CORPORATE ADVERTISING'S DEMOCRACY

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I. INTRODUCTION

Commercial advertising is now considered constitutionally protected speech. What does this mean? The question is not one of doctrine or even of definition. It is not difficult to harmonize the outcomes of cases so as to state the doctrine of commercial speech. Nor is it difficult to define, at least approximately, what commercial speech is. The meaning of this change in the law, however, goes beyond both doctrine and definition.

Why is there any issue as to this meaning? On one level it is clear what constitutional protection entails. When certain governmental regulations of advertising are unconstitutional, they can be set aside by courts. Although the degree of judicial protection accorded to advertising is not entirely settled yet, courts have recently accorded advertising a substantial degree of protection from government regulation.

On another level, however, the legal protection accorded to advertising involves something more profound. It means that we, the public, are subject to the world of advertising. First Amendment protection subjects us to advertising in two senses. First, freeing the advertising industry from most governmental restrictions enhances the amount and types of advertising. More fundamentally, we are subject to advertising in the sense that we are subject to all that makes advertising the social phenomenon that it is today. Constitutional protection means that advertising will achieve its full potential in our society.

Modern advertising encompasses four important features of American life: market consumption, corporate personhood, information technology and psychological conditioning. Thus, to some degree, constitutional protection of advertising ultimately protects each of these four features. In this Article, Part II outlines the history of advertising protection. Part III illustrates the role that these four domains play in advertising caselaw. Judicial opinions do not fully describe the kind of advertising to which they have granted constitutional protection.[1] The opinions fail to acknowledge that the constitutional protection of

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[1] *See* RONALD K. L. COLLINS & DAVID M. SKOVER, THE DEATH OF DISCOURSE 102 (1996) ("The Court's pronouncements on commercial speech say little about how mass advertising

advertising may threaten democracy. Democracy in a world of advertising may be far different from what we have traditionally imagined democracy to be. The potential threat is not that politicians will adopt the techniques of advertising in order to win elections. Instead, the potential threat lies in what commercial advertising means for the autonomy of the citizenry to whom democracy traditionally makes its appeal. Part IV of this Article illustrates this threat.

Looking at advertising in terms of First Amendment protection may seem to suggest that the law's protection makes advertising what it is and that without such protection, advertising would have less social impact. That may not be the case. Reversing the recent judicial extension of constitutional status to advertising would probably not lead to serious restriction of advertising. However, such a change might illuminate the relationship between advertising and democracy. Part V of this Article addresses the role of law in the relation of advertising to democracy.

II. THE HISTORY OF GRANTING CONSTITUTIONAL PROTECTION TO ADVERTISING

In just a quarter century, commercial advertising has evolved from being of no constitutional significance to representing a major limit on government regulation of the marketplace. Commercial speech caselaw may arguably have constitutional significance akin to that of *Miranda v. Arizona*[2] and other Warren Court constitutional criminal procedure cases.[3] Those cases, however, only affected one area of American life, whereas advertising is everywhere. In terms of their impact on political life, examined in Part III, the import of advertising caselaw may be of comparable significance to the voting rights cases of the sixties.[4]

Oddly, this advertising revolution took place without much notice by the American public and with relatively little comment in legal academia.[5] Unlike

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actually works.").

[2] 384 U.S. 436 (1966).

[3] *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

[4] *See, e.g.*, Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966) (striking down the poll tax); Reynolds v. Sims, 377 U.S. 533 (1964) (deciding the first "one-person, one-vote" case).

[5] The emphasis here is on the words "relatively little." There are hundreds of articles dealing with various aspects of commercial speech, a number of which are cited here. An early suggestion that the First Amendment protects commercial advertising was given in Martin Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 420, 429 (1971). A few of the better known articles critical of such constitutional protection include: Daniel Hays Lowenstein, *Too Much Puff: Persuasion, Paternalism and Commercial Speech*, 56 U. CIN. L. REV. 1205 (1988); Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985); Thomas Jackson & John Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979); Lawrence

more politicized legal issues, like abortion, neither the political right nor the left have made these cases the subject of political debate. This may be because the importance of these cases is not fully appreciated, despite the fact that future generations may well refer to our era as the age of advertising.[6]

The understanding that purely commercial advertising is speech for purposes of the First Amendment first appeared, and then developed rapidly, from 1975 to 1980. During this period, analysis in judicial opinions shifted from considering advertising as just another form of business practice, subject to varying degrees of governmental regulation, to seeing it as a form of protected speech with its own, albeit limited, First Amendment test. Alex Kozinski and Stuart Banner argue that prior to 1975, the Court did not reject the idea that advertising is speech but neither did they consider the First Amendment issue one way or the other.[7] For example, Kozinski and Banner view *Valentine v. Chrestensen*,[8] traditionally characterized as demonstrating no First Amendment protection for advertising, as a case that involved economic regulation rather than speech. The truth of this insight is suggested by *Pennsylvania Bd. of Pharmacy v. Pastor*,[9] in which the Pennsylvania Supreme Court established a state constitutional right to advertise the prices of certain prescription drugs as a matter of due process. An analogous right would be extended by the United States Supreme Court under the First Amendment as a matter of free speech five years later.[10] But the Pennsylvania Supreme Court did not view the issues in *Pastor* from a free speech perspective. Similarly, *Railway Express Agency v. New York*,[11] which upheld a prohibition of advertising vehicles on the streets of New York City against due process and

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Alexander, *Speech in the Local Marketplace: Implications of* Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. for Local Regulatory Power, 14 SAN DIEGO L. REV. 357 (1977). *See also* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1 (2000); William Van Alstyne, *Remembering Melvill Nimmer: Some Cautionary Notes on Commercial Speech*, 43 UCLA L. REV. 1635 (1996); Sylvia Law, *Addiction, Autonomy and Advertising*, 77 IOWA L. REV. 909 (1992); Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747 (1993); Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 BROOK. L. REV. 5 (1989).

[6] Henry James referred to the 1890's as the age of advertising. *See* J. WICKE, ADVERTISING FICTIONS 88 (1988). Our age, however, certainly qualifies as well. *See* WILHELM ROPKE, A HUMANE ECONOMY 137 (1960) ("[Advertising] separates our era from all earlier ones as little else does, so much so that we might well call our century the age of advertising.") (*quoted in* Gregory H. Bowers & Otis H. Stephens, Jr., *Attorney Advertising and the First Amendment: The Development and Impact of a Constitutional Standard*, 17 MEM. ST. U. L. REV. 221, 252 (1987)).

[7] *See* Kozinski & Banner, *supra* note 5, at 756-57.

[8] 316 U.S. 52 (1942).

[9] 272 A.2d 487, 495 (Pa. 1971)

[10] *See* Va. Bd. of Pharm. v. Va. Citizens Consumer Council, 425 U.S. 748, 773 (1976).

[11] 336 U.S. 106 (1949).

equal protection challenges, was not understood at the time as raising speech issues. Kozinski and Banner suggest that judicial silence concerning the speech issue in these and similar cases was not the same as rejecting it.

The first case to uphold constitutional protection for advertising was *Bigelow v. Virginia*.[12] *Bigelow* struck down the conviction of the managing editor of a newspaper in Virginia for the crime of encouraging the procurement of abortion based on his publication of an advertisement for a New York based abortion clinic. Writing for the majority, Justice Blackmun held that the conviction amounted to a First Amendment violation.

Although the Court's ruling heralded the beginning of the era of constitutional protection for commercial advertising, such a characterization of the case was not obvious when the decision was announced. The editor, Bigelow, could have been regarded as unfairly victimized at the end of the political fight over abortion. The statutory prohibition in *Bigelow* had not been generally enforced.[13] Shortly after Bigelow's conviction, the Virginia legislature amended the statute to eliminate its application to advertisements for legal abortions in other states. Shortly thereafter, *Roe v. Wade* changed the entire context, rendering abortion legal throughout the country.[14]

It is not clear whether the *Bigelow* majority thought that advertising in general was at issue. Justice Blackmun seemed to accept that there are two kinds of speech, one with constitutional protection and one without.[15] The Court emphasized that the advertisement in *Bigelow* "did more than simply propose a commercial transaction."[16] *Bigelow* might have been interpreted as related to the fundamental right of abortion. In fact, Justice Rehnquist's dissent attempted to characterize the majority opinion as not changing the law of commercial advertising very much.[17]

Any doubts about the Court's direction in terms of advertising in general were lifted the following year in *Virginia Bd. of Pharmacy v. Virginia Citizens Council, Inc.*[18] In this case, the Court invalidated Virginia's ban on the advertisement of prescription drug prices on free speech grounds. Although the plaintiffs were mere consumers who wished to know information regarding price, the majority ruled that the consumers must be granted standing since, "[i]f there

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[12] 421 U.S. 809, 829 (1975). *See also* New York Times v. Sullivan, 376 U.S. 254 (1964) (granting substantial constitutional protection to the content of a newspaper advertisement, but characterizing the ad, which defended the civil rights campaign of Martin Luther King, as an "editorial advertisement").

[13] *See* 421 U.S. at 813 n.2.

[14] *See* 410 U.S. 113, 166 (1973).

[15] *See Bigelow*, 421 U.S. at 819.

[16] *Id.* at 822.

[17] *See id.* at 832 (Rehnquist, J., dissenting) (recognizing that a purely commercial proposal is entitled to little constitutional protection).

[18] 425 U.S. 748 (1976).

is a right to advertise, there is a reciprocal right to receive the advertising."[19]

Although the Court in *Va. Bd. of Pharm.* directly confronted the issue of the constitutional status of commercial speech,[20] it also suggested that *Bigelow* had already resolved the question.[21] Nevertheless, the Court went on to state for the first time why constitutional protection should be extended to speech concerning the proposal of a commercial transaction at a certain price. More specifically, the Court referred to the well-established two-level speech tradition[22] to explain why such commercial proposals should be protected. Certain forms of speech, such as obscenity, are not protected by the First Amendment. But, unlike obscenity, advertising is not so removed from the "exposition of ideas"[23] nor from "the administration of Government"[24] as to justify according it no constitutional protection.

The Court offered three justifications for protecting advertising under the First Amendment. First, commercial speech is similar to other types of speech, like labor speech, that are protected by the First Amendment. Secondly, access to advertising helps the market work more efficiently with significant cost savings, often to the benefit society's poorest consumers. Finally, even under a restricted view of the First Amendment as only serving to enlighten public decision-making, judgments about how the market should be regulated may depend on the free flow of commercial information.[25] The fears of the effects of price advertising that presumably prompted the state's advertising ban in *Va. Bd. of Pharm.* were dismissed as highly paternalistic,[26] by which the majority apparently meant that

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[19] *Id.* at 757.

[20] *See id.* at 758.

[21] *Id.* at 759 ("Last term . . . the notion of unprotected 'commercial speech' all but passed from the scene.").

[22] In 1942, the United States Supreme Court categorized speech into two levels: speech that is protected by the guarantees of the First Amendment and speech that is unprotected by the guarantees of the First Amendment. Under this "two-level theory of speech," the first, higher level included speech considered worthy of constitutional protection under the First Amendment, and the second, lower level encompassed forms of speech—such as defamation, obscenity, and "fighting words"—that are so void of social utility as to fall outside First Amendment protection. *See* Roth v. United States, 354 U.S. 476 (1957). *But see* Matthew E. Saunders, Comment, Florida Bar v. Went For It, Inc.: *A Thirty-Day Bugaboo?*, 31 NEW ENG. L. REV. 1215, 1218 (1997) (asserting that the two-level speech theory is widely criticized); Claudia Tuchman, Note, *Does Privacy Have Four Walls?: Salvaging* Stanley v. Georgia, 94 COLUM. L. REV. 2267, 2270 n.18 (1994) ("Legal commentary has criticized what constitutional scholar Harry Kalven labels Roth's 'two-level' speech theory . . . as overly simplistic.") (citing Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 10 (1960)).

[23] *See Va. Bd. of Pharm.*, 425 U.S. at 762 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

[24] *See id.* (quoting *Roth*, 354 U.S. at 484).

[25] *See id.* at 762-65.

[26] *See id.* at 770.

citizens must be trusted to evaluate truthful information, commercial or otherwise, in a responsible way.

Then-Justice Rehnquist's dissent addressed most of the criticisms that have been made of the commercial speech doctrine since *Va. Bd. of Pharm.* was decided. The dissent counseled that advertising would essentially endorse products that are arguably contrary to the public interest such as liquor or cigarettes.[27] Justice Rehnquist suggested that the majority had adopted an "Adam Smith" policy in an area in which other economic approaches were equally valid.[28] Justice Rehnquist also observed that although the majority concluded that advertising is similar to other types of speech, there are exceptions to First Amendment protection in these other fields.[29] Justice Rehnquist concluded his dissent with observations that seem prescient today. In the future, he wrote, drug advertisers would try to pressure doctors into prescribing certain drugs with the following type of ad: "Don't spend another sleepless night. Ask your doctor to prescribe Seconal without delay."[30] Justice Rehnquist warned that if advertisers are given this right, they will ultimately be given a license to disseminate such advertisements even on television during family viewing time; advertisers will do everything they can to generate demand for prescription drugs.[31]

The doctrinal development of commercial speech was first delineated in the final case of the late 1970's trilogy: *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.[32] In *Central Hudson*, the Court struck down a ban on energy product advertising that had been designed to reduce demand for energy. The majority acknowledged the lesser protection accorded commercial speech compared to core political speech in a "test" that still remains as the starting point for legal analysis in this area. The *Central Hudson* test denies constitutional protection for advertising that misleads or relates to unlawful activity. If the commercial speech does not mislead and does not relate to unlawful activity, it may not be prohibited unless the government demonstrates a pursuit of a substantial interest that is directly advanced by the regulation, which cannot be achieved by a more limited restriction.[33] The majority referred to this test as a "four-step" analysis.[34]

In *Central Hudson*, the governmental interest was to limit the increase in energy consumption created by promotional advertising. The Court upheld this purported aim as a substantial interest.[35] Moreover, banning such advertising

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[27] *See id.* at 789 (Rehnquist, J., dissenting).

[28] *See Va. Bd. of Pharm.*, 425 U.S. at 784.

[29] *See id.* at 786.

[30] *Id.* at 788.

[31] *See id.* at 789.

[32] 447 U.S. 557 (1980).

[33] *See id.* at 564.

[34] *See id.* at 566.

[35] *See id.* at 568. The Court also found that the state's interest in equitable distribution of energy demand and its effect on rate structure represented a substantial interest. *See id.*

directly promoted and facilitated the goal of energy conservation. The Court thus accepted that the more advertising there is, the more consumption there is likely to be.[36] But the Court found that the Commission's ban on promotional advertising was excessive because it prevented the utility from advertising products that might actually reduce overall energy consumption by drawing consumers away from less efficient energy sources. Furthermore, there might have been other ways, less restrictive of speech than a total ban, to achieve the goal of energy conservation.[37]

Justice Powell's majority opinion in *Central Hudson* elicited criticism from Justices Blackmun and Stevens for theoretically accepting the suppression of advertising in order to depress demand for a product.[38] The Justices objected to the government's argument that speech may be suppressed on the ground that the listener, in this case consumers, would find the advertiser's message persuasive. Justices Blackmun and Stevens criticized the majority for not rejecting this argument out of hand. Their position is one that is increasingly popular among the Supreme Court Justices today, and one that has led to recent criticism of the *Central Hudson* test.[39] There is a serious doubt whether a majority of Justices today would allow a widespread ban on advertising for the avowed purpose of suppressing demand for a lawful product.[40]

Justice Rehnquist dissented in *Central Hudson*, again rejecting the extension of First Amendment protection to commercial advertising.[41] He also criticized the speculative nature of the Court's suggestions of alternative restrictions that might accomplish the State's goal without this degree of speech suppression.[42] But, by the time *Central Hudson* was decided, the battle of constitutional protection for advertising had already been decided. The only remaining question, still a

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at 568-69.

[36] *See id.* at 569 ("There is an immediate connection between advertising and demand for electricity. The interest in the equity of the rate structure was held not to be directly promoted by the ban.").

[37] *See Central Hudson*, 447 U.S. at 570.

[38] *See id.* at 574 (Blackmun, J., concurring), 581 (Stevens, J., concurring).

[39] *See infra* notes 62-63 and accompanying text.

[40] *See* Thompson v. Western States Med. Ctr., 122 S. Ct. 1497 (2002) (striking down a ban on advertising and promotion of compounded drugs) ("[B]ans against truthful, nonmisleading commercial speech . . . usually rest solely on the offensive assumption that the public will "respond irrationally" to the truth. 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.").

[41] *See Central Hudson*, 447 U.S. at 598 (Rehnquist, J., dissenting).

[42] *See id.* at 599-600 ("The final part of the Court's test thus leaves room for so many hypothetical 'better' ways that any ingenious lawyer will surely seize on one of them to secure the invalidation of what the state agency actually did . . . . 'A judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation . . . .'") (quoting Ill. Elections Bd. v. Socialist Workers Party, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring)).

question today, is whether the protection accorded commercial speech is any less than that accorded other kinds of speech.

In the 1980's, advertising arguably received less than full First Amendment protection.[43] For one thing, the *Central Hudson* test itself allowed the government to ban misleading advertising and to ban advertising for unlawful activities that fell short of direct incitement, both of which distinguished commercial from political speech.[44] In addition, using the argument criticized by the concurrences in *Central Hudson*, the Court in *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico* upheld restrictions on the advertising of casinos on the theory that suppressing advertising could be used legitimately to suppress demand for a product.[45]

Justice Rehnquist wrote the opinion for the Court in *Posadas* and while it was an exaggeration for one commentator to write that *Posadas* accorded advertising no constitutional protection,[46] it was an understandable exaggeration. Not only did the *Posadas* Court uphold the government ban in order to suppress demand for gambling among local residents, but the Court also permitted restrictions on advertising on the theory that the power to ban an activity includes the power to ban advertising about that activity.[47] Given the government's vast power over substantive activity, such a theory would be available to uphold almost any restriction on advertising.

After *Posadas*, the constitutionally protected status of advertising was, as a practical matter, subject to doubt. This state of greatly weakened constitutional protection of advertising was short-lived. The distinction between commercial and other protected speech, which fostered reduced constitutional protection for

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[43] Although commercial speech received less than full First Amendment protection during the period between *Central Hudson* and *Posadas*, the Court did strike down restrictions on commercial speech. *See, e.g.*, Bolger v. Youngs Drugs Prods. Corp., 463 U.S. 60 (1983) (striking down federal statute prohibiting unsolicited mailing of contraceptive advertisements); *In Re* R.M.J., 455 U.S. 191 (1982) (invalidating state court rule placing various limits on nonmisleading lawyer advertising).

[44] *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (stating that in the area of core political speech, the government may only ban advocacy of illegal action "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

[45] *See* 478 U.S. 328 (1986).

[46] *See* Law, *supra* note 5, at 935 ("Although the Supreme Court continues to pay lip service to the principles of *Virginia Pharmacy* and the similar standards of *Central Hudson* . . ., the majority of the Court has *sub silentio* adopted Rehnquist's view that the First Amendment does not protect commercial speech.").

[47] *See* Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at the Greater Includes the Lesser*, 55 VAND. L. REV. 693, 714-15 (2002). In a thorough study of *Posadas* and of its doctrinal foundations and implications, Professor Mitchell Berman indicates that *Posadas* does not necessarily permit a ban of speech "about" an activity. The majority opinion only allows prohibition, under certain circumstances, of advertising, assumed to be promotion, of the activity.

advertising, became particularly undermined in 1993, in *City of Cincinnati v. Discovery Network, Inc.*[48] *The Discovery Network* Court struck down a ban on commercial news racks on the ground that the ban did not apply to non-commercial newspapers.[49] By 1995, the Court had reinstated vigorous constitutional protection of advertising, striking down a ban on alcohol content labels in *Rubin v. Coors Brewing Co.*[50] *Coors Brewing* was especially significant because the government's asserted interest to prevent alcohol content wars seemed socially beneficial, unlike the suspected oligopolistic manipulation in *Va. Bd. of Pharm.*[51] When a majority of the Justices formally repudiated *Posadas* in *44 Liquormart, Inc. v. Rhode Island*,[52] the transformation of advertising into very well-protected speech was complete.[53]

The question now remaining is whether the Court will eliminate the category of commercial speech and, instead, apply general First Amendment categories and analysis in cases involving advertising. Commercial speech has never received the constitutional protection that core or political speech receive. In 1997, for example, a divided Court upheld assessments for agricultural advertising in *Glickman v. Wileman Brothers & Elliott, Inc.*, refusing to view the case as one of coerced speech.[54] It is hard to imagine a similar outcome if the advertising in question had involved political speech. Yet, even in this one area, the Court struck down a similar assessment for advertising in 2001, in *United States v. United Foods, Inc.*[55] The level of constitutional protection for advertising seems to be rising.[56]

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[48] 507 U.S. 410 (1993).

[49] *See id.* at 419 ("[T]he city's argument attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimates the value of commercial speech.").

[50] *See* 514 U.S. 476 (1995).

[51] *See* Lowenstein, *supra* note 5, at 1238 ("In *Virginia Pharmacy*, the ban on price advertising by pharmacists was not paternalistic. Probably a major reason for the restriction was to increase the income of pharmacists by partially insulating them from price competition."); *see generally* Fred McChesney, *Commercial Speech in the Professions: The Supreme Court's Unanswered Questions and Questionable Answers*, 134 U. PA. L. REV. 45 (1985) (arguing that non-promotion rules are anti-competitive).

[52] 517 U.S. 484, 513 (1996) ("As the entire Court apparently now agrees, the statements in the *Posadas* opinion on which Rhode Island relies are no longer persuasive.").

[53] Even though commercial speech is very well protected, it is not fully protected. *See infra* Part III.

[54] *See* 521 U.S. 457 (1997).

[55] *See* 533 U.S. 405 (2001).

[56] *See* Paul M. Schoenhard, Note, *The End of Compelled Contributions for Subsidized Advertising:* United States v. United Foods, 25 HARV. J.L. & PUB. POL'Y 1185, 1186 (2002) (describing *Glickman* as factually similar to *United Foods*). The description is a fair one. The different outcomes in the two cases highlight the uncertainty among the Justices over how far to go in protecting commercial speech. The commercial speech area

The references to general commercial advertising in Supreme Court opinions increasingly sound in the language of core First Amendment protection. For example, in *United Foods*, Justice Kennedy, writing for a six-Justice majority, likened advertising to other spheres of our social and cultural life where ideas and information flourish.[57] Justice Thomas, perhaps the strongest advocate of advertising on the Court, has actually made reference to the *Brandenburg* test[58] as the proper standard by which to decide if advertising relates to underage smoking.[59] The *Brandenburg* test was designed to protect political protest in the most extreme context.[60] Applied to advertising, *Brandenburg* might mean that a cigarette company billboard message urging stores to break the law by selling cigarettes to minors would be protected by the First Amendment either because the billboard represented only general incitement rather than direct incitement or because there is little likelihood of imminent lawless conduct.[61] This is clearly an extremely high degree of constitutional protection for advertising.

