

# The First Amendment and Commercial Speech

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## INTRODUCTION

The world would do well not to follow the lead of the United States in its view that commercial speech is an aspect of free speech. If guidance were sought, rather than the current American view developed over the last thirty years, greater wisdom would be found in the earlier American view that commercial speech has nothing to do with such freedom. With this in mind, Part II of this Article offers three arguments that I have previously advanced for excluding commercial speech from First Amendment protection and one additional argument that, though I have never offered it, is provocative and I largely endorse. First, however, Part I gives a very brief history of the U.S. constitutional treatment of commercial speech and a possibly controversial characterization of its current status.

## I. HISTORY

Though the constitutional idea of free speech had a robust political life in the United States during the late eighteenth and nineteenth centuries, the Supreme Court first gave free speech serious attention in the twentieth century. Even then, the Court did not find a federal statute to violate the First Amendment until 1965 in *Lamont v. Postmaster General*.<sup>1</sup> Nevertheless, ever since the early 1930s, U.S. courts have actively protected speech and press freedom. Still, little thought was given to commercial advertising. When the constitutional status of commercial speech first reached the Supreme Court in *Valentine v. Chrestensen*,<sup>2</sup> the Court spent three sentences disposing of it: one to

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1. 381 U.S. 301 (1965).

2. 316 U.S. 52 (1942).

state the issue, a second to say that if the behavior regulated had not been commercial advertising then the First Amendment would restrain the state's power to regulate, and a third that said the Court was "clear that the Constitution imposes no such restraint on government as respects to purely commercial advertising."<sup>3</sup> This quick disposal remained the law for over thirty years. During this period, the only doctrinal issue that concerned the Court was whether something was properly characterized as commercial speech. It concluded, for example, that despite newspapers' commercial goal of being profitable businesses, neither a newspaper's content nor a newspaper advertisement placed by civil rights leaders discussing public issues constituted commercial speech.<sup>4</sup>

The 1950s and 1960s saw a huge proliferation of First Amendment scholarship but virtually none that dealt with commercial speech. With the exception of a somewhat perfunctory treatment by Thomas Emerson, who saw commercial speech as part of the system of commerce, not the system of free expression, and Alexander Meiklejohn, who dismissed commercial advertising as not related to the democratic political ideal of self-government, no theoretical explanation for denial of protection was offered.<sup>5</sup> Then Martin Redish, in an important article, stepped into this vacuum. He argued that commercial speech could not be distinguished from any category of protected speech in its capacity to provide the public with information that is relevant both to people's personal lives and to their political decisions or in any other constitutionally relevant dimension.<sup>6</sup> Redish's argument quite explicitly, as does marketplace of ideas theory more generally, took the perspective of the audience for the speech. Here, the relevance of its content to them was the crucial concern. It should also be noted that as of the early 1970s, with the exception of Emerson's broader four-function theory, virtually all First Amendment scholarship and the dominant doctrinal formulations accepted some version of a marketplace of ideas theory.<sup>7</sup>

Then in 1976, a case came before the Court involving a statute that prohibited pharmacists from advertising the price of prescription drugs.<sup>8</sup> Clarifying a decision from the year before that protected as free speech an advertisement for abortion services, the Court established the modern view that the First Amendment protects commercial speech. The Court's reasoning, clearly adopting a marketplace of ideas theory that emphasized the informative value of commercial speech to its audience, offered arguments that duplicated those that Redish had advanced several years before. The Court did suggest, however, that regulations of commercial speech were likely constitutionally justifiable if the commercial speech were false or misleading (imagine the silence of politicians that would follow if law prohibited misleading political huckstering); if the advertising were for an illegal product or transaction (although the Court fully protects advocacy of law violation under the First Amendment); or if the regulation related to the time, place, and manner of commercial speech. The Court

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3. *Id.* at 54.

4. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

5. *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948), *reprinted in* POLITICAL FREEDOM 3 (1965).

6. *See* Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971).

7. *See, e.g.*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 6–25 (1989).

8. *See* Va. Bd. of Pharm. v. Va. Citizens Consumer Council, 425 U.S. 748 (1976).

stated that general First Amendment rules against prior restraints (e.g., pre-approval schemes) may not apply, and requirements that advertisements include warning or other informational content apparently would be permitted. In protecting commercial speech, however, the Court clearly concluded that commercial advertising can serve all the purposes related to informing audiences that other protected speech performs.

*Virginia Board* remained the lead case until the Supreme Court purported to summarize the law and established the current, though much criticized, four-part doctrinal test in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.<sup>9</sup> This balancing test indicated that the state could regulate commercial speech, not only when the commercial speech would be excluded from First Amendment protection under *Virginia Board* (for example, because the speech was false or misleading or because it promoted a product whose sale was itself illegal), but also if the state's interest was substantial, if the regulation directly advanced the interest, and if the regulation was no more extensive than necessary to advance it. In *Central Hudson*, New York, in pursuit of an environmental interest in preventing excess energy use, had barred a broad range of electric utility companies' advertising. Although the Court invalidated the regulation, noting for example that the law prevented advertisements that advised consumers to shift their electric usage to place less demand on the system or to purchase energy-saving devices, the Court indicated that it would uphold a ban if it only prohibited advertising that promoted behavior that contradicted the state's conservation objectives.<sup>10</sup>

Ever since *Virginia Board*, both before and after *Central Hudson*, the Court has swung back and forth between weaker and stronger protection of commercial speech. As of 2007, though, the trend is apparently toward being more protective. Although the judiciary is usually quite deferential to the government's characterization of its interest as serious, that is, a "substantial" interest, the *Central Hudson* test gives courts considerable leeway in determining whether the law directly advances the state's purported interest and whether the regulation is more extensive than necessary. Sometimes invalidation seems merely to reflect a law's apparent sheer stupidity in relation to its announced purpose. For example, who would think that to advance an interest in preventing children from smoking or even the more attenuated interest in avoiding their exposure to advertising for tobacco products, a requirement that ads in stores be placed over five feet above the store floor effectively advance the interest?<sup>11</sup> Did Massachusetts believe its young people always hung their heads and looked at the ground? This is not to say that the Court has not also struck down much more plausible regulations. The point here is that the *Central Hudson* test usually gives courts plenty of room to maneuver.

