial speech into public discourse by inserting words of political protest. When he was restrained by the police, he asserted that "he was engaged in the dissemination of matter proper for public information, none the less so because there was inextricably attached to the medium of such dissemination commercial advertising matter." Id. at 55. The Court, however, would have none of it:

We need not indulge nice appraisal based upon subtle distinctions in the present instance nor assume possible cases not now presented. It is enough for the present purpose that the stipulated facts justify the conclusion that the affixing of the protest against official conduct to the advertising circular was with the intent, and for the purpose, of evading the prohibition of the ordinance. If that evasion were successful, 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 law's command.

Id. It is clear, therefore, that *Valentine* holds that the category of commercial speech does turn merely on the specific content of particular words, but instead on a constitutional appraisal of "the character of the expressive activity" at issue. The content of words are relevant to this appraisal, but not determinative.

organizer's solicitation as inseparable from the efforts of union labor to participate in the formation of public opinion.⁸² And the Court had no doubt but that such efforts were to be included within public discourse, because "[f]ree discussion concerning the conditions of industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society."⁸³

Thomas thus displays the same analytic structure as *Murdock*. The Court seeks, first, to ascertain the "character of the expressive activity" within which a particular speech act is embedded, and then, second, to determine whether that activity is to be included within public discourse.⁸⁴ To include speech within public discourse is to signify that it is constitutionally valued not merely for the contribution it may make to public discussion, but also, intrinsically, for the engagement it

⁸² "This case falls in the category of a public speech, rather than that of practicing a vocation as solicitor." *Thomas*, 323 U.S. at 548 (Jackson, J., concurring).

⁸³ *Id.* at 532 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 102-03 (1940)).

⁸⁴ The Court's recent line of cases holding that charitable solicitations are part of public discourse rather than commercial speech displays analogous reasoning. See, e.g. *Schaumburg v. Citizens for A Better Environment*, 444 U.S. 620, 632 (1980).

represents in the public life of the nation. A democracy cannot flourish unless its citizens actively participate in the formation of its public opinion. Such participation is "precious"⁸⁵ and to be encouraged for its own sake.

This perspective suggests a concise formulation of the First Amendment difference between commercial speech and public discourse. The distinction turns on whether constitutional value attaches to participation in a given speech act, or whether constitutional value attaches instead only to the information conveyed by the speech act.

B. The Distinction Between Commercial Speech and Commercial Communications

The Court is fond of observing that "[o]ur jurisprudence has emphasized that `commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to `modes of regulation that might be impermissible in the realm of noncommercial expression.'"⁸⁶ But this observation is highly misleading, for it falsely implies that commercial speech receives less

⁸⁵ *Forsyth County, v. Nationalist Movement*, 505 U.S. 123, 131 (1992); *United States v. Robel*, 389 U.S. 258, 265 (1967).

⁸⁶ *Board of Trustees of the State Univ. v. Fox*, 492 U.S. 469, 477 (1989) (quoting *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 456 (1978)). See, e.g., *Florida Bar v. Went For It., Inc.*, 515 U.S. 618, 623 (1995).

protection than all other forms of expression. Although the First Amendment protections extended to commercial speech are fewer and weaker than those extended to public discourse, commercial speech in fact receives far greater constitutional protection than many forms of commercial communication.

It has rightly been observed that there is a "universe of communication relating only to business activity, having no explicit political or artistic or ideological content, and yet differing substantially from the kind of widespread public hawking of wares represented by the *Virginia Pharmacy* archetype."⁸⁷ These include

numerous communications among business executives about prices and business practices now regulated by the Sherman Antitrust Act; . . . representations about products now regulated by various consumer protection laws, by the Uniform Commercial Code, and by the common law of warranty and contract; statements about willingness to enter into a contract now regulated by the common law of contract; and so on and on.⁸⁸

Whatever First Amendment protection the commercial communications within this larger universe are entitled to receive, it is clear that they do not receive the specific

⁸⁷ Schauer, *supra* note 10, at 1183. See Shiffrin, *supra* note 20, at 1213-14.

⁸⁸ Schauer, *supra* note 10, at 1184.

constitutional safeguards created by commercial speech doctrine.

Commercial speech doctrine is thus not merely about the boundary that separates commercial speech from public discourse, but also about the boundary that separates the category of commercial speech from the surrounding sea of commercial communications that do not benefit from the protections of the doctrine. If the construction of the first boundary must answer to the question of why commercial speech receives less First Amendment protection than public discourse, the construction of the second boundary must answer to the question of why commercial speech doctrine extends special First Amendment protections to some commercial communications but not to others.

Although there are numerous cases in which the Court has more or less explicitly addressed the distinction between commercial speech and public discourse, there are few if any decisions in which the Court has addressed the distinction between the First Amendment category of commercial speech and these other forms of commercial communications. The question is rendered even more confusing by the Court's conclusion that "for commercial speech to come within [the First Amendment], it at least

must concern lawful activity and not be misleading.”⁸⁹ It is not clear whether “misleading” speech is simply “commercial speech” that can be regulated by the state, or whether it is instead excluded even from the category of “commercial speech.”

Consideration of the distinction between commercial speech and the general category of commercial communications must thus be at best tentative and speculative. In this section I will offer an analytic framework intended to illuminate some of the issues involved in this distinction.

It is often quite useful to begin analysis by focusing on paradigmatic cases. State efforts to prohibit advertisements for drug prices placed by a pharmacist in a local newspaper would unambiguously be analyzed by the First Amendment principles of commercial speech doctrine. An unobtrusive but essential aspect of what makes this case exemplary is the fact that the pharmacist’s advertisements have been placed in a newspaper.⁹⁰ I have argued elsewhere that newspapers are a medium for the communication of

⁸⁹ *Coors Brewing Co.*, 514 U.S. at 482 (Quoting *Central Hudson*, 447 U.S. at 566).

⁹⁰ For attempted regulation of advertisements in newspapers, see, e.g., *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *In Re R.M.J.*, 455 U.S. 191 (1982); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *44 Liquormart*, 517 U.S. at 490-91.

ideas, and that such media constitute the "structural skeleton"⁹¹ of a public communicative sphere. Sociologists have defined this sphere as a shared "universe of discourse"⁹² that unites persons who would otherwise be strangers by exposing them "to similar social stimuli."⁹³ Within the public communicative sphere, persons are presumed to be independent and rational,⁹⁴ and to engage each other through "critical interaction."⁹⁵ The operation of democracy presupposes and requires a public communicative sphere.⁹⁶

A newspaper editorial discussing drug prices would be protected as public discourse, because it would be regarded as an effort to participate in this public communicative sphere in a manner that enacts the constitutional value of democratic self-governance. A pharmacist advertising drug prices in that same newspaper, however, would not be regarded as a participant in public discourse, because her speech would not be deemed to enact the value of democratic

⁹¹ Post, *Recuperating*, supra note 36, at 1276.

⁹² Clark, *The Concept of the Public*, 13 Sw. Soc. Sci. Q. 311, 313 (1933).

⁹³ J. Bennett & M. Tumin, Social Life: Structure and Function 140 (1948).

⁹⁴ Post, *Recuperating*, supra note 36, at 1276.

⁹⁵ E. Reuter & C. Hart, Introduction to Sociology 502 (1933).

self-governance. Nevertheless the pharmacist's advertisement, no less than the newspaper's editorial, would disseminate information to the public at large and in this way serve the important constitutional function of sustaining the public communicative sphere. This is an essential insight of commercial speech doctrine.

We might contrast the pharmacist's advertisement, therefore, to those forms of commercial communications that do not serve to underwrite a public communicative sphere. A paradigmatic example might be communications that occur within "fiduciary, person-to-person relationships."⁹⁷ Although the communication between a professional and her client might concern commercial matters, its regulation would almost certainly not be conceptualized as an issue of First Amendment commercial speech doctrine. This suggests that we should distinguish between "impersonal" communications that sustain a public of independent strangers, and "personalized communications" that constitute particular relationships of dependence.⁹⁸

⁹⁶ See Post, *Constitutional Concept*, supra note 25, at 633-44, 672-76.

⁹⁷ *Lowe v. SEC*, 472 U.S. 181, 210 (1985).

⁹⁸ *Id.*

Such a distinction allows us to see that Court's narrow focus on "informational function"⁹⁹ is radically insufficient to define the First Amendment category of commercial speech. In speaking with their clients, lawyers undoubtedly convey information relevant to the exercise of citizenship, and yet such communications would not normally come within the purview of commercial speech doctrine. The doctrine seems to protect only the distribution of commercial information which reinforces a public communicative sphere by addressing strangers who are presumed to be independent and self-possessed. The doctrine stops short of commercial communications between persons deemed to be involved in relationships of dependence or reliance.¹⁰⁰

⁹⁹ *Central Hudson*, 447 U.S. at 563.

¹⁰⁰ For a discussion of these presumptions as thresholds to First Amendment protection, see *Post, Recuperating*, supra note 36, at 1254-55. For an effort to draw this line, see the remarks of Justice White:

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. If the government enacts generally applicable licensing provisions limiting the class of persons who may practice the profession, it cannot be said to have enacted a limitation on freedom of speech or the press subject to First Amendment scrutiny. Where the personal nexus between 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

If we imagine the pharmacist's impersonal newspaper advertisements and the lawyer's personal advice to her clients as the opposite poles of a spectrum, we can perhaps envision how more difficult cases might be analyzed. So, for example, consumer product safety warnings are distributed to the public at large, but they are not regarded as commercial speech because consumers in such contexts are presumed to be dependent and justifiably reliant upon the care of manufacturers.¹⁰¹

By contrast, expression classified as commercial speech is sometimes disseminated to particular persons, rather than to the public at large.¹⁰² In such contexts, however, the Court is careful to assure itself that the strangers who are addressed by a solicitation are able to

incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech, or of the press."

Lowe, 472 U.S. at 232 (White, J., concurring). For a good discussion, see Halberstam, *supra* note 6.

¹⁰¹ See, e.g., *Pavlidis v. Galveston Yacht Basin Inc.*, 727 F.2d 330, 338-339 (5th Cir. 1984); *Knaysi v. A.H. Robins Co.*, 679 F.2d 1366, 1369 (11th Cir. 1982).

¹⁰² *Edenfield v. Fane*, 507 U.S. 761 (1993). Similarly, the Court will sometimes regard as public discourse speech directed only at particular persons, as the Court's invocation of "the lonely pamphleteer who uses carbon paper or a mimeograph" suggests, so long as the speech is distributed in a way --as for example to strangers-- that suggests its target to be the public at large. *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972).