Perhaps the plainest indication that advertising is eventually going to receive the highest level of First Amendment protection is the unwillingness of a majority of the Justices to re-endorse the *Central Hudson* test as the proper standard for evaluating commercial speech. Recently, the Court criticized *Central Hudson,* suggesting that a majority of the Court might favor its abolition.[62] Surprisingly,

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is now a "mess" as far as knowing what analysis applies and how it applies. *See* Berman, *supra* note 47, at 763. But the search for the proper doctrine may only be a law professor problem since advertising generally wins. Outside of fraud, advertising bans are likely unconstitutional.

[57] *See* 533 U.S. at 409 ("The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish.") (quoting Edenfield v. Fane, 507 U.S. 761, 767 (1993)).

[58] *See supra* note 44 and accompanying text.

[59] *See* Lorillard Tobacco Co. v. Reilly, 535 U.S. 525, 579 (2001) (Thomas, J., concurring) (responding to the Commonwealth of Massachusetts' argument that tobacco advertisements could be restricted because they propose illegal sales to minors, Thomas argued that *Brandenburg* applies to any attempt by the State to punish speech that solicits or incites crime).

[60] *See* John Charles Kunich, *Natural Born Copycat Killers and the Law of Shock Torts*, 78 WASH. U. L.Q. 1157, 1170 (2000) ("The extreme requirements of the Brandenburg test" involve the context of "criminal convictions of people who gave highly unpopular political speeches which allegedly advocated criminal activity." The point is to "provide[] adequate First Amendment protection to . . . marginalized political speakers.").

[61] *See* Bernard Schwartz, *Holmes Versus Hand: Clear and Present Danger or Advocacy of Unlawful Action*, 1994 SUP. CT. REV. 209, 240 (arguing that "advocacy in print" cannot be proscribed under the *Brandenburg* test because it is not likely to produce imminent lawless action.) Under this view, billboard advertising could not be proscribed, as far as advocacy of illegal conduct is concerned.

[62] *See* Berman, *supra* note 47, at 794-95 (suggesting that Justices Thomas, Scalia, Kennedy, and Stevens as so inclined, with Justice Ginsburg perhaps leaning in that direction).

the criticisms have been voiced in cases in which regulations of advertising have been struck down under the *Central Hudson* test.[63] In other words, although the *Central Hudson* test increasingly results in protecting advertising from government regulation, a number of Justices still feel the need to abandon it in order to provide advertising with even greater protection. Even Justice Stevens' statement for eight Justices in *Greater New Orleans Broadcasting Ass'n, Inc. v. United States* that the *Central Hudson* test is now applied more strictly than it had been in *Posadas*[64] has not been enough to satisfy some of the Justices.

This internal dispute suggests that it may not matter what test the Court announces it is using in advertising cases. Realistically any regulation of advertising that goes beyond banning fairly base fraud is unconstitutional. Increasingly, the Court seems to hold that restricting advertising may not be used as a proxy for any other governmental goal. Demand for a product may not be limited by, as it has been said, keeping people in ignorance. Advertising must be given its free reign.

III. THE ROOTS OF ADVERTISING

Advertising is commercial speech, protected by the First Amendment. But what is advertising? The cases and commentary offer several definitions and approaches. An early criticism of the commercial speech doctrine proposed the following definition: "'Commercial speech' refers to business activity that does no more than solicit a commercial transaction or state information relevant thereto."[65] This definition is fairly close to the Supreme Court's own early definition: "speech proposing a commercial transaction."[66]

But, while such definitions may be of assistance to a judge who must decide whether a particular activity is commercial speech for purposes of applying a legal rule, they do not promote our understanding of advertising. If we wish to come to grips with advertising's significance, we might better ask: "In what

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[63] *See, e.g.*, Greater New Orleans Broadcasting Ass'n, Inc. v. United States, 527 U.S. 173, 183 (1999) ("[R]easonable judges may disagree about the merits of [repudiating the *Central Hudson* test]."); *Lorillard Tobacco*, 535 U.S. at 554 ("[S]everal Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases."); *United Foods*, 533 U.S. at 409 (*Central Hudson* test "has been subject to some criticism."). Perhaps the broadest hint of *Central Hudson*'s shaky hold was Justice O'Connor's majority opinion in *Thompson v. Western States Medical Ctr.*, 122 S. Ct. 1497, 1504 (2002), where the Court noted that "[n]either party has challenged the appropriateness of applying the *Central Hudson* framework to the speech-related provisions at issue here."

[64] *See* 527 U.S. at 182.

[65] Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 1 (1979).

[66] *Central Hudson*, 447 U.S. at 562 (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978)). The Court has also defined commercial speech as "expression related solely to the economic interests of the speaker and its audience." *Id.* at 561.

aspect of our society does advertising participate?"

Advertising is a part of four defining aspects of this society: the market, corporations, technology, and psychology. Within these domains, advertising promotes a particular point of view that relates to these realms. What we experience in advertising is consumption, personhood, information, and conditioning. Through advertising's information and conditioning, corporations become persons, while people become consumers.

A. Market Consumption

The change in judicial viewpoint in *Va. Bd. of Pharm.* that most obviously permitted constitutional protection of advertising had to do with the importance of the market. Justice Blackmun's majority opinion acknowledged that the pharmacist did "not wish to editorialize on any subject, cultural, philosophical, or political . . . . The 'idea' he wishes to communicate is simply this: 'I will sell you the X prescription drug at the Y price.'"[67] Justice Blackmun acknowledged that there could in theory be communication so lacking in truth that it does not merit First Amendment protection—the classic two-level speech theory. The Court, however, held that advertising is not that kind of speech. Advertising imparts important information. Indeed, the information at issue in the case—drug prices—is very important to sellers, consumers, and to the proper functioning of the economy as a whole. "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."[68] It is a matter of public interest that these decisions are made intelligently. In other words, the First Amendment protects advertising because advertising is necessary to the efficient functioning of the market.

This particular aspect of the *Va. Bd. of Pharm.* opinion has led to criticism that the commercial speech doctrine is just another form of economic due process, limiting the government's power to regulate the market.[69] Indeed, it is not clear why, assuming government could interfere directly with the efficient allocation of resources in the market by price controls, it cannot do so indirectly through the

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[67] *Va. Bd. of Pharm.*, 425 U.S. at 761.

[68] *Id.* at 765.

[69] *See* MARK TUSHNET, RED, WHITE AND BLUE 290 (1988) (stating that private interest prevails over a more republican vision of political life); *see also* Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1387 (1984) ("The First Amendment has replaced the due process clause as the primary guarantor of the privileged.); Jackson & Jeffries, *supra* note 65, at 30 (noting that commercial speech cases resurrect economic due process). *But see* Michael J. Phillips, *The Slow Return of Economic Substantive Due Process*, 49 SYRACUSE L. REV. 917, 968 (1999) (suggesting an unnoticed "economic substantive due process[] revival"). Perhaps the accepted idea that the Court has turned to the First Amendment from the due process clause will have to be reevaluated. Maybe the Court is now generally more oriented to the market than in previous years.

elimination of price advertising.[70]

The obvious imbalance between what the government presumably can do substantively and what it cannot do by advertising restrictions, leads critics to argue that the commercial speech cases were wrongly decided because the efficient functioning of the market is not a First Amendment value.[71] Robert Post, on the other hand, views the outcomes of these cases as defensible, but not on the ground of efficiency, despite the Court's opinions.[72] In any event, the Court plainly now views the First Amendment as concerned with more than political self-government.[73] The commercial speech cases are informed, at least in part, by concern for the proper functioning of the market.

Another indication of the central role of the market in the advertising cases is the theme, so far formally adopted on the Court only by Justice Thomas, that "speech is speech,"[74] that no distinction can be made between advertising and any other kind of speech, whether political or cultural.[75] But, of course, such a distinction could be made. The Justices are able to distinguish between "speech" and obscenity[76] and between "speech" and criminal solicitation.[77] The Justices

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[70] *Cf.* Alexander, *supra* note 5, at 376 (noting that if government is permitted to be paternalistic in the arena of allowing access to goods, why not apply this paternalism to information?).

[71] *See, e.g.*, STEVEN H. SHIFRIN, DISSENT, INJUSTICE AND THE MEANING OF AMERICA 40 (1999) ("Why should the allocation of resources be a First Amendment concern?").

[72] *See* Post, *supra* note 5, at 10 ("[C]ommercial speech doctrine should not be defended on the ground that commercial advertising serves the First Amendment value of market efficiency.")

[73] *See, e.g.*, Rubin v. Coors Brewing Co., 514 U.S. 476, 481-82 (1995) (citing economic efficiency as the only reason for protecting commercial speech).

[74] *See Lorillard Tobacco*, 533 U.S. at 575 (Thomas, J., concurring) ("Indeed, I doubt whether it is even possible to draw a coherent distinction between commercial and noncommercial speech."); *44 Liquormart*, 517 U.S. at 522 (Thomas, J., concurring) ("I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech.").

[75] The "speech is speech" position is also popular in academia. In the context of defending the constitutional protection of advertising, Kozinski and Banner argue that distinguishing between worthwhile speech and worthless speech is "exactly the type of argument the First Amendment should foreclose." Kozinski & Banner, *supra* note 5, at 752; *see also* Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777, 780 (1993) ("Commercial speech, as speech, should presumptively enter the debate with full First Amendment protection."). *But see* Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1254-55 (1995) ("[T]he facilitation of communication is not by itself a sufficient reason for social conventions to be valued by the First Amendment. Navigation charts for airplanes, for instance, are clearly media in which speakers successfully communicate particularized messages. And yet when inaccurate charts cause accidents, courts do not conceptualize suits against the charts' authors as raising First Amendment questions.").

[76] However defined, obscenity is not protected by the First Amendment. *See* Miller v.

even must distinguish commercial speech in order to decide when to apply the *Central Hudson* test. If the Justices were unwilling to distinguish commercial from political speech, the reason would be that advertising seems so important and so culturally dominant to the Justices that they feel the First Amendment should apply to it more or less as it does to other kinds of speech.[78] In other words, the "speech is speech" position is normative, not descriptive.

In terms of methodological issues of constitutional interpretation, the extension of First Amendment protection to advertising in order to further market values is not justifiable in any obvious sense. This is particularly so with regard to conservative approaches to constitutional interpretation. While a liberal[79] like Justice Blackmun might recognize a constitutional right to advertise based an evolving sense of what the Constitution means in our time,[80] a time dominated by the market, that course is not open to the conservative interpreter.[81]

California, 413 U.S. 15, 18 (1973).

[77] *See* Richard A. Posner, *Cost-Benefit Analysis: Definition, Justification, and Comment on Conference Papers*, 29 J. LEGAL STUDIES 1153, 1173 (2000) ("[F]reedom of speech . . . does not prevent suits for defamation or prosecutions for threats and criminal solicitations.").

[78] Justice Thomas' position seems to have support from other members of the Court, as indicated by a general escalation of rhetorical support for advertising in the opinions. *See supra* note 56 and accompanying text. On the other hand, the Court recently impliedly reaffirmed the political speech/commercial speech divide in *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 122 S. Ct. 2080 (2002), in which Justice Stevens suggested for the Court that a door-to-door registration requirement, although unconstitutional for religious or political solicitation, might be constitutional if limited to "commercial activities and the solicitation of funds . . . ." *Id.* at 2089. It is difficult to locate *Watchtower* in the commercial speech line of cases, however, because actual door-to-selling is as much conduct as speech and so might be more justifiably regulated.

[79] Collins and Skover note the compatibility of liberal thought and constitutional protection of advertising. *See* COLLINS & SKOVER, *supra* note 1, at 104 (noting that the transformation of the individual self of the Enlightenment to the consumer self was accompanied by the growth of the ideology of consumption, consisting of a value system equating acquisition with self-realization).

[80] One criminal law casebook contrasts an original or textual approach to interpretation with the interpretive approach of two liberal constitutional thinkers as follows: "Consider a different interpretive method that looks not only at the meanings a statute's words had at the time of enactment but also at the evolution of their meaning over time. Some constitutional scholars such as Ronald Dworkin and Michael Perry, have suggested that because language evolves, constitutional and statutory language should be read in the light of changing usages." STEPHEN A. SALTZBURG ET AL., CRIMINAL LAW: CASES AND MATERIALS 46 (2d ed. 2000).

[81] One difference between liberal and conservative approaches to constitutional interpretation is support or opposition to the idea that "the Constitution is an evolving charter that may need to be applied according to principles 'not strictly derivable from it.'" Book Note, *Commemorating the Bicentennial of the Constitution*, 101 HARV. L. REV. 890, 895 (1988) (reviewing MORTON WHITE, PHILOSOPHY, THE FEDERALIST, AND THE

Two conservative jurists have faced this issue squarely in the context of expansive interpretations of speech. Robert Bork and Justice Scalia have expressed doubts about extending First Amendment protection to areas far from its historical core. Judge Bork famously argued that the First Amendment protects only political speech[82] within a historical intent framework.[83] In a related vein, Justice Scalia, a textualist,[84] acknowledged in his concurrence in *44 Liquormart* that beyond protecting political speech, the First Amendment text is "indeterminate" about what other sorts of speech are protected.[85] From the perspective of constitutional authorization in the absence of textual condemnation,[86] such indeterminacy should have removed advertising from judicial consideration and located its regulation in the political arena.[87] Justice Scalia stated further in his concurrence that in the absence of clear textual guidance he would look to the "long accepted practices of the American people" to define the reach of the First Amendment.[88] No party in the case had

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CONSTITUTION) (quoting Frank I. Michelman, *Constancy to an Ideal Object*, 56 N.Y.U. L. REV. 406, 413 (1981)). *Compare* ANTONIN SCALIA, A MATTER OF INTERPRETATION 38 (1997) ("What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text . . . ."), *with* William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 697-98 (1976).

[82] *See* Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971) ("Constitutional protection should be accorded only to speech that is explicitly political.").

[83] The original intent framework was not entirely explicit in Bork's *Neutral Principles*. It can be gleaned, however, from this description of the reach of equal protection: "The equal protection clause has two legitimate meanings. It can require formal procedural equality and, because of its historical origins, it does require that government not discriminate along racial lines." *Id.* at 11. Historical intention could not directly answer the question of the reach of the First Amendment because the framers "seem to have had no coherent theory of free speech." *Id.* at 22.

[84] *See* SCALIA , *supra* note 81, at 23 ("The philosophy of interpretation I have described above is known as textualism.").

[85] *See 44 Liquormart*, 517 U.S. at 517.

[86] Textualism is, methodologically, especially applicable to advertising because, unlike other practices that cannot be compared to the past because the modern context is so different, see McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 375 (1995) (Scalia, J., dissenting) (the issue of anonymity in electioneering could not have arisen historically because "[t]he idea of close government regulation of the electoral process is a more modern phenomenon, arriving in this country in the late 1800's"), there was such a thing as commercial advertising in the late 1700's and the failure of contemporary thinking to consider it as "speech" would then be a textualist bar to constitutional protection.

[87] *See* SCALIA, *supra* note 81, at 38-40 (criticizing the interpretive approach to the Constitution "that affirms the existence of what is called The Living Constitution, a body of law that . . . grows and changes from age to age, in order to meet the needs of a changing society," Scalia concludes that, "[t]his is preeminently a common-law way of making law, and not the way of construing a democratically adopted text.").

[88] *See 44 Liquormart*, 517 U.S. at 517 ("I will take my guidance as to what the

enlightened Justice Scalia as to what those practices were.[89] Again, this should have meant no First Amendment protection for advertising, for surely the opponent of majority rule has the burden to show that a government regulation is unconstitutional. In any event, even if one had to hazard a guess, that guess would have to be that advertising was traditionally, and in many ways, subject to government regulation.[90] Thus again, advertising would have little or no protection from the perspective of textualism.

In the face of such weak support for First Amendment protection of advertising, why does Justice Scalia in particular, and why do conservative Justices and commentators in general, support the doctrine of commercial speech? The answer must lie, at least in part, with the intrinsic importance of the market in the modern era. It must somehow be obvious that we live today immersed in the ideas and information of the market. Thus, constitutional protection of advertising rests in part on a new and fundamental recognition of the centrality of the market economy in our lives.

But there is more to modern advertising than the efficient allocation of resources. As a social phenomenon, advertising is not about production, although, of course, suppliers of materials for production do advertise. Advertising, according to the Court, is concerned primarily with consumption.[91] It is consumers whom the Court unreflectively assumes will be affected and benefited by the commercial speech doctrine. It is demand that is efficiently channeled in the cases.

The message of the advertising in these cases has been that the receiver should consume something at a certain price. The Justices are opposed to "keeping people in the dark" about their choices for consumption.[92] This is akin to a

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Constitution forbids, with regard to a text as indeterminate as the First Amendment's preservation of 'the freedom of speech,' and where the core offense of suppressing particular political ideas is not at issue, from the long accepted practices of the American people.").

[89] *See id.* at 518 ("The parties and their amici provide no evidence on these points.").

[90] *See* Bork, *supra* note 82, at 22 (noting that framers had no coherent theory of free speech and did not even necessarily seek to protect criticism of government). Justice Stevens' plurality opinion in *44 Liquormart* refers to advertising "throughout our history," but his rendition of that history does not suggest that advertisements were understood as a part of free speech or were not subject to government regulation. *See* 517 U.S. at 495.

[91] *See, e.g., Va. Bd. of Pharm.*, 425 U.S. at 757.

[92] This image of the people in the dark was used in Justice Black's dissent in *Ginzburg v. United States*, 383 U.S. 463, 481 (1966). When used by Justice Stevens in his concurring opinion in *Rubin v. Coors Brewing Co.*, it was directed at commercial information concerning the alcohol content on labels. *See* 514 U.S. at 497 ("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."). Justice Stevens repeated the image in his plurality opinion in *44 Liquormart*, 517 U.S. at 503 ("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.").

constitutional right for consumers to know what products are for sale and under what conditions. The significance of this insight is the recognition that it is not only the centrality of the market in general that is endorsed in the advertising cases. It is also consumption that is served by the commercial speech doctrine. It is to consumption that these cases have granted constitutional recognition. What emerges in the advertising cases, albeit only as yet in nascent form, is a constitutional right to consume. What has already emerged is a constitutional concern with consumption. We see in the commercial speech doctrine the ultimate vindication of one political critique against capitalism: "The bourgeois conception of citizen is of the citizen as consumer."[93]

B. Corporation/Personhood

Most advertisers are corporations and large-scale, publicly-held corporations at that.[94] For that reason, the commercial speech doctrine is the latest, and now perhaps the most important, area in which corporations are recognized by the courts as having constitutional rights.

The question of corporate constitutional rights in the realm of advertising can be looked at in at least three different ways. First, the corporate constitutional right to advertise is an extension of the issue of corporate constitutional rights in general. The question here is, are corporations protected parties? Are they "persons" in the language of the Fourteenth Amendment?[95] Are they "citizens" for purposes of Article IV's Privileges and Immunities Clause?[96] A second way to look at the free speech rights of advertising corporations is as a matter of the rights of people who are exposed to the advertisements. This means considering the rights of the receivers.[97] Finally, the corporate constitutional right of

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[93] DAVID DYZENHAUS, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR 188 (1997). Dyzenhaus does not quote Carl Schmitt here, as one might expect, but rather Hermann Heller. In Heller's understanding, "the bourgeois becomes the depoliticized citizen whose sole political aim is the maintenance of the night-watchman state" to protect his property. Ultimately, the bourgeois seeks this security not in representative government but in the "strong man" dictator and "radical theories to try to justify its superior economic position . . . ." *Id.* Tellingly, these words were written in Germany in 1932.

[94] Indeed, what we think of as modern advertising is basically a creation of corporate America seeking a more humane image. *See generally* ROLAND MARCHAND, CREATING THE CORPORATE SOUL: THE RISE OF PUBLIC RELATIONS AND CORPORATE IMAGERY IN AMERICAN BIG BUSINESS (1998).

[95] U.S. CONST., amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

[96] U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

[97] *Compare* Martin Redish, *Self Realization, Democracy, and Freedom of Expression: A Reply to Professor Baker*, 130 U. PA. L. REV. 678, 678-79 (1982) (viewing favorably

advertising can be viewed from the perspective of the right of a particular corporation to speak its own message. This might entail a corporate constitutional right of self-commercial-expression.

In terms of the corporate constitutional rights in general, the courts have never definitively or adequately addressed the general extension of constitutional rights to corporations.[98] Corporations have been granted constitutional rights in a number of areas but without persuasive interpretive justification and without full judicial consideration. Indeed, the issue of corporate constitutional rights is really not an issue in American law and legal debate at all.[99] For example, in most constitutional law casebooks, the issue of the legitimacy of corporate constitutional rights is not even raised as a topic or is raised only marginally.[100]

Despite the absence of controversy, corporations have been granted important constitutional rights. In *Santa Clara County v. Southern Pacific Railroad, Co.*,[101] the Supreme Court held that in terms of property rights, a corporation is a person for purposes of the Fourteenth Amendment.[102] The Court has repeated this holding on many occasions.[103]

In the twentieth century, the Court extended liberty-type rights to

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the subject of corporate speech and the rights of listeners), *with* Matthew J. Geyer, Note, *Statutory Limitations on Corporate Spending in Ballot Measure Campaigns: The Case for Constitutionality*, 36 HASTINGS L.J. 433 (1985) (stating that corporate political speech is of little value to listeners).

[98] *See generally* Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577 (1990).

[99] *See id.* at 652 ("There has been little, if any, systematic thinking about the problem of corporations and the Bill of Rights as a whole.").

[100] The subject of the constitutional rights of corporations is generally not a topic in itself, but a discussion of corporate campaign finance restrictions is a common theme. *See, e.g.*, JEROME A. BARRON ET AL., CONSTITUTIONAL LAW: PRINCIPLES AND POLICY, CASES AND MATERIALS 1230-37 (6th ed. 2002); NORMAN REDLICH ET AL., CONSTITUTIONAL LAW 1315-46 (4th ed. 2002); JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW 1005-32 (9th ed. 2001). These books discuss the issue of distinctive regulation of corporate political donations and spending raised by cases such as *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (upholding ban on corporate contributions to candidate) and *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) (striking down campaign spending limits on nonprofit, nonstock corporations). These two cases are referenced in the context of spending limits as a First Amendment issue. Such discussion may or may not mention the issue of corporate constitutional rights in general.

[101] 118 U.S. 394, 396 (1886).

[102] *See also* Mayer, *supra* note 98, at 581 ("In *Santa Clara County v. Southern Pacific Railroad*, the Court simply decreed, without hearing argument, that a corporation is a person for purposes of the Fourteenth Amendment."). Earlier, in *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819), the Court had held that a college corporation was protected by the Contract Clause. *See id.* at 658.