Beyond its manipulability, the primary criticism of the *Central Hudson* test is that it apparently authorizes what critics identify as paternalism, an approach that had arguably been repudiated in the initial case of *Virginia Board*. Under *Central Hudson*, if the state has a substantial interest in preventing some legal behavior, it purportedly can "paternalistically" prevent people from receiving argument or information that promotes the behavior, such as advertisements promoting increased electrical usage.<sup>12</sup>

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9. 447 U.S. 557 (1980).

10. *See id.* at 569–71.

11. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

12. *See Central Hudson*, 447 U.S. at 563–64; *cf.* Daniel Hays Lowenstein, "Too Much

Nevertheless, it should be—but almost never is—noted that this assertion of paternalism is not quite right. As Justice Rehnquist first pointed out in his *Virginia Board* dissent, regulations of commercial speech are never blanket prohibitions on provision of any category of information or argument. They are not inartful attempts to keep people ignorant by preventing them from receiving information. Rather, they are direct efforts to prevent or regulate the participation of certain speakers in a discourse.<sup>13</sup> The regulations always apply only to a specified class of commercial speakers.<sup>14</sup> For example, the regulations at issue in *Virginia Board* only prohibited pharmacists from advertising their drug prices—the press, public interest organizations, and individuals were left free to publicize this information to the extent they chose to do so. A regulation of a tobacco company’s advertising does not prohibit people from telling their friends that smoking is sexy, safe, fun, or any other stupid and harmful opinion they want to offer. The law does not impede freedom of private or public discourse among people and in the press. Similarly, legislation barring corporate entities from placing political advertisements promoting their preferred candidate for public office does not paternalistically bar people from expressing or hearing content favoring or opposing particular candidates, but only restricts the public discourse to speakers other than non-media commercial entities. The paternalism, if it is to be called that, is about limiting participation in a particular communication sphere or particular debate to non-commercial agents and to the press. Discourse in the press and among all citizens and non-commercial associations is unrestrained. Still, some Justices, most prominently Justice Thomas, have made the factually false claim concerning paternalism—that the aim of regulating commercial speech is to “keep[] people ignorant by suppressing expression,”<sup>15</sup> as well as indicating impatience with any constitutional distinction between commercial speech and other speech.

There is much more to be said about the current state of doctrine and scholarly debates. For the last thirty years, commercial speech has been one of the most prolific subjects of both Supreme Court decisions and scholarly commentary in the free speech area—though I might add that this prominence is hardly accidental or due solely to the intrinsic interest of the subject. Not only do corporate interests bring almost all the litigation, finding it possibly the most potent constitutional ground for invalidating governmental economic regulation since the demise of *Lochner* in 1937,<sup>16</sup> but these corporate interests have also paid for many of the conferences and many of the papers that initiated and sustained interest in the subject. I will put these debates aside. Instead, I outline three separate arguments, each of which I accept as adequate in itself,

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*Puff*”: *Persuasion, Paternalism, and Commercial Speech*, 56 U. CIN. L. REV. 1205, 1238 (1988).

13. See *Va. State Bd. of Pharm.*, 425 U.S. at 782–83 (Rehnquist, J., dissenting).

14. The one arguable exception to the claim in the text was a federal rule that prohibited (in the case of broadcasters in states that barred lotteries) the broadcast of information about lotteries. The law would appear to apply to a broadcast station, for example in its news program, from listing the winning numbers of the state lottery in a neighboring state. The Court, however, found the law inapplicable to this type of situation by interpreting it to apply only to advertisements, not news, about the lottery, thus following the distinction offered in the text above. *United States v. Edge Broad. Co.*, 509 U.S. 418 (1993).

15. *Lorillard Tobacco*, 533 U.S. at 575 (Thomas, J., concurring).

16. See *Lochner v. New York*, 198 U.S. 45 (1905), *overruled by* *W. Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

and then favorably mention one more for denying all First Amendment protection for the speech of profit-oriented enterprises—a category that includes what has been described as commercial speech.

## II. REASONS TO DENY PROTECTION

I have long advanced a strongly libertarian interpretation of the First Amendment freedom of speech: it should protect an individual's meaningfully expressive behavior, including speech.<sup>17</sup> An adequate premise for this view is the notion that the legitimacy of legal order requires that the government respect individual autonomy. In addition, I argue that this respect for people's autonomy, plus respect for people's fundamental equality, provides the basic normative rationale for democracy. Respect for people's autonomy, for a person's choices about herself, explains why the government must not aim to restrain a person's speech. Unlike the marketplace of ideas theory, this interpretation of free speech relates most overtly to the speaker—she gets to choose what she wants to say—although indirectly it also provides for the autonomy of the listener in that the law must not stop her from trying to hear anything that someone else has a right to and chooses to say to her. Moreover, unlike the purely instrumental value of speech in a marketplace search for truth (an instrumental value that is arguably often better advanced by intelligent regulation than by anarchy in a speech agora), this argument is basically non-instrumental in nature. The question here is what the implications of this view are for the commercial sphere.