"assess the value of the information presented"¹⁰³ without "dangers of compromised independence."¹⁰⁴ The Court seeks to ascertain whether the circumstances of the solicitation are "conducive to rational and considered decisionmaking."¹⁰⁵ If the context of an individualized solicitation is deemed inconsistent with rational independence, the Court will deprive the solicitation of the First Amendment protection of commercial speech doctrine, citing the possibility of "fraud, undue influence, intimidation," or "overreaching."¹⁰⁶

We can thus see that implicit within commercial speech doctrine lie a set of significant but largely unarticulated assumptions about the context in which the Court will use the First Amendment to ensure that "the stream of commercial information" flows "freely."¹⁰⁷ The Court will intervene only where the stream of information flows among strangers who can be conceived as independent and rational.

¹⁰³ *Edenfield*, 507 U.S. at 767.

¹⁰⁴ *Id.* at 772.

¹⁰⁵ *Id.* at 775.

¹⁰⁶ *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 462 (1978). See *Edenfield*, 507 U.S. at 775 (danger of "uninformed acquiescence"); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 642 (1985) (regulation permissible to avoid "undue influence" or "pressure" that is not "conducive to reflection and the exercise of choice."); *Shapiro v. Kentucky Bar Assn.*, 486 U.S. 466, 474 (1988).

¹⁰⁷ *Edenfield*, 507 U.S. at 768; *Virginia Pharmacy*, 425 US. At 771-72.

We can interpret this as a constitutional requirement that information must be dispersed under conditions that are constitutive of a public communicative sphere.

Where information is exchanged in circumstances that are deemed inconsistent with this sphere, because persons are implicated in relationships of dependence or reliance requiring legal protection, the Court has not applied commercial speech doctrine. It has tended instead to regard the exchange of information within such relationships as “`linked inextricably’ with the commercial arrangement”¹⁰⁸ in which it occurs, so that regulation of the arrangement can also restrict the speech by which the arrangement is constituted.

II. Protecting Commercial Speech

We can now formulate a somewhat more comprehensive account of the First Amendment category of commercial speech. We can define it as the set of communicative acts about commercial subjects that within a public communicative sphere convey information of relevance to democratic decisionmaking but that do not themselves form part of public discourse. This definition, in turn, should

¹⁰⁸ *Edenfield*, 507 U.S. at 767. See *Lowe*, 472 U.S. at 228-29 (White, J. concurring).

illuminate our consideration of Van Alstyne's second question, which asks what difference it makes that a speech act is classified as commercial speech. Constitutional protections for the category of commercial speech ought to be explicable in terms of the constitutional values the category is created to serve.

Commercial speech doctrine is a sprawling, complex and contentious area of jurisprudence, and it is certainly not my ambition to propose a systematic reconstruction of its structure and rules. My hope instead is simply to illustrate that many of the doctrinal rules that establish the subordinate status of commercial speech can be explained by the difference between valuing speech as a form of participation in public discourse, and valuing speech merely for the information it conveys.

To find a path through this large and amorphous topic, I shall divide commercial speech doctrine into two parts. First, I shall discuss rules articulated at the very origins of commercial speech doctrine that describe the kinds of regulations that may be imposed upon commercial speech, but not upon public discourse. There are a number of such rules that have endured with stability and resilience, but I shall discuss only three of them: those which (1) empower states to compel disclosures within the

domain of commercial speech;¹⁰⁹ (2) suspend overbreadth doctrine within the domain of commercial speech;¹¹⁰ and (3) suspend prior restraint doctrine within the domain of commercial speech.¹¹¹ Second, I shall discuss the canonical standard that is used to assess the constitutionality of regulations that are imposed upon commercial speech. This is of course the controversial but still regnant multi-part test first set forth in 1980 in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.¹¹²

A. Rules that Subordinate Commercial Speech

1. Compelled Disclosures

The First Amendment ordinarily prohibits the state from regulations that compel speech within public discourse.¹¹³ The Court has observed that "There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term

¹⁰⁹ *Virginia Pharmacy*, 425 U.S. at 772 n.24.

¹¹⁰ *Bates*, 380-81.

¹¹¹ *Virginia Pharmacy*, 425 U.S. at 772 n.24.

¹¹² 447 U.S. 557, 566 (1980).

¹¹³ Such regulations are viewed as content-based and hence subject "to exacting First Amendment scrutiny." *Riley v National Federation of the Blind*, 487 U.S. 781, 795, 798 (1988).

necessarily comprising the decision of both what to say and what *not* to say.”¹¹⁴ The essential point is that “mandating speech that a speaker would not otherwise make necessarily alters the content of the speech,”¹¹⁵ and “the First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it.”¹¹⁶

This rule does not apply, however, within the domain of commercial speech. In *Virginia Pharmacy* the Court held that commercial speech could be required to “include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive.”¹¹⁷ And in *Zauderer v. Office of Disciplinary Counsel*,¹¹⁸ the Court upheld a state requirement that attorney advertisements contain particular disclosures. The Court reasoned:

¹¹⁴ Id. at 796-97. In *Riley* the Court upheld its previous precedents to the effect that charitable solicitation was public discourse rather than commercial speech. It therefore struck down a state law mandating that professional charitable fund raisers disclose to potential donors the average percentage of gross receipts actually turned over to charities.

¹¹⁵ Id. at 795.

¹¹⁶ Id. at 790-91. For recent examples of the Court’s prohibition of compelled speech, see *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).

¹¹⁷ 425 U.S., at 772 n.24.

¹¹⁸ 471 U.S. 626 (1985).

In requiring attorneys who advertise their willingness to represent clients on a contingent-fee basis to state that the client may have to bear certain expenses even if he loses, Ohio has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present. We have, to be sure, held that in some instances compulsion to speak may be as violative of the First Amendment as prohibitions on speech. . . .

Ohio has not attempted to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." . . . The State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising a purely factual and uncontroversial information about the terms under which his services will be available. Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such provides. . . appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal. . . .

We hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonable related to the State's interest in preventing deception of consumers.¹¹⁹

The doctrinal discrepancy between public discourse and commercial speech could not be sharper. But what explains this discrepancy? The First Amendment strongly disfavors compelled disclosure requirements within public discourse because such requirements are understood to infringe the autonomy of speakers in determining the content of their speech. Disclosure requirements are permissible within the

domain of commercial speech, however, because the autonomy of speakers is not at stake, but only the conveyance of information. Hence commercial speech doctrine accords only "minimal" value to the interests of speakers "in *not* providing any particular factual information."

The doctrinal discrepancy between public discourse and commercial speech accurately reflects the distinct First Amendment values that are understood to be at stake in these two different forms of speech. Public discourse is where citizens attempt to render the state responsive to their views, and hence where individual and collective self-determination is reconciled.¹²⁰ In such circumstances, compulsory speech disrupts the very point of public discourse, for it threatens to compromise "values lying at the `heart of the First Amendment[--]the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."¹²¹

¹¹⁹ Id. at 650-51.

¹²⁰ Post, *Democratic Community*, supra note 11, at 173.

¹²¹ Glickman v. Wileman Brothers & Elliott, Inc., 521 U.S. 457, 472 (1997).

Within commercial speech, by contrast, the primary constitutional value concerns the circulation of accurate and useful information. For the state to mandate disclosures designed more fully and completely to convey information is thus to advance, rather than to contradict, pertinent constitutional values.

2. Overbreadth Doctrine

State regulations of public discourse are subject to overbreadth analysis, but "the First Amendment overbreadth doctrine does not apply to" commercial speech.¹²² This is an important point of difference, but its significance is somewhat obscured by the fact that overbreadth analysis itself is so various and ambiguous.

It will be sufficient for our purposes to distinguish between two different meanings of overbreadth doctrine. First, overbreadth can refer to the form of a legal rule. To say that a legal rule is overbroad is to say that it is overinclusive, that its provisions regulate more behavior than can or should strictly be regulated.¹²³ We use the

¹²² *Shapero v. Kentucky Bar Assn*, 486 U.S. 466, 478 (1988) (Opinion of Brennan, J.). See *Board of Trustees, State University of New York v. Fox*, 492 U.S. 469, 481 (1989); *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 462 n.20.(1978).

¹²³ For examples of this usage, see *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985); *Massachusetts v. Oakes*, 491 U.S. 576, 586-88 (1989) (Opinion of Scalia, J.).

term "overbreadth" in this way whenever we speak of "overbroad statutes."¹²⁴

Second, overbreadth can also refer to the ability of a person to strike down a statute on its face, even if the statute's specific application to him might be constitutional. Overbreadth in this sense is often referred to as a doctrine of third party standing designed to avoid the chilling effect that might occur when a statute is unconstitutional in many of its applications but lacks proper plaintiffs to challenge it.¹²⁵ I shall separately discuss each of these meanings of overbreadth doctrine.

a. Overbreadth as Overinclusiveness

Overbreadth in the sense of overinclusiveness concerns the question of how narrowly tailored a legal rule must be. Overinclusiveness is a matter of degree, and the Court has made clear that it is prepared to accept greater

¹²⁴ See, e.g., *Osborne v. Ohio*, 495 U.S. 103, 118-19 (1990); *Bates*, 433 U.S. at 380; *Erznoznick v. City of Jacksonville*, 422 U.S. 205, 216 (1975).

¹²⁵ *Broadrick v. Oklahoma*, 413 U.S. 601, 610-13 (1973). There is also a third meaning of overbreadth doctrine, which refers to the actual operation of a legal rule. To say that a legal rule is overbroad in this sense is to say that, regardless of its precise drafting, its actual effect is to inhibit the exercise of otherwise protected First Amendment freedoms. Justice Brennan coined the term "overbreadth" in *NAACP v. Button*, 371 U.S. 415, 433 (1963), to describe just this kind of situation. It is not, however, particularly pertinent to our consideration of commercial speech doctrine, and so I have omitted it.

overinclusiveness in the domain of commercial speech than in the arena of public discourse. Within public discourse, it is commonly said that "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."¹²⁶ Considerably greater latitude is allowed within the domain of commercial speech, however, where it is said that "what our decisions require is a 'fit' between the legislature's ends and the means chosen to accomplish those ends, . . . a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interests served.'"¹²⁷

The contrast between the two standards can be seen by comparing the Court's judgments in two cases decided on the same day: *Ohralik v. Ohio State Bar Assn*¹²⁸ and *In re Primus*.¹²⁹ In *Ohralik* the Court upheld a broad prophylactic ban upon in-person solicitation by lawyers. It noted that the ban was justified by inherent dangers of overreaching

¹²⁶ *NAACP v. Button*, 371 U.S. 415, 438 (1963).