[103] *See* Michael D. Rivard, Comment, *Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Trangenic Humanoid Species*, 39 UCLA L. REV. 1425, 1452 n.103 (1992).

corporations.[104] In 1906, the Court found that a corporation could invoke the protections of the Fourth Amendment against unreasonable searches and seizures, but not the Fifth Amendment protection against self-incrimination.[105] Since then, the Court has extended to corporations the right to free speech,[106] the right to be free from double jeopardy,[107] the right to just compensation, [108] and the right to a jury trial in criminal cases[109] and civil cases.[110]

The extension of constitutional rights to corporations did not proceed universally,[111] nor without some dissent where it did occur. For example, corporations are not considered "citizens" for purposes of either Article IV of the Constitution or the Fourteenth Amendment's Privileges and Immunities clauses.[112] There have also been dissents more or less from the whole notion of corporate

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[104] Corporations first received Bill of Rights protection in 1893, in the context of Fifth Amendment due process. *See* Noble v. Union River Logging R.R., 147 U.S. 165, 176 (1893) (invoking the Fifth Amendment Due Process Clause to challenge the Secretary of the Interior's revocation of an approval for a right-of-way over federal public lands).

[105] *See* Hale v. Henkel, 201 U.S. 43, 75-76 (1906).

[106] *See* Grosjean v. Am. Press Co., Inc., 297 U.S. 233, 242-43 (1936) (holding that a newspaper corporation has a First Amendment right to freedom of speech that would be applied to the states through the due process clause of the Fourteenth Amendment); *see also* Consol. Edison Co. of New York, Inc. v. Pub. Serv. Comm'n, 447 U.S. 530 (1980) (holding that prohibiting the utility company from inserting corporate opinion on controversial issues in monthly consumer bill was in violation of the First Amendment); First Nat'l Bank v. Bellotti, 435 U.S. 765, 784 (1978) (striking down a Massachusetts statute prohibiting business corporations from making expenditures or contribution to influence the vote in initiative campaigns).

[107] *See* Fong Foo v. United States, 369 U.S. 141, 143 (1961); *see also* United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977) (ruling that the Fifth Amendment bars the retrial of corporations).

[108] *See* Penn. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[109] *See* Armour Packing Co. v. United States, 209 U.S. 56, 76-77 (1908) (holding that a corporate defendant, convicted of violating a federal criminal statute, is an "accused" for Sixth Amendment purposes).

[110] *See* Ross v. Bernhard, 396 U.S. 531, 532-33 (1970) (implying that a corporation has a right to jury trial in civil cases).

[111] The Court differed between property rights and liberty rights and did not reach entirely consistent results in either area. *See* Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745, 1751-52 (2001).

[112] *See* Pembina Mining Co. v. Pennsylvania, 125 U.S. 181, 187 (1888) (finding that corporations are not citizens for purposes of the Fourteenth Amendment Privileges and Immunities Clause); Paul v. Virginia, 75 U.S. 168, 177 (1869) (noting that corporations are not "citizens" within the meaning of, and are not protected by, the Article IV Privileges and Immunities Clause); Bank of Am. v. Earle, 38 U.S. 519, 587 (1839) (noting that foreign corporations cannot claim rights of a person under Article IV Privileges and Immunities Clause).

constitutional rights.[113] These dissents have not proved influential.

On the level of methodological issues of interpretation, the strong support of the Court for corporate constitutional rights makes little sense. Neither text nor original intent would likely yield the result of recognizing corporate constitutional rights.[114] The word "person" in the Fourteenth Amendment presumably would not have meant to include corporations, nor were corporations likely intended to be included within its protection.[115] The various forms of liberal and radical approaches to constitutional interpretation also would seem to fail to yield much support for corporate constitutional rights.[116]

On the other hand, from the perspective of pure result, the cases make a great deal of sense.[117] Liberal judges and commentators support broad expansions of constitutional rights, especially where such expansion might favor abortion and other non-textual rights. Corporate constitutional rights are an example of expansive constitutional interpretation. Conservatives, on the other hand, generally favor limits on the power of government to regulate the market and market participants. Corporate constitutional rights are an effective block to at least some instances of government economic regulation. So, for different reasons, most judges favor corporate rights.[118] The advertising cases, however, do not rely expressly on the general tradition of corporate constitutional rights. This is because the rationale for protection of advertising in *Va. Bd. of Pharm.* had more to do with the needs of the listener than with the rights of the advertiser.[119] The case itself was brought by consumers who wanted the price

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[113] *See Bellotti*, 435 U.S. at 826-27 (White, J., dissenting), 802-22 (Rehnquist, J., dissenting); Wheeling Steel Corp. v. Glander, 337 U.S. 563, 578 (1949) (Douglas, J., dissenting); Conn. Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 85-90 (1938) (Black, J., dissenting); *Hale*, 201 U.S. at 78 (Harlan, J., concurring) (opposing the extension of Fourth Amendment rights to corporations).

[114] The Constitution does not mention corporations despite the fact that corporations were an established part of late eighteenth century life. *See* Mayer, *supra* note 98.

[115] *Conn. Gen. Life Ins. Co.*, 303 U.S. at 86 (1938) (Black, J., dissenting) ("Neither the history nor the language of the Fourteenth Amendment justifies the belief that corporations are included within its protection."). Justice Douglas made the same argument in *Wheeling Steel Corp.*, 337 U.S. at 578.

[116] *See* Mayer, *supra* note 98, at 657 ("Granting corporations Bill of Rights protections cannot be justified under any of the schools of contemporary constitutional thought: Originalism, Legal Process, Rights, Law and Economics, or Critical Legal Studies.").

[117] *See* Note, *supra* note 111, at 1754.

[118] *See* Mayer, *supra* note 98, at 650 (suggesting that expansion of corporate rights could have been the price of coalition building for cases expanding individual constitutional rights).

[119] *See id.* at 633 ("While the Court abandoned corporate theory for a collection of Fourth Amendment paradigms, in the First Amendment context it supplanted the personhood theory with a single notion: the free market of ideas. In both the political speech and the commercial speech context the question became not whether the party asserting the right (a corporation) was entitled to free speech protections, but whether

information at issue rather than by would-be advertisers, although it was stipulated that willing advertisers did exist.[120]

In discussing the interests involved in advertising, Justice Blackmun's majority opinion in *Va. Bd. of Pharm.* did note the economic interest of the advertiser and stated that economic incentive for speech does not deprive it of protection under the First Amendment.[121] But most of the discussion in the opinion was of the interests of others—of consumers in drug price information, of society in commercial information, and of voters in the governance or policy implications suggested by particular advertisements.[122] In terms of issues of self-government, the opinion cited philosopher Alexander Meiklejohn, who emphasizes the interests of society in free speech rather than the interest of the speaker in self-expression.[123]

Given the Court's emphasis on the social benefits of commercial speech, there was no reason for the Court in *Va. Bd. of Pharm.* to grapple with, or even mention, the constitutional rights of corporations. Nor did that issue arise even in later cases involving speech by large, publicly held corporations, such as, for example, *Central Hudson*.[124] Indeed, the willingness of the Court in that case to withhold First Amendment protection for misleading commercial speech[125] was based on the view that the "First Amendment's concern for commercial speech is premised on the informational function of advertising."[126] Since the listener's interest in commercial speech dominated the analysis, there was no reason to consider whether corporations should be deemed protected by the First Amendment and, if so, to what extent.

The necessity of clarifying the rights of commercial speakers to speak and thus, at least indirectly, the rights of corporations to commercial speech, did arise in two recent subsidized commercial speech cases. In the first case, *Glickman v. Wileman Brothers & Elliott, Inc.*, Justice Stevens, writing for a narrow majority, found that mandatory assessments for the purpose of funding generic advertising of fruit as part of an overall regulatory program should be judged as economic regulation rather than as a First Amendment issue.[127] Justice Stevens found the

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assertion of the right furthered free and open debate.").

[120] *Va. Bd. of Pharm.*, 425 U.S. at 756 n.14.

[121] *See id.* at 762.

[122] *See id.* at 763-65.

[123] *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26 (1960) ("What is essential is not that everyone shall speak, but that everything worth saying shall be said."). While the Court did not cite this particular work or this exact language, it did cite Meiklejohn's *Free Speech and Its Relation To Self-government*. *See Va. Bd. of Pharm.*, 425 U.S. at 765.

[124] *See generally Central Hudson*, 447 U.S. 557.

[125] *See id.* at 563.

[126] *Id.*

[127] 521 U.S. 457, 476 (1997).

compelled speech cases distinguishable[128] because the advertising in *Glickman* did not involve political or ideological views.[129] This suggested that a corporation might be permitted to rely on the compelled speech doctrine under other factual circumstances; since the requirements of the program in question did not conflict with freedom of belief, the majority held that the doctrine was not applicable in *Glickman*.[130]

The government argued in *Glickman* that the compelled speech cases would not have applied in any event because the societal interest in commercial speech lies solely in the availability of truthful commercial information.[131] From this point of view, since generic advertising adds to the amount of truthful commercial information available to the consumer, this sort of compelled commercial speech could not violate the First Amendment.[132] The exclusion of misleading commercial information from constitutional protection in the *Central Hudson* test certainly lent support to the government's argument that only limiting truthful information could violate the First Amendment in the commercial speech area.

The majority in *Glickman* did not discuss the theoretical applicability of the compelled speech doctrine in the commercial speech area. But Justice Souter's dissenting opinion, joined by four other Justices, rejected the government's argument that only the consumer's interest is at stake in the constitutional protection of commercial speech.[133] The speaker/advertiser has his own interests in its commercial speech. Furthermore, these speaker interests go beyond the right to disseminate truthful factual information. The advertiser has a right to "exploit all the symbolic and emotional techniques of any modern ad campaign . . . ."[134]

In the next agricultural compelled assessment case, *United States v. United*

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[128] Justice Stevens distinguished cases like *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), which had prohibited compelling a flag salute by public school children, on the ground that the program in *Glickman* did "not compel any person to engage in any actual or symbolic speech." *Glickman*, 521 U.S. at 469. Stevens also distinguished cases like *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), in which the Court had limited the use of a mandatory service charge for employees represented by a union to speech related to the union's duties of exclusive bargaining agent, on the ground that in the program in *Glickman*, the producers were not compelled to endorse or finance "any political or ideological views." *Glickman* at 469-70. For a general discussion of the compelled speech doctrine, see David W. Ogden, *Is There a First Amendment Right to Remain Silent: The Supreme Court's "Compelled Speech" Doctrine*, 40 FED. B. NEWS & J. 368 (1993).

[129] *See Glickman*, 521 U.S. at 469-70.

[130] *See id.* at 471-72.

[131] *See id.* at 489-91 (Souter, J., dissenting).

[132] *See id.* at 489. The government did not argue that there should be no First Amendment review of forced payments for truthful advertising and promotion, only "lesser" scrutiny, which may have amounted to the same thing.

[133] *See id.* at 479.

[134] *Glickman*, 521 U.S. at 479 (Souter, J., dissenting).

Foods, Inc.,[135] a divided Court struck down the assessment, distinguishing *Glickman* on the ground that the statutory context in *United Foods* lacked general regulatory content, thus amounting essentially to compelled speech and nothing else.[136] Justice Breyer, in a dissent joined by three of the five Justices who had formed the majority in *Glickman*, argued what had been the government's position in that case—that the compelled speech doctrine had not been applied by the Court in the commercial speech context because the amount of truthful commercial information available to the public was actually increased by an assessment and advertising program like that in *United Foods*.[137]

What passed without comment in both *Glickman* and *United Foods* was the implication of applying the compelled speech doctrine to cases involving corporations.[138] In the first place, the compelled speech cases, whatever their particular contexts, involve the right of conscience, the human right of self-expression or conversely the right of silence: "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."[139] However, the compelled speech cases should not apply to corporations because corporations do not have consciences. If they did, laws that require corporations to maximize profits or pursue only certain activities would be flagrantly unconstitutional.[140] Human beings, after all, have constitutional rights not to be restricted by government in such ways.[141]

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[135] 533 U.S. 405 (2001).

[136] *See id.* at 411-12 ("The program sustained in *Glickman* differs from the one under review in a most fundamental respect . . . . Here, for all practical purposes, the advertising itself, far from being ancillary, is the principal object of the regulation.").

[137] *See id.* at 426-27 ("When purely commercial speech is at issue, the Court described the First Amendment's basic objective as protection of the consumer's interest in the free flow of truthful information . . . . Unlike many of the commercial speech restrictions this Court has previously addressed, the program before us promotes the dissemination of truthful information to consumers.").

[138] *See* Pac. Gas & Elec. v. Pub. Utils. Comm'n, 475 U.S. 1 (1986) (applying the compelled speech doctrine to a corporation in the area of political speech and striking down a regulation which permitted a utility to allow a ratepayer advocacy group to enclose inserts in the billing envelope).

[139] *Abood*, 431 U.S. at 234-35.

[140] *See* Trs. of Dartmouth College v. Woodward, 17 U.S. 518, 636 (1819). In this case, the Court recognized the right of a corporation's charter to be protected by the Contract Clause. "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 its creation confers upon it, either expressly, or as incidental to its very existence." *Id.*

[141] *See generally* Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CAL. L. REV. 761 (1986). Theories of free speech tend to be understood in terms of deontological or consequentialist grounds. That is, free speech is protected either as a human right of self-expression is protected for its positive consequences for society. *See*

Furthermore, even if the compelled speech doctrine might be relevant in the context of advertising campaigns pursued by large-scale corporations, the compelled speech should not compare the corporation to, for example, the lone employee forced to subsidize union speech.[142] But rather, the comparison should be of individual shareholders in the plaintiff corporation to that lone employee.[143] In a case like *United Foods*, if anyone was being associated with speech without his consent, it was the dissenting shareholders. But the Court imposed no requirement on the corporation to inquire of its shareholders whether they agreed with United Foods' proposed advertising campaign. The selective invocation of the compelled speech doctrine in *United Foods* jeopardizes its applicability to corporate advertising.[144] The Court looks at corporations in advertising cases as if they were merely, as Justice Scalia put it in a different context, "individuals who form that voluntary association known as a corporation . . . ."[145] While the Court

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id. at 769. The compelled speech cases are generally premised on deontological grounds—that it is inherently wrong to force a person to be associated with a message with which he does not agree. But, as Schauer says, under such a theory, "it would no longer be clear that speech by corporations implicates the protections of free speech." *Id.* at 773. *See also* Daniel J. H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1070 (1998) (stating that, unlike a human being, a corporation is not permitted by law and the market to pursue the public interest versus its own economic interest). In the context of compelled speech, the right of the listener also would not seem to justify recognition of corporate speech rights.

[142] *See Abood*, 431 U.S. at 234-35.

[143] At least one commentator contends that the Court permitted campaign finance limits on for-profit, stockholder corporations because buyers and shareholders did not intend to engage in political expression. *See* Gerald G. Ashdown, *Controlling Campaign Spending and the "New Corruption" Waiting for the Court*, 44 VAND. L. REV. 767, 773 (1991). In other words, a corporation does not have a political speech interest in general. The shareholder in *United Foods* is in a position similar to that of the dissenting shareholder in the political speech context. The shareholder only wants to make money. The shareholder has no speech interest for or against generic advertising, except to the extent that it increases or decreases profits. He is not supportive or opposed to the message of the generic commercials. It may be that all the shareholders agree with management that the company's own commercials will be a more profitable use of company funds, although that is not necessarily the case. That corporate money could be more profitably spent is not the same as opposition to the generic advertisements themselves. Maximizing profit is not a distinct First Amendment issue even under the commercial speech cases. For consideration of the rights of shareholders in corporate speech cases, see Victor Brudney, *Business Corporations and Stockholders Rights Under the First Amendment*, 91 YALE L.J. 235 (1981).

[144] *See generally* Carl E. Schneider, *Free Speech and Corporate Freedom: A Comment on* First National Bank of Boston v. Bellotti, 59 S. CAL. L. REV. 1227, 1234 (1986) (noting that corporate speech tends to be managerial rather than shareholder speech).

[145] Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 680 (1990). *But see* William Patton & Randall Bartlett, *Corporate "Persons" and Freedom of Speech: The Political Impact of Legal Mythology*, 1981 WIS. L. REV. 494 (1981) (analyzing *Bellotti* and

has been willing to a certain extent to consider the implications of corporate constitutional rights in the political funding cases,[146] the Justices have not done so in the context of advertising. Thus the corporate aspect of modern advertising remains invisible in American law.[147]

C. *Information/Technology*

From the beginning of the new advertising cases, the Court has emphasized that advertising adds to the information that is available to the consumer. Some cases, such as *Va. Bd. of Pharm.*, have involved advertisements that contained simple and straightforward information.[148] When pressed, some of the Justices have acknowledged that perhaps advertising is more than just conveying information,[149] but the core image of information about products still dominates the language of the opinions. In fact, it is information that allows the Justices to distinguish between truthful advertising and misleading advertising in applying the *Central Hudson* test.

In the next Section, this Article addresses aspects of advertising that are not information-like. In this Section, it examines some of the implications of the role of information in advertising. Specifically, this Section looks at advertising as part of the information technology revolution.[150]

During the summer of 2002, we were given a glimpse of a possible media-

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the purportedly neutral principles underlying the doctrines of corporate free speech).

[146] *See* FEC v. Nat'l Political Action Comm'n, 470 U.S. 480, 495 (1985) (upholding political spending limits on corporations that would be unconstitutional as applied to individuals, on the theory that "[i]n return for the special advantages that the State confers on the corporate form, individuals acting jointly through corporations forgo some of the rights they have as individuals."). The recognition of limited corporate constitutional rights may be defensible when applied to advocacy groups that are simply organized in corporate form (often non-profit).

[147] *See Pac. Gas & Elec.*, 475 U.S. at 33 (Rehnquist, J., dissenting) ("Extension of the individual freedom of conscience decisions to business corporations strains the rationale of those cases beyond the breaking point. To ascribe to such artificial entities an 'intellect' or 'mind' for freedom of conscience purposes is to confuse metaphor with reality . . . . The insistence on treating identically for constitutional purposes entities that are demonstrably different is as great a jurisprudential sin as treating differently those entities which are the same.").

[148] *See, e.g.*, Thompson v. Western States Med. Ctr., 122 S. Ct. 1497 (2002) (addressing mailing announcements of availability and effectiveness of specified compound drugs); *44 Liquormart*, 517 U.S. 484 (addressing advertisements containing alcohol prices); *Coors Brewing*, 514 U.S. 476 (addressing advertisements containing alcohol content). None of these cases raised the issue of truth—the information was simple, specific, and product-oriented.

[149] *See infra* notes 173-75.

[150] *See* COLLINS & SKOVER, *supra* note 1, at 3. ("The forces of capitalism now encourage exploitation of highly advanced electronic technology to accelerate the age-old human drive for self-gratification.").

dominated future. In the movie *Minority Report*, director Steven Spielberg presents a nightmare world of information technology advance.[151] In this future of 2054, most surfaces—sides of buildings, overpasses, mall escalators—have been turned into commercial-advertising-message carriers. These messages are not static. Each surface is a moving, speaking, electronic image. Nor are these messages passive. Most of the images are close enough to passers-by to allow for the scanning of retinas for identification. The image then "knows" who the next person is and "speaks" a message to that person. In one moment in the movie, the hero, John Anderton, wrongly accused of a serious crime;[152] is running from the police. As he passes one such moving advertisement on a wall, a voice booms out: "John Anderton, you could use a Guinness right about now." Every other image in every other advertisement is similarly hawking at him at the same time. Stores in the movie operate similarly. Upon entering a store, the customer is greeted by name by a computer generated image and voice that "knows" the customer's buying habits and history. Anderton, for example, is asked about a recent purchase of tank tops at a Gap store.

This future world is dominated by commercial activity. Human life is overwhelmingly concerned with gadgets—with things. Purchasing is a major human activity. Retail images and outlets are everywhere, and every person is wired with instantaneous communication. In this future, the line between commercial advertising and non-commercial advertising has been blurred. The same surfaces that announce products also announce a slick political message for a national referendum. The movie viewer never sees counter-ads or hears anyone debating the merits of the proposal that will be voted on. The suggestion is that the citizenry have become completely passive in governance—with the result that rights appear to be routinely violated by the police.[153]

The world the movie presents is not just Spielberg's own vision. According to the 20th Century Fox website for *Minority Report*, the movie production crew brought together "experts" who could help create a plausible world that might exist in Washington, D.C. in 2054.[154] In other words, with the exception of the

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[151] MINORITY REPORT (20th Century Fox 2002).

[152] He was actually accused of the "precrime" of murder; in the movie, one can be convicted of a murder he "will" commit.

[153] A layer of corruption seems to be widespread beneath the surface of ordinary life: Detective Anderton uses illegal drugs; the Justice Department investigates with no obvious concern for search and seizure law; and the police enter private property without warrant or any other process through the use of mobile sensors called spiders.

[154] *See Minority Report*, *available at* http://www.minorityreport.com. (last visited Apr. 3, 2003). In April 1999, Steven Spielberg and the *Minority Report* production commissioned a "think tank" to develop the framework for a world, specifically Washington D.C., that could exist in the year 2054. A group of experts, to whom this Article will refer as "Futurists," came together and brainstormed on topics ranging from city landscape to futuristic weapons. All of this was done in an effort to create a futuristic world for *Minority Report* that is based on realistic theories from leading experts.

plot device of psychics who help the police arrest persons for crimes they "will" commit in the future, the rest of the images in the movie are meant to represent some of our best thinking about what the future may be like. So, if *Minority Report* presents a future we don't want, it also presents a future that some experts think we will have.

It is certainly a future no sane person could want. As Geoffrey O'Brien put it: "The hall of advertising holograms that Tom Cruise strolls through in *Minority Report*—each ad calling him by name as he comes near—is at once the triumph of product placement and a vision of a peculiarly painless hell."[155] The question is: what would prevent such a future from occurring? Certainly the information technology depicted in the movie is not beyond our current capabilities. Some of it could be achieved by simple extension of the technology we have now.[156]

One might suppose that the government would regulate advertising so as to protect us from such a future. But, would the First Amendment allow such regulation? In order to seriously address this question, let us take three aspects of the advertising presented in *Minority Report*: the ubiquitous moving images, the address to individuals by name as they walk by, and the address to individuals by name as they enter stores.

The problem with the constant message screens in the movie is that they destroy repose. They interfere with concentration and thought. Their electronic movement demands attention, which the viewer can avoid only by limiting her field of vision and/or by numbing her mind. The sound of the messages, although not excessively loud in a way threatening to health, is a constant presence. In our current world, even in a big city, human-produced sounds ebb and flow. Only computer generated images produce speech in such a constant and continuous manner.

The problem with advertisements addressing pedestrians by name is that these "greetings" create the illusion of a human community. Naturally, the passer-by tends to respond as if a fellow human being were saying hello. That momentary attentiveness is what the advertiser is seeking. After a while, everyone would have to respond, as the people in the movie seemed to do, by ignoring these voices. But, that means training oneself to ignore human greetings.