### *A. Autonomy and Market Dictates*

Max Weber describes modernity as crucially involving the separation of the economy from the household.<sup>18</sup> His iron cage of rationalization pictures the modern market as effectively dictating to all participants that they adopt the most efficient behavior. In this view, a firm has no freedom except to adopt ever more profitable techniques. Since any commercial entity must reproduce its capital to continue, it must meet any efficiency challenge generated by a competitor—failure to do so causes bankruptcy to loom. At least as long as markets are fully competitive, real freedom of choice exists only in the non-rationalized realms such as the household or politics, not in the efficient behavior of market participants. This, of course, does not deny that individuals lucky enough to have various employment options do have choices—because they are individuals rather than capital-reproducing entities, the market does not force them to seek the most profitable employment. Their employers, though, and the individual employee once having taken the job, must behave so or the employer's capital and the employees' jobs are put at risk. The simplest example is a tobacco or whiskey company. Even if the stockholders, board of directors, top management, marketing personnel, and other employees all believe that smoking or drinking is bad for one's health and should be avoided, the company's continuance depends on its speech effectively promoting the profitable sale of its products. On pain of losing out

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17. See BAKER, *supra* note 7.

18. See generally MAX WEBER, *ECONOMY AND SOCIETY* (Guenther Roth & Claus Wittich eds., 1968).

to its competitors, if the company's expression fails at this, it ceases as a business enterprise.

The observation that freedom does not exist in the market turns out to be a point on which conservative free market economists—in the United States, the Chicago School types—agree with Marxists, who critique not so much the capitalists but capitalism. The main difference is that the free market economists see the market as dictating what they describe as efficiency but what the Marxists describe as alienation. Both, however, argue that the market dictates profit-maximizing (purportedly efficient) behavior and, presumably, dictates speech that the firm believes most advances that goal.

Three of the dissenters in *First National Bank of Boston v. Bellotti*,<sup>19</sup> a case invalidating a state law banning corporate expenditures that promote the corporation's views relating to a ballot measure, saw this point in explaining why they would deny protection to corporate political speech:

[W]hat some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech. It is clear that the communications of profitmaking corporations . . . do not represent a manifestation of individual freedom or choice.<sup>20</sup>

Though a dissent then, these views later carried the day in a similar case, *Austin v. Michigan State Chamber of Commerce*,<sup>21</sup> which upheld a ban on corporate expenditures promoting candidates for office, and they currently provide the rationale for largely denying constitutional protection to corporate political speech.<sup>22</sup> My claim is that this feature of not manifesting individual freedom is a proper reason to deny First Amendment protection for commercial speech.

Three important observations—one about history, one about application, and one about structures—concerning this argument for denying protection to the speech of market enterprises should be noted. The argument assumes the existence of the largely competitive market that economists widely observe and Marxists describe. Weber saw this market realm as central to the modern process of rationalization. Jürgen Habermas sees it as creating a systems realm on which modern society relies in order to relieve coordination problems that would become unmanageable for a complex modern society if left to communicative practices of what he describes as the lifeworld.<sup>23</sup> Much law assumes this division between the market enterprise and the lifeworld. Tax codes, for example, purport to be able to distinguish business expenses and personal expenditures. Business expenses are viewed as a necessary cost, created by market demand, and thus, deserving of a tax deduction. In contrast, personal expenditures are viewed as a reflection of personal values and individual needs, and thus, undeserving of a deduction. In the United States, corporate law often imposes duties on boards or

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19. 435 U.S. 765, 802 (1978) (White, J., dissenting).

20. *Id.* at 804–05.

21. 494 U.S. 652 (1990).

22. *McConnell v. Fed. Elections Comm'n*, 540 U.S. 93 (2003). *But cf.* *Fed. Elections Comm'n v. Wis. Right to Life*, 127 S. Ct. 2652 (2007).

23. *See, e.g.*, 2 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON* (Thomas McCarthy trans., 1987).

management to be oriented toward profitability for the ultimate benefit of equity holders. Nevertheless, this market realm is explicitly historical, and if the economic order were structured differently, this argument would not justify denying protection to commercial speech.

In addition to the argument being historically bound, it must recognize “slippage.” The real world diverges in varying degrees from the world of market determination described here. Sometimes monopolistic circumstances allow management to spend potential profits and sometimes workers or other stake-holders will be willing and able to accept lower wages or interest rates essentially to subsidize practices that embody ideals other than market-demanded economic efficiency. Nothing said here commits First Amendment theory to how it should respond to this slippage away from market-demanded efficiency. In fact, one commentator has raised the question of whether, if our ethical ideals for economic life and economic organization diverge from the model described here, constitutional principles should assume this existing order, or instead, should in some way reflect or protect this ethical alternative.<sup>24</sup>

Finally, the specifically structural orientation of this analysis must be emphasized. The observation is commonplace that a person’s circumstances or context influences (a social scientist might claim causes or determines) her speech. Certainly, the electoral context strongly influences many candidates to compete by saying what they believe will result in electoral victory. Nevertheless, the candidate can choose to express her true values and make the arguments that she believes. The ideal of the political realm—the ideal of when it operates properly—and an ideal of much of life in both the public and private portions of the lifeworld view people as having freedom to, and as properly choosing to, express their real values and allegiances. This attributed freedom reflects a structural view that characterizes expenditures in these realms as value-based consumption rather than inherent attempts at reproducing capital. In contrast, the structural ideal of a modern commercial market—the market sphere when it works properly—is precisely to dictate an instrumental orientation toward efficiency and profit, the behavior that economists like to say leads to placing resources in their highest and best uses (at least, purportedly does so given the market measure of value). For this reason, attributing potential freedom to the actor is not appropriate in the market sphere but is appropriate elsewhere. Both attributions of lack of freedom in one and freedom in the other represent the ideal characterizations of their respective spheres. Thus, regulation of commercial speech does not, but regulation of speech in other arenas does, deny the respect for the autonomy that the state must attribute to people.