¹²⁷ *Fox*, 492 U.S. at 480. There is actually a great deal of play in the joints about how overinclusive a legal regulation may be in the area of commercial speech. Compare *Edenfield*, 507 U.S., at 769; *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 107 (1990) (Opinion of Stevens., J.); *Shapero*, 486 U.S. at 476; *Zauderer*, 471 U.S. at 649, with *Ohralik*, 436 U.S. at 464.

¹²⁸ 436 U.S. 447 (1978).

¹²⁹ 436 U.S. 412 (1978).

and undue influence, and the Court held that the ban could be applied to a particular lawyer even though the state had not demonstrated that he had himself engaged in any such misconduct.¹³⁰ In *Primus*, by contrast, the Court held that in-person solicitation of public interest litigation by an ACLU lawyer was to be regarded as public discourse, rather than as commercial speech, and hence that it could not be regulated by such an overbroad rule.

The approach we adopt today in *Ohralik* . . . that the State may proscribe in-person solicitation for pecuniary gain under circumstances likely to result in adverse consequences, cannot be applied to appellant's activity on behalf of the ACLU. . . .

At bottom, the case against appellant rests on the proposition that a State may regulate in a prophylactic fashion all solicitation activities of lawyers because there may be some potential for overreaching . . . whenever a lawyer gives unsolicited advice and communicates an offer of representation to a layman. Under certain circumstances, that approach is appropriate in the case of speech that simply "propose[s] a commercial transaction" In the

¹³⁰ The lawyer argued "that nothing less than actual proved harm to the solicited individual would be a sufficiently important state interest to justify disciplining the attorney who solicits employment in person for pecuniary gain." 436 U.S. at 464. But, the Court said, the lawyer's "argument misconceives the nature of the State's interest."

The Rules prohibiting solicitation are prophylactic measures whose objective is the prevention of harm before it occurs. The Rules were applied in this case to discipline a lawyer for soliciting employment for pecuniary gain under circumstances likely to result in the adverse consequences the State seeks to avert. In such a situation, which is inherently conducive to overreaching and other forms of misconduct, the State has a strong interest in adopting and enforcing rules of conduct designed to protect the public from harmful solicitation by lawyers whom it has licensed.

Id.

context of political expression and association, however, a State must regulate with significantly greater precision.¹³¹

Notice that the state's interest in protecting clients is exactly the same in *Ohralik* and in *Primus*. Because the significance of the state's interest is held constant, the distinction between the degree of overinclusiveness allowed by the two cases must reflect a difference in the constitutional value of the speech that the state seeks to regulate. A Meiklejohnian model of the First Amendment cannot explain this difference, for it regards all speech as constitutionally valuable because of the information it provides for public decisionmaking. We need instead a theory of the First Amendment capable of recognizing that public discourse implicates different constitutional values than does commercial speech.

I have already suggested that the participatory model of self-governance offers such an account, because it allows us to see that public discourse exemplifies the constitutional value of democratic legitimation, while

¹³¹ 436 U.S. at 434, 437-38. It should be noted, however, that within public discourse the Court has only required "precision of regulation" for legal rules that are content-based. Content-neutral time, place and manner regulations are permitted approximately the same degree of overinclusiveness as are regulations of commercial speech. See *Fox*, 492 U.S. at 477-78; *Post Recuperating*, supra note 36, at 1260-63. But regulations of commercial speech are characteristically content-based, and so, like the regulation at issue in *Ohralik*, tend to be too imprecise to withstand the strict scrutiny they would receive were they to be imposed upon public discourse.

commercial speech does not. Both public discourse and commercial speech convey information relevant to democratic decisionmaking, but because public discourse is also a venue of democratic participation, overinclusive statutes do more constitutional damage when applied to public discourse than to commercial speech. Applied to public discourse, overinclusive statutes endanger the precious and fragile value of democratic engagement. This value is not at risk in the regulation of commercial speech.

b. Overbreadth as Third Party Standing

The doctrine of overbreadth refers not only to the overinclusiveness of legal rules, but also to the question of whether "a party whose own conduct is not protected by the First Amendment" can "challenge a regulation as" overinclusive "because of its impact on parties not before the Court."¹³² The justification for this branch of overbreadth doctrine is that an overinclusive statute

might serve to chill protected speech. First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the *in terrorem* effect of the statute. . . . The use of overbreadth analysis reflects the conclusion that the possible harm to society from allowing

¹³² *Peel*, 496 U.S. at 107 n.15. For a typical confusion between the two senses of overbreadth, see *id.* at 118-19 (White, J., dissenting).

unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted.¹³³

This aspect of overbreadth doctrine, which might be termed overbreadth standing analysis, is said to be categorically inapplicable to commercial speech.¹³⁴ The reason given by the Court for this exclusion is that "commercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely."¹³⁵ "[C]ommercial speech is more hardy, less likely to be 'chilled,' and not in need of surrogate litigators."¹³⁶

This reasoning relies upon an empirical account of the actual durability of commercial speech, an account that does "not survive close examination."¹³⁷ Many forms of public discourse are fueled by an intense and hardy search for profits: motion pictures, books, magazines, and

¹³³ *Bates*, 433 U.S. at 380.

¹³⁴ *Id.*

¹³⁵ *Virginia Pharmacy*, 425 U.S. at 771 n.24. See *Bates*, 433 U.S. at 381: "Since advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation."

¹³⁶ *Fox*, 492 U.S. at 481. "Commercial speech is not as likely to be deterred as noncommercial speech, and therefore does not require the added protection afforded by the overbreadth approach." *Ohralik*, 436 U.S. 462 n.20. See *Friedman v. Rogers*, 440 U.S. 1, 10 (1979).

¹³⁷ See Farber, *supra* note 20, at 385-86.

newspapers, to mention only a few.¹³⁸ The chilling effect of regulation, moreover, "depends as much on the potential penalty as on the motivation for the speech. A five dollar fine in a political speech case is probably less of a deterrent than a jail sentence—or disbarment—in a commercial speech case."¹³⁹

At most, therefore, it might be argued that commercial speech is perhaps relatively less likely to be chilled than public discourse, and the empirical basis of even such a tepid generalization is quite shaky. The argument certainly does not justify a rule that *categorically* forbids applying overbreadth standing analysis to commercial speech. It is more plausible to understand the categorical nature of this exclusion as expressing the perspective which we have already applied to the overinclusiveness branch of overbreadth doctrine. Overbreadth standing analysis is categorically excluded from commercial speech doctrine because of the constitutional *quality* of the speech that might be chilled, rather than because of its empirical *quantity*.

To chill commercial speech is to lose information. No other constitutional value is at stake. Information is

¹³⁸ Kozinski and Banner, *supra* note 3, at 637.

¹³⁹ Farber, *supra* note 20, at 386.

fungible. The central insight of Meiklejohnian analysis is that it doesn't matter which speaker provides information, so long as it is provided. If a particular speaker is chilled, therefore, it is quite possible that equivalent information will become available from other sources.

If public discourse is chilled, by contrast, not only is information lost, but also the possibility of democratic legitimation. Democratic legitimation is not fungible; it is earned, speaker by speaker. A person whose participation within public discourse has been chilled has by hypothesis become that much more alienated from the state. This important difference might well explain why the Court categorically applies overbreadth standing analysis to public discourse, but not to commercial speech.

3. Prior Restraint Doctrine

There are heavy presumptions against imposing prior restraints upon public discourse.¹⁴⁰ But in *Virginia Pharmacy* Blackmun specifically notes that these presumptions might be "inapplicable" to commercial speech.¹⁴¹ In *Central Hudson* the Court even recommends a system of

¹⁴⁰ *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971).

¹⁴¹ *Virginia Pharmacy*, 425 U.S. at 772 n.24; *Friedman*, 440 U.S. at 10.

prior restraints as an acceptable method of regulating commercial speech.¹⁴² The Court thus seems to have created a doctrinal structure in which prior restraints are presumptively unconstitutional within public discourse, but presumptively constitutional for commercial speech.

A difficulty in explaining this discrepancy lies in the knotted and ambiguous nature of prior restraint doctrine, for it is hard to ascertain exactly what values the doctrine is meant to serve.¹⁴³ A plausible account, however, is that offered by the Court in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, in which the Court asserted that "the special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment."¹⁴⁴

Although this reasoning cannot begin to provide a full explanation of the entire range of prior restraint

¹⁴² *Central Hudson*, 447 U.S. at 571.

¹⁴³ See, e.g., Stephen Barnett, *The Puzzle of Prior Restraint*, 29 *Stan. L. Rev.* 539 (1977); Vincent Blasi, *Prior Restraints on Demonstrations*, 68 *Mich. L. Rev.* 1482 (1970); Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 *Minn. L. Rev.* 11 (1981); John C. Jeffries, Jr., *Rethinking Prior Restraint*, 92 *Yale L.J.* 409 (1983); Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 *Va. L. Rev.* 53 (1984).

¹⁴⁴ 413 U.S. 376, 390 (1973).

doctrine,¹⁴⁵ it does seem pertinent to the Court's refusal to apply the doctrine to the area of commercial speech. The Court has explicitly remarked that "We have observed that commercial speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it."¹⁴⁶ We can thus interpret the Court's refusal to apply prior restraint doctrine to commercial speech as resting on the notion that commercial speech is too durable to be chilled by prior restraints.

If this is the Court's reasoning, the same explanation that we have already articulated with regard to overbreadth standing analysis applies to prior restraint doctrine. The empirical assertion that commercial speech is more "sturdy" than public discourse is suspect, but the chilling of public discourse poses distinctive and more significant threats to central constitutional values than does the chilling of commercial speech. The differential application of prior restraint doctrine, therefore, expresses the constitutional distinction between

¹⁴⁵ In a case like *New York Times Co. v. United States*, 403 U.S. 713 (1971), for example, the proposed injunction of the Court could not possibly have resulted in a chilling effect, since the injunction would have extended only to specific materials before the Court, as to which a full judicial examination had been conducted. Yet the proposed injunction was regarded as a disfavored prior restraint.

¹⁴⁶ *Central Hudson*, 447 U.S. at 571 n.13.

communication valued only as information, and communication valued as constitutive of democratic self-government.

B. The *Central Hudson* Test

After a period of much controversy, the Court in 1980 in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*¹⁴⁷ articulated a general test for determining the constitutionality of regulations of commercial speech. Although the test has subsequently been interpreted from radically different perspectives,¹⁴⁸ and although it has been attacked by numerous justices,¹⁴⁹ it has nevertheless remained the dominant test.¹⁵⁰ The test provides:

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not

¹⁴⁷ 447 U.S. 557 (1980).