The store voice greeting the shopper by name, and with a purchasing history, is a manipulation even worse than the billboard greeting. Anyone would be flattered at being remembered by a human salesclerk in a busy store. That is the impression the shopper receives from the computer created message of the virtual clerk. But, of course, the impression is false. Again, a false promise of human community is used to sell products, thereby debasing true human community.

Are these technological innovations protected by the First Amendment? All of

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[155] Geoffrey O'Brien, *Prospero on the Run*, N. Y. REV. OF BOOKS, Aug. 15, 2002, at 21.

[156] *See* Jamie Reno & N'gai Croal, *Hearing is Believing*, NEWSWEEK, Aug. 5, 2002, at 44 (reporting on a sound technology that is on the verge of achieving "'Minority Report'-style applications: vending machines that call to you as you walk by.").

these technologies are premised on what the Court might consider the truthful dissemination of information. The moving images present a nonmisleading message; they are the same as commercials today. The personal greetings are simply a form of personalization made possible by technology; they are not different in concept from a personally addressed mailing to one's home. And, of course, the greeting in the store allows the company to track what the shopper buys and whether the products purchased perform as expected. These are all true information technologies.

One response to these stated concerns is: "It's just a movie." But if these information technologies are protected by the First Amendment, why would *Minority Report*, or something like it, not be our future? Though the psychic in the movie says to Tom Cruise about his own predicted future, "You still have a choice," it is not clear that we do.

What would the Supreme Court Justices say about government restrictions on these information technologies? Taking them in turn, prohibiting all moving image signs is not much different from the context of *Railway Express Agency v. New York*.[157] Even if the Justices saw the matter as one of speech, a ban on such moving images is content neutral—that is, it is aimed at what the Justices call the "secondary effects of speech"[158]—its intrusiveness—rather than at preventing people from being convinced by, and acting on, the commercial message itself.[159] Thus, restricting such images might be constitutional. The retina scan on the street would seem to be some form of invasion of privacy and bodily integrity that the government would be permitted to prevent.[160] Even the greeting in the store surely could at least be subject to the shopper's request that purchasing records not be used in this way.

But, are these matters so simple? The Justices have not shown that they understand information technology's effects. They write opinions based on slogans rather than on realities.[161] They write as if a buyer and seller were having

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[157] *See* 336 U.S. 106 (1949) (upholding a ban on advertising vehicles).

[158] *See generally* Brandon K. Lemley, *Effectuating Censorship: Civic Republicanism and the Secondary Effects Doctrine*, 35 J. MARSHALL L. REV. 189 (2002).

[159] This is the difference between banning "for sale" signs because people will then sell their homes and move, which the Court found unconstitutional in *Linmark Ass'n, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), and banning signs because of the visual blight they cause, which the Court suggested in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) might be constitutional if limited to commercial speech. While the ordinance in *Metromedia* was struck down because it applied to noncommercial speech, the Court noted that "the California courts may sustain the ordinance by limiting its reach to commercial speech." *Id.* at 522 n.26.

[160] *But see* David A. Petti, *An Argument for the Implementation of a Biometric Authentication System ("BAS")*, 80 J. PAT. & TRADEMARK OFF. SOC'Y 703, 703 (1998) (stating that even though "widespread regulation of biometrics remains uncharted territory in the legal framework of the United States," the reason is not that such regulation would itself be unconstitutional).

[161] The recent academic emphasis upon developing theoretical rationales to extend or

a chat—advertising as classifieds, as Collins and Skover put it.[162] The Justices might not understand what these new information technologies portend.

For example, in regard to the moving images, why should the government be permitted to eliminate an entire technology of speech? What sort of showing of harm could the government actually make to support its restriction? Even in the movie there were no car crashes by distracted drivers. The notion that such constant hawking of goods is degrading to the human spirit is what some people—well-educated, elite people—say about advertising now.[163] The Court has not been concerned with advertising's effect on the human spirit up to this point. Isn't this complaint about the moving images akin to complaining that there is too much "speech?" How could more speech be a bad thing?[164] The moving images could be viewed as especially beneficial because they are also used for political speech, thus rendering political campaigns much more vibrant and involving. In any event, banning such information technology prohibits too much speech.[165] All the unwilling citizen needs to do is avert his or her eyes.[166]

And as for the sound they make—their constant messaging—why is that not

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deny First Amendment protection to speech has yielded a plethora of potential reasons for protecting speech. These reasons include fostering the discovery of truth, fostering social stability through toleration, deterring abuses of authority, fostering individual autonomy and self-realization, and facilitating liberal democracy. Some of these justifications have been used to develop coherent rationales for protecting or not protecting commercial speech. Unfortunately, the Court has neither participated in this development nor explicitly engaged in the dialogue that fuels it. Rather, the Court simply has that declared commercial speech is not at the "core" of the First Amendment and, therefore, receives an "intermediate" level of First Amendment protection. *See* David F. McGowan, Comment, *A Critical Analysis of Commercial Speech*, 78 CAL. L. REV. 359, 411 (1990).

[162] *See* COLLINS & SKOVER, *supra* note 1, at 96.

[163] *See* Smolla, *supra* note 75, at 783-84 ("This judgment . . . reflects a bias that is undemocratic and intellectually elitist. It is not so much an upper-class bias or leisure-class bias as it is a vocational bias, a bias likely to be found in many academics and others who live by and for words and ideas. I am part of that vocational class and I share the bias, a bias that often looks with disdain upon much of mass culture—mass commercial culture, mass political culture, mass entertainment culture, mass journalistic culture.").

[164] Justice Scalia probably spoke for most of the Justices on this point in his dissent in *Austin v. Michigan Chamber of Commerce*: "The premise of our system is that there is no such thing as too much speech—that the people are not foolish but intelligent and will separate the wheat from the chaff." 494 U.S. 652, 695 (1990).

[165] In *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), a unanimous Court struck down the city's virtual complete ban on residential signs. Justice Stevens pointed out that "[o]ur prior decisions have voiced particular concern with laws that foreclose an entire medium of expression . . . . Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech." *Id.* at 55.

[166] *See* Cohen v. California, 403 U.S. 15, 21 (1971) (reversing conviction of disturbing the peace for wearing offensive message on First Amendment grounds).

also a good thing? Of course, reasonable decibel levels may be prescribed;[167] but the sound of these messages is not excessively loud. The fact that the displays are "on" at all times is not a harm at all. Because of this constant accessibility, the consumer or voter who is not informed about products or issues will be able to gain information day or night. Naturally, some persons will not want to hear these messages. They need only not listen.

And so it may go. And soon there may be no "elsewhere" in the world for the unwilling citizen to look at or listen to. As for the personally addressed messages to passers-by, no doubt the Justices would allow the government to ban unconsented-to retina scans. But face recognition technology may improve to the point where a person can be recognized by computer without the need for invasive examination. Then the government would have to seek to ban individualized computer greeting itself.

In such an instance, just as in *United Foods*,[168] the Justices might analogize the corporate advertiser and its technology to a human being—in this case, perhaps a canvasser for a political candidate. Absent previous unlawful or abusive conduct, a citizen certainly has a First Amendment right to approach and address a potential listener on a city street.[169] Any citizen has the right to go up to any other citizen on a public street and ask, "Would you like to hear some information about the political candidate for whom I am campaigning?" What could be more American than that?[170] Furthermore, the canvasser must have the

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[167] *See* Kovacs v. Cooper, 336 U.S. 77 (1948) (upholding conviction for violation of public sound limit ordinance).

[168] *See supra* notes 136-147 and accompanying text for the application of the compelled speech doctrine for the benefit of corporations.

[169] *See* Schenck v. Pro-choice Network of Western New York, 519 U.S. 357, 377 (1997) (limiting an injunction against prior unlawful conduct, the Court stated: "This is a broad prohibition, both because of the type of speech that is restricted and the nature of the location. Leafleting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum."). The Court did uphold a statutory ban against knowingly approaching within eight feet of another person near a health care facility in *Hill v. Colorado*, 530 U.S. 703 (2000). Even that standard, however, might serve to protect speaking message signs because they remain stationary. *See id.* at 727 ("The statute does not, however, prevent a leafletter from simply standing near the path of oncoming pedestrians . . . ."). In any event, the Court might accord greater constitutional protection to these messages than to the free speech at issue in *Hill* because the State's interest in *Hill* was weighty and specific. The Court described that interest as protecting "those who enter a health care facility from the harassment, the nuisance, the persistent importuning, the following, the dogging, and the implied threat of physical touching that can accompany an unwelcome approach within eight feet of a patient by a person wishing to argue vociferously face- to-face and perhaps thrust an undesired handbill upon her." *Id.* at 724. None of that would be present in the case of message signs.

[170] *See Watchtower Bible*, 122 S. Ct. at 2089. ("It is offensive—not only to the values

right to use the addressee's name if he knows it.

How is this computer display any different, except that it is not a human being and is not a political message? Those are differences that might be crucial in distinguishing this sort of commercial speech from core political speech, but such differences have not been considered important by the Court up to now. The individualized computer message simply quietly addresses a short, personalized greeting to the passer-by, asking if the person would like to buy a certain product. As Professor Smolla says about advertising in general, where is the harm?[171]

Finally, in the store, how can the government prohibit a company from addressing customers by name? How can the government forbid a company from accessing past buying history in order to offer the buyer precisely what the company thinks the buyer will want?[172] If customers do not want this kind of attention there will certainly be stores that will offer silence. Since customers do not have to enter stores with these messages, what substantial governmental interest could a restriction on such treatment serve?

This thought "experiment" concerning the information technology of *Minority Report* does not show that the Justices are mistaken in according advertising technology the protection of the First Amendment anymore than the previous Sections show that the Justices are mistaken in recognizing the importance of the market or the rights of corporations. What we see in these realms is simply the innate tendency of advertising to expand. There is more to advertising than the simple slogans of free speech that have satisfied the Justices until now. Those slogans will have to be reexamined if we are not to completely surrender ourselves to technology before we even realize what the stakes are.

D. Psychology/Conditioning

What did Justice Souter mean in his dissent in *Glickman* that the corporate advertiser has an interest—a right really, since Justice Souter is prepared to recognize and protect it from regulation—in "exploit[ing] all the symbolic and emotional techniques of any modern ad campaign."[173] He was certainly accurate in pointing out that "most advertising meant to stimulate demand" is like this and that such efforts contain messages that are "far removed from simple proposals to

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protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.").

[171] *See* Smolla, *supra* note 75, at 778.

[172] In *Rowan v. Post Office Dep't*, 397 U.S. 728 (1970), the Court upheld a federal statute allowing individuals to remove their names from commercial mailing lists. But that outcome turned on the recognition that "a mailer's right to communicate must stop at the mailbox of an unreceptive addressee." *Id.* at 736-37. *Rowan* would not necessarily extend to forcing a business to purge its own business records, and cease addressing customers in its own way in its own store.

[173] *Glickman*, 521 U.S. at 479.

sell fruit."[174] Did he mean that there is a constitutional right to "exploitation" of techniques of manipulation? This would suggest that stimulating demand by whatever means advertising uses is protected by the First Amendment.[175]

Justice Souter seems unwilling to confront the implications of subjecting the citizenry to such exploitation. His view of the "complex nature of expression"[176] prevents him from making any constitutional distinctions among types of speech. This should come as no surprise. When advertising is protected by the First Amendment, all its techniques of manipulation are going to be protected as well. Justice Souter probably has these techniques in mind when he refers to the "rhetoric of advertising."[177] This rhetoric is connected to the "persuasion" that is "an essential ingredient of . . . competition."[178] Justice Souter allows that the value of this rhetoric of persuasion may be less, even "of a distinctly lower order,"[179] than that of informational advertising, but the Court does not currently recognize the distinction between the persuasive aspects of advertising and its informational aspects. In this acknowledgment of the "symbolic and emotional" techniques of advertising, Justice Souter may perhaps speak for all the Justices, who must know what modern advertising is actually like, though the opinions do not show it.[180]

Justice Souter's cryptic comments demonstrate that in the eleven years between *Posadas* and *Glickman*, promotional advertising had been eliminated as a separate conceptual category in commercial speech doctrine. In *Posadas*, the power to ban gambling includes the power to ban advertising. But Justice Rehnquist had in mind only a particular kind of advertising—advertising that stimulates demand for gambling. Justice Rehnquist did not envision an advertising ban as eliminating any important information about either gambling or government policy toward gambling. Advertising that stimulates demand is a category apart from information under *Posadas*. Stimulating demand is a form of psychology. Banning promotional advertising is therefore similar to banning sales of the product.[181]

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[174] *Id.*

[175] *Cf.* Berman, *supra* note 47, at 778 ("Hostility to tobacco advertising is based not on such advertising's capacity to inform or persuade, but rather on its ability to manipulate and seduce.").

[176] *Id.* at 480 (quoting Fla. Bar v. Went for It, Inc., 515 U.S. 618, 636 (1995) (Kennedy, J., dissenting)).

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] This theme—that First Amendment doctrine must reflect the reality of advertising and that currently it may not—is common among supporters and critics of commercial speech doctrine. *See* Kazinski & Banner, *supra* note 5, at 747 ("If courts are going to apply the First Amendment to commercial speech with any coherence, they should have a grasp of what commercial speech actually is . . . ."); COLLINS & SKOVER, *supra* note 1.

[181] That is why the Court could formulate the doctrine in *Posadas* that "the greater includes the lesser"—not the lesser power to ban speech about an activity, but only the

Anyone who has seen or heard gambling advertising knows that by and large it contains no information.[182] Rather, the point of the advertising is to remind people that gambling is available, and the point of limiting advertising is to keep susceptible people from being reminded of the temptation to gamble. Does a ban on gambling advertising then manipulate the flow of information, as supporters of commercial speech protection fear, or "manipulate" the flow of manipulation?[183]

The nature of modern advertising's techniques of manipulation has been chronicled since the 1950's. Vance Packard's book, *The Hidden Persuaders*,[184] described in detail the growth of the new advertising approaches in the 1950's.[185] These approaches were premised not on an attempt to inform the public of the availability of a product or of the attributes of a product, which had been the basic approach of advertising in the early industrial period. Instead, Packard described modern advertising as the "Depth Approach:" "[L]arge-scale efforts

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lesser power to ban advertising, that is, promotion, by the casino. *See* Berman, *supra* note 47, at 714-17.

[182] Of course there may be exceptions that emphasize relative pay-out and so forth. It is also true that the regulation at issue in *Posadas* did not formally—that is, "[o]n its face"—distinguish among degrees of information in banning advertising. *See* McGowan, *supra* note 161, at 423-24. That does not make the assumption that the advertising involved in *Posadas* was, or was likely to be, noninformational a "forced assumption." *See id.* It is an assumption premised on experience with the gambling industry's retail advertising. Internet gambling sites, on the other hand, may actually engage in more informational, albeit often inaccurate, advertising. *See* Note, *Casinos of the Next Millennium: A Look into the Proposed Ban on Internet Gambling*, 17 ARIZ. J. INT'L & COMP. L. 413, 443 (2000) (averring that the industry model code contains truth in advertising provisions concerning payout information).

[183] Redish first made the distinction in 1971 between informational and persuasive advertising. *See* Redish, *supra* note 5, at 445-47. This has since become a widely acknowledged distinction. *See, e.g.*, Rajshree Agarwal & Michael Gort, *First-Mover Advantage and the Speed of Competitive Entry, 1887-1986*, 44 J.L. & ECON. 161, 163 (2001) (stating that effect of advertising on competition depends "in part on the relative importance of persuasive versus informational advertising"); Sarah C. Haan, Note, *The "Persuasion Route" of the Law: Advertising and Legal Persuasion*, 100 COLUM. L. REV. 1281 (2000) (noting that techniques of persuasive advertising affect legal reasoning); Laurie A. Lucas, *Integrative Social Contracts Theory: Ethical Implications of Marketing Credit Cards to U.S. College Students*, 38 AM. BUS. L.J. 413 (2001) (use of persuasive strategies and peripheral cues, such as promotional gifts and celebrity endorsements, rather than informational advertising, takes unfair advantage of unsophisticated people). *But see* McGowan, *supra* note 161, at 425 (arguing that there is a distinction among critics of commercial speech between persuasive and informational advertising that "rests upon a contrived definition of 'information.").

[184] VANCE PACKARD, THE HIDDEN PERSUADERS (1957).

[185] Of course, there were precursors to Packard's insights. Stuart Ewen has located the beginnings of the "American persuasion industry" in Gustave Le Bon, Sigmond Freud and Walter Lippmann. Stuart Ewen, *Reflections on Visual Persuasion*, 43 N.Y.L. SCH. L. REV. 811, 813-14 (1999).

being made, often with impressive success, to channel our unthinking habits, our purchasing decisions, and our thought processes by the use of insights gleaned from psychiatry and the social sciences."[186] Packard called these efforts at persuasion "hidden" because, typically, they "take place beneath our level of awareness."[187]

Packard described these efforts as the search through science for ways to "effectively manipulate" consumers.[188] Packard did not see the need for such manipulation as inhering in the search for profits in and of itself, but in the particular conditions of excess productive capacity in the United States after World War II.[189] Packard does not say whether the crisis of overcapacity is temporary or endemic to advanced capitalism,[190] but he was clear that the depth approach to advertising is going to be a permanent fact of American life.

Packard described three problems for producers that the depth approach was meant to overcome. First, people tend to buy products unpredictably. Producers needed to know more about when a consumer would make a purchase in order to plan production. Second, left to their own devices, consumers would not buy enough goods to keep industry producing. There was not enough need for all the products that could be produced. Thus, people had to be induced "to consume more and more, whether we want to or not, for the good of our economy."[191] Advertising induces such consumption by stimulating desires in people that they did not know existed and by creating a cycle of psychological obsolescence in which the consumer does not wait until a product becomes physically obsolete before buying a new product.[192] Ultimately, consumers are not buying products but are buying an ever renewable and unattainable promise: of love, hope, and a better life. Finally, since most brands of products are basically of equal quality and interchangeable, advertising is one way to suggest product differentiation.

Packard was opposed to the use of these techniques of manipulation. He referred to the practice and promise of the sciences of manipulation as the "world of George Orwell and his Big Brother."[193] These efforts at manipulation are not limited to advertising particular goods for sale, but include the techniques of

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[186] PACKARD, *supra* note 184, at 3.

[187] *Id.*

[188] *See id.* at 4.

[189] *See id.* at 13 ("The trend in marketing to the depth approach was largely impelled by difficulties the marketers kept encountering in trying to persuade Americans to buy all the products their companies could fabricate.").

[190] *See* Sut Jhally, *Commercial Culture, Collective Values, and the Future*, 71 TEX. L. REV. 805, 806 (1993) (describing the invention of the advertising industry to sell the products the productive capacity of America could produce, Jhally quotes retail analyst Victor Lebow as follows: "Our enormously productive economy . . . demands that we make consumption our way of life . . . .").

[191] PACKARD, *supra* note 184, at 19-20.

[192] *See id.* at 21.

[193] *Id.* at 5.

campaigning for political office, creating internal corporate culture and destroying our culture's capacity for independent and creative thinking.[194]

Packard has proved prescient in his predictions and descriptions.[195] The Supreme Court must be aware that much advertising consists of techniques of manipulation as opposed to factual information—Justice Souter acknowledged as much in his dissent in *Glickman*. So why is advertising, especially this particular form of advertising, given First Amendment protection? Why are the techniques of manipulation and their implications not confronted?

Justice Souter's dissent suggests that advertising's techniques of persuasion are part of the competition that goes with the market, and, thus, advertising is protected by the First Amendment.[196] The notion that mere information could not sustain the market is not very different from Packard's view that the American economic system requires manipulation of consumers to stimulate "enough demand to keep production running. But this way of looking at advertising—partaking as it does of economic due process—is subject to the criticism that it is not for the Court, but for Congress and the states to oversee the manner in which the market functions.

Another reason that the Court is not too concerned about the manipulative aspects of advertising may be that First Amendment doctrine generally is not limited to the protection of truth per se. When, for example, an idea or a promise from a political candidate appears to be misleading and manipulative, the Court is content to rely on the self-correction of more speech, or even the citizenry's experience with the idea in practice or the candidate in office, to correct whatever misapprehension has been engendered.[197] Similarly, although not expressly stated in the commercial speech opinions, the Justices may be assuming that when manipulative techniques are used to sell products that do not perform as advertised, the market will eventually discipline itself.

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[194] *Id.* at 239.

[195] The manipulations of popular culture are omnipresent. Consider a recent description of the movie *Spider Man*: "What we get now is Spider-Man as narrative theme park, cautious, respectful, planned down to the last dangling coil of webbing, realized by the usual coordinated teams of disciplined professionals, and pre-sold with the skill that is an art in itself to a global audience that will wake up to find that this is what it was waiting for all along." Geoffrey O'Brien, *Popcorn Park,* N.Y. REV. OF BOOKS , June 13, 2002, at 9.

[196] *See Glickman*, 521 U.S. at 480 (Souter, J., dissenting).

[197] This is the search-for-truth among all the different possibilities in the marketplace of ideas described in Justice Holmes' dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919):

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

The American experience with automobile sales supports this view. During the 1950's and 1960's American automobiles were sold based upon all the techniques of manipulation to which Packard refers, especially that of psychological obsolescence. But eventually, the superior workmanship of some foreign brands cut into the American market and forced American manufacturers to produce more reliable cars.[198] At the same time, the durability of cars, as opposed to the trend of psychological obsolescence, became a selling point. In other words, with the exception perhaps of certain psychologically-oriented products, such as perfume and youth clothing,[199] image, while important, is not everything.

This way of looking at the advertising cases is admittedly in some tension with the limit articulated in the *Central Hudson* test, that misleading advertising is not protected by the First Amendment.[200] For one thing, it is precisely misleading advertising that would most easily be corrected by the discipline of the market. For another, according to Packard's understanding of depth advertising, there is a sense in which much of modern advertising is misleading. Strictly speaking, all tobacco advertising is misleading, for example, in failing to point out that regular use of the product is likely to injure or kill the user. In this sense, "misleading" may not be a helpful term to use in reference to the sort of manipulative advertising that is currently practiced.

This tension between the assumed working of the market and the content of commercial speech doctrine may be more apparent than real, however, because the Court may not mean misleading as much as fraudulent in the *Central Hudson*

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[198] In the automobile industry, producers and laborers shared oligopoly profits until the advent of significant foreign competition. At that point,

> [a]utomobile companies, long isolated from significant foreign competition, began rapidly losing sales to Japanese and European competitors. The result was a major crisis that produced plant closings, laid off workers, and a near financial collapse for one major U.S. firm (Chrysler). Although there were doubtless multiple causes for this crisis, it seems likely that successive oligopoly conditions contributed to the anticompetitive performance of the U.S. automobile industry. Until foreign competition intensified, the U.S. firms competed primarily with one another, priced in parallel fashion, and responded to the countervailing power exercised by the union by raising wages (again in parallel fashion), the cost of which was passed on to buyers of automobiles.

