

## THE COMMERCIAL DIFFERENCE

FELIX T. WU\*

### ABSTRACT

*When it comes to the First Amendment, commerciality does, and should, matter. This Article develops the view that the key distinguishing characteristic of corporate or commercial speech is that the interest at stake is “derivative,” in the sense that we care about the speech interest for reasons other than caring about the rights of the entity directly asserting a claim under the First Amendment. To say that the interest is derivative is not to say that it is unimportant, and one could find corporate and commercial speech interests to be both derivative and strong enough to apply heightened scrutiny to the restrictions that are the usual subject of debate, namely, restrictions on commercial advertising and restrictions on corporate campaigning.*

*Distinguishing between derivative and intrinsic speech interests, however, helps to uncover three types of situations in which lesser or no scrutiny may be appropriate. The first is in the context of compelled speech. If the entity being compelled is not one with intrinsic speech rights, this undermines the rationale for subjecting speech compulsions to heightened scrutiny under the First Amendment. The second is in the context of speech among commercial entities. In these cases, the transaction may be among entities none of which merit intrinsic First Amendment concern. The third is in the context of*

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\* Professor of Law, Benjamin N. Cardozo School of Law. Thank you to Jane Bambauer, Ashutosh Bhagwat, Vince Blasi, Marc Blitz, Bruce Boyden, Eric Goldman, James Grimmelman, Tom Joo, Helen Norton, Paul Ohm, Tamara Piety, Blake Reid, Neil Richards, Pierre Schlag, Kathy Strandburg, Alex Tsesis, Jane Winn, and participants at the 2014 Freedom of Expression Scholars Conference, the 2014 Privacy Law Scholars Conference, the Hofstra IP Colloquium, the University of California at Davis faculty workshop, and the University of Colorado faculty colloquium for helpful comments and discussions.

*unwanted marketing. It makes no sense to protect listeners' access to information they do not want to receive.*

*Highlighting the difference that commerciality makes helps to better explain certain exceptions, or apparent exceptions, that existing case law already makes to heightened scrutiny. It also provides insight into a number of current controversies, such as those over cigarette and product labeling. It has particularly important implications for consumer privacy regulation, suggesting that regulation of both the consumer data trade and commercial data collection merit significantly less scrutiny than might be applied to restrictions on the privacy-invasive practices of ordinary individuals.*

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## INTRODUCTION

Courts and commentators have struggled for some time to determine what, if anything, is different about “commercial speech” or “corporate speech,” as compared to “fully protected speech.” Many share an intuition that either commercial speech, corporate speech, or both are in some way lesser forms of speech, less deserving of the protections of the First Amendment and more readily subject to government regulation.<sup>1</sup> Others say there is no principled way to distinguish corporate and commercial speech from types of speech that the court fully protects, and thus see doctrines that treat commercial speech or corporate speech as their own First Amendment categories as unwarranted and unprincipled encroachments upon free expression.<sup>2</sup>

This Article develops the view that corporate and commercial speech are different, but that whether the difference matters varies with the context in which the question arises. The key distinguishing characteristic of corporate or commercial speech is that the speech interest at stake in these contexts is “derivative,” in the sense that we care about the speech interest for reasons other than caring about the rights of the entity directly asserting a claim under the First Amendment.<sup>3</sup> We assign such speech rights to the entity asserting them for instrumental purposes, to vindicate what are really the speech rights of others. In some cases, we may mean to vindicate the rights of others as listeners; in other cases, the rights

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1. See, e.g., *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978) (recognizing a “commonsense” distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech” (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976))); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 804-05 (1978) (White, J., dissenting) (“[A]n examination of the First Amendment values that corporate expression furthers and the threat to the functioning of a free society it is capable of posing reveals that it is not fungible with communications emanating from individuals and is subject to restrictions which individual expression is not.”).

2. See, e.g., MARTIN H. REDISH, *MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY* 2 (2001).

3. See Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*, 79 CALIF. L. REV. 1229, 1233-34 (1991) (distinguishing between “original” and “derivative” speech rights).

of others as speakers.<sup>4</sup> To be sure, those third-party interests are potentially implicated in every dispute over speech. What makes corporate and commercial speech different is that those third-party interests are the *only* interests that matter.

The fact that a speech interest is derivative need not undermine its strength or importance. The key Supreme Court opinions on corporate and commercial speech have thus far arisen largely in the context of restrictions on commercial advertising<sup>5</sup> and restrictions on corporate campaigning.<sup>6</sup> In these contexts, the derivative nature of the speech interests at stake is entirely consistent with an argument that commercial speech and corporate speech should receive full protection under the First Amendment. Even if third-party interests are the ones that really matter, one could view those interests as being equally harmed whether the speech being restricted is commercial or noncommercial, corporate or noncorporate. For example, one could take the view that in all cases speech restrictions undermine the autonomy of willing listeners.

Distinguishing between derivative and intrinsic speech interests, however, helps to uncover three types of situations in which the regulation of corporate or commercial speech does not deserve the same First Amendment scrutiny as an equivalent regulation of noncommercial, noncorporate speech. The first is when the regulation compels speech rather than restricts it.<sup>7</sup> Speech compulsions are problematic primarily because of their effects on the person being compelled. If the compulsion is directed not to a person, but to an artificial entity with no intrinsic rights to “freedom of mind,” then the rationale for heightened scrutiny of speech compulsions dissolves. The same can and should be said about compulsions directed to individuals who are acting in a commercial, rather than personal, capacity.

A second context in which the derivative nature of speech interests matters is that of speech that occurs among commercial

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4. *See id.* at 1234 (distinguishing between a “passive derivative speech right,” one which is meant to protect the interests of listeners, and an “active derivative speech right,” one which is meant to protect the interests of other speakers).

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

6. *See generally, e.g.*, *Citizens United v. FEC*, 558 U.S. 310 (2010).

7. *See infra* Part II.

entities.<sup>8</sup> The paradigmatic commercial speech case envisions an advertiser communicating with a consumer.<sup>9</sup> The paradigmatic corporate speech case is usually one in which corporations are speaking to voters.<sup>10</sup> If heightened scrutiny of corporate or commercial speech is justified primarily by the interests of the noncommercial listener, then such scrutiny may no longer be justified when the listener is equally commercial. In that case, none of the parties to the transaction may have an intrinsic First Amendment interest, and thus, there is no third-party interest to protect by giving the speaker a derivative claim.

The third situation in which recognizing derivative interests matters is in the context of unwanted marketing.<sup>11</sup> The problem of unwanted speech has often been conceptualized as a conflict between the speaker's right to speak and the listener's desire to avoid that speech.<sup>