### *B. Speech of Artificial, Instrumentally Justified Entities*

Business enterprises in general—commercial *corporations* even more obviously—are legal entities created for essentially instrumental reasons. These entities allow the economy to operate effectively in the modern world. Despite being vitally important, their merely instrumental rationale leaves them with a morally different status than living, flesh-and-blood people—the people who Kant argues must be valued as ends

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24. See Seana V. Shiffrin, *Compelled Association, Morality, and Market Dynamics*, 41 *LOY. L.A. L. REV.* 317 (2007).

and whose ultimate value a legitimate state must respect.<sup>25</sup> This difference certainly explains why, under any theory centered on the moral importance of individual liberty (the formal right to make, stupidly or wisely, choices about oneself), individuals' right to make speech choices has constitutional status while these entities' rights do not.

Of course, people make up commercial entities' animating parts, but the status of people's acts within these structures—and the rights and obligations, even the existence of these entities—is ultimately determined by law. People within the legal framework of these entities act as an element of the entity, but they always also leave these roles at times and act in the lifeworld, the household, and the public sphere, where they make choices as individuals. The law constantly treats a person's acts that it attributes to the commercial entity differently than acts within the rest of a person's life. Tax law, for example, must allow deductions for business expenses in order to make income taxes on businesses coherent, while for individuals the law sensibly taxes all income (not revenue minus expenses). Essentially, for instrumental reasons of efficiency, these artificial entities are given potentially perpetual life, but when it becomes socially useful to put any one of them "to death," the law does so with dispatch without creating any moral qualms that the death penalty famously raises for flesh-and-blood people.

This last point about the death penalty can be generalized. Moral and political theory simply does not demand that the state *respect* the business entity's autonomy or its liberty; rather, normative theory demands that the state *design* these entities—give them existence, rights, and obligations—in a manner crafted to serve societal interests. Given business enterprises' artificial nature and instrumental justification, the law should regulate them to serve flesh-and-blood people, not equate them in regard to rights with real people nor allow them to dominate people. For example, though respect for autonomy should disable majorities from excluding particular people from public discourses or from barring people's expression of particular views in their public or private discourses—we call such limitations censorship—this required respect for the individual is not offended by shutting out or regulating the extent and form of participation by these artificial entities.

Importantly, the vulnerability of a commercial entity to regulation of its speech never leaves the individual, the constitutionally and morally valued agent, unfree. Part of an individual's nature is that even though she plays roles within the commercial realm, she always leaves that context at points; whenever she does, she is entirely free to speak as she will. The law often draws these lines—determining whether to attribute speech (or other activities, for example, tortious acts on which to premise liability) to the corporation on the basis of factors such as whether the speaker was charging expenses to the corporation, taking business expense deductions for these expenses, or being paid for her time related to the speech.

Some commentators rightly observe that regulation of these artificial entities disfavors certain views—those otherwise promoted by the market. But the legal order always favors or disfavors various views, most obviously by how it distributes wealth or spends tax money on its own expression. With no natural baseline, it is difficult to see why conscious efforts to improve existing baselines of expressive influence, as long

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25. See IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* (Thomas Kingsmill Abbott trans., Dover Publ'ns 2004) (1788); cf. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).



as using means consistent with respecting people's autonomy, are problematic. Everyone is left free to argue her own position on her own with whatever resources she is able to muster. In passing, I note a ubiquitous argument often presented to me in conversation, most persistently by Martin Redish. By regulating commercial speech on a particular subject, it is argued, the law biases debate. When a view is so wrong-headed that no real individuals would advance it, regulation of commercial speech will sometimes prevent speech from the only source that will present a particular view in a serious, sustained manner. Putting aside the empirical truth of this claim (for example, whether instead a teenager's peer will actually be the most powerful advocate of smoking cigarettes), the answer is twofold. First, there is little obvious baseline to establish when the debate is unbiased. Different communications occur depending on how the law determines distribution of income or communicative power. If there is to be a proper baseline, the most obvious possibility is for it to reflect lack of restraint on *individuals* to say what they want when speaking for themselves or, more radically, it is proper only if all individuals have equal resources to commit to their expression. This leads to the second response to the possibility of mandating silence by these entities: "so what?" If no real flesh-and-blood person subscribes to the merits of a particular viewpoint, the concept of freedom provides no reason for creating a "flat earth society" that makes money by trying to persuade people to adopt particular beliefs.

In the United States, the Supreme Court repudiated the so-called *Lochner* era, which typically found that business regulation unconstitutionally infringed on individual liberty. Historically, this change occurred roughly simultaneously with the beginning of vigorous protection of speech freedom. An obvious explanation would be that the Court saw constitutional liberty as essentially a matter for individuals operating outside the commercial sphere while viewing commercial entities more instrumentally. Justice Rehnquist was a modern Justice who often reasoned in a manner similar to Justice Oliver Wendell Holmes, a leading proponent of repudiating *Lochner*. Thus, it is not surprising that Rehnquist should offer precisely this argument in his persistent opposition to protecting commercial speech. In his dissent in *Virginia Board*, for example, Rehnquist quoted the statement in the anti-*Lochner* case, *Williamson v. Lee Optical Co.*,<sup>26</sup> which upheld a state prohibition on advertisements for eyeglass frames. There the Court stated: "We see no constitutional reason why a State may not treat all who deal with the human eye as members of a profession who should use no merchandising methods for obtaining customers."<sup>27</sup> In a later dissent outlining essentially the same argument given here for denying speech rights to business corporations, Rehnquist went back even further. He quoted Chief Justice John Marshall's description of "the status of a corporation in the eyes of federal law":

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created.<sup>28</sup>

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26. 348 U.S. 483 (1955).