Warren S. Grimes, *The Sherman Acts Unintended Bias Against Lilliputians: Small Players' Collective Action as a Counter to Relational Market Power*, 69 ANTITRUST L.J. 195, 211 (2001).

[199] *See, e.g.*, Anne D'Innocenzio, *It's a Guy-Girl Thing*, PITTSBURGH POST-GAZETTE, July 28, 2002, at E10 (describing manufacturers' successful advertising of tight pants to young men, despite the fact that the clothing was not comfortable).

[200] *See Central Hudson*, 447 U.S. 566 ("For commercial speech to come within that provision [the First Amendment] it at least must concern lawful activity and not be misleading.").

test.[201] Exaggerated claims and image advertising are not unprotected by the First Amendment.[202]

How likely is it that the consumer can protect herself from the manipulations of modern advertising? Packard himself pointed out that advertising's techniques of manipulation can be resisted by the consumer: "We still have a strong defense available against such persuaders: we can choose not to be persuaded."[203] When we know the techniques being used against us, we can build up a "recognition reflex" against them. This is very much how supporters of the commercial speech doctrine, such as Professor Smolla, respond to the doctrine's critics: we are still in control.[204] Packard's assurance of our ability to resist the techniques of the hidden persuaders assumes that these techniques are not really hidden after all. It is true that advertising's tricks cannot be entirely hidden with regard to product advertising designed to cause us to purchase a particular brand. In that case, we can see some of the ways in which we are being subjected to psychological techniques and pressures.

But, is this so with regard to the weaknesses themselves that Packard says advertising is exploitive?[205] For example, an advertising campaign that emphasizes the unattractive qualities of being overweight may fail to attract customers to Weight Watchers. This might illustrate our resistance to advertising. But the failed campaign may still cause normal weight teenage girls to develop abnormal notions about ideal body proportions. We can learn to resist advertising's primary message to buy without successfully combating its implied messages.[206]

This hidden psychological manipulation of advertising is not readily subject to correction by market discipline. Over time we can be changed by exposure to

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[201] Some tensions, however, remain in commercial speech doctrine. *See* Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of* 44 Liquormart, 1996 SUP. CT. REV. 123, 156 ("The Court has not made it clear why government paternalism in the case of true speech is abhorrent while government paternalism in the case of misleading speech is entirely permissible . . . . Misleading commercial speech does not amount to the kind of fraud that warrants government intervention under standard libertarian theory.").

[202] *See id.* at 153 n.114 ("Prohibitions against false and misleading statements have not traditionally extended to puffery or image advertising.").

[203] PACKARD, *supra* note 184, at 249.

[204] *See* Smolla, *supra* note 75, at 797 ("We are inured to most of these advertisements and commercials . . . .").

[205] *See* STANLEY J. BARAN, INTRODUCTION TO MASS COMMUNICATION 354 (2002) ("A common advertising strategy for stimulating desire and suggesting action is to imply that we are inadequate and should not be satisfied with ourselves as we are. We are too fat or too thin, our hair is in need of improvement, our clothes are all wrong, and our spouses don't respect us. Personal improvement is only a purchase away.").

[206] Theoretically, since profits come only from selling particular products, such product resistance could eventually lead to the elimination of these techniques in selling. But, since that has not yet happened, confidence in such an outcome may be unwarranted.

such messages. One cannot undo this sort of effect by more speech, or at least cannot do so easily.[207]

The Federal Communications Commission ("FCC") raised the issue of implied or hidden messages in advertising when it decided in 1967 that cigarette advertising was subject to the Fairness Doctrine.[208] The FCC tacitly agreed with critics that cigarette commercials present the point of view that smoking is "socially acceptable and desirable, manly, and a necessary part of a rich life."[209] Therefore, cigarette commercials on television had a positive effect on public attitudes toward smoking in general. The invocation of the Fairness Doctrine in the case of cigarette advertising suggests that there is more to advertising than the explicit message that is promulgated. That explicit message of the cigarette advertisements in question was simply to "promote the use of a particular cigarette as attractive and enjoyable."[210]

The FCC decision ultimately led not to continuing counter-smoking advertisements on television, but to a Congressional ban on cigarette advertisements on television and radio.[211] Nevertheless, the subsequent course of public opinion regarding tobacco use supports the FCC's and smoking critics' view. The last cigarette advertisement appeared on television on January 1, 1971. Since that time, generations of voters have grown up without constant exposure to positive images of smoking on television. Voters thirty years old and younger have never seen a television cigarette advertisement. During this same time period, public attitudes toward smoking evolved to support a greater degree of regulation of, and outright bans of, smoking than would have seemed possible

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[207] *See* George Wright, *Freedom and Culture: Why We Should Not Buy Commercial Speech*, 72 DENV. U. L. REV. 137, 149 (1994) ("By itself, the power of commercial speech to shape inadvertently our culture might not be so troubling, were it not for the fact that today, in our cultural context, there is no realistic prospect for effective 'counterspeech' tending to promote noncommercial approaches to life's problems and opportunities. In our cultural circumstances, no institution currently devotes any real energy or resources to provide a counterspeech remedy for the implicit message of our commercial culture.").

[208] *See* Television Station WCBS-TV, 8 F.C.C.2d 381 (1967); *see also* Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968). David McGowan refers to the *Banzhaf* decision as "the sole judicial opinion that takes persuasive commercial speech seriously." McGowan, *supra* note 161, at 420.

[209] It is not entirely clear that the FCC "agreed" with this portrayal of the cigarette commercials. *See Banzhaf*, 405 F.2d at 1086. The opinion letter did repeat the description but did not expressly rely on it in its ruling. Nevertheless, the overall tone of the opinion letter does support the court's characterization. *See id.*

[210] *Id.*

[211] *See* Jeff I. Richards, *Politicizing Cigarette Advertising*, 45 CATH. U. L. REV. 1147, 1181 n.155 (1996) ("The FCC's decision led to a heavy barrage of anti-smoking commercials during the next two years, eventually contributing to the prohibition of broadcast cigarette commercials.").

thirty years ago.[212] Perhaps advertising does affect public policymaking in ways not directly connected to the express content of the ad.[213]

The Court has generally assumed that there is a link between advertising and public policy, but what the link was thought to be has never been clear. In *Va. Bd. of Pharm.*, Justice Blackmun's majority opinion generally argued that the commercial/informational content of advertising justified its protection under the First Amendment. But, the opinion added that even if the First Amendment were conceptualized as protecting only speech that "enlightens public decisionmaking

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[212] For example, in a 1989 study by the National Cancer Institute, "82%-100% of smokers supported limiting smoking in restaurants, private worksites, government buildings, indoor sports arenas, hospitals, and doctors' offices." *Health Objectives for the Nation Public Attitudes Regarding Limits on Public Smoking and Regulation of Tobacco Sales and Advertising in 10 U.S. Communities 1989*, MORBIDITY AND MORTALITY WEEKLY REPORT, May 31, 1999, at 344, *available at* http://www.cdc.gov/mmwr/preview. A 1993 study of public opinion in eight states found a mix of public opinion on restricting smoking in public. "Public opinion about whether to restrict or ban smoking varied across settings[,] . . . support was greater for banning smoking in fast food restaurants (range: 42.5%-63.0%) and at indoor sporting events (55.4%-66.9%) than in sit-down restaurants (39.5%-50.6%) and indoor malls (33.4%-56.5%)." *Current Trends in Attitudes Toward Smoking Policies in Eight States in the United States 1993*, MORBIDITY AND MORTALITY WEEKLY REPORT, Nov. 4, 1994, at 43, *available at* http://www.cdc.gov/mmwr/preview.

[213] The slow growth of anti-smoking government policy matched the slowly changing public attitude toward smoking. *See Reducing Tobacco Use: Historical Fact Sheet*, *available at* www.cdc.gov/tobacco/sgr/sgr_2000/factsheet_historical.htm (last visited Apr. 4, 2003). In 1973, Arizona became the first state to restrict smoking in a number of public places explicitly because environmental tobacco smoke exposure is a public hazard. By the mid-1970's, the federal government began regulating smoking within government domains. In 1975, the Army and Navy stopped including cigarettes in rations for service members. Smoking was restricted in all federal government facilities in 1979 and was banned in the White House in 1993. In 1988 Congress prohibited smoking on domestic commercial airline flights scheduled for two hours or less. By 1990, the ban was extended to all commercial U.S. flights. In 1994, Mississippi became the first state to sue the tobacco industry to recover Medicaid costs for tobacco-related illnesses, settling its suit in 1997. A total of forty-six states eventually filed similar suits. Three other states settled individually with the tobacco industry—Florida (1997), Texas (1998), and Minnesota (1998).

In terms of state anti-smoking legislation, the CDC's *1999 State Tobacco Control Highlights* showed a wide range of state initiatives in terms of smoke-free indoor air. The states were evaluated in terms of smoking allowed at state government worksites, private worksites, restaurants, day care centers, and home-based day care. By 1999, most states had enacted legislation limiting smoking in some or most of these areas. There were exceptions, which seemed to follow the influence of tobacco agricultural interests. Kentucky had no restrictions, for example, and Arkansas had restrictions only in day care centers. On the other hand, even Virginia had enacted limits on smoking in government offices, private worksites, and restaurants. *See* Center for Disease Control, *State Tobacco Control Highlights 1999*, *available at* http://www.cdc.gov/tobacco/statehi/statehi.htm (last visited Apr. 4, 2003).

in a democracy," advertising should still be protected because the information it imparts will be "indispensable to the formation of intelligent opinions as to how [the market] ought to be regulated or altered."[214]

The possibility that the ban on television and radio advertising of cigarettes might have affected public attitudes on the issue of regulating smoking gives powerful, albeit troubling, support to Justice Blackmun's view. Perhaps in light of the advertising ban, public opinion on smoking is now "uninformed" because the industry has not been allowed to advertise on television or radio. Perhaps public policy is now more anti-smoking than it would have been and more anti-smoking than it, in some sense, ought to be.[215]

Is this psychological effect the sort of connection between advertising and public policy the Court had in mind in *Va. Bd. of Pharm.*, or was Justice Blackmun referring only to the explicit messages of advertising that would affect public policy? In the narrow sense of information contained in advertising, public policy presumably would be furthered by whatever facts advertising explicitly brings forth that then become part of the public debate?[216] In that sense,

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[214] *Va. Bd. of Pharm.*, 425 U.S. at 765.

[215] *See* Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 587 (D.D.C. 1971) (Wright, J., dissenting). According to Judge Wright, the "Court of Appeals in this circuit has approved the view that 'cigarette advertising implicitly states a position on a matter of public controversy.' For me, that finding is enough to place such advertising within the core of protection of the First Amendment." *Id.* at 587 (quoting *Banzhaf*, 405 F.2d at 1102). *See also* McGowan, *supra* note 161, at 420-22.

[216] The one example Justice Blackmun used to illustrate how advertising furthers the goal of "intelligent" opinion as to how the "free enterprise system" "ought to be regulated or altered" was that the free flow of price information for prescription drugs would save consumers millions of dollars. *See Va. Bd. of Pharm.*, 425 U.S. at 765 n.20. This example does not seem to illustrate the point Justice Blackmun was making. Justice Blackmun seemed to be saying that advertising could bring forth information on policy matters other than whether that very information should be made public. After *Va. Bd. of Pharm.*, the First Amendment would decide that policy issue. Nevertheless, nothing in the example suggests that the effect Justice Blackmun was describing would be subtle and rely on implicit messages.

Another reason to doubt that Justice Blackmun had in mind generalized psychological associations in *Va. Bd. of Pharm.* is the skeptical view the Court took of a somewhat similar association the next year in *Friedman v. Rogers*, 440 U.S. 1 (1977). In *Friedman*, the Court upheld a state prohibition on the practice of optometry under a trade name against the claim that this restriction violated commercial speech rights under the First Amendment. Justice Powell stated for the Court that:

> A trade name conveys no information about the price and nature of the services offered by an optometrist until it acquires meaning over a period of time by associations formed in the minds of the public between the name and some standard of price or quality. Because these ill-defined associations of trade names with price and quality information can be manipulated by the users of trade names, there is a significant possibility that trade names will be used to mislead the public.

advertising would indeed further public debate and perhaps justify First Amendment protection.

On the other hand, if the link between advertising and public policy is simply the planting of a positive image of a product, for example, cigarettes, in the mind of the public, it is not clear that this would "enlighten" public opinion at all. In other words, the question in considering the impact of advertising on public life is whether all effects on public debate are equally legitimate and equally important. Is there a point at which the hidden persuasive effects of advertising on public policy become something to be feared, rather than something to be sought and protected?[217]

The relationship of advertising to public policy may become crucially important in years to come, even aside from policies involving obvious "vice" products like tobacco and alcohol, or even fast foods.[218] If advertising is indeed a hidden persuader, with effects on public policy that go beyond, or have little directly to do with, the explicit message of the advertisement, we must then ask about the effects of advertising on democratic life. What effects do or might, the thousands of advertisements to which we are subjected have on the overall public perception and public policy? Now that we have a more genuine feel for advertising's nature, it may be possible to examine that question productively.

IV. THE RELATIONSHIP OF ADVERTISING TO DEMOCRACY

A. The Political Aspects of Commercial Speech

There is no obvious relationship of advertising to democracy. Aside from Justice Blackmun's reference in *Va. Bd. of Pharm.*, alluded to above, the

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Id. at 12-13. Similarly, the "ill-defined association" between a glamorous cigarette advertising image and the value of smoking or of allowing smoking in public places might well be used to mislead the public.

[217] Robert Post, for example, celebrates a broad sense in which advertising may influence public policy apart from specific policy debates:

> 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 relevant to this process. Any observer of the American scene would report that advertising deeply influences our sense of ourselves as a nation.

Post, *supra* note 5, at 11. But, what if this process is hidden and the effect subconscious? And what if there are not "visions" of the good life, but basically only one vision, that of consumption? At what point do we ask where we are being led?

[218] *See* Peg Tyre, *Fighting "Big Fat,"* NEWSWEEK, Aug. 5, 2002, at 38 (reporting on efforts to sue fast food companies for misleading advertising on the basis of unmentioned high fat content and its consequences).

opinions in general have assumed, as has most commentary about them, that the commercial speech doctrine protects advertising even though it is not core, political speech and has no important political effect. Both critics and defenders of the doctrine agree that commercial speech is not political speech. Critics of commercial speech have argued that advertising should not be protected because it is not political speech,[219] while defenders have usually argued that it should be protected even though it is not political speech.[220] Some defenders of the doctrine, like Justice Thomas,[221] argue that no distinction can be made among types of speech or that advertising is just as valuable as are plays or music.[222] But most commentators concede that whatever advertising may be, it is not political and thus not directly related to democracy.[223]

What happens to these assumptions and arguments if the absence of tobacco advertising on television and radio since 1971 actually helped promote the more anti-smoking public attitude that emerged in the 1980's and 1990's? What if the anti-smoking laws of the 1990's would not have been enacted when they were if it had not been for the earlier advertising ban? What if, in other words, even though the banned commercials were commercial in content, they were, and would have continued to be, political in effect? Looking at advertising this way recognizes it as the undeniably powerful social practice that it is. Advertising may have real effects on society beyond stimulating and channeling commercial demand.

Of course, the question of what would have happened to tobacco policy without the cigarette advertising ban is unanswerable and speculative. Nevertheless, if the ban affected public policy, what would that say about advertising and democracy? Let us assume that the ban on cigarette advertising helped change public opinion about legal restrictions on smoking. Would that suggest that advertising threatens dangerously to subvert democracy and that the ban was

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[219] *See, e.g.*, Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, *in* HUMAN LIBERTY AND FREEDOM OF SPEECH 194 (1989); Blasi, *supra* note 5, at 486 (stating that commercial speech is undeserving of First Amendment protection because it is not related to self-government).

[220] *See* Law, *supra* note 5, at 932 (stating that the First Amendment is about more than the political process); Redish, *supra* note 5, at 433 (stating that advertising is necessary if people are to maximize satisfaction); Van Alstyne, *supra* note 5 (stating that people want to know about products more than about politics).

[221] *See Lorillard Tobacco*, 533 U.S. at 575 (Thomas, J., concurring) ("I doubt whether it is even possible to draw a coherent distinction between commercial and noncommercial speech.").

[222] *See* Law, *supra* note 5, at 932 (arguing that lack of First Amendment protection for non-informational commercial speech would reinforce a narrow First Amendment that protects only political participation and rational decisionmaking).

[223] *But see*, McGowan, *supra* note 161, at 415 ("[E]ven speech we can agree should be denominated 'commercial' is not solely for that reason devoid of political effect."); *contra* Wright, *supra* note 207, at 159-60 (criticizing advertising as having broad and destructive cultural effects, but assuming that advertising is not meaningful political speech).

fortunate? Or would it suggest that the advertising ban was an unfortunate setback for democracy because, in a sense, public debate was restricted?

Advertising presents conceptual problems for the meaning of democracy because the First Amendment, as we understand it, presupposes a fairly simple model of how public opinion is formed. In terms of issue X, the First Amendment ensures that the public has a chance to hear all that is possibly persuasive about issue X. Some of that persuasion may be manipulative, misleading, and emotional, but all of it in some sense concerns issue X. When misleading arguments are put forth on one side, the proponents of the opposite side counter them, sometimes with their own manipulative arguments, and the public makes up its mind. Censorship in such a context is harmful because the public then will not hear an argument that may change people's minds. In this model of democracy, there is no "right" position. There is only the position where the majority ends up at a particular time.[224]

It is not clear how this simple model applies to the possible effects of advertising. Cigarette advertisements, for example, were not aimed at any political or policy issue. They were aimed, in general, at convincing people to smoke and, in particular, to smoke a specific brand. The advertisements were not banned to enhance the prospects of enacting legislation, but to limit the number of people, particularly children, who might otherwise begin to smoke. The cigarette commercials did not expressly argue the case for smoking or for allowing smoking in public places or restaurants. The ban did not limit public information about those issues or about smoking and health. In theory, nothing was eliminated from the public debate. Yet, the public debate and the outcome of that debate might have been changed.

If the ban on cigarette commercials had an effect on political debate and public policy, the relation between advertising and democracy might be described in one of two ways. On one hand, advertising might be considered a stealthy

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[224] *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25 (1948) ("[Democracy requires that] all facts and interests relevant to the problem shall be fully and fairly presented . . . [so] that all the alternative lines of action can be wisely measured in relation to one another."); *cf.* HANS KELSEN, GENERAL THEORY OF LAW AND STATE 287-88 (1949):

> The will of the community, in a democracy, is always created through a running discussion between majority and minority, through free consideration of arguments for and against a certain regulation of a subject matter. This discussion takes place not only in parliament, but also, and foremost, at political meetings, in newspapers, books, and other vehicles of public opinion. A democracy without public opinion is a contradiction in terms.

Because no ultimate decision is possible, democratic persuasion is ongoing. "[I]t is precisely because absolute agreement can never actually be reached that the debate which constitutes democracy is necessarily 'without any end,' and hence must be independently maintained as an ongoing structure of communication." Robert Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 283 (1991).

impediment to democratic outcomes, completely manipulative, achieving political ends only by disguising its message. Advertising could be compared to a public opinion pill that companies could secretly add to the water supply, chemically changing public opinion on an issue without anyone knowing that their minds had been changed.

On the other hand, public opinion has always been made up of disparate elements, some rational and some not. Since the process of forming pubic opinion is uncertain, the best approach is to allow all possible information and points of view to come forward, even if they do not appear rationally germane to the political issues in question. There is no doubt that plays and movies also change the public mind about political issues. There is nothing illegitimate about this process. In fact it is necessary to a free people and free government. Thus, it might be said that advertising takes its place as a crucial partner in our model of democracy.

Of course, since the matters here discussed are uncertain, advertising which only tangentially touches on issues, like cigarette advertisements and public policy on smoking, will either have no effect on public attitudes on an issue or will have only a minor effect that can safely be ignored.[225] There is a fear, however, that modern advertising is having a great effect on public opinion, indeed on the very kind of society in which we live. Advertising may be tainting democracy itself, for its effects are hidden and indirect. It may even be that the effects of advertising are different from what advertisers intend.

Vance Packard shares that fear of the power of modern advertising. Packard worries that advertising has turned to "subconscious appeals" in order to bypass public skepticism about product claims and that this effort might be succeeding.[226] He writes that modern advertising is teaching society the false necessity of material goods and that our hopes and dreams can be enhanced by the purchase of a commodity. Packard quotes Reinhold Niebuhr's warning that "we are in danger . . . of developing a culture that is enslaved to its productive process, thus reversing the normal relation of production and consumption."[227] This kind of society was not chosen by anyone. It was not argued for by advertisers in the public forum of open debate, nor endorsed by the people. Such a society may universally be condemned, even by business. But the relentless drumbeat of modern advertising may be leading us there.

Packard writes that we can resist this onslaught by opening our eyes. But his prescription belies the subconscious nature of the manipulation he describes. It might be supposed that the problem Packard is warning us about is not primarily

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[225] One tobacco issue researcher, for example, was willing to speculate informally about the link between public attitudes recently and the 1971 advertising ban, but he thought the effect might have been to lessen public concern about smoking because the problem seemed to have been dealt with. Presumably only later did people see that more needed to be done about smoking. (Email on file with author).

[226] *See* PACKARD, *supra* note 184, at 256.

[227] *Id.* at 249.

political. He describes a social malaise, a kind of dwindling of the human spirit. He us not writing about a connection between advertising and public opinion on a particular political question. Without any such direct policy connection perhaps the fear of advertising is exaggerated. Perhaps democracy and advertising are compatible, at least outside some particular subjects like tobacco.

But, what if there were an issue, one that suggests the same kind of close relationship between advertising and public policy as between cigarette broadcast advertising and tobacco policy? In other words, what if advertising is changing public policy today on a large scale? There may in fact be such an issue—global warming.

B. Advertising's Possible Role in the Global Warming Stalemate

As I worked on this Article in the summer of 2002, the Colorado forests burned wildly.[228] Arizona forests also burned.[229] Utah suffered its fourth year of below normal snowpack; its farmers were threatened with no water.[230] In fact, it was reported in July that of the lower forty-eight states, only Wisconsin did not suffer from drought somewhere within its borders.[231] Drought conditions in the United States were so serious that agricultural production of corn, soybeans, and other crops were affected.[232] In Alaska, warming induced snow-melts so serious that runoff affected ocean levels, causing people to consider moving to higher ground.[233] But are these happenings droughts? Heat waves? Temporary patterns? Separate events? Or are we seeing the beginning of something terrible? Is this a permanent climate change?[234]

Why has there been no action by the United States concerning global warming?

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[228] In response to devastating wildfires, Colorado Governor Bill Owens declared on June 9, 2002: "All of Colorado is burning today." Nick Wadhams, *Colorado Wildfire Destroys Structures*, AP ONLINE, June 9, 2002, *available at*, 2002 WL 22577664.