¹⁴⁸ Compare, e.g., *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328 (1986) with *Rubin v. Coors*, 514 U.S. 476 (1995). See Note, *A Doctrine in Disarray: Why the First Amendment Demands the Abandonment of the Central Hudson Test for Commercial Speech*, 27 *Seton Hall L. Rev.* 1626, 1628 (1997); Note, *The First Amendment and Legislative Bans of Liquor and Cigarette Advertisements*, 85 *Colum. L. Rev.* 632, 635 (1985).

¹⁴⁹ See, e.g., *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

¹⁵⁰ See, e.g., *Greater New Orleans Broadcasting Ass'n v. United States*, 119 S.Ct. 1923 (1999).

more extensive than is necessary to serve that interest.¹⁵¹

The *Central Hudson* test can be divided into two parts. The first part of the test articulates threshold conditions for the application of First Amendment protections. The second part of the test enunciates the nature of these protections. I shall discuss each of these parts separately. My concern will be to explore how the various aspects of the *Central Hudson* test can best be interpreted to reflect the underlying First Amendment theory that justifies constitutional protections for commercial speech.

1. The Threshold Requirements

The *Central Hudson* test imposes two threshold requirements before commercial speech can receive First Amendment protection. The speech must concern lawful activity and it must not be misleading.

In this brief lecture I shall not discuss the requirement of lawful activity. Within public discourse, the advocacy of illegal actions cannot be sanctioned "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."¹⁵² In an early case the Court

¹⁵¹ *Central Hudson*, 447 U.S. at 566.

¹⁵² *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). For a discussion of

actually used this test to shield commercial speech from regulation on the ground that it advertised potentially illegal action.¹⁵³ But the *Central Hudson* test has since drawn a bright line between commercial speech and public discourse with regard to speech connected to illegal action.

Some have argued that this line is illusory, because soliciting illegal action is flatly unprotected even within public discourse.¹⁵⁴ But there does seem to be an important difference between advocating illegal action and soliciting illegal action, and much commercial speech would appear closer to the former than the latter. Apart from stressing the obvious (and to me significant) constitutional difference between penalizing the dissemination of information about illegal acts and penalizing participation in the process of democratic self-governance because of a possible connection to illegal acts, however, I shall only observe that this is a dense and obscure area that is best left to another day.

Brandenburg, see Larry Alexander, *Incitement and Freedom of Speech*, in David Kretzmer and Francine Kershman Hazan, Freedom of Speech and Incitement Against Democracy 101-18 (2000); Kent Greenawalt, Speech, Crime and the Uses of Language (1989).

¹⁵³ *Carey v. Population Services Intl.*, 431 U.S. 678, 701 (1977).

¹⁵⁴ See, e.g., *Sullivan*, *supra* note 3, at 152.

Instead I shall focus on the threshold requirement that commercial speech cannot receive First Amendment protection if it is "misleading."¹⁵⁵ To analyze this requirement, we must distinguish speech that is factually false from speech that is merely misleading. With respect to false speech, the Court has held that "there is no constitutional value in false statements of fact."¹⁵⁶ Although the dissemination of false facts within public discourse is most often protected in order to avoid chilling the communication of otherwise protected speech,¹⁵⁷ the Court has refused to apply this kind of chilling analysis to commercial speech. As a consequence the lack of constitutional protection for false statements of fact has had more dramatic effects in the realm of commercial speech.

Of much greater theoretical importance, however, is the distinction between commercial speech and public discourse with regard to the regulation of misleading speech. Within the area of public discourse, the Court has

¹⁵⁵ "[F]alse, deceptive, or misleading commercial speech may be banned." *Ibanez v. Florida Department of Business and Professional Regulation*, 512 U.S. 141, 142 (1994).

¹⁵⁶ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

¹⁵⁷ See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).

been clear that "there is no such thing as a false idea."¹⁵⁸ But under the *Central Hudson* test "misleading" commercial speech does not merit any First Amendment protection at all.¹⁵⁹ This is said to be because "[t]he First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flow[s] cleanly as well as freely.'"¹⁶⁰

Withholding First Amendment protection from misleading speech appears on its face inconsistent with the Meiklejohnian theory that justifies constitutional protection for commercial speech. Meiklejohn famously

¹⁵⁸ *Gertz*, 418 U.S. at 339. See, e.g., *Central Hudson*, 447 U.S. at 598 (Rehnquist, J., dissenting):

[I]n the world of political advocacy and *its* marketplace of ideas, there is no such thing as a "fraudulent" idea: there may be useless proposals, totally unworkable schemes, as well as very sound proposals that will receive the imprimatur of the "marketplace of ideas" through our majoritarian system of election and representative government.

See Shiffrin, *supra* note 20, at 1231.

¹⁵⁹ See, e.g., *In Re R.M.J.*, 455 U.S. 191, 203 (1982):

Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive.

¹⁶⁰ *Edenfield*, 507 U.S. at 768 (Quoting *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976)).

believed that there was an "equality of status in the field of ideas."¹⁶¹ Imagine, for example, the moderator at a Meiklejohnian town meeting ruling a speaker out of order because his ideas were "misleading." Meiklejohn would have been appalled:

When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American. Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good.¹⁶²

The threshold requirement that commercial speech not be misleading is especially striking because the Court's justification for it is so very weak. The Court has sought to explain the requirement on the grounds that "the truth of commercial speech . . . may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself knows more about than anyone

¹⁶¹ Meiklejohn, *supra* note 51, at 27.

¹⁶² *Id.*

else."¹⁶³ But this explanation, like the hypothetical "durability" which the Court has attributed to commercial speech, has received scathing and persuasive criticism.

Putting aside outright false communications, the difficulties of identifying misleading statements seem as formidable in the area of commercial speech as in the arena of public discourse.¹⁶⁴ Indeed, the Court has itself acknowledged as much:

A brief survey of the body of case law that has developed as a result of the Federal Trade Commission's efforts to carry out its mandate under §5 of the Federal Trade Commission Act to eliminate "unfair or deceptive acts or practices in . . . commerce," 15 U.S.C. §45(a)(1), reveals that distinguishing deceptive from nondeceptive advertising in virtually any field of commerce may require resolution of exceedingly complex and technical factual issues and the consideration of nice questions of semantics.¹⁶⁵

Especially in an age of "product-image and produce-personality advertising,"¹⁶⁶ the notion that commercial

¹⁶³ *Virginia Pharmacy*, 425 U.S. at 771 n.24. See *Coors Brewing Co.*, 514 U.S. at 495 n.4 (Stevens, J., concurring):

Most of the time, if a seller is representing a fact or making a prediction about his product, the seller will know whether his statements are false or misleading and he will be able to correct them. On the other hand, the purveyor of political speech is more often . . . an observer who is in a poor position to verify its truth.

¹⁶⁴ See, e.g., Farber, *supra* note 20, at 385-86.

¹⁶⁵ *Zauderer*, 471 U.S. at 645.

¹⁶⁶ Ronald K.L. Collins & David M. Skover, *Commerce & Communication*, 71 *Tex. L. Rev.* 697, 702 (1993).

speech is any more verifiable than public discourse has a rather quaint air about it, as though nostalgic for an era before "advertising entered the twentieth century."¹⁶⁷

Stripped of this unconvincing justification, the withholding of First Amendment protection from misleading commercial speech appears puzzling, because it seems inconsistent with the very theory articulated by the Court to justify constitutionally protecting commercial speech. The Court has, however, used the *Central Hudson* "misleading" requirement in two distinct ways, and at least one of these can be rendered compatible with the Meiklejohnian foundations of commercial speech doctrine.

Meiklejohn imagined the town meeting as an assembly "of free and equal men."¹⁶⁸ Implicit within the public communicative sphere, which defines the limits of commercial speech, are similar presuppositions.¹⁶⁹ There are many social settings, however, where persons are neither equal nor free, but unequal and dependent. A paradigmatic example might be the reliance of a patient upon the advice of his doctor. The Court has sometimes used the

¹⁶⁷ Kozinski and Banner, *supra* note 3, at 635. How, for example, might the misleading quality of the claim that "Burger King's hamburgers taste better than McDonalds' because they are charbroiled" be evaluated? *Id.*

¹⁶⁸ Meiklejohn, *supra* note 51, at 25.

¹⁶⁹ See text at notes 90-96 *supra*.

"misleading" requirement to identify such circumstances and to deprive them of the constitutional protection of commercial speech doctrine on the grounds that they "pose dangers that the State has a right to prevent," like "uninformed acquiescence."¹⁷⁰

Used in this way, the "misleading" requirement refers not to the content of speech, but to the structural relationship between a speaker and her audience. Thus the Court has used the requirement to distinguish between "in-person solicitation" and "print advertising," holding that the latter "poses much less risk of overreaching or undue influence" because "more conducive to reflection and the exercise of choice on the part of the consumer."¹⁷¹ In this context, the misleading requirement articulates the prerequisites for the public communicative sphere that underwrites the very constitutional category of commercial speech. It is therefore appropriate to use the requirement as a threshold precondition for First Amendment protection under the *Central Hudson* test.

¹⁷⁰ *Ohralik*, 436 U.S., at 449, 465; *Edenfield*, 507 U.S. at 774-75; text at notes 102-106 supra.

¹⁷¹ *Zauderer*, 471 U.S. at 642. See *Shapero*, 486 U.S. at 475: "In assessing the potential for overreaching and undue influence, the mode of communication makes all the difference."

But the Court has sometimes deployed the misleading requirement in a second and altogether different manner. The Court has interpreted the requirement to refer to the content of commercial speech that is unambiguously disseminated within the public communicative sphere, as for example within newspaper advertisements.¹⁷² Used in this way, the misleading requirement does not refer to the structural relationship between a speaker and her audience, but to the meaning of a speaker's words.¹⁷³ The requirement strips of First Amendment protection speech that, while not outright false, carries the potential to deceive its audience.¹⁷⁴ This usage of the misleading requirement is controversial,¹⁷⁵ but nevertheless enormously significant,

¹⁷² See, e.g., *Zauderer*, 471 U.S. at 652-53.

¹⁷³ Hence the Court stated in *In Re R.M.J.* that the First Amendment would not protect commercial speech when its "particular *content or method* . . . suggests that it is inherently misleading." 455 U.S. 191, 203 (1982) (emphasis added).

¹⁷⁴ It should be said about this usage of the misleading requirement that, although the Court has been careful not to impugn administrative authority to review commercial speech for deceptive meanings, *Zauderer*, 471 U.S. at 645, it has itself been quite chary of using the *Central Hudson* misleading requirement to deprive commercial speech of constitutional protection on the grounds of its content. Early in the career of the doctrine, the Court found the use of a trade name that had "no intrinsic meaning" to be deceptive, *Friedman*, 440 U.S. at 12-13, and it later authorized compelled disclosures in order avoid "the possibility of deception." *Zauderer*, 471 U.S. at 652. But for the most part the Court has been unsympathetic to claims that commercial speech is misleading, rejecting "'mere speculation or conjecture'" and insisting that "the State `must demonstrate that the harms it recites are real.'" *Ibanez*, 512 U.S., at 143 (quoting *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993)).