27. *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 784 (1976) (Rehnquist, J., dissenting) (quoting *Williamson*, 348 U.S. at 490).

28. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 823 (1978) (Rehnquist, J.,

Rehnquist made the important follow-up point that the law only restricts corporate participation in public discourse but does not prevent communications by people who have liberty interests in their speech.<sup>29</sup> Thus, in *Virginia Board* he pointed out that the statute “only forbids *pharmacists* to publish this price information. There is no prohibition against a consumer group . . . collecting and publishing comparative price information as to various pharmacies in an area.”<sup>30</sup> In his *Bellotti* dissent, where he argued in favor of accepting the broad consensus among most state governments and the federal government that corporate speech aimed at the political process should be restricted, Rehnquist likewise observed that “all natural persons, who owe their existence to a higher sovereign than the Commonwealth, remain as free as before to engage in political activity.”<sup>31</sup>

The argument is, therefore, that respect for individual autonomy does not require protecting the speech of artificially created and instrumentally valued commercial entities. Mention should be made, however, to an important caveat to this conclusion that answers an obvious objection. The press—the mass media—is often described as having one foot in the commercial realm and the other in the democratic public sphere. This is not the place to treat the constitutional protection of a free press systematically, but the structural point about the merely instrumental significance of corporate entities continues to apply. Unlike the rationale for speech freedom, the best rationale for press freedom relates to the instrumental purpose or point of these entities—to produce information and vision independent of governmental or legal direction—which distinguishes their product from that of other businesses. Though of merely instrumental value, this value, especially including the quality of independence, is absolutely crucial for a free and democratic society. The point is not that the value of press freedom is other than instrumental but that this instrumental value, unlike that of the rest of the commercial sphere, lies precisely in its speech being free of censorious regulation—and on this ground it is the one business with an explicit constitutional status.<sup>32</sup>

### C. Power Versus Liberty

A person exercises autonomy most fundamentally by embodying her values in her actions or chosen inactions. A plausible (roughly libertarian) political theory argues that the law should presumptively permit (and possibly that a constitution should protect) these exercises of autonomy when they do not physically restrict another’s use of her body or property in her actions or otherwise exercise power over her. A person’s basic autonomy rights should include her own self-expression, engaging with others in solidarity, or achieving aims by persuasion of others. In contrast, one person’s constitutionally protected autonomy should not include exercising power over other people. Many exercises of power should be allowed, but only when they contribute to a better—fairer, more efficient, or otherwise collectively chosen—society.

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dissenting) (quoting *Dartmouth Coll. v. Woodward*, 17 U.S. 250, 303 (1819)).

29. *See id.* at 827–28.

30. *Va. State Bd. of Pharm.*, 425 U.S. at 782 (Rehnquist, J., dissenting) (emphasis added).

31. *Bellotti*, 435 U.S. at 828 (Rehnquist, J., dissenting).

32. *See* Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975).

A person's speech choices constitute an integral aspect of this autonomy, especially when she is using her speech to express her values or to change the world to correspond more to what she values. This is true, in any event, as long as she respects the other's autonomy *in the sense* that the other is not only free to reject her expressive *claims*, but also to follow her expressive lead by representing his acceptance of her leadership, or the values or facts that she honestly asserts. The speaker respects the other's autonomy when, as is typically true, the speaker leaves the other with this possibility of choice as to what they want or believe—what Rawls calls consensus as opposed to *modus vivende*, or what Habermas calls communicative agreement.<sup>33</sup> This case should be contrasted with a second case where the speaker instrumentally uses lies or power to get the other to act in a manner she recognizes is likely to be contrary to his values. In the first case, the speaker relies not on law, deception, or force but *only* on her own insight as embodied in her expression to create solidarity with her audience and, thereby, often to change the world to her liking. A person's own use of property, even though it is *her* property only due to law, within her own activities to embody or express her values likewise is an aspect of her autonomy. This autonomy aspect of her use of property applies likewise to its use within joint solidaristic activities with others where each party values both her and the other's activity.

The question here is whether this autonomy encompasses changing the world through voluntary market exchanges. Two claims are defended below. First, the typical speech situation involves an attempt at persuasion—to create a solidarity—while the typical offer of a market transaction is an attempt to exercise power (in an instrumental effort to rearrange resources) without solidarity, that is, without the transferor substantively valuing the transferee getting what transferee wants, and vice versa. More money is not a better argument. It is more power. Second, though society often benefits from market transactions (as well as many other exercises of power), exercises of power of one person over another should be subject to collective regulation while exercises of persuasion and creation of solidarities almost never should be.<sup>34</sup>

In many quarters, the first point will be most the controversial. The typical description of a market exchange is that it is (or at least should be) voluntary, with both parties wanting to participate, and that the exchange makes both better off than they were before. Those points I largely accept. Still, my claim is that, phenomenologically and structurally, market transactions are *mutual* exercises of power of one over another. When *B* offers *S* one dollar in exchange for *S*'s apple pie (Americans are fond of apple pies), *B* seeks to get *S* to do something. The same is true when *B* tells *S* that she may shoot *S* in the head but offers not to if *S* gives her the pie. In each case, *S* does not substantively want *B* to have the pie but transfers it to *B*, if she does, because of the value *S* places on *B*'s "offer." Of course, if *S* really does value *B*'s having the pie, even if the law prohibited *S*'s exercise of power (that is, prohibited *S*'s offer to pay or not to

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33. See generally JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996); JOHN RAWLS, POLITICAL LIBERALISM (1993).