[229] *See* Michael Janofsky, *Arizona Fires May Merge, Expected to Burn Until Summer Monsoon Rains Make Delayed Appearance*, PITTSBURGH POST-GAZETTE, June 22, 2002, at A1.

[230] *See* Patty Henetz, *Edgy Utah Farmers Reminded of Simple Fact: It's a Desert*, PITTSBURGH POST-GAZETTE, June 23, 2002, at A2.

[231] *See* Cynthia Hodnett, *State Joins 48 Others on Drought List*, GREEN BAY PRESS-GAZETTE, July 26, 2002, at A1.

[232] *See* Emily Gersema, *Drought prompts Agriculture Department to slash its crop estimates* , PITTSBURGH POST-GAZETTE, Aug. 13, 2002, at A5.

[233] *See Earthweek: A Diary of the Planet*, PITTSBURGH POST-GAZETTE, June 23, 2002, at A3 ("Alaska's terrain is cracking, sinking and breaking apart under the stress of global warming that has produced an average 7-degree Fahrenheit rise in temperature statewide during the past 30 years. The warming trend has prompted entire communities to contemplate moving inland as rising sea level approaches homes along the shore.").

[234] *See* Joan Lowy, PITTSBURGH POST-GAZETTE, Aug. 25, 2002, at A11, 2002. ("This summer's devastating wildfires may be the precursors of even greater conflagrations to come as the earth's climate continues to warm, scientists warn.").

Why has there been so little discussion of the issue in political campaigns and other political discourse? Why, in other words, is contemporary democratic dialogue on this issue in such a "disreputable state?"[235]

Of course my statements here are an exaggeration. There has been "some" action—for example, President Bush recently reemphasized voluntary industry reductions of greenhouse gases.[236] Certainly there has been "some" discussion. For example, both major parties' platforms addressed global warming during the 2000 presidential campaign,[237] and we hear reports about global warming all the time.[238]

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[235] *See* Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1109 (1993) (describing "contemporary democratic dialogue in America," not merely the global warming issue in particular. Although he apparently shares this negative evaluation of the state of American political life, Post does not address that state in any obvious way. Post addresses the "collectivist" theory of free speech that he may feel would only exacerbate whatever retards healthy political life now.).

[236] *See* John Heilprin, *White House Warms on Climate Change*, AP ONLINE, June 3, 2002, *available at* WL 21842870. ("The Bush administration warns in a report to the United Nations of significant effects on the environment from climate change but suggest nothing to deal with heat-trapping 'greenhouse' pollution beyond voluntary action by industry.").

[237] The Democratic Party Platform was pretty specific, claiming that the Clinton-Gore Administration produced "a strong international treaty to begin combating global warming - in a way that is market-based and realistic, and does not lead to economic cooling." The platform also described the likely effects of global warming:

> Eight of the ten hottest years ever recorded have occurred during the past ten years. Scientists predict a daunting range of likely effects from global warming. Much of Florida and Louisiana submerged underwater. More record floods, droughts, heat waves, and wildfires. Diseases and pests spreading to new areas. Crop failures and famines. Melting glaciers, stronger storms, and rising seas. These are not Biblical plagues. They are the predicted result of human actions. They can be prevented only with a new set of human actions - big choices and new thinking.

AMERICA 2000: THE 2000 DEMOCRATIC NATIONAL PLATFORM (2000).

The Republican platform did not deal with the issue of global warming in a policy sense but certainly acknowledged it: "More research is needed to understand both the cause and the impact of global warming." REPUBLICAN PLATFORM 2000: RENEWING AMERICA'S PURPOSE TOGETHER (2002).

[238] The August 2002 World Summit on Sustainable Development in Johannesburg, South Africa brought about a great deal of attention to the issue of global warming and related environmental threats. For example, *Time* magazine published a special that coincided with the Summit. *See Special Report, How to Save the Earth*, TIME, Aug. 26, 2002, at A1. Earlier in the summer, attention to global warming was sparked by the EPA report to the United Nations in June 2002. In an op-ed piece, Eileen Claussen, President of the Pew Center on Global Climate Change, wrote:

> In its business-as-usual approach to climate change, the Bush administration is

But, given the potential significance of global warming, nothing much has been done and very little has been said.[239] If humanity is changing the world's climate through increased concentrations of greenhouse gases in the atmosphere, the result will be a very high level of suffering and death among the people of the world. In turn, the likelihood of such intolerable consequences will force changes in production and consumption in an attempt to lessen the impact of climate change. Those changes, though they may then be necessary, threaten a great deal of harm to human economic well-being. Such charges also threaten liberal political institutions since liberal democratic societies may prove unwilling and unresponsive in the shadow of such unpalatable choices. It is in light of this momentous crisis that I ask why there has been no action on global warming.[240]

> increasingly out of step not only with other industrialized powers, but also with the growing support in this country for action to prevent global warming. The administration's oddly two-sided report last week to the United Nations brings the White House into the scientific mainstream on the subject - acknowledging that human activity is probably the cause of global warming and that America itself faces serious consequences—but at the same time lays out a strategy ensuring that American emissions of greenhouse gases will continue rising sharply for at least a decade.

Eileen Claussen, *The Global Warming Dropout*, N.Y. TIMES, June 7, 2002, *available at* http://www.pewclimate.org/media/oped-nyt06072002.cfm.

[239] *See* Andrew C. Revkin, *U.S. Sees Problems in Climate Change*, N.Y. TIMES, June 3, 2002, at A1:

> In a stark shift for the Bush administration, the United States has sent a climate report to the United Nations detailing specific and far-reaching effects that it says global warming will inflict on the American environment. In the report, the administration for the first time mostly blames human actions -- primarily the burning of fossil fuels -- for recent global warming. But while the report says the US will be substantially changed in the next few decades -- "very likely" seeing the disruption of snow-fed water supplies, more stifling heat waves and the permanent disappearance of Rocky Mountain meadows and coastal marshes, for example -- it does not propose any major shift in the administration's policy on greenhouse gases. The document, "U.S. Climate Action Report 2002," emphasizes adapting to inevitable changes and fits in neatly with the climate plan Mr. Bush announced in February. He called for voluntary measures that would allow gas emissions to continue to rise, with the goal of slowing the rate of growth. Yet the new report's predictions present a sharp contrast to previous statements on climate change by the administration, which has always spoken in generalities and emphasized the need for much more research to resolve scientific questions.

[240] This inaction by the United States is affecting the world-wide effort to do something about global warming. At the Johannesburg Summit, see *supra* note 238, frustration with the United States' stifling of initiatives on a wide-range of issues led some representatives to wear T-shirts with the message, "What should we do about the United States?" In fact so many people began wearing the T-shirts that security guards began banning them at the door. *See* David Arnold, *Can Earth survive our waste?*, PITTSBURGH POST-GAZETTE, Aug. 25, 2002, at A1.

There are many kinds of possible answers to this question of "why," including, of course, that the American people have concluded that global warming is not going to happen, or that, if the climate does change, the consequences will not be severe. Since there has not been the kind of national debate over global warming that could warrant such a dramatic stand, the answer to the "why" question probably lies, instead, in the roots of a particular breakdown in American democracy.

The roots of the global warming stalemate lie in the nature of the threat global warming poses. All sides in the global warming debate agree that responses to global warming threaten fundamental changes in our way of life. The reason for this radical potential for change is not just because the consequences of climate change are serious. Rather, the difficulty is in the way that global warming comes about. Global warming occurs because of factors inherent in our way of life. Greenhouse gases (primarily carbon dioxide) are a byproduct of the combustion of carbon. The combustion of carbon is a hallmark of industrialism and a byproduct of the use of the internal combustion engine.[241] Put simply, cutting greenhouse gas emissions is likely to require less industrial production and less automobile traffic. Since economic and social organizational patterns in this society are premised on both industrial production and on automobile mobility, any substantial lessening of either would mean a serious change in our lifestyle. The domestic gross national product grows, for example, as output grows. As output grows, greenhouse gas production tends to grow. Americans also value the mobility of the automobile. Residential patterns and retail patterns of strip mall development require constant and widespread use of cars. As this required mobility spreads, there tends to be more driving and, thus, more greenhouse gas emission. It is no wonder that efforts to stabilize greenhouse gas emissions in the United States have failed. Simply put, global warming is caused by the way we live.[242] This means that almost anything that we could do about global warming would entail daunting problems for us. For example, most strategies for dealing with global warming involve more expensive carbon, specifically gasoline.

Of course, climate change itself imposes severe financial harm, as victims of drought and heat and fire are finding out. But the fact that all choices facing us are today are in some sense negative does not make fundamental change easier to face. Indeed, since we face only choices with negative consequences, it almost becomes easier to do nothing and let the future take care of itself.

There are those in the sustainability movement who deal with this political reluctance to discuss, or act against, global warming by maintaining that we can

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[241] Serious discussion of the causes of global warming is beyond the scope of this Article. For general background, see IPCC, CLIMATE CHANGE 1995: IMPACTS, ADAPTATIONS AND MITIGATION OF CLIMATE CHANGE: SCIENTIFIC-TECHNICAL ANALYSES (Robert T. Watson et al. eds., 1996).

[242] *See* Sarah D. Himmelhoch, *Environmental Crimes: Recent Efforts to Develop a Role for Traditional Criminal Law in the Environmental Protection Effort*, 22 ENVTL. L. 1469, 1473 (1992) (stating that the causes of global warming are everyday activities).

achieve our needed environmental goals economically painlessly. These claims of radical economic change without disruption and without any necessary political change strike me as unrealistic.[243] I agree with Bill McKibben that the greatest barrier to preventing environmental catastrophe is the current cult of consumption.[244] McKibben is convinced that our current way of life is not sustainable. But, unlike other proponents of sustainability, McKibben confronts our fear of living in any way other than the way we live now. He tries to help us see that greater material attainment does not necessarily bring greater happiness. Nor does less material wealth, given a certain minimum attainment, necessarily entail suffering. McKibben recognizes the fundamental change that dealing with global warming and other environmental problems is going to bring.

Given that this much may be at stake, no one would expect political debate about such matters to be easy or even enlightened. Instead, surprisingly, there really has not been much of any debate at all. We certainly have not confronted these potentially negative choices concerning consumption and the future in open political exchange. We have not debated the merits of our way of life and the steps necessary to change what we must and to keep what we can. Like President Bush simply staying home while the world engages crucial environmental and economic issues in Johannesburg,[245] in absolute political irresponsibility, we have abstained.

The absence of robust political debate on the issue of global warming is easy to see. The political leadership of the United States has not shown much political courage on the global warming issue. This is not a partisan observation aimed at President Bush. During the Clinton Administration, the Kyoto global warming treaty[246] was not submitted to the United States Senate for advice and consent for ratification. Of course the Senate was controlled by the opposition party during much of that time and was not going to ratify the Kyoto treaty by a two- thirds vote as required by the Constitution.[247] But, if there had been much political support for the treaty or if the people of the United States had intensely wanted to

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[243] *See* Bruce Ledewitz, *The Constitutions of Sustainable Capitalism and Beyond*, 29 B.C. ENVTL. AFF. L. REV. 229, 251-55 (2002).

[244] *See id.* at 275.

[245] *See* Kenneth Weiss, *Summit Tackles Saving Earth*, PITTSBURGH POST-GAZETTE, Aug. 26, 2002, at A1 (reporting on President Bush's announcement prior to the meeting that he would not be attending the world summit in Johannesburg).

[246] *The Kyoto Protocol to the United Nations Framework Convention on Climate Change*, *available at* http://www.unfccc.de/resource/docs/convkp/kpeng.html (adopted by 159 nations in Kyoto, Japan, on Dec. 11, 1997) (last visited Mar. 30, 2003).

[247] *See* U.S. CONST., art. II, § 2, cl. 2. In fact there was no observable support in the Senate for anything like the Kyoto agreement. *See* S. REP. No. 98 (1997); 143 CONG. REC. S8117 (daily ed. July 25, 1997) (stating that a Senate resolution introduced by Senators Chuck Hagel (R-Neb.) and Robert C. Byrd (D-W. Va.), along with sixty-four cosponsors, passed the Senate by a vote of 95-0 on July 25, 1997; the resolution warned the Administration against signing any agreement that did not bind developing countries and that serious harm to the American economy).

hear about the global warming issue and make up their minds, President Clinton would have submitted the treaty. It is extremely telling that global warming played little or no role in the presidential campaign of 2000. Gore's decision not to run on the issue represented a political judgment that it was not to his advantage to raise the issue in a serious way.

No one really knows what the American people are, or might be, willing to do about the global warming threat because they have never been asked. Nor will they be anytime soon. It must also be added that the people of the United States have not been pressing their leadership for action either. My point here is simply that the global warming issue has not been seriously considered in a national political sense despite its potential danger to us. This is a breakdown in democracy on a crucial issue. What is the root of this breakdown? What has kept us from confronting the environmental reality all around us? While there are surely many reasons for this stalemate, it seems that the massive onslaught of commercial advertising has helped keep us wedded to material consumption as an unquestioned, and unquestionable, focus for human life.[248] If the American political *system* is unable to consider fundamental changes to our way of life of consumption, then this inability is held in place, at least in part, by the manipulations of commercial advertising. Advertising has helped convince us of the desirability and inevitability of consumption as our way of life.[249]

This may strike the reader as a surprising conclusion. There are, of course, factors other than advertising that contribute to the current political stalemate concerning global warming.[250] It is worth considering them before concluding that advertising plays any role at all.

The lack of discussion about global warming might mean that global warming is not a serious problem. Or, the lack of discussion might mean that we mistakenly think it is not a serious problem. But, given the grave potential for

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[248] *See* COLLINS & SKOVER, *supra* note 1, at 81 (describing mass advertising as "a social discourse whose unifying theme is the meaning of consumption").

[249] The situation of stalemate I am describing is similar to that described in Daniel Quinn's *Ishmael*. At one point, the teacher, Ishmael explains to a would-be student that people are not excited about the catastrophic damage that humans are inflicting on the natural world because they have been "told an explaining story. They've been given an explanation of *how things came to be this way*, and this stills their alarm." DANIEL QUINN, ISHMAEL 44 (1992). In Quinn's terms, commercial advertising is an important part of the story that Mother Culture whispers in our ears constantly all our lives—a story of the inevitability of growth, development, progress, and consumption. From Quinn's point of view, the notion of protecting such a message from regulation by the State is preposterous. It would be extraordinary and unheard of for the State to propose any such regulation. Indeed, the State is in part the embodiment of this same story.

[250] Indeed, there are quite different ways even to conceptualize the existing deadlock. At least one commentator, for example, has located the essential problem of political response in what might be called the psychological structure of the global warming threat. *See generally* Jeffrey J. Rachlinski, *The Psychology of Global Climate Change*, 2000 U. ILL. L. REV. 299 (2000).

harm, what would be the ground of such popular confidence? Something is feeding this refusal to consider the possibility that global warming is a serious threat. That something, whatever it is, is the ground of our stalemate.

The lack of discussion might mean that it is still too early to address global warming. We will address the matter when we have to do so. But, if this were our view, the discussion of the issue would be growing over time. Discussion is growing, but only a little.[251] Of course eventually there will be discussion and action on global warming, whatever the impediments are. Science and nature will not be put off forever. The delay will have increased the suffering in many ways. The lack of discussion might reflect the contingency that in 1997 the Republican Party controlled the Senate while the Democrats controlled the Presidency, and so no agreement could be reached. Later, in 2002, the situation was reversed, with similar effect. But, this structural account fails to explain the lack of debate on global warming. In our system, each political party takes advantage of the unpopular stands of the other party. If the Democrats thought that the Republicans were vulnerable on the global warming issue, they surely would be targeting the issue for discussion.

The lack of discussion might mean that we are not going to like the necessary solutions to global warming. So we put off the bad news as long as possible. But that immature attitude would itself indicate an incapacity for self-government. Where would such an attitude have come from? What happened to our democracy?

The lack of discussion might mean we are waiting for more scientific evidence of warming or the consequences of climate change. This reason for delay is often touted by politicians.[252] But that would mean searching for the evidence in a serious way. We are not funding such a search in an ardent or pressing manner.

The lack of discussion might mean we lack the ability to focus on an abstract and scientific issue. But where did that capacity go? Or, if what is lacking is leadership to help us understand global warming, why has that leadership not been forthcoming? Has the ruling elite become irresponsible? In what did that root?

The lack of discussion might mean that we have too many other pressing matters to think about. The United States was brutally attacked on September 11, 2001, and since then we have worried about further attacks. Clearly, the war on terrorism and later the war on Iraq are factors in keeping all other issues on the back burner. But we were not focusing on global warming before September 11th.

The lack of discussion might mean that we, the United States, are on top in the

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[251] *See supra* note 237 and accompanying text.

[252] *See, e.g.*, John Heilprin, *Bush Dismisses Climate Change Study*, AP ONLINE, June 4, 2002, *available at* WL 21843233 (noting that White House spokesman Scott McClellan "pointed to language in the report [Environmental Protection Agency Report on Climate Change] acknowledging 'considerable uncertainty' in current understanding of how climate varies naturally.").

world, and we know we do not want any fundamental changes in the world system. No doubt the people of Rome at its imperial height thought that the world was marvelously arranged and did not desire change. But this would only explain the complacency of some. I do not think that most of the American people understand just how dominant we are in the world. Certainly most Americans are not sharing in the material prosperity of empire.

The lack of discussion might mean that we think warming is inevitable and can be accommodated without too much damage. One climate skeptic wrote in the Wall Street Journal in 1995 that global warming can be combated with lighter shirts.[253] But, given the likely harm from global warming, one would not expect lighthearted comments to assuage the worry. There would be pressure to do something, if we were able to countenance the possibility of changing our way of life of consumption.

In addition to the lack of discussion about global warming, there also has been little action taken. Why we have not acted is by and large similar to why no serious discussion has taken place. While it is not clear precisely what should be done about global warming, an increase in the gasoline tax, or the imposition of carbon taxes would be obvious starting points, as would an increase in fuel economy standards or, for that matter, ratifying the Kyoto treaty.

The lack of action might mean that the United States does not have to act. Global warming might represent the classic economic case of a "free loader" or "free rider;"[254] if other nations take action against global warming, they will pay all of the costs of such action, but we will gain part of the benefit. But surely the possibility of taking advantage of the rest of the world in this way has not occurred to the people of the United States, though it may have occurred to our ruling elite. Anyway, such a plan would not work for us. The United States is simply too big in too many ways for any changes in production and consumption to happen at the planetary level without our involvement. It is much more likely that our refusal to make sacrifices to curb greenhouse gases will eventually convince other nations to limit their greenhouse gas reforms as well.

Don Brown, the noted environmentalist, spoke at Duquesne Law School in the spring of 2002 and was asked, "Why has there been no action on global warming?" He responded that "special interest groups"—the extraction lobby for example—have stymied action.[255] While this analysis may in some sense be correct—it begs the question, "Why has industry had its way on the global warming issue?" Industry does not control the outcome of all environmental

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[253] *See* Wilfred Beckerman, *Why Worry About the Weather?*, WALL ST. J., Aug. 25, 1995, at 6.

[254] On the problem of free riders or free loaders and public goods, see James P. Power, *Reinvigorating Natural Resource Damage Actions Through the Public Trust Doctrine*, 4 N.Y.U. ENVTL. L.J. 418, 422 (1995); *see also* Guido Calabresi, *Transaction Costs, Resource Allocation, and Liability Rules-A Comment*, 11 J.L. & ECON. 67, 68 n.5 (1968).

[255] The author attended this meeting.

issues.[256] Perhaps the legislative problem is that global warming is so serious and may represent a threat to our current way of life. Thus, potential global warming legislative action is easier for industry lobbyists to block. But if this is the case, to understand why there has been no action on global warming, one would have to ask, "What helps hold in place our current way of life?"

Maybe the answer to all of this is just "human nature." Maybe there has been no action on global warming out of intergenerational selfishness. After all, we do not have to act. Climate change is not going to harm us imminently. It is going to take some years, and by the time things get really bad, most of us will be gone.[257]

There is no doubt some selfishness around the global warming issue. But, given the biological tendency in our species to protect our young, it is all the more amazing that we might be willing to harm our own children and grandchildren by refusing to make any sacrifices to protect the world they will inherit. In other words, this degree of selfishness is itself a question, not an answer.[258]

The remarkable complacency about the possibility that global warming is a threat to our children is one of the reasons that I conclude that advertising has changed the tenor and content and even the possibility of political debate in America. It seems that we have been manipulated and brainwashed into believing that our way of life cannot be harmful, that it must be beneficial—and that in any event our way of life is inevitable and natural. We now believe, without even thinking about it, that it is normal and acceptable, maybe even for the best, "to change products and services constantly"—the only constant in the message of advertising.[259] My conclusion is that our belief in consumption as our way of life is at work in the global warming stalemate and relative silence. Whatever else advertising is, it is certainly an engine of consumption. Thus, advertising plays a critical role in our political life.

But, even if this view of advertising is plausible, does advertising then threaten democracy? To begin to evaluate that question, we need to consider advertising

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[256] *See* Tracey A. LeBeau, *Energy Security and Increasing North American Oil and Gas Production*, 16 NAT. RESOURCES & ENV'T 193, 194-95 (2002) (noting that proposed oil drilling in the Arctic National Wildlife Refuge has remained politically charged but has not gone forward).

[257] I have heard such statements myself from otherwise sane and responsible people. *See* Bruce Ledewitz, *Establishing a Federal Constitutional Right to a Healthy Environment in Us and in Our Posterity*, 68 MISS. L.J. 565 (1998). Moreover, Jared Keamond, UCLA professor of geography and public health and director of the World Wildlife Fund, has recently written that before his children were born in 1987, he "couldn't think of 2050 as a real date . . . . I would surely be dead before 2050." *Special Report*, *supra* note 238.

[258] The point is that Jared Keamond did view the world differently because he had children. Many voters, however have children and grandchildren. So, where is their concern?

[259] *See* COLLINS & SKOVER, *supra* note 1, at 93.

in terms of the foundations of our political life.

C. *The Potential Threat of Advertising to Democracy and Individual Liberty*

Aldous Huxley asked in 1958 whether advertising is compatible with democracy. Huxley saw in the promise of mass communication, "a democratic Dr. Jekyll" who would reach the mass of citizenry with "truth and reason."[260] There is also a "Mr. Hyde—or rather a Dr. Hyde, for Hyde is now a Ph.D. in psychology and has a master's degree as well in the social sciences."[261] It is this "anti-democratic, because anti-rational" Hyde who controls advertising.[262] Huxley was not sanguine about the answer to his question about democracy and advertising.