¹⁷⁵ In *Peel v. Attorney Disciplinary Comm'n of Illinois*, 496 U.S. 91

for it authorizes a "vast regulatory apparatus in both the federal government and the states . . . to control . . . potentially misleading or deceptive speech."¹⁷⁶

It is all the more important, therefore, fully to grasp the deep incompatibility between this interpretation of the misleading requirement and the Meiklejohnian justifications for First Amendment protection of commercial speech. "Just so far as . . . the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue," Meiklejohn writes, "just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment*

(1990), the Court fractured over the issue of deceptive advertising, with the decisive votes of Marshall and Brennan standing for the conclusion that

States may prohibit actually or inherently misleading speech entirely. . . . The Court has upheld such a ban only when the particular method by which the information is imparted to consumers is inherently conducive to deception and coercion.

Id. at 111-12 (Marshall, J., concurring). Citing *Ohralik*, Justices Marshall and Brennan would seem to advocate restricting the "misleading" requirement to circumstances where the relationship between a speaker and her audience does not meet the prerequisites of a public communicative sphere. They seem to argue that within the public communicative sphere the state can not ban commercial speech outright, but only craft regulations designed "to ensure that the information is presented in a nonmisleading manner." *Id.* at 111.

¹⁷⁶ Sullivan, *supra* note 3, at 153.

to the Constitution is directed."¹⁷⁷ When the *Central Hudson* misleading requirement is used to censor the content of speech, it invites the state to mutilate the thinking process of the community by censoring communication which the state believes might potentially be deceptive.

To analyze this issue, we must more precisely specify what it means to label speech as "misleading." If a health reformer were to publish an essay concluding that "eggs are healthy,"¹⁷⁸ the assertion would without doubt be viewed as part of public discourse and protected as an hypothesis, an idea that cannot be sanctioned by the state as "false." But if a commercial group, the National Commission on Egg Nutrition, were to assert precisely the same proposition, the statement might very well be branded as "misleading" and hence stripped of First Amendment protection under *Central Hudson*. It would be feared that consumers might interpret the statement as a simple and inaccurate factual claim.

In the case of the health reformer, the focus of analysis is on the speaker. The distinction between

¹⁷⁷ Meiklejohn, *supra* note 51, at 27.

¹⁷⁸ This hypothetical is based upon *National Commission on Egg Nutrition v. FTC*, 570 F.2d 157 (7th Cir. 1977), cert. denied, 439 U.S. 821 (1978), and the discussion of the case in *Kozinski and Banner*, *supra* note 3, at 642-43.

"ideas" and "factual statements" is interpreted so as to maximize the speaker's freedom of participation within public discourse.¹⁷⁹ In the case of the National Commission on Egg Nutrition, by contrast, the focus of analysis is on the audience. The Commission's speech is entirely circumscribed by the danger that its audience might possibly misinterpret its words. These discrepant foci of analysis are roughly what one would expect from the distinct orientations of the participatory and Meiklejohnian models of self-governance.

The Meiklejohnian model, however, requires us to imagine the audience for protected speech as analogous to citizens at a town meeting. Meiklejohn would have us safeguard the flow of information to the "free and equal" persons "who must pass judgment upon unwisdom and unfairness and danger."¹⁸⁰ But when used to regulate the content of expression, the "misleading" requirement does not imagine the audience of commercial speech as independent and self-governing in these ways. Instead, as Kathleen Sullivan has perceptively noted, "the consumer is not expected to have the competence or access to

¹⁷⁹ See, e.g., *Time, Inc. v. Pape*, 401 U.S. 279 (1971) (distinguishing between interpretations and factual assertions).

¹⁸⁰ Meiklejohn, *supra* note 51, at 25, 27.

information needed to question the advertiser's claim, and the correction is not to be left to competitors and mere government counterspeech."¹⁸¹ The Court has frankly acknowledged that the "misleading" requirement is premised on the notion that "the public lacks sophistication."¹⁸²

This is why the *Central Hudson* "misleading" requirement, when used to prohibit commercial speech based upon the content of that speech, is incompatible with the Meiklejohnian premises that justify protecting commercial speech.¹⁸³ Incompatibility exists to the extent that the Court interprets the category of "misleading" speech more expansively than the category of false factual statements, which can be regulated consistently with a Meiklejohnian model. And this discrepancy can be precisely measured by the Court's willingness to attribute to consumers an inadequate ability to interpret and evaluate ambiguous

¹⁸¹ Sullivan, *supra* note 3. See US Articles of Drugs, etc., 263 F. Supp 212, 215 (N.D. Neb. 1967).

¹⁸² In re R.M.J., 455 U.S. 191, 200 (1982) (quoting *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977)). But see *Peel*, 496 U.S. at 105 (Opinion of Stevens, J.): "We reject the paternalistic assumption that the recipients of petitioner's letterhead are no more discriminating than the audience for children's television."

¹⁸³ Notice that this tension does not extend to the Court's rule that commercial speech which is only "potentially misleading" may not be banned, but that the state may require it to be supplemented by compelled disclosures so as to offer more complete and accurate and information. See In Re R.M.J., 455 U.S. 191, 203 (1982). Supplementation of speech is consistent with a Meiklejohnian model, because it increases the information available to democratic decisionmakers.

information. Such attribution suggests that the Court has not been able entirely to transcend older images of consumers as vulnerable and reliant, images that underlay the Court's earlier refusal to extend any First Amendment protection to commercial speech.¹⁸⁴

For this reason, *Central Hudson's* use of the "misleading" requirement as a threshold precondition for First Amendment protection can not, without internal contradiction, be premised upon the content of speech. The contradiction can be resolved only by redefining the "misleading" requirement to focus on the specific conditions that might be understood to render consumers dependent and vulnerable. The Court might conclude, for example, that state protections are necessary where the evaluation of commercial information requires unusual expertise¹⁸⁵ or where there are reasons to doubt the autonomy of consumers.¹⁸⁶ Such an approach would shift judicial

¹⁸⁴ Justice Rehnquist saw this very clearly when, objecting to the very creation of commercial speech doctrine, he argued that consumers, unlike citizens, cannot be trusted to know their own interests. *Central Hudson*, 447 U.S. 593 n.5 (Rehnquist, J., dissenting).

¹⁸⁵ See, e.g., *In re R.M.J.*, 455 U.S. 191, 200 (1982). I owe to Eugene Volokh the suggestion that the Court might even regard consumers as vulnerable when an adequate understanding of commercial speech would require more time and resources than the average consumer could reasonably be asked to invest.

¹⁸⁶ See, e.g., Sylvania A. Law, *Addiction, Autonomy, and Advertising*, 77 *Iowa L. Rev.* 909 (1992).

attention away from the content of particular communications and instead direct judicial scrutiny to the structural preconditions of consumer rationality and independence.

This approach would essentially align the *Central Hudson* "misleading" requirement with the first interpretation we have discussed. It would use the requirement to determine the boundaries of a public communicative sphere. It would not define these boundaries exclusively in terms of "the particular method by which . . . information is imparted to consumers,"¹⁸⁷ but would instead invite the Court to offer a more discriminating and nuanced account of the circumstances under which consumers are constitutionally to be regarded as "free and equal" citizens. The implication of such an approach, however, is that it would be unconstitutional for the state to suppress the content of commercial speech as "misleading" in structural conditions where consumers are deemed to be independent and competent.¹⁸⁸

¹⁸⁷ *Peel*, 496 U.S., at 112 (Marshall, J., concurring).

¹⁸⁸ Outright fraud would remain subject to legal control, because falsity remains an element of the tort. See *Soules v. General Motors Corp.* 79 Ill.2d 282, 286 (Ill. Sup. Ct. 1980).

2. First Amendment Protections

Once the threshold conditions of the *Central Hudson* test are satisfied, its remaining three prongs articulate the First Amendment safeguards to which commercial speech is entitled. These safeguards are astonishingly abstract. To survive First Amendment review, the state need only craft regulations that directly advance a substantial interest in a manner that is not too overinclusive; i.e., in a manner "whose scope is `in proportion to the interest served.'" ¹⁸⁹

The bland, generic quality of these requirements are unconnected to any particular First Amendment theory, which is no doubt why they have proved susceptible to such wide swings of application. In 1986 Justice Rehnquist was able to convince the Court to apply the test in so deferential a manner as to virtually strip commercial speech of all constitutional protection.¹⁹⁰ But recently the *Central*

¹⁸⁹ *Fox*, 492 U.S. at 480.

¹⁹⁰ *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328 (1986). Rehnquist had previously and conspicuously taken the position that commercial speech doctrine was a mistake, and that commercial speech should not receive any constitutional protection. *Virginia Pharmacy*, 425 U.S. at 781-90 (Rehnquist, J., dissenting); *Bates*, 433 U.S., at 404 (Rehnquist, J., dissenting); *Central Hudson*, 447 U.S., at 588-99 (Rehnquist, J., dissenting). In *Posadas* he crafted an opinion that in effect achieved this same result. He argued that "it is precisely because the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising." 478 U.S. at 346. By concluding that the power to regulate conduct necessarily implied the

Hudson test has been applied with a severity that borders on strict scrutiny.¹⁹¹ These extraordinary oscillations exemplify the essential difficulty of contemporary commercial speech doctrine, which is that its major doctrinal test remains untethered to any particular First Amendment theory.

Doctrine fulfills its function when it accurately accomplishes the purposes of the law. If I am correct that the purpose of protecting commercial speech is to realize the constitutional values articulated in a Meiklejohnian vision of democratic self-government, then commercial speech doctrine ought to articulate and apply those values. Although the specific doctrinal rules applied to commercial speech regarding compelled disclosure, overbreadth, and prior restraints, do roughly express the implications of a Meiklejohnian vision, the *Central Hudson* test does not. As a consequence important aspects of the doctrine have been left to twist slowly in the wind.

The relationship of First Amendment doctrine to constitutional objectives ought to be assessed in two

power to regulate commercial speech advertising the conduct, Rehnquist effectively reduced First Amendment protections of commercial speech to the due process safeguards for the conduct the commercial speech sought to advertise. It is remarkable that after a decade of commercial speech decisions Rehnquist was able to assemble a court for this approach.