34. I should note that the term "persuasion" here is actually somewhat distortive of the vast range of communicative uses of speech that receive constitutional protection, but at least in most cases, any harm or benefit that results from the protected speech involves the listener's mental assimilation and then her agreement, disagreement, appreciation, or other reaction to the message.

shoot), *S* is normally free to give *B* the pie. And, of course, it works both ways—*B* can charitably or loyally give *S* money and can peacefully avoid mayhem. *S*'s possession of the pie gave *S* the capacity to exercise power over *B*—to get *B* to pay one dollar or keep *B* from shooting. In each case, absent *B*'s exercise of power, *S* would prefer to keep her pie. *S* treats her pie *in this context* purely instrumentally—just as *B* similarly treats her money or gun—while she values it expressively when she shares it with *B*. The pie leads to something *S* wants: the dollar or not being shot. The only difference—though, of course, noteworthy—is that *B* normally has a right to transfer the dollar, but normally no right to shoot (or threaten to shoot). Or, from the other side, normally *S* already had a right not to be shot while normally no right to the dollar in *B*'s pocket.

The question is the significance of that difference. Ultimately, the difference is not whether *S* had a choice. If *S* desperately needed *B*'s dollar to buy a life saving drug, even if pies normally sell for two dollars (but with these purchasers now being nowhere around), *S* may experience herself as having no choice but to sell to *B* for one dollar. If the pie is part of a sacrament in *S*'s religion but *B*'s gorging himself would defile that religion, *S* may think she has a choice when *B* puts the gun to her head, deciding to take the chance of surviving *B*'s gunshot (and in any event getting to heaven even if *B* shoots). Most importantly for my purposes, in both cases, when *S* transfers possession, structurally there is no indication that *S* values *B* having the pie. Of course, if *S* is in the pie business, *S* wants customers, but often *S* would be even happier if the customers simply came and gave *S* their money without demanding pies in return. Central is that, in both cases, structurally the interaction only need assume, and often only involves, instrumental calculations of the two parties. *B* uses his purported ownership of the dollar or gun plus trigger hand and *S* uses her ownership of the pie to get what is desired, given that the other person will not provide it otherwise. In this fact—the instrumental use of what she controls to get the other to do what the other otherwise would not want to do—lies the structural exercise or attempted exercise of power.

Of course, for moral or pragmatic reasons lawmakers conclude some exercises of power are undesirable and others are desirable—market transactions often (but certainly not always) lead to efficient, socially desirable allocation of resources. Even when market transactions are not ideal, legal policies other than barring the transaction often provide the better response. In other cases, however, the law bars this exchange use of property, this exercise of power. It does, for example, in respect to how you vote in elections—you can “give me” but not sell me your vote. And the post-*Lochner* era of economic regulations shows that often societies conclude that a transaction (that does not meet certain conditions) is not desirable and prohibits this exchange-use of property (usually, on one side, prohibits this exchange-use of money) just as it prohibits the use of the gun to make a threat. The difference between the situations is not the forcefulness of the demand or offer. It is neither the voluntariness of the response nor its beneficial outcome. Rather, the difference, if there is one, lies in the law. Some exercises of power the legal policy considers desirable to allow, others not. Despite exceptions, the law (and morality) seldom considers the power that comes from guns a form of power desirable to promote domestically. Still, though generally gun use is considered excessive, under appropriate additional circumstances, some American states have allowed *B* to shoot *S* if *S* is on *B*'s property without permission

and if she first “offers” *S* the option of leaving.<sup>35</sup> In contrast, the law—and most but not all ethical views—considers most market exercises of power desirable to allow, though sometimes not and it is always a policy matter to identify when it is not. But structurally, except for this common legal difference, the market and weapon actions both exercise power where the party initiating the transaction treats what she is capable of offering (or threatening) purely instrumentally.

I should note that this is not a critique of property. Property consists of many separate rights, the normative significance of which and the legal, constitutional, and moral treatment of which vary.<sup>36</sup> Most obvious for the present discussion is the difference between *exchange* value and *use* value. The first involves situations where, at least structurally, the owner treats the property simply instrumentally—to exercise power over another. The second includes many situations where the owner integrates the property into her substantively valued activities and chosen life. This distinction even applies to ways of transferring ownership. In most cases where law forbids market exchanges, it permits transfers of the same items by means of gift, a gift being a *use* that expresses solidarity or other substantive values.<sup>37</sup> My most iconoclastic claim is probably my view that libertarians have been ideologically tricked into identifying the notion of liberty or autonomy with the first category of property rights. Rather, their plausible claim should go no further than to emphasize the need for careful explanation of any limits on a person’s *use* of her property within her own substantively valued practices. That is, any plausible libertarian claim should relate to property’s use value, not its exchange value. And, of course, the initial questions of where to recognize private property and how to allocate it logically must represent collective choices—the specific legitimacy of these choices ought to be evaluated on the basis of principles of justice as well as in terms of their contribution to various collective visions of the good.

As an illustration of the claim here, compare five forms of interaction: persuading, cooperating, giving, trading, and stealing. In the first three, there is no structural reason not to think both parties substantively value both their own and the other’s conclusions or resulting circumstances. They express (or may express) solidarity and association. In contrast to giving, in trading a person need not value in itself the other’s consequent possession of what was formally her property. She only values the result—that she now has something the other previously had. Trading may create an association, but one only necessarily valued instrumentally—though, of course, this observation does not deny that a person can substantively value her life as a trader (just as she can substantively value her life as a thief) and have real concern for her customers. The claim is only that this affirmative valuation of the other’s situation is not essential to the structure of “trading” while “giving” creates a form of association whose essential quality expresses a form of solidarity or other substantive values. The giver values the other being better off—at least, better off as she the giver sees it.

There is an important parallel to the way speech operates. In persuasion, a speaker willingly offers, as a “gift,” her own wisdom, knowledge, or vision. Even when the speaker communicates invective or with a wish to demoralize the other—to insult, for

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35. See, e.g., *Vann v. State*, 64 S.W. 243, 247 (Tex. 1900).