Our understanding of advertising today has not changed much since Huxley wrote, though perhaps our confidence in our ability to resist it has grown. That does not mean, however, that our ability to resist it has in fact grown. In an article generally critical of the notion that commercial speech—mass advertising—could really be changing our worldview in ways that we cannot control, Professor Rodney Smolla wrote the following:

> I will concede that these advertisements influence me to consume, and all to often to consume extravagantly, and what is far worse, particularly in light of the stresses we are placing in the environment, to consume wastefully. Like many others, I buy more things than I really need often I admit, because these material things give me a fleeting sense of well-being.[263]

Professor Smolla did not mean that we should do anything about this effect of advertising. Advertising has not caused him to become "a narrow minded materialist" because the effect of advertising on any particular individual is "surely . . . infinitesimal."[264] Professor Smolla thought that he was referring in a good-natured way to a not-too-serious personal flaw.

But what Professor Smolla sensed in himself may not be a personal flaw at all, but rather a deep manipulation of his own personality. Despite his personal confidence, we may all have come to see products differently than have all previous human beings.[265]

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[260] ALDOUS HUXLEY, BRAVE NEW WORLD REVISITED 58-59 (1958).

[261] *Id.* at 59.

[262] *Id.*

[263] Smolla, *supra* note 75, at 803.

[264] *Id.*

[265] *See* BARAN, *supra* note 205, at 354 ("Critics argue that ours has become a consumer culture, a culture in which personal worth and identity reside not in ourselves but in the products with which we surround ourselves. People are troubled by this trend, but are also at a loss about what to do about it."). One commentator, John Balzar, has recently written that he hardly knows anyone "who isn't nagged by doubts about materialism. At the same time, I don't know a single person, me among them, who doesn't desire something more, something better, something new." John Balzar, *Life Support*, PITTSBURGH POST-

One critic of advertising, Fritjof Capra, describes this situation in terms that are surprisingly similar to those that Professor Smolla uses to describe the "infinitesimal" effect advertising has on him:

> Manufacturers spend enormous amounts of money on advertising to keep up a pattern of competitive consumption; many of the goods thus consumed are unnecessary, wasteful, and often outright harmful. The price we pay for this excessive cultural habit is the continual degradation of the real quality of life, the air we breathe, the food we eat, the environment we live in, and the social relations that constitute the fabric of our lives.[266]

This kind of conditioning through commercial messages is not liberty, although it may seem like an enhanced choice. Isaiah Berlin apparently had advertising in mind in his critique of a certain conception of liberty:

> [T]he definition of negative liberty as the ability to do what one wishes, which is, in effect, the definition adopted by Mill, will not do. If I find that I am able to do little or nothing of what I wish, I need only contract or extinguish my wishes, and I am made free. If the tyrant (or 'hidden persuader') manages to condition his subjects (or customers) into losing their original wishes and embracing ('internalizing') the form of life he has invented for them, he will, on this definition, have succeeded in liberating them. He will, no doubt, have made them *feel* free–as Epicetus feels freer than his master (and the proverbial good man is said to feel happy on the rack). But what he has created is the very antithesis of political freedom.[267]

If this is what advertising does, it undermines our notion of freedom. Freedom for an individual requires an autonomous will, which Berlin describes above as our "original wishes." For the same reason, advertising also undermines our model of democracy. For democracy also requires that our autonomous wills be expressed. Psychological and other techniques of manipulation challenge the very notion of autonomous will.

This possibility does not necessarily mean that anything should be done to restrict advertising. Sometimes it is better to be subject to a disease than to its cure. We cannot expect to save democracy through acts of tyranny. But we should at least consider our true situation.

GAZETTE, Aug. 29, 2002, at B2.

[266] FRITJOF CAPRA, THE TURNING POINT 215 (1982). Oddly enough, Smolla agrees with some of this. For example, Smolla contrasts Nike's advertising with the company's operations themselves —"Debate over the harm caused by the fantastical nuances of a Nike ad positively pales in significance by comparison to the debate over the actual social and economic problems posed by Nike's enterprise." Smolla, *supra* note 75, at 803. But this is part of the point. Without mass commercial advertising of the kind Smolla is defending, and whose constitutional status he is asserting, Nike would not be the kind of enterprise that it is.

[267] Isaiah Berlin, *Two Concepts of Liberty*, *in* THE PROPER STUDY OF MANKIND 211 (Henry Hardy & Roger Hausheer eds., 1998). Berlin wrote these words in 1958, one year after the publication of *The Hidden Persuaders*.

How do we decide whether advertising has debased democratic deliberation on the subject of continuing our way of life of consumption? There is no conclusive empirical evidence to support, or contradict such a proposition.[268] If commercial advertising has an effect, it is subtle, and most people are unaware of it. Some people argue that there is such an effect or related effects,[269] while others think that commercial advertising is not significant or harmful.[270]

The first question in evaluating advertising is whether it could be harmful. The Court's current view is that advertising primarily provides information and that consumers, as rational actors, use this information to make decisions that improve their lives. Assuming that the information in the advertisement is true, or assuming that the consumer will have enough time to find out for herself whether the information is true or not, one simply cannot have "too much" speech, as far as the Court is concerned.[271] The Court's current view fails to take account of the power of advertising. The twentieth century invented mass advertising.[272] One would scarcely know that the effects of propaganda have been well documented.[273]

The best source for understanding advertising and democracy is a classic source. In his statement of liberal principles, John Stuart Mill wrote of the possible "tyranny of the majority" in order to show that democracy does not necessarily lead to liberty.[274] Mill makes a distinction that American

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[268] It has never been possible to "prove" that exposure to cigarette advertising causes people to smoke. *See* Richards, *supra* note 211, at 1153.

[269] Most notably, see COLLINS & SKOVER , *supra* note 1.

[270] *See* Sonja J.M. Cooper, *Comments on Lawyer Advertising Paper*, 14 LAW & LITERATURE 207 (2002) ("Americans are accustomed to these appeals to their market decisions, and we think of advertisements as helpful, even if occasionally intrusive or even irritating.").

[271] Or, for that matter, too much of any kind of "speech." In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), the Court upheld a Michigan statute prohibiting corporations from using corporate treasury funds for independent expenditures in support of or in opposition to candidates in elections for state office. In his dissent, Justice Scalia wrote: "In permitting Michigan to make private corporations the first object of this Orwellian announcement, the Court today endorses the principle that too much speech is an evil that the democratic majority can proscribe." *Id.* at 679 (Scalia, J., dissenting).

[272] *See* Charles Krauthammer, Editorial, *Why Winston Churchill Was the Twentieth Century's Indispensable Man*, PITTSBURGH POST-GAZETTE, Jan. 1, 2000, at A18 ("The originality of the 20th century surely lay in its politics. It invented the police state and the command economy, mass mobilization and mass propaganda, mechanized murder and routinized terror—a breathtaking catalog of criminal and delusional political creativity.").

[273] *See, e.g.*, LINDLEY MACNAGHTEN FRASER, PROPAGANDA (1957); HAROLD LASSWELL, PROPAGANDA TECHNIQUE IN THE WORLD WAR (1927); ANTHONY R. PRATKANIS & ELLIOT ARONSON, AGE OF PROPAGANDA: THE EVERYDAY USE AND ABUSE OF PERSUASION (1992).

[274] John Stuart Mill, *Prefaces to Liberty*, *in* SELECTED WRITINGS OF JOHN STUART MILL,

constitutional law usually ignores or forgets. Mill distinguishes between the tyranny of democratic government, which he calls "the acts of public authority,"[275] and the tyranny of society itself. Society practices a "social tyranny"—the tyranny of the prevailing opinion and feeling. This social tyranny "prevent[s] the formation of any individuality not in harmony with its ways . . . ."[276] Unlike unjust laws, the tyranny of social practice, though it lacks "extreme penalties, it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself."[277] In pointing to "enslaving the soul," Mill might be perfectly describing the power of advertising to impose a worldview on us. Nor does it lessen the applicability of this insight to advertising that Mill puts the matter in terms of the majority influencing the individual. For in terms of the effect of advertising, all of us are individuals in the hands of social conditioning. The majority itself in modern society is formed from the images and messages of advertising. Thus, not only does advertising threaten democracy, it threatens individual liberty to the same extent since only free individuals can come together in democratic form. If advertising conditions all of us, it also conditions each of us. In this light, trying to limit the power of advertising is not an example of the majority legislating against the individual, but of the majority protecting the autonomy of the individual.

The average American is said to watch forty-seven hours of television or related media a week,[278] adding up to 3000 advertisements per day.[279] While all this advertising differs in detail, it does impart one overwhelming subliminal message—the proper goal of human life is consumption. Consumption is understood as a social duty.[280] It is the social conditioning of that message that helps inhibit discussion of something like global warming, because global warming throws into question the starting point of consumption itself.

The common sense response to these assertions would be as follows. People are not stupid. They have the ability to discount the claims of commercial

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236 (Bernard Wishey ed., 1959).

[275] *Id.* at 244.

[276] *Id.* at 245.

[277] *Id.*

[278] *See* COLLINS & SKOVER, *supra* note 1, at 213.

[279] *See* Lewis H. Lapham, *Paper Moons*, HARPER'S MAG., Dec. 2000, at 10-11.

[280] *See* Karen Hosler, *Approve Tax Cut Quickly, Treasury Chief Urges House Action*, BALTIMORE SUN, Feb. 14, 2001, at 1A ("Paul H. O'Neil urged speedy action on . . . President Bush's $1.6 trillion tax cut plan in hopes that consumers with extra money in their pockets will spend enough to boost the stalled economy."); Gary Martin, *Divided House OK's Core of Bush Tax Cut*, SAN ANTONIO EXPRESS-NEWS, Mar. 9, 2001, at 1A, ("[The $1.6 trillion tax cut gives] an average $400 tax refund to families to spend on consumer goods and services. The President portrayed the tax cuts as a tonic for impending recession."). The view that the consumer has a duty to spend is not limited to partisan support of tax cuts. *See* Rachel Beck, *It Fails on Their Shoulders: American Consumers Hold the Key to Economy's, Market's Failure*, PITTSBURGH POST-GAZETTE, Aug. 7, 2002, at C1.

advertising. They can see the need to change our ways in order to combat global warming. Many advertising campaigns fail because consumers are sophisticated and skeptical.

People do regard advertising claims skeptically. But one cannot look at any particular claim of a commercial ad, but rather must look at the worldview of commercial advertising itself. The message of that worldview is that the good life is defined by products. Aldous Huxley called this "commercial propaganda" for a good reason. It is much more difficult for people to protect themselves from a worldview than from an ill-advised purchase of a product.[281]

How do these insights look in terms of constitutional doctrine? Can the government act upon the recognition of the dangers of advertising to democracy? Robert Post has suggested that it would be unconstitutional for the government to ban advertisements of attractive cars if the ban were "enacted for the *purpose* of manipulating public opinion in favor of mass transportation."[282]

What if "purpose" matters not at all, whether in terms of government suppression or commercial goal?[283] What if the sole intent of corporation running these ads is to sell cars, but it nevertheless has the incidental effect of destroying support for mass transit? Is it purpose that defines "manipulating" public opinion, or is it "manipulation" to predictably affect public opinion without openly expressing an opinion on an issue?[284] Who is manipulating public opinion in Post's example, the government or the corporation? Where is the natural—that is, value neutral—starting point?[285] Where does true democracy lie—with advertising or without? And is the answer to that question obvious—obvious, that is, without the assumption that it is our destiny to be ruled by the market, and by corporate advertising?

Global warming is a threat and, eventually, something must be done. That something may well mean limiting the life of consumption. The issue for consideration here is how long will this take compared to how long it would have

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[281] *See* Wright, *supra* note 207, at 149 ("[W]hile consumers reject or ignore most of the particularized ad messages they receive . . . they may be less able to resist the unintended broader 'message' of the superiority of commercial consumption as a basic approach to living.").

[282] Post, *supra* note 5, at 43 (emphasis added).

[283] *Contra* Berman, *supra* note 47, at 751-62 (basing his analysis largely on the role of the government in restricting speech).

[284] *Cf.* Lowenstein, *supra* note 5, at 1222 ("It is not the government that will be manipulating consumers if it bans cigarette advertising. The manipulation occurs on the part of those who create and disseminate these advertisements . . . .").

[285] David Strauss makes a similar distinction between regulating gambling and "manipulating the flow of information so that some people who would otherwise have developed that desire never do so." David Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 359-60 (1991). If one assumes that the latter creates a First Amendment problem, one is treating advertising-induced desire as the natural pre-existing starting state—the "otherwise." But why is it not advertising that induces a desire for gambling in people who "otherwise" would not have developed it?

taken without widespread commercial advertising. None of this necessarily means that an attempt should be made to suppress commercial advertising, whether in terms of particular products or restricting available times for any advertising. Perhaps such regulation is a bad idea despite the power of advertising. At the moment, however, there can be no democratic decision or robust debate on the question of advertising. In a strange parallel, just as commercial advertising now may inhibit democratic deliberation over global warming, the constitutional doctrines protecting commercial speech may be preventing democratic evaluation of advertising itself. To properly evaluate advertising and decide what, if anything to do about it, American constitutional law must first relax its grip on this field.

V. ADVERTISING, DEMOCRACY, AND LAW

A. The Cigarette Advertising Ban as a Doctrinal Benchmark

How can the soundness of a method of interpreting the Constitution be measured? One way is to apply an interpretive approach to an already-decided-case whose outcome one considers valid. Robert Bork did so with *Brown v. Board of Education*[286] in his article about neutral principles.[287] He measured the outcome in *Brown*, which was beyond criticism, against ways of formulating the concept of neutral principles. Interpreters today tend to measure methods of constitutional interpretation against the outcome in *Roe v. Wade*.[288] The interpretivist or noninterpretivist debate[289] focuses on whether a particular method of interpretation would, or would not, allow a decision like *Roe*.[290]

We can treat another legal outcome as this kind of benchmark and measure the commercial speech cases against it. The decision by Congress to ban cigarette advertising from radio and television beginning in 1971 stands today as the beginning of the change in public perceptions about smoking. The advertising ban probably led to a reduction in the number of children who started to smoke[291]

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[286] 347 U.S. 483 (1954).

[287] *See* Bork, *supra* note 82, at 12-15.

[288] 410 U.S. 113 (1973).

[289] For introduction into this debate and *Roe*'s role in it, see Ira Lupu, *Constitutional Theory and the Search for the Workable Premise*, 8 DAYTON L. REV. 579, 583 (1983).

[290] *See* Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 666 (stating that *Washington v. Glucksberg*, 521 U.S. 702 (1997) repudiated the method of constitutional interpretation by which courts make normative judgments in fundamental rights cases thus brings the *Roe* era to a close).

[291] *See* Richards, *supra* note 211, at 1153-62. *But see* Robert D. Bobrow, *The First Amendment: Oasis or Mirage for Old Joe Camel*, 34 U. LOUISVILLE J. FAM. L. 963, 988-95 (1995) (arguing that studies purporting to show that advertising leads children to smoke fail to prove that cigarette advertising "causes" children to smoke). If the standard was properly empirical proof, Bobrow would probably be right that the link of smoking to

and the number of adults who decided to quit. Thus, the cigarette advertising ban saved lives.[292]

The advertising ban remains so popular with the public that the cigarette companies have never sought to rescind it.[293] The companies realize that to seek to overturn the ban would be a public relations nightmare.

The ban has its critics,[294] but their voices have largely been muffled. One argument against any advertising ban is that such limits on cigarette advertising have kept the cigarette companies from engaging from health-oriented competition that would have led to the introduction of safer cigarettes, thus saving more lives than could any advertising limitation.[295]

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advertising could not be shown. Bobrow structures the burden of proof in this way because of the loss of First Amendment rights from an advertising ban. *See id.* at 1002-03. But this is akin to saying that the possibility of saving children's lives is not as important as the continuation of some form of commercial advertising. That kind of thinking illustrates the negative consequences of attributing First Amendment protection to advertising in the first place.

[292] Admittedly, these are controversial claims. *See, e.g.*, Paul Robbennolt, Note, *Not Just Smoke and Mirrors: Free Expression and EC Restrictions on Tobacco and Alcohol Advertising*, 1992 U. CHI. LEGAL F. 419, 438-39 ("The consensus of studies after the 1971 ban on broadcast advertisements conclude that '[n]o significant correlation [exists] between aggregate cigarette advertising and industry demand . . . .' Instead, advertising serves only to reallocate market shares of the producers by influencing current consumers to switch brands. In fact, the ban may be detrimental by restricting advertisements that encourage a change to less harmful cigarettes, such as low-tar brands."); Lynne Schneider et al., *Governmental Regulation of Cigarette Health Information*, 24 J.L. & ECON. 575, 599-606 (1981) (arguing that the 1971 television and radio advertising ban served to increase consumption). These conclusions are hard to believe as a matter of "practical experience." *See* Lee Gordon & Carol Anne Granoff, *A Plaintiff's Guide to Reaching Tobacco Manufacturers: How to Get the Cigarette Industry Off its Butt*, 22 SETON HALL L. REV. 851, 877 (1992) ("It is reasonable to assume that cigarette manufacturers would not spend large sums of money on advertising over a number of decades unless they felt that the advertisements promoted the consumption of cigarettes."); Kenneth L. Polin, *Argument for the Ban of Tobacco Advertising: A First Amendment Analysis*, 17 HOFSTRA L. REV. 9, 127 (1988).

[293] *See* Yabo Lin, Note, *Put a Rein on that Unruly Horse: Balancing the Freedom of Commercial Speech and the Protection of Children in Restricting Cigarette Billboard Advertising*, 52 WASH. U.J. URB. & CONTEMP. L. 307, 315 n.33 (1997) ("Ironically, the 1969 advertising ban of cigarettes on TV and radio was, in part, a response to pressure from the cigarette industry, which felt that a total ban would be less detrimental than the mandatory anti-smoking advertisements.").

[294] *See, e.g.*, John E. Calfee, *The Ghost of Cigarette Advertising Past, Regulation, available at* http://www.cato.org/pubs/regulation (last visited Mar. 30, 2003).

[295] *See id.* ("Health advertising was an effective means of promoting one brand over another and thus was an important weapon for smaller firms seeking to wrest business from larger firms. This competition also brought rapid improvements in cigarette design in the wake of pronouncements by medical experts that changes were desirable.").

The federal ban on cigarette advertising in the broadcast media was upheld prior to the development of the modern commercial speech doctrine,[296] so the Court's action in upholding the ban need not indicate its current constitutionality. Recently, however, the Justices have acknowledged the advertising ban without indicating any constitutional problems with it. In striking down Massachusetts' limits on cigarette advertising on preemption grounds,[297] Justice O'Connor stressed the need to examine the context of the 1969 preemption language in light of, inter alia, the "electronic media" ban.[298] The ban and the warnings on cigarette packages represented federal concerns about smoking and health that was supportive of a broad view of federal preemption.[299] Justice O'Connor noted that Massachusetts had not raised the issue of the constitutionality of federal cigarette advertising legislation,[300] but this notation was in response to the observation by Justice Stevens that it was ironic that federal law could preempt the State from banning cigarette advertising within 1000 feet of a school since, under *United States v. Lopez*,[301] Congress would not have been able to impose a ban similar to that enacted by Massachusetts.[302] Justice O'Connor's hint about possible unconstitutionality had nothing to do with the advertising ban.

Justice O'Connor accorded similar weight to the advertising ban in deciding that the Food and Drug Administration ("FDA") lacked authority to regulate tobacco products.[303] Justice O'Connor concluded that the actions taken by Congress over a thirty-five year period "created a distinct scheme to regulate the sale of tobacco products, focused on labeling and advertising" that precludes the FDA from regulating tobacco products.[304] These two decisions grant substantial weight to the federal advertising ban.[305] While they do not ratify the action as

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[296] *See infra* notes 303-305 and accompanying text.

[297] *See Lorillard Tobacco*, 533 U.S. 525.

[298] *See id.* at 546.

[299] *See id.* at 548.

[300] *See id.* at 550 ("Massachusetts did not raise a constitutional challenge to the [Federal Cigarette Labeling and Advertising Act] . . . .").

[301] 514 U.S. 549 (1995).

[302] *See Lorillard Tobacco*, 533 U.S. at 598-99 n.8 (Stevens, J., concurring in part, dissenting in part).

[303] *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

[304] *Id.* at 155.

[305] *See also* United States v. Edge Broadcasting Co., 509 U.S. 418 (1993) (upholding federal rule allowing only broadcasters in States with legal lotteries to advertise lotteries). The *Edge Broadcasting* Court stated:

> Congress clearly was entitled to determine that broadcast of promotional advertising of lotteries undermines North Carolina's policy against gambling, even if the North Carolina audience is not wholly unaware of the lottery's existence. Congress has, for example, altogether banned the broadcast advertising of cigarettes, even though it could hardly have believed that this regulation would keep the public wholly ignorant of the availability of cigarettes.

constitutional, neither do they betray the slightest hesitation concerning the 1969 Congressional decision.

Even though the ban is popular and has received favorable judicial references, it is possible that the television and radio advertising ban is unconstitutional. The reason for this judgment is the recent trend in commercial speech cases. The ban was enacted and upheld prior to the extension of First Amendment protection to advertising.[306] This, coupled with the then-prevailing recognition of greater federal authority over broadcast media,[307] resulted in the advertising ban not raising a significant constitutional issue when it went into effect in 1971.

Today, the advertising ban is in tension with recent caselaw that criticizes any government ban of a nonmisleading advertising which arises out of a fear that people may believe and act on the message conveyed. As early as 1980, the *Central Hudson* Court stated that "in recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity."[308]

The clearest justification for a ban on television and radio cigarette advertising is that such advertising increases cigarette smoking, which poses a severe health hazard for its users. Rhode Island tried a similar argument in its attempt to ban price advertising for liquor products in *44 Liquormart*. Justice Stevens' plurality opinion distinguished between restrictions on commercial speech that protect consumers from commercial harms like deceptive sales practices, which receive "less than strict review,"[309] and "a blanket prohibition against truthful, nonmisleading speech about a lawful product," which must be reviewed with "special care" and which "rarely survive constitutional review . . . ."[310] Justice Stevens concluded that the First Amendment does not allow the State to suppress "truthful, nonmisleading information for paternalistic purposes. [311]

Justice O'Connor's concurrence in *44 Liquormart*, applied the *Central Hudson* test[312] and found that the price advertising ban violated the fourth part of the test,

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Id. at 434.

[306] *See Capital Broadcasting*, 333 F. Supp. 582 (D.D.C. 1971).

[307] *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (upholding access regulations in broadcast media under Fairness Doctrine).

[308] *Central Hudson*, 447 U.S. at 566.

[309] *See 44 Liquormart*, 517 U.S. at 501-02, 504.

[310] *Id.* at 504.

[311] *See id.* at 510.

[312] It is not really clear what standard Justice Stevens applied in *44 Liquormart*. He stated that:

> [E]ven under the less strict standard that generally applies in commercial speech cases, the State has failed to establish a 'reasonable fit' between its abridgment of speech and its temperance goal . . . . It necessarily follows that the price advertising ban cannot survive the more stringent constitutional review . . . appropriate for the complete suppression of truthful, nonmisleading commercial speech.