¹⁹¹ 44 *Liquormart*, 517 U.S. 484 (1996). See Sullivan, *supra* note 3, at 141-45.

distinct dimensions. The first is that of government purpose. A useful doctrine ought to distinguish government interests that are compatible with relevant constitutional values from those that are not. The second is that of impact. A useful doctrine ought to distinguish effects on speech that are compatible with relevant constitutional values from those that are not.

a. The *Central Hudson* Test and the Purpose of Government Regulations

The *Central Hudson* test simply asks whether government interests in regulating commercial speech are "substantial." We can read this as a rough way of saying that the "informational function" of commercial speech ought to be compromised only if there is a pretty good reason to do so. This is may be an acceptable starting point for analysis, but doctrine ought to do more. It ought to ask whether government purposes are consistent or inconsistent with pertinent constitutional values. The *Central Hudson* test pointedly avoids this inquiry.

A careful elaboration of a Meiklejohnian perspective, however, would rule out certain government purposes as *prima facie* inappropriate. It should be regarded as improper for the government to regulate commercial speech

in order to affect governmental decisionmaking. A prohibition on advertisements of Nazi memorabilia, for example, should be prima facie unacceptable if enacted for the purpose of preventing persons from voting in ways influenced by Nazi ideas.¹⁹² For similar reasons, it should be regarded as presumptively improper for the government to regulate commercial speech in order to influence the formation of public opinion with regard to particular conceptions of national identity.¹⁹³ A prohibition on advertisements of attractive cars, for example, should be unacceptable if enacted for the purpose of manipulating public opinion in favor of mass transportation.

Typically, however, the government does not prohibit advertising in order to influence political decisionmaking or public opinion, but instead to regulate consumer behavior. A government will ban "for sale" signs to discourage home sales so as to preserve racially integrated neighborhoods under threat of blockbusting;¹⁹⁴ or it will bar

¹⁹² In the end, of course, we might permit the government to advance inappropriate purposes, if the stakes in doing so were sufficiently high. It is not the function of doctrine to place the state in a suicidal straitjacket, but instead to identify the particular circumstances in which the state must meet very high thresholds of justification, akin to strict scrutiny, before it can act.

¹⁹³ For a fuller development of this point, see Post, *Meiklejohn's Mistake*, supra note 25, at 1116-17.

¹⁹⁴ *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977).

energy advertisements in order to promote conservation;¹⁹⁵ or it will proscribe casino or liquor advertisements in order to ameliorate the evils of gambling or drinking.¹⁹⁶ In recent years, these forms of regulation have become deeply controversial, so much so that they threaten to unravel the *Central Hudson* test itself.

Justice Blackmun in fact dissented from *Central Hudson* because he believed that it should be presumptively improper for the state to attempt to modify behavior by suppressing truthful commercial information. He argued that "a strict standard of review" should apply "to suppression of commercial information, where the purpose of the restraint is to influence behavior by depriving citizens of information."¹⁹⁷ Subsequently Justice Thomas has written forcefully that the *Central Hudson* test ought not to be applied to situations "where the asserted interest is one that is to be achieved through keeping would-be recipients of the speech in the dark."¹⁹⁸ And Justice

¹⁹⁵ *Central Hudson*, 447 U.S. at 568.

¹⁹⁶ See, e.g., *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328 (1986); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

¹⁹⁷ *Central Hudson*, 447 U.S. at 577 (Blackmun, J., concurring).

¹⁹⁸ *44 Liquormart*, 517 U.S. at 523 (Thomas, J., concurring). In *Greater New Orleans Broadcasting Ass'n*, Justice Thomas concurred specially to reiterate his view

Stevens has also argued strongly against the *Central Hudson* test, because "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."¹⁹⁹

There are (at least) three distinct reasons for this growing opposition to state suppression of truthful advertising in order to modify behavior. These are (1) ambiguity concerning the purpose of commercial speech doctrine; (2) the conflation of commercial speech and public discourse; and (3) hostility to paternalism. Each of these reasons contributes to the centrifugal pressure currently tearing at the very fabric of commercial speech doctrine.

that "[I]n cases such as this, in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace," the *Central Hudson* test should not be applied because "such an 'interest' is *per se* illegitimate and can no more justify regulation of 'commercial speech' than it can justify regulation of 'noncommercial' speech."

119 S.Ct., at 1936 (quoting *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518 (1996) (Thomas, J. concurring)). Justice Thomas, however, has joined the Court in suppressing commercial speech for reasons other than keeping consumers "in the dark." See, e.g., *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995).

¹⁹⁹ *44 Liquormart*, 517 U.S. at 503 (Opinion of Stevens, J.). Stevens' opinion was joined by Justices Kennedy and Ginsburg.

(1) **Ambiguity about the Purpose of
Commercial Speech Doctrine**

Opposition to the suppression of truthful advertising to modify consumer behavior may express judicial uncertainty about the constitutional purpose of commercial speech doctrine. If that purpose were to protect market efficiency, government efforts to shape consumer preferences by suppressing accurate information about legal goods and services would be presumptively improper. Such efforts would violate an independent First Amendment ideal of consumer autonomy, conceptualized as the right of each consumer to receive pertinent and truthful information about market choices. One hypothesis, therefore, is that current dissatisfaction with *Central Hudson* reflects a resurgent commitment to Blackmun's original claim that commercial speech doctrine serves the constitutional purpose of ensuring "the proper allocation of resources in a free enterprise system."

This account is most plausible with regard to Justice Thomas, because he has expressed particular approval of Blackmun's claim²⁰⁰ while at the same time joining controversial opinions approving the suppression of commercial speech to serve government goals ostensibly

²⁰⁰ *Coors Brewing Co.*, 514 U.S. at 481-82.

consistent with market efficiency, like maintaining the reputation of the bar.²⁰¹ Justice Stevens' background and expertise in antitrust has also seemed to endow him with an intense appreciation of the centrality and significance of market institutions.²⁰²

Nevertheless, the Court has never squarely and unambiguously embraced the free market and consumer autonomy as independent First Amendment ideals. If recent controversy over the *Central Hudson* test signifies that the Court is now ready to reshape First Amendment doctrine to reflect a constitutional commitment to market efficiency and consumer sovereignty, it would be best to have a full and candid assessment of that ambition.²⁰³ As I have already suggested, I myself believe that the First Amendment should no more be interpreted to incorporate Milton Friedman than

²⁰¹ *Florida Bar v. Went For It, Inc.*, 525 U.S. 618 (1995).

²⁰² See, e.g., Daniel Farber, "The Scholarly Attorney as Lawyerly Judge: Stevens on Statutes," 1992/1993 *Ann. Surv. Am. L.* xxxv, xxxvi-xxxvii.

²⁰³ For a good discussion tending toward this line, see Halberstam, *supra* note 6. Halberstam views commercial speech doctrine as protecting the social norms implicit in commercial transactions. He seems to assume, therefore, that the First Amendment incorporates and enforces the norms of any "bounded speech practice." *Id.* at 832-33. While I completely agree that these norms affect the constitutional values that First Amendment jurisprudence is willing to locate in particular speech practices, and therefore that these norms are highly material to locating the boundaries of public discourse, it is not clear to me that the First Amendment necessarily accepts these norms as themselves meriting constitutional protection. *That* case has yet to be made.

the Fourteenth Amendment should be read to incorporate Herbert Spencer.

(2) The Conflation of Commercial Speech and Public Discourse

A second source of contemporary opposition to the suppression of truthful advertising to modify consumer behavior is the conflation of commercial speech with public discourse. Within public discourse it is presumptively improper to prohibit speech because it might be persuasive. In its early decisions the Court was prone simply to apply to commercial speech First Amendment principles developed for the protection of public discourse.²⁰⁴ Prohibitions of truthful advertisements might thus seem especially suspect because designed precisely to counteract the persuasive power of speech.²⁰⁵

Justice Stevens has come close to explicitly defending this perspective. Because of his growing dismay at "the artificiality of the rigid commercial/noncommercial distinction,"²⁰⁶ Stevens has sought to restructure commercial speech doctrine to focus on the particular

²⁰⁴ See, e.g., *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977).

²⁰⁵ See *id.* at 94, 96-97. This theme is explicit in Stevens' early opinions. See, e.g., *Central Hudson*, 447 U.S. at 581-82 (Stevens, J., concurring).

²⁰⁶ *Coors Brewing Co.*, 514 U.S. at 494 (Stevens, J. concurring).

government interests that justify differential treatment of commercial speech. He has argued that "It is the State's interest in protecting consumers from 'commercial harms' that provides 'the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.'" ²⁰⁷

Stevens has accordingly advanced a theory in which commercial speech receives the same high degree of protection as public discourse, subject only to the state's specific interests in averting "commercial harms" that might justify more intrusive regulation of commercial speech:

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 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 a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands. ²⁰⁸

²⁰⁷ 44 *Liquormart*, 517 U.S. at 502 (opinion of Stevens, J.) (quoting *Cincinnati V. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993)). For a good example of academic perturbation at this position, see Van Alstyne, *supra* note 9, at 1638-48.

²⁰⁸ 44 *Liquormart*, 517 at 501 (Opinion of Stevens, J.). "There is . . . no question," Stevens writes, that a ban on liquor advertising in order to reduce the consumption of alcohol "serves an end unrelated to consumer protection. Accordingly, we must review the price advertising ban with 'special care,' *Central Hudson*, 447 U.S. at 566, n. 9, mindful

This passage fundamentally challenges the entire conceptual structure of *Central Hudson*, which conceives commercial speech as a discrete category of communication that can be regulated for a wide variety of reasons. Stevens, by contrast, denies that there is a categorical distinction between commercial speech and public discourse. He therefore claims that the First Amendment should apply to commercial speech the protections applicable to public discourse, unless the government can adduce interests specifically applicable to commercial speech, like "the preservation of a fair bargaining process," which justify diminishing these protections. If Stevens' premises are accepted, prohibiting advertisements to modify consumer behavior would violate the First Amendment, because such prohibitions would not seek to redress specifically "commercial harms" and because such prohibitions would be per se unconstitutional if applied to public discourse.

There is good reason, however, to reject Stevens' premises. Stevens accepts as a baseline for constitutional protection for speech a certain kind of "rigorous review that the First Amendment generally demands," and he believes variations from this baseline should occur only as

that speech prohibitions of this type rarely survive constitutional review." *Id.* at 504.

required by the pressing necessities of distinct government interests. But Stevens never inquires how this baseline of "rigorous review" has itself been determined. If that baseline was actually developed to protect a specific constitutional communicative function, rather than "speech as such," it would be inappropriate to apply it to expression not serving that function. Stevens never asks this question, however, because he implicitly assumes that all speech serves the same constitutional function and hence that all speech should be subject to the same rigorous "baseline" of protection.