36. See C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 742–74 (1986).

37. See *Andrus v. Allard*, 444 U.S. 51 (1979) (noting that there is no taking where the law allows a person to possess, give, or devise, but not to sell the artifact).

example—she offers information or vision that she wants the other to have. In contrast, unlike with the gift that the speaker willingly transfers, trading or effectively coercive demands result in a person transferring something with which she would prefer not to part in order to obtain something she desires. Thus, the autonomy or liberty that is a central justification of speech freedom in many ways parallels the freedom to make gifts but is not involved in either market transactions or theft, both of which involve exercises of power and should be justified or rejected on pragmatic grounds other than a formal interest in autonomy.

The only further step in this argument is to note that commercial speech is a practice integrally involved in the aim of consummating profitable market transactions. As such, it should be subject to regulation on the same basis as any other aspect of this process. Just like market exchanges themselves, commercial speech is often socially useful and thus, on pragmatic grounds, should often be allowed. But when commercial speech impedes any social aim, the law should prohibit or regulate it to remove dysfunctional aspects or to generate more functional aspects. These points are probably why Thomas Emerson, the greatest American First Amendment absolutist (who proposed what he called a “full protection” approach), viewed commercial speech entirely outside the system of freedom of expression and instead a part of the system of commerce.<sup>38</sup> It is likewise closely related to why John Stuart Mill, despite his adamant defense of speech freedom, did not think his argument applied to speech promoting commercial exchanges, speech which could be properly restricted even if the law properly allows the practice that the speech seeks to promote.<sup>39</sup>

#### *D. Dissent*

Steve Shiffrin has argued that “dissent” ought to be the ruling image of free speech in America.<sup>40</sup> Shiffrin grounds his argument in American history and its romantic literary tradition, as well as pragmatic arguments concerning an effectively functioning democracy. In particular, society will better identify and respond to injustices (as well as simply incompetences) if it encourages rather than suppresses dissent.<sup>41</sup> Even if one accepts an autonomy or liberty theory as the underlying normative rationale of speech freedom, as a practical matter, autonomy or liberty is seldom threatened except when embodied in dissent. Thus, dissent is what needs protection. Shiffrin’s conclusions, as well as his pragmatic observations, ring largely true.

Shiffrin observes that his romantic or reformist vision of dissent is seldom an attribute of commercial speech—certainly in contexts where regulation has been fought. The billions of dollars commercial firms commit to advertising, with its typically mainstream values, overwhelmingly swamp opposing views supported by the typically tight budgets of those activist groups able to even muster a budget.

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38. See EMERSON, *supra* note 5.

39. See JOHN STUART MILL, ON LIBERTY 163–87 (Gertrude Himmelfarb, ed., Pelican Classics 1974) (1859).

40. STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA (1999); STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE (1990).

41. Aspects of Thomas Emerson’s fourth function of free speech, to create a balance between stability and change, are implicit in Shiffrin’s discussion of dissent. See EMERSON, *supra* note 5.

Commercial advertisers' speech typically exploits, extends, or defends the status quo, in this regard consistently diverging from activist dissenters' typically critical stances toward the status quo. Thus, commercial speech seldom provides any analogy to the dissent that Shiffrin argues merits protection. What commercial speech puts in play is not dissent but unregulated power. Rhetorically, it could be claimed that "regulated" commercial speech dissents precisely to the majoritarian views justifying regulation. This definitional trick seems quite disingenuous. Except for the fact of regulation, few would identify as *citizen*-based dissent the tobacco companies' promotion of their cigarettes, the liquor companies' promotion of their products, the fast food chains' promotion of their unhealthy food, or the pharmaceutical companies' promotion of their drugs. Occasional attempts to rein in powerful economic forces should not be mistaken for regulation of dissent. In sum, Shiffrin's dissent-based theory provides a reason to typically reject constitutional protection of commercial speech.

Shiffrin's dissent theory can be seen as a critique of the theories offered above. He regularly emphasizes "thinking small," or thinking contextually.<sup>42</sup> He invokes Isaiah Berlin's admonition to think like a fox, not like a hedgehog. A pragmatic contextualist, Shiffrin consistently resists sweeping abstract principles of the sort offered in the first three arguments above. Even if commercial speech typically should not be protected, at times it does represent dissent. Consider the speech of an artisan commune that self-consciously seeks to challenge capitalist production. Or consider the speech of organic farmers who seek to integrate both work and environmental practices and to embody a vision not of profitability but of human stewardship. This commune may then wish to advertise (or not support governmentally compelled advertising) precisely to promote this vision of the world and to create solidarity with customers in expressing this vision. One question is whether, in these cases, the dissent theory and the other approaches to commercial speech developed above lead to different conclusions.

Of course, my first argument about market determination was explicitly contextual—it claimed to be historically grounded and to reflect the dominating structure of our market economy. The possibility of these dissenting commercial practices exists only to the extent that—or in contexts where—people are able to and do take advantage of this structure not having total dominance. Some of these "dissenting" commercial practices are possible precisely due to contexts where workers are able, in a sense, to subsidize their economic practice by accepting lower wages. From a Weberian perspective, they have reintegrated the household and economic spheres. Where this provides the best description of the speech situation, my first argument justifying regulation does not apply to this speech.

Seana Shiffrin recently employed similar examples to suggest something like the following: Grant that collective choice, represented by government power, has proper sway over the structure of the economic realm. When this government power is not exercised, it largely leaves this realm to the amoral (not immoral, but specifically amoral) market.<sup>43</sup> Speech regulation in these contexts can rely on collective value choices to temper the dominance or other consequences of this amoralism. When the economic sphere is not pervasively regulated on the basis of collective choice,

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42. Steven H. Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1214 (1984).