Id. at 507-08.

that the regulation of commercial speech not be more extensive than necessary to serve the State's interest.[313] Rhode Island's justification was that the price advertising ban would raise liquor prices, and the price increase would discourage consumption. O'Connor believed that reduced consumption could be more readily accomplished by taxes, minimum prices, or conducting an educational campaign about the dangers of alcohol consumption.[314]

At first glance, it might appear that the federal ban on cigarette advertising on television and radio might fare better because the price advertising ban in *44 Liquormart* only bore an indirect relationship to the goal of reduced liquor consumption. But, as Justice Thomas pointed out in his concurrence in that case, the opinions of Justice Stevens and Justice O'Connor

> would appear to commit the courts to striking down restrictions on speech whenever a direct regulation . . . would be an equally effective method of dampening demand by legal users. But it would seem that directly banning a product (or rationing it, taxing it, controlling its price, or otherwise restricting its sale in specific ways) would virtually always be at least as effective in discouraging consumption as merely restricting advertising regarding the product . . . .[315]

Thus, in Justice Thomas' view, advertising bans to discourage consumption will always ultimately fail the *Central Hudson* test, even assuming that the Court would accept the suppression of truthful speech as legitimate means of suppressing demand for a product.[316] Justice Thomas' observation about the likelihood of a finding of unconstitutionality would seem to apply even to a less-than-complete ban, like the federal cigarette advertising ban, which allows advertising of the product in question in print and other media.

The federal advertising ban thus appears vulnerable in terms of its full original purpose—the general dampening of demand for cigarettes.[317] However, the ban could also be defended as a way to prevent, or lessen, underage smoking.[318] This justification might support a ban on television and radio advertising at all hours, because the age of lawful smoking (eighteen) is so high that some young people might be watching television or listening to radio at any hour of the day. Furthermore, the inability of parents to monitor and control the content of the broadcast media also supports the ban.[319]

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[313] *See id.* at 529 (O'Connor, J., concurring).

[314] *See 44 Liquormart*, 517 U.S. at 530 (O'Connor, J., concurring).

[315] *Id.* at 524 (Thomas, J., concurring).

[316] There is language in *Lorillard Tobacco*, 533 U.S. at 558, that does not necessarily reflect Justice Thomas' insight in *44 Liquormart*. The *Lorillard Tobacco* Court stated that "[i]n previous cases, we have acknowledged the theory that product advertising stimulates demand for products, while suppressed advertising may have the opposite effect." *Id.*

[317] *See Capital Broadcasting*, 333 F. Supp. at 585.

[318] *See id.* at 585-86.

[319] Justice Brennan describes the broadcast media in *FCC v. League of Women Voters*,

Nevertheless, as substantial as these justifications may seem, they may not be sufficient to satisfy the fourth prong of the *Central Hudson* test as illustrated by the Court's striking down the 1000-foot advertising ban of smokeless tobacco and cigars products in *Lorillard Tobacco Co.* The Court applied a searching analysis to the requirement of a careful calculation of the costs and benefits associated with the burden on speech.[320] Given that the federal cigarette advertising ban prohibits the most effective speech possible for the tobacco advertiser, Justice O'Connor's caution, even in the case of a tobacco regulation,[321] is a reminder that the interests of the speaker in his message, and of adults in receiving the message, must be seriously considered in evaluating youth-oriented advertising restrictions. Could the government show convincingly, for example, that counter-advertising plus a more limited, early evening ban, would not be more effective in reducing underage smoking than, or as effective as, the current total ban on cigarette television and radio advertising?[322]

It is unlikely that the Court would actually strike down the cigarette advertising ban in light of the ban's popularity.[323] Also, the Justices may appreciate the social benefit of the federal advertising ban. As explained above, this point is one of comparison. If the commercial speech doctrine might lead to the invalidation of the federal ban on television and radio advertising of cigarettes, then there is something wrong with the commercial speech doctrine. That "something" is the Justices' failure to consider the role democracy should play in commercial speech

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468 U.S. 364, 380 n.13 (1984), as a "uniquely pervasive presence" and "the ease with which children may gain access to the medium," in order to justify government regulation. Brennan was describing the outcome and reasoning in *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), which upheld the Commission's authority to regulate broadcasts containing "indecent" language.

[320] *See Lorillard Tobacco*, 533 U.S. at 561.

[321] *See id.* at 564 ("The State's interest in preventing underage tobacco use is substantial, and even compelling, but it is no less true that the sale and use of tobacco products by adults is a legal activity. We must consider that tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products.").

[322] What evidence there is on this issue suggests that counter advertising might be more effective than any kind of ban. In the one "experiment" with counter ads compared to bans on promotional advertising, there was a decline in cigarette consumption during the period of counter advertising: "[T]he decrease in consumption coincided perfectly with the appearance of anti-smoking advertisements in broadcasting and . . . declining consumption halted the year that cigarette ads, and consequently, anti-smoking ads were removed from radio and television . . . ." Sally L. Venverloh, *The Harking Amendment: The Constitutionality of Limiting Deductions for Tobacco Advertising*, 13 ST. LOUIS. U. PUB. L. REV. 787, 798 (1994).

[323] Public opinion probably is a factor in Supreme Court decision-making. *See* LAWRENCE BAUM, THE SUPREME COURT 129-43 (4th ed. 1992) (asserting that mass public opinion and Congress are among the factors that influence the Court's decisions).

doctrine.

B. The Uncertain Relationship of the Commercial Speech Doctrine to Democracy

What is wrong with the commercial speech doctrine? Because the Justices have not considered the relationship of advertising to democracy, the law in this field bears an uncertain, if not to say destructive, relationship to our political life?[324] With the exception of the value of transparency—the need of policy making in democracy to be open[325]—the commercial speech cases do not contribute to democracy because they do not see the need to consider democracy.

The cases also have their own negative effect on political life. As the debate over federal cigarette advertising ban suggests, the Justices have not left much room for democratic action with regard to advertising. On purely technical grounds, this is because the Justices are mistaken about what a misleading advertising is. Any cigarette advertisement that does not show a person dying from lung cancer, for example, is misleading because the product tends to injure and kill its users with normal use. In this sense, Justice Thomas is wrong to link tobacco restrictions with restrictions on alcohol and fast foods, which are products that can be used safely.[326] This view that advertising is not all or mostly misleading is superficial. The failure of the Justices to limit First Amendment protection to verifiable advertising claims has removed the potential for government restriction on advertising's most manipulative aspects. The rhetoric in the opinions about "truthful" information is an even more significant illustration that democratic action is essentially barred in the commercial speech area. This language may be appropriate in a case about price advertising, like *44 Liquormart*, but it has nothing to do with the billboards at issue in *Lorillard Tobacco*. The advertisers in that case simply wanted name recognition and a "cool image" for the young—not to say underage—market. These advertisements

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[324] *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 813 (1999) (finding that "moving from free speech to free markets" detaches the First Amendment from democracy); *see also supra* note 216 and accompanying text for Justice Blackmun's comment about advertising's contribution to public policy. The Court has not returned to this theme, which would require the Court to confront the political impact of advertising.

[325] Transparency is served by not allowing government advertising limits to mask government policy. *See 44 Liquormart*, 517 U.S. at 503 (stating that "commercial speech bans . . . impede debate over central issues of public policy"); *Central Hudson*, 447 U.S. at 575 (Blackmun, J., concurring) (contending that the dampening of demand by an advertising ban "deprive[s] the public of the information needed to make a free choice . . . . [T]he State's policy choices are insulated from the visibility and scrutiny that direct regulation would entail . . . .").

[326] Justice Thomas argued that if commercial speech doctrine permitted regulation of tobacco advertising because of tobacco's threat to public health, there would be no "principle of law or logic that would preclude the imposition of restrictions on fast food and alcohol advertising similar to those . . . [sought for] tobacco advertising." *Lorillard Tobacco*, 533 U.S. at 589 (Thomas, J., concurring).

are essentially stimulation plus a name. They do not constitute "speech" any more than a laser in the eye or riding a roller coaster. The commercial speech doctrine should at least permit regulation of advertisements that contain "no message" at all.[327]

Beyond these proposals to allow space for democratic action on the issue of advertising, is there any other way for public action to be taken with regard to advertising? Is there any way for realistic debate to take place concerning the overall danger of advertising in the context of regulatory proposals that would not be obviously unconstitutional?[328]

Ironically, and despite the restrictions on government regulation of advertising identified above, the current commercial speech doctrine may actually permit wide-ranging government regulation of overall levels of advertising. Dealing with the relationship of advertising to global warming and consumption, for example, would not involve advertising limits on a particular product, but advertising limits in general. For example, the government could regulate when, where, and how much advertising takes place, through means such as banning advertising from 8 to 10 p.m.[329]

Would such time, place, and manner restrictions be constitutional?[330] Any ban on the advertising of a particular product, in order to suppress demand, is likely to be struck down, as in *Lorillard Tobacco*, either as too restrictive a limit on commercial speech or as a content-based restriction subject to careful or strict scrutiny[331] A ban on all advertising during certain times or places would reflect

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[327] In a *Dilbert* comic strip, an advertising firm representative describes the advertising campaign for the company as follows: "I see a gaseous cloud and some music . . . . No, just a noise." "Excellent," replies the company executive, who then asks, "And then we say the name of our company? "Sure, if you want to ruin the ad," replies the ad man. Scott Adams, *Dilbert*, BOSTON GLOBE, Aug. 15, 2002, at D16. The distinction between informational and promotional advertising is used in other legal systems. *See* COLLINS & SKOVER, *supra* note 1, at 101.

[328] It is beyond the scope of this Article to consider why the doctrines of constitutional law have the political effect that they do. Suffice it to say, proposals in the political realm that are viewed as unconstitutional under current Supreme Court doctrine face serious hurdles in stimulating public debate. A societal debate about the meaning and effect of advertising, let alone political action to do something about it, is much less likely to occur in the current legal context.

[329] This proposal is wildly unrealistic and would not be adopted, but the point is to ask what kinds of democratic action are potentially open with regard to advertising.

[330] The different treatment by the Court of content regulation, which is subject to careful and strict review and content neutral regulation, especially of the time, place, manner, and type, is perhaps the core conceptual category of First Amendment analysis. See Kenneth Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 28 (1975). *See also* Martin Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981) (criticizing the distinction but acknowledging its current role).

[331] In *Lorillard Tobacco*, the Court ruled that the outdoor advertising restrictions failed the fourth prong of the *Central Hudson* analysis, which requires "a reasonable fit between

content neutrality and would likely be sustained. Such a ban probably would not be thought to "single out certain ideas for suppression."[332] Advertising restrictions that deal with advertising's overall effects on public attitudes toward consumption may therefore be constitutional.[333] The commercial speech doctrine may allow total bans on advertising or total bans of limited duration, which would be aimed at lessening the power of advertising in general. Such a ban presumably still could not single out commercial speech alone without running afoul of the commercial/noncommercial speech distinction that was found not to be content-neutral in *Discovery Network*.[334]

A determination that a general advertising restriction is content neutral would support, but not necessarily ensure, that such a limit is constitutional. Constitutionality at that point would depend on whether the restrictions were narrowly tailored and whether ample alternative avenues of speech were available.[335] Alternatives would certainly be available in the case of advertising restrictions limited to broadcast media. As for narrow tailoring, the Court's view would depend on how it conceptualized commercial speech. If the Court continued to view advertising as non-political, time, place and manner restrictions would probably be allowed.

The constitutionality of general restrictions on advertising is important if there is any validity to Vance Packard's fear that advertising is changing the kind of people that we are and the kind of society in which we live. If general restrictions on advertising are constitutional, then society could, in theory, take some action to defend itself against the current commercial onslaught.

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the means and ends." *Lorillard Tobacco*, 533 U.S. at 561. On the other hand, Justice Thomas found the Massachusetts regulatory program to be content based because the goal of the program was to suppress public response to the idea of using tobacco products. *See id.* at 573-74 (Thomas, J., concurring).

[332] *See 44 Liquormart*, 517 U.S. at 501 ("[C]omplete speech banks, unlike content-neutral restrictions on the time, place or manner of expression . . . are particularly dangerous . . . . Our commercial speech cases have recognized the dangers that attend governmental attempts to single out certain messages for suppressions.").

[333] Regulations aimed at the overall effect of advertising could be written so as to run the risk of content-based invalidation. An example would be a regulation that bans advertising that "unduly promotes consumption" or "fails to promote an ultimately sustainable economy." An alternative to time, place, and manner restrictions would be to put warnings on commercial advertising, (such as a warning label that low mileage per gallon vehicles promote dependence on foreign oil), or to require counter consumption messages. This, however, would raise its own First Amendment issues.

[334] *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) (finding a ban on commercial news racks only unconstitutional).

[335] *See* United States v. Grace, 461 U.S. 171, 177 (1983) ("[T]ime, place and manner restrictions are permissible if they are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication") (quoting Perry Educ. Ass'n v. Perry Local Educ. Ass'n, 460 U.S. 37, 45 (1983)).

The problem of advertising and consumption perhaps could be dealt with by fundamental debate about limiting advertising's power through stringent restrictions. The commercial speech doctrine then perhaps does allow space for democratic action and democratic debate about the dangers of advertising.

This conclusion is ironic, however, because these sorts of limits might be considered constitutional precisely because the Justices do not understand the nature of advertising and its effects on political life. The concepts and categories associated with the commercial speech doctrine assume that proposing a commercial transaction is not directly related to political speech. That is why commercial speech receives less protection than does core political speech under the First Amendment. That is also why a section in a constitutional law casebook that considers "government efforts to prevent the domination of the political process by wealthy individuals and business corporations"[336] treats limits on campaign contributions and issue advertisements, but does not deal with the doctrine of commercial speech. We do not conceptualize commercial advertising as having a direct effect on political life. But, as discussed above, advertising may have as much effect on political life as do elections. In fact it is the political effect of advertising that urges its regulation and restriction.

The relationship of advertising to political ideas does not usually arise with regard to restrictions on advertising a particular product. Advertisements of particular products usually have no direct political fallout. But, as suggested above, in the case of certain products, like cigarettes, even individual product advertising may have direct political effects. In terms of advertising as a whole, if Vance Packard is right about advertising's effects and my speculation about the global warming issue has some validity, the overall effect of advertising is close to what the Court would consider core political speech. An explicit argument that unlimited consumption is the proper end of humankind might be unhealthy, but it is undeniably protected by the First Amendment. All commercial advertising may contain this message.

Thus, we return to Robert Post's example.[337] The question now is whether government may limit advertising in general, and not whether government may limit the advertising of a certain product for political reasons.[338]

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[336] CHOPER, *supra* note 100, at 1005.

[337] *See supra* note 282 and accompanying text.

[338] Smolla observed that "[i]n classic First Amendment terms . . . the one thing the government may not do is regulate speech because it 'sells' a lifestyle, fantasy, ethos, identity, or attitude that happens to be regarded by most as socially corrosive." Smolla, *supra* note 75, at 780-81. This does not apply to general government regulation of advertising because such regulation would be regarded as content neutral. "Classic" First Amendment terms do not easily apply to regulation of a whole type of speech premised on its implied effects and not its "message." It is not obvious, for example, that a "no advertising" rule from 8 to 10 p.m. would violate classic First Amendment precedent. It is odd for Smolla to criticize as "undemocratic" the concern about the effects of advertising. *See id.* at 783. One can say that the commercial speech doctrine, which

Of course, if serious public debate ever takes place about the role of advertising in modern life, the Justices might come to see commercial speech differently. Until now, there has been something of a debate between critics who view advertising as degrading to culture and defenders who argue that it isjust as expressive as other forms of communication.[339] The recognition by the Court of the true nature of advertising, including its political role, would thus bring about a crisis in First Amendment doctrine. For the Justices would then be faced with a dilemma. On one hand, advertising would have to be recognized as the hidden persuader and powerful, dangerous, social practice that it is, and not as cultural junk.[340] The contribution of advertising to our mania for consumption and its possible effect on global warming would have to be confronted. The danger it poses to democracy would have to be evaluated. On the other hand, however, the ideological power implied by that recognition would tempt the Justices to treat advertising as if its indirect and implied messages were argued openly. The Court might well say that advertising cannot be limited, and the only cure for the harms of advertising is, ironically and tragically, more advertising.[341]

Ultimately, the question is whether the Justices will come to see advertising as unique—as different from movies or novels or plays. Not because it is not informative and not because it is not rational. Clearly the First Amendment protects emotive content from government regulation. Justice Harlan recognized that long ago.[342] Supporters of commercial speech are right to say that it is not enough to ban speech that the majority thinks it of little value,[343] and artistic

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Smolla defends, is undemocratic. That is why the doctrine exists. Urging the courts to let the American people consider limiting advertising may be a bad idea, but it is at least democratic. Similarly, Smolla's criticism of the effect of advertising on our culture as "elitist" is misplaced. *See* Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 801 (1999). It is ironic that those who purport not to be elitist are opposed to allowing the general public decide what role advertising should have in our society.

[339] For participants in this debate, see Halberstam, *supra* note 338, at 800-03.

[340] *See* BURT NEUBRONE, FREE SPEECH—FREE CHOICE 19 (1987) ("As a means of expressing shared values and a common national ideology, advertising dwarfs any other genre of communication.").

[341] This is essentially the argument, on a product-specific basis, of those who criticize limits on cigarette advertising. *But see* Richards, *supra* note 211, at 1200-02 (turning anti-cigarette advertising arguments on their head by pointing out that if every cigarette advertisement contains a message that smoking is a good thing, as critics of such ads maintain, then the advertisements should be protected by the First Amendment as if they expressly argued that smoking is a good thing).

[342] *See* Cohen v. California, 403 U.S. 15, 26 (1971) ("[M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well.").

[343] *See* Berman, *supra* note 47 at 752 ("[I]t strikes [Kozinski and Banner] as odd to argue that a particular form of speech shouldn't receive First Amendment protection solely because that speech has little value. This is exactly the type of argument the First

expression must be protected.[344]

Modern advertising is unique in other senses. Its power is unique. Its profit motive is unique. Its pervasiveness is unique. Its unified voice is unique. Music and plays and literature do not all push in one direction, as advertising does toward consumption. They do not press us in a manner mostly hidden, totally pervasive, extremely profitable and possibly even unintended. Advertising works because it is not argument, because it is driven only by profit, because it is not a search for truth and because it is not human.

In the future, will we be subject to advertising without the right to try to control it? Hopefully, the Justices will permit the people to decide their own fate. Commercial advertising cannot be allowed to overwhelm our political institutions and to decide our destiny without our consent. Law must, therefore, relinquish its grip in this area and let the democratic dialogue begin.

What if we fail to consider advertising's effect on democracy? The acceptance of advertising may not proceed from First Amendment doctrine at all, but from other sources, such as the failure of the Enlightenment. It may be our fate to "abandon[] the pretenses of the Enlightenment: absolute truths, reasoned inquiry, civilized public discourse, informed decisionmaking, and restrained self-realization."[345] What if we are destined to "embrace openly the conventions of popular culture: contingent truths, entertainment ideology, imagistic talk, compulsive consumption, and libidinous self-gratification."[346] What if the law has nothing to do with these tendencies, except perhaps to ratify them, because these "are the free speech codes by which our culture elects to live."[347] Perhaps this post-modernist position taken by Collins and Skover is right.[348]

If Collins and Skover are right, then the Madisonian experiment with democratic self-rule is also over. But has this been "elected" by popular culture? At the very least, the law should not impede this discourse. By de-constitutionalizing commercial advertising, the general public can decide the role of advertising. Because constitutional doctrines restrict democratic decisionmaking, such decisionmaking has not been possible.

Collins and Skover uncritically view "compulsive consumption" because they fail to acknowledge the environmental crisis facing humankind. Nothing in their book demands a political response. To them, passive citizenship has no negative consequences. They see humanity as self-sufficient rather than dependent. Thus, they can afford to cheerfully observe our hedonism.

Global warming and other environmental threats show that mankind is not

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Amendment should foreclose."). Daniel Halberstam has called this "[t]he most provocative rebuttal of the cultural criticism of commercial speech." Halberstam, *supra* note 338, at 803.

[344] *See* Law, *supra* note 5, at 932.

[345] COLLINS & SKOVER, *supra* note 1, at 211.

[346] *Id.* at 214.

[347] *Id.*

[348] *Id.*

independent. Humans must make decisions that have serious consequences. People are not necessarily selfish or short-sighted buffoons. Faced with the need to decide, the people may prove more willing to deliberate than Collins and Skover assume. Moreover, maybe the people would deliberate more if the drumbeat of consumption were lessened.

Nevertheless, the view of Collins and Skover cannot be dismissed. What would happen if courts did relax their grip on the regulation of advertising? Would there be a political debate about the nature of advertising and its effects on our lifestyles? Would there be soul searching about our relationship to nature and consumption? Would we consider legislation to turn off our television sets and palm pilots and the malls, go back to a six-day week and in other ways turn back the avalanche of retail consumption that our lives have become?

The answer to these questions is likely no. For one thing, the media absolutely depends on advertising. Political life is, in a certain sense, dependent on advertising.[349] No one knows what a less materially oriented society would be like, or how one might go about achieving it. Society is held in the grip of technological forces, and it is by no means obvious that we have the insight or the will to begin to extricate ourselves. American society also does not have the kind of political institutions that could help approach these questions.

In the end, what difference do the advertising cases make? Perhaps none in terms of result. There is no guarantee that changing them or altering the doctrines would lead to democratic deliberation. At the moment we are held powerless by both advertising and law. If the courts removed the bond of law, society might at least see that it is truly enslaved. Society owes itself this knowledge.

VI. CONCLUSION

We live in corporate advertising's democracy. This is the meaning of the constitutional protection of advertising.

There are many questions in our condition. Has judicial action helped produce this state or has it been a mere recognition of it? What effects do corporate advertising have on us? Is any different situation actually possible?

Thus far, the law has not helped us illuminate our situation. Corporate advertising did not need the Court's protection in 1975, nor is advertising in any danger today. The Court has put the law in the way of democratic evaluation of what, if anything, is to be done. The Justices have not even attempted to understand democracy and corporate advertising together. Therefore, the Court is not now capable of assisting us.

No pure democracy—that is, one untouched by the unknown effects of corporate advertising—is attainable today, and any attempt along that line would lead to befuddling nostalgia. My suggestions here about the effect of corporate

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[349] *See generally* C. EDWIN BAKER, ADVERTISING AND A DEMOCRATIC PRESS (1994) (noting negative implications of advertising for democratic politics and culture).

advertising on our efforts to deal with global warming are merely speculative, first attempts. No one can tell what the popular will would be if we did not have advertising or if we had less of it.

The great American debate of the twenty-first century is not going to be about terrorism in particular or religion in general. It is going to be about the relationship of our consumption lifestyle to everything else--nature, population, wealth, our own happiness, and the divine. During this century we will awaken as if from a dream and wonder how retail activity and commercial empire came to dominate our lives without our quite realizing it. We will then shrug off the excesses of the commercial speech cases. We will then begin to replace corporate advertising's democracy with a democracy that more approximates the real thing.