But this assumption is manifestly false, as we have already seen in our comparison of the *Ohralik* and *Primus* decisions.²⁰⁹ Although the state's interests in protecting clients from the potential harms of in-person legal solicitation were identical in each case, the Court nevertheless employed radically different constitutional standards, depending upon whether it understood public discourse or commercial speech to be at stake. The stark discrepancy of constitutional method can be explained only by the distinct constitutional values of public discourse and commercial speech.

²⁰⁹ For a discussion, see text at notes 127-131.

There are many other examples of this same phenomenon. The government has specific interests in managing its employees, including the speech of its employees. These interests do not alter if employee speech happens to be about "a matter of public concern," yet constitutional protections for employee speech do change, because speech about matters of public concern embodies a distinct and greater constitutional value.²¹⁰ For analogous reasons, constitutional protections for defamation will vary depending upon whether or not defamation is about a matter of public concern, although government interests in protecting reputation remain constant.²¹¹

Even Justice Stevens has recognized that different constitutional values are immanent in different kinds of speech. In his recent opinion in *Glickman v. Wileman Brothers & Elliott, Inc.*, for example, Stevens writes that compelling persons to engage in "political" or "ideological" speech imperils entirely different constitutional concerns than compelling persons to engage in mere commercial speech. The former threatens

²¹⁰ See *Connick v. Myers*, 461 U.S. 138, 145-54 (1983).

²¹¹ Compare *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) with *Dun & Bradstreet Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

fundamental First Amendment interests of individual autonomy not present in the latter.²¹²

It is evident, then, that constitutional protections depend not only upon the nature of government interests, but also upon the constitutional significance of the speech that is regulated. The distinction between commercial speech and public discourse is meant to mark precisely such a difference in the constitutional value of communication. The distinction is no doubt difficult and at points obscure, but its central thrust is to separate speech that is constitutionally valued because it is itself a way of participating in the processes of democratic self-governance, from speech that is constitutionally valued merely because within a public communicative sphere it provides information relevant for democratic self-government.

This difference of constitutional value makes it dangerous to analyze issues of commercial speech by uncritically relying upon First Amendment intuitions developed in the arena of public discourse.²¹³ The reason

²¹² *Glickman*, 521 U.S. at 469-72.

²¹³ I have argued elsewhere, for example, that the distinction between content neutral and content based regulations is best interpreted as expressing understandings of specific government purposes deemed impermissible within public discourse. *Post, Recuperating*, supra note 36, at 1277-79. It is therefore of no small significance that the distinction has virtually no application within the domain of

why the First Amendment prohibits the state from suppressing public discourse on the grounds of its persuasiveness is that participation within democratic self-governance is understood to encompass a variety of social relationships, ranging from dialogue to association to persuasion. Within public discourse, speakers seek to persuade others to their point of view and in this way to make the state responsive to their perspective; for the state deliberately to disrupt this communicative relationship is to negate the very constitutional *raison d'être* of public discourse.

This analysis, however, is not applicable to commercial speech, which is protected to ensure "the free flow of information and ideas."²¹⁴ Thus when the Court holds that government can compel commercial speech, it presumes that the state can diminish a speaker's persuasiveness in order to facilitate the dissemination of accurate information. The doctrine is explicable because the only social relationships that matter from a Meiklejohnian perspective are those connected to the uptake and use of information by citizens in democratic

commercial speech, where most regulation is content-based. See, e.g., *Bolger*, 463 U.S. at 65.

²¹⁴ *Discovery Network*, 507 U.S. at 426.

decisionmaking. The interests of speakers in persuading others to action are not of particular constitutional moment.²¹⁵

This implies that in analyzing statutes suppressing accurate commercial advertising, government purposes should be assessed on their own merits. Government interests in promoting racial integration or reducing the social problems associated with liquor have their own weight and validity. They should not be automatically and reflexively dismissed because of a speaker's interests in being persuasive.

(3) Opposition to Paternalism

State efforts to advance legitimate interests through the suppression of accurate information, however, have aroused the suspicion of an increasing number of Justices.

²¹⁵We thus often regulate communication outside of public discourse for fear that it might be persuasive. We restrict the speech of physicians, for example, for fear that they might cause their patients to undergo medical treatments inconsistent with generally accepted medical practice. See *Molien v. Kaiser Foundation Hospitals*, 27 Cal. 3d 916 (1980). We restrict the speech of persons who would persuade others to break their contracts, for fear that their speech might undermine important social policies promoting the stability and reliability of contractual undertakings. See, e.g., *Quelimane Co., Inc. v. Stewart Title Guaranty Co.*, 19 Cal. 4th 26, 55 (1998). We restrict the speech of soldiers who would contest the orders of their superiors, for fear that their speech might persuade to mutiny. See, e.g., *Greer v. Spock*, 424 U.S. 828, 840 (1976); *Parker v. Levy*, 417 U.S. 733, 759 (1974). These examples suggest that constitutional protection for the "persuasive" power of speech does not automatically apply outside the boundaries of public discourse, and that such protection depends very much upon specific social contexts. See Cass R. Sunstein, Democracy and the Problem of Free Speech 176 (1995).

Insofar as this suspicion focuses on the constitutionality of government purposes, and insofar as it can be distinguished from a First Amendment commitment to market efficiency or from a conflation of public discourse with commercial speech, this suspicion seems to derive from a hostility to "paternalism" that has been most explicitly articulated by Justice Stevens:

Any "interest" in restricting the flow of accurate information because of the perceived danger of that knowledge is anathema to the First Amendment; more speech and a better informed citizenry are among the central goals of the Free Speech Clause. Accordingly, the Constitution is most skeptical of supposed state interests that seek to keep people in the dark for what the government believes to be their own good. . . . One of the vagaries of the "commercial speech" doctrine in its current form is that the Court sometimes takes such paternalistic motives seriously.²¹⁶

This is a powerful passage, whose perspective seems to be gaining ground within the Court. To appreciate its reach and force, we must distinguish between government efforts to alter public opinion by means of suppressing advertising and government efforts to modify behavior by means of suppressing the information contained in commercial speech. The paradigmatic instances of this distinction are plain enough. We might contrast, for example, a statute designed to inhibit public approbation of violence that prohibits

²¹⁶ *Coors Brewing Co.*, 514 U.S. at 497 (Stevens, J., concurring).

positive depictions of brutality in advertisements, with a statute designed to discourage neighborhood gentrification that suppresses price information in real-estate advertisements. No doubt a good many difficult and obscure cases will lie between these paradigmatic examples.

As we have already observed, the Meiklejohnian justifications for commercial speech doctrine would render prima facie suspect government efforts to alter public opinion by means of suppressing advertising.²¹⁷ Stevens' condemnation of paternalism, however, aspires to transcend this distinction and to condemn as constitutionally improper even government efforts to modify behavior by means of suppressing the information contained in commercial speech. Stevens views such efforts as attempts "to keep people in the dark for what the government believes to be their own good," and he charges that "such paternalistic motives" are not to be taken "seriously."²¹⁸

But the distinction we have just noted implies that government "motives" in suppressing accurate commercial information need not be different from those that impel

²¹⁷ See text at note 193 supra.

²¹⁸ Part IV of Stevens' opinion in *44 Liquormart*, which is joined by Justices Kennedy and Ginsburg, gestures toward Stevens' arguments against paternalism. These arguments are, however, most fully and forcefully developed in Stevens' opinion for himself alone in *Coors Brewing Co.*

most ordinary legislation. In the *Linmark* case, for example, the government forbade "For Sale" signs in order to prevent the blockbusting of a racially integrated neighborhood.²¹⁹ The regulation had nothing to do with the "good" of individual buyers or sellers, but was instead enacted to preserve the possibility of integrating housing. The ordinance was not paternalistic, at least as Stevens seems to be defining the term. It did not regulate the behavior of individuals in order to protect them from themselves; it sought instead to achieve a public good.

Similarly, when the government in *Central Hudson* prohibited energy advertising to promote energy conservation, it was not for "the good of" individual consumers, but instead aimed at the preservation of valuable non-renewable resources.²²⁰ A government effort to attain this very same end by flatly prohibiting certain energy uses could not constitutionally be dismissed as "paternalistic."²²¹ Its purposes and "motives" would no doubt be taken quite "seriously."

²¹⁹ *Linmark*, 431 U.S. at 87-91.

²²⁰ *Central Hudson*, 447 U.S. at 568.

²²¹ Stevens is of course right that the "greater" power to prohibit the sale of liquor does not necessarily include the "lesser" power to ban liquor advertisements. 44 *Liquormart*, 517 U.S. at 511-12 (Opinion of Stevens, J.). The point, however, is how the state's interest in preventing liquor consumption is to be characterized in each instance.

This suggests that the charge of paternalism is actually something of a red herring. As Daniel Hays Lowenstein has observed, "It is simply not the case that the commercial speech doctrine has been deployed against paternalistic state measures. It would be far closer to the truth to say that restrictions on commercial speech are usually struck down *unless* they are intended to serve genuinely paternalistic purposes."²²² Certainly our analysis of the "misleading" requirement would support Lowenstein's conclusion, for the Court has used this requirement to prohibit the circulation of information on the blatantly paternalistic assumption that consumers are unable properly to interpret commercial speech for themselves.

If there is nothing constitutionally suspicious about government efforts to conserve energy or to integrate housing, Stevens' discomfort with these regulations must ultimately stem from the *means* by which the government has attempted to achieve these otherwise legitimate purposes. In the end, Stevens' argument turns on a fierce opposition to state regulations that seek to ameliorate social problems by curtailing information rather than by regulating behavior directly. By employing these means,

²²² Daniel Hays Lowenstein in "Too Much Puff": Persuasion, Paternalism, and Commercial Speech, 56 U. Cin. L. Rev. 1205, 1238 (1988).

Stevens suggests, the state directly infringes First Amendment interests in "more speech and a better informed citizenry."

These are certainly important interests, and they do evoke images of independent citizens deciding for themselves how to use information. But these interests are ruptured every time the government uses confidentiality as a means to an end. Every confidentiality requirement suppresses the flow of accurate information to citizens because of fear that persons will use or respond to the information in a manner that might cause harm. They thus compromise the autonomy of persons to receive and to act upon information.

For example, most states impose confidentiality requirements on grand jury proceedings. These requirements prohibit a willing speaker from communicating with a willing audience. They do so in part in order to optimize the performance of grand juries, because it is believed that this functioning would be impaired were the flow of accurate information to citizens not restricted. Yet grand jury confidentiality requirements are regarded as neither paternalistic nor as "anathema" to the First Amendment.²²³

²²³ See, e.g., Fed. R. Crim. P. 6(e)(2); *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218-19 (1979) ("We consistently have recognized that the proper functioning of our grand jury

Nor is it regarded as "anathema" when the federal government seeks to avert dangers to the national security by prohibiting the dissemination of accurate information that is classified or that concerns atomic weapons.²²⁴

Dangers to privacy norms are averted by suppressing the circulation of medical records.²²⁵ Dangers to a well-functioning economy are averted by prohibiting the disclosure of trade secrets.²²⁶

Each of these regulations compromises the autonomy of persons to receive and act upon information. Each poses serious First Amendment issues that must be resolved by weighing the relevant state objective against the First Amendment value of the prohibited speech.²²⁷ In none of these situations would analysis be assisted by abstract

system depends upon the secrecy of grand jury proceedings.").