43. See Shiffrin, *supra* note 24.

however, First Amendment commitments should protect those who are able individually or associatively to struggle against the market's amorality by embodying non-market substantive values into their practices. They may aim to create solidarities with others in society and to create an ethical alternative to the amorality of the market. Sometimes (not always) applying commercial speech regulations would require these actors to contradict their non-market values. This application is problematic both from the perspective of the rationale of government regulation—which is to respond to market amorality—and from the perspective of the autonomy (specifically the opportunity to dissent and try to create alternative practices) that the First Amendment protects. Of course, if the self-proclaimed dissenting economic actors are merely seeking to escape regulation in order to take advantage of amoral market incentives, they hardly have any right to free ride. They have no claim to opt out just because, in other respects, their allegiance is to other normative (or sometimes religious) values. To justify opting out, the regulatory requirements must specifically contradict the value integration that makes their practice dissenting. This analysis emphasizes that constitutional norms are misapplied when they contradict the moral ideals they are designed to embody. Even if in the routine case these moral ideals are part of the justification of government authority over amoral markets, when people themselves struggle specifically against market amorality, these constitutional ideas should flip into offering protection of their practices.

In some respects, this argument parallels one made in respect to the First Amendment protecting the anonymity of campaign contributions made to unpopular “dissenting” political parties. Government authority over the structure of elections, and thus general authority to regulate the fairness of political campaigns,<sup>44</sup> should allow government to mandate disclosure of the identity of campaign contributors. Even so, the rationale for making the elections more open and more democratic does not apply when uncloaking the identity of a contributor to basically marginal unpopular political groups would substantially discourage contributions. In this case, not only does the rationale of the government regulation not apply, but also the autonomy interests of the contributor provide a heightened justification for protecting anonymity. When faced with this issue, the Supreme Court in a sense found a content distinction constitutionally compelled.<sup>45</sup> The Court protected the anonymity of contributors to the Socialist Workers Party.<sup>46</sup> Note that this argument does not suggest general disempowerment of government in contexts where the structural context gives reason for governmental power—whether that structure involves elections or markets. Rather, it shows that sometimes the very rationale for governmental power suggests limits and exceptions.

Protection of the dissenters' commercial speech here might still seem in conflict with my third argument, specifically that the state should have authority to regulate the use of property as power. This conclusion is right, I believe, as a matter of *principle*. And it could be argued that even dissenting commercial enterprises should be required to find a way to operate—including in relation to their speech—within the legal

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44. See C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1 (1998).

45. See Geoffrey R. Stone & William P. Marshall, *Brown v. Socialist Workers: Inequality as a Command of the First Amendment*, 1983 SUP. CT. REV. 583.

46. *Brown v. Socialist Workers '74 Campaign Comm.* (Ohio), 459 U.S. 87 (1982).



framework that the law provides. Nevertheless, as a matter of legislative *policy*, here as elsewhere, the state ought to allow diversity in people's expression of values. Applying my interpretation of Seana Shiffrin's discussion, I tentatively suggest that despite the state's declared underlying rationale for market regulation (controlling market amorality), expressive freedom ought to prevail. In other words, the state should not focus on controlling for market amorality, but rather the exercise of autonomous choice of these dissenters from the market's amorality, regardless of this context of power.

#### CONCLUSION

I have described four reasons that the fundamental ideal of speech freedom should not extend to commercial speech.<sup>47</sup> I argued, first, that commercial speech is not an exercise of freedom because market forces dictate its content. Second, commercial speech is not an exercise of freedom by morally significant flesh-and-blood individuals to the extent that the speech is properly attributed to a legally constructed commercial entity. This attribution always leaves the flesh-and-blood individual free to say what she wishes when she leaves her commercial role, even when her speech duplicates in content possible messages of commercial entities. Third, commercial speech is not an exercise of constitutionally protected freedom because of its integral relation to market transactions that structurally involve exercises of power subject to state regulation rather than embodying individual autonomy. Fourth, commercial speech generally should not be protected to the extent that constitutional rights of free speech ought to be regarding dissent.

In reasons and result, I join the ranks of John Stuart Mill and most American First Amendment absolutists—a group that includes Supreme Court Justice Hugo Black and scholars such as Tom Emerson, Alexander Micklejohn, John Ely, and Hans Linde—who all conclude that protection of speech freedom should not extend to commercial speech. Of possible particular note is my third argument—that the libertarian tradition makes a fundamental mistake when it tries to connect its emphasis on autonomy and

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47. A fifth theory might be that the First Amendment concerns only or primarily political or democracy-related speech. This argument could proceed in either of two ways. It might focus on the content of commercial speech, in which case both Redish's article and the Court in *Virginia Board* emphasized that the content of commercial advertising can be politically relevant. Alternatively, it might focus on the proper political enfranchisement of the speaker and the contexts in which she is oriented toward the public sphere. See Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1 (2000); James Weinstein, *Speech Categorization and the Limits of First Amendment Formalism: Lessons from Nike v. Kasky*, 54 CASE W. RES. L. REV. 1091 (2004). Though this second approach would justify denying protection to commercial speech, I put it aside because I believe the rationale for protection of political speech lies in a conception of legitimate government that implies both democracy and limits on democracy as necessary consequences of a view of legitimate government as necessarily respecting individual liberty and equality—as Rawls put it, a view of people as “free and equal.” RAWLS, *supra* note 25, at 13. This view makes protection of speech based on respect for individual autonomy more basic than protection of the subsumed category of political speech. This more expansive view of expressive freedom also, I believe, better describes speech doctrine and judicial results in the United States.

liberty to claims about market freedom. On this point at least, John Stuart Mill got it right: "the principle of individual liberty is not involved in the doctrine of free trade."<sup>48</sup>

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48. MILL, *supra* note 39, at 164.