²²⁴ See, e.g., 42 U.S.C. § 2274 (1994); *United States v. The Progressive, Inc.*, 467 F. Supp. 990, 994 (W.D. Wisc. 1979); 18 U.S.C. § 798 (1976); *United States v. Boyce*, 594 F.2d 1246 (9th Cir. 1979).

²²⁵ See, e.g., Cal. Civ. Code § 56.10 (2000); *Pettus v. Cole*, 57 Cal. Rptr. 2d 46 (1996). For a recent example of the Court upholding restrictions on the disclosure of information in order to sustain privacy values, see *Reno v. Condon*, 120 S.Ct. 666 (2000).

²²⁶ See., e.g., Cal. Civ. Code § 3426 (1997); *E. I. duPont deNemours & Co. v. Christopher*, 431 F.2d 1012 (5th Cir. 1970), cert. denied 400 U.S. 1024 (1971); *Bridge Publications, Inc. v. Vien*, 827 F. Supp. 629, 632-33 (S.D. Calif. 1993).

²²⁷ Even within public discourse, moreover, it is not "anathema" to suppress accurate speech because it might cause harm, if the state does so in a content neutral way. *Post, Recuperating*, supra note 36, at 1260-64. Even within public discourse, that is, the particular interests served by government suppression of speech are of great significance.

charges of "paternalism," or by generic appeals to the need for "more speech and a better informed citizenry."

Instead, the strength and quality of the government's interest, its instrumental connection to the suppression of speech, the constitutional value of the speech, and the practical availability of alternative modes of regulation, would all require careful review.

In the particular environment of commercial speech, the justifications for First Amendment protection do not suggest that either government efforts to constrict consumer autonomy or to undermine the persuasiveness of speakers should render regulation especially suspect. Instead, doctrine ought to assess whether the "informational function" of commercial speech has been unacceptably compromised. Such analysis in fact fits nicely with Stevens' appeal to the need for "a better informed citizenry." This appeal, however, does not imply that state purposes in suppressing accurate information in nonmisleading advertisements to modify consumer behavior need be presumptively improper.²²⁸ When stripped of its

²²⁸ Of course a state's purpose could be presumptively improper, if for example it were to repress truthful nonmisleading advertising merely in order to keep consumers "in the dark." But such a state purpose will no doubt prove bizarre and rare. In most cases, a state will seek to suppress advertising to serve perfectly acceptable social goals, as for example (in *Central Hudson*) the attainment of energy conservation.

rhetoric of "paternalistic motives," Stevens' analysis actually implies the quite different proposition that the effect of state regulations ought to be carefully monitored to ensure that citizens retain adequate access to accurate and truthful information relevant to democratic decisionmaking.

b. The *Central Hudson* Test and the Impact on Commercial Speech

It is in fact surprising that the *Central Hudson* test refuses explicitly to evaluate the impact of state regulations on the dissemination of information contained in commercial speech. At most the test vaguely disfavors overinclusive statutes. Yet if commercial speech is constitutionally protected because of its "informational function," it would certainly seem to follow that commercial speech doctrine should self-consciously safeguard this function. The only hint of such an ambition, however, appears in footnote 9 of the *Central Hudson* opinion, which states: "We review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy. In those

circumstances, a ban on speech could screen from public view the underlying governmental policy."²²⁹

Although the passage is somewhat obscure, its general thrust seems to me basically right. If commercial speech is constitutionally valuable because it conveys information to facilitate better public decisionmaking, then constitutional analysis ought to assess the impact of government regulations on the circulation of information, using as a standard of assessment the potential effect on public decisionmaking and public opinion. Because any such assessment will no doubt entail considerable guesswork, a workable rule of thumb might well be that government regulations entirely eliminating a category of truthful information are good candidates for heightened constitutional suspicion.

The exact standards of any such test would no doubt require much careful consideration. The point I wish to stress here, however, is that although recent dissatisfaction with the *Central Hudson* test has focused on the impropriety of government purposes in suppressing truthful advertising, it is possible that this dissatisfaction instead reflects the striking failure of the *Central Hudson* test to assess how state regulations

²²⁹ *Central Hudson*, 447 U.S. at 566 n.9.

actually affect the "informational function" of commercial speech. Justice Stevens, for example, has sought to resuscitate the doctrinal importance of Footnote 9 of *Central Hudson*.²³⁰ Whether or not the exact formulation of Footnote 9 is ultimately satisfactory, Stevens seems to me justified to urge that commercial speech doctrine responsibly express the implications of its own theoretical foundations. The inability of the *Central Hudson* test carefully to assess the impact of state regulation on the circulation of information constitutes a serious deficiency that requires redress.

III. Conclusion

Commercial speech doctrine is now almost a quarter of a century old. Yet in all that time it has never systematically queried its own justifications and implications. By settling quickly and easily into a test whose bland provisions were indifferent to a disciplined account of the constitutional value of commercial speech, the doctrine has allowed fundamental differences of perspective to fester and increase. These differences now threaten to explode the doctrine entirely.

²³⁰ In Part III of his opinion in *44 Liquormart*, which is joined by Justices Souter, Kennedy, and Ginsburg, Stevens draws heavily on footnote 9 of *Central Hudson*.

Commercial speech doctrine initially developed on the assumption that commercial speech was constitutionally protected because of its "informational function." The pronouncement of the *Central Hudson* test prematurely stunted the evolution of the doctrine, because the test did not seek to explicate the implications of this function, either in the dimension of government purpose or in the dimension of impact on commercial speech. Nevertheless, the Court also established a structure of rules which persisted alongside of *Central Hudson*, and which clearly sought to express a vision of speech constitutionally valued merely as information.

Contemporary dissatisfaction with the *Central Hudson* test suggests that this vision is now under considerable pressure. I do not believe that a majority of the Justices will ultimately explicitly embrace market efficiency as an independent First Amendment ideal. Nor do I believe that they will throw aside as "paternalistic" all confidentiality provisions presently enforced by the law.

My best guess, therefore, is that the commercial speech doctrine will either continue to unfold the implications of its Meiklejohnian foundations by developing the doctrinal tools necessary to assess the impact of state

regulation on the actual circulation of commercial information, or it will abandon these foundations as the Justices seek to merge commercial speech with public discourse. At least four justices of the Court are now edging toward an alternative perspective²³¹ in which commercial speech is protected as a kind of public discourse subject to regulations designed to serve specific state interests in preserving "a fair bargaining process."²³²

It is not clear to me that this alternative perspective is ultimately coherent, because interests in preserving a fair bargaining process are necessarily paternalistic. They presuppose that consumers are vulnerable and dependent, and these assumptions conflict with the autonomy that public discourse must ascribe to citizens.²³³ A thorough assessment of the adequacy of this alternative vision, however, should be put off to the day

²³¹ See, *44 Liquormart*, 517 U.S. at 502 (opinion of Stevens, J.) (quoting *Cincinnati V. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993)) (joined by Justices Kennedy and Ginsburg); *44 Liquormart*, 517 U.S. at 522 (Thomas, J., concurring).

²³² *44 Liquormart*, 517 at 501 (Opinion of Stevens, J.). Cf. *Cincinnati V. Discovery Network, Inc.*, 507 U.S. 410 (1993).

²³³ For a full discussion, see Post, *Meiklejohn's Mistake*, supra note 25, at 1128-33. It would be quite inconceivable, for example, to regulate "misleading" political speech within public discourse on the grounds that citizens are not autonomously capable of evaluating speech for themselves and hence need protection from potential deception. Within public discourse, persons are presupposed to be independent and autonomous. If commercial speech were to be redefined as a variant of public discourse, such independence and autonomy would also have to be ascribed to consumers.

when its precise dimensions and structure become more visible. For the moment I wish only to observe that a principled exposition of this perspective would require deep and substantial modifications of existing commercial speech doctrine.

The alternative vision implies, for example, that the First Amendment could no longer countenance compelled disclosures within the realm of commercial speech. If commercial speech were conceptualized as an effort of citizens to render the state responsive to them, compelled commercial speech would compromise the basic independence of citizens. Nor could the Court any longer tolerate regulations of commercial speech that were significantly more overinclusive than those accepted within public discourse. The same precision of regulation would be applicable to both. Nor could the "misleading" requirement any longer be deployed, even in the limited form that I have suggested is compatible with a Meiklejohnian perspective.²³⁴

²³⁴ I mention in text only revisions in those aspects of commercial speech doctrine that I have already discussed in this lecture. Other revisions would also be necessary. For example, most regulations of commercial speech are content-based. The constitutionality of such regulations would present significant problems if commercial speech were conceptualized as a form of public discourse. Moreover, if the flimsy claims propagated by the Court about the unique durability and verifiability of commercial speech are not credited, the Court would

The Court thus seems to be working its way toward a fundamental choice. It can either continue the task of fashioning doctrine on the assumption that the First Amendment safeguards the "informational function" of commercial speech, or it can overturn its prior doctrinal structure and remake commercial speech doctrine as though it were protecting participation within the process of self-government. It is not clear to me that the Court has thoroughly canvassed the enormous implications of the latter alternative. One might perhaps interpret the tentative speculation of some Justices concerning the lack of a normative boundary between commercial speech and public discourse as expressing their frustration at the manifest inadequacies of the *Central Hudson* test, rather than as indicating a serious commitment to fundamentally re-evaluating the significance and regulatory framework of commercial speech.

My hope in this lecture has been to demonstrate that the major outlines of contemporary commercial speech doctrine can be explained by reference to a roughly Meiklejohnian perspective, so that the *Central Hudson* test can in fact be subject to principled revision. Such

also have to apply to commercial speech the same chilling effect analysis that it presently applies to public discourse.

revision would require the test both to articulate which government purposes are acceptable and which not, and to specify which impacts on commercial speech are acceptable, and which not. It would also require that the "misleading requirement" be deployed only in a restricted and disciplined way.

But such revision would not precipitate a total reconstruction of the contemporary doctrinal framework of commercial speech. It would preserve the distinction between commercial speech and public discourse, and it would explain why the latter has always received different and greater constitutional protections than the former. If these advantages are attractive to a majority of the Court, commercial speech doctrine, as we now know it, may survive its present vicissitudes, as it has survived those of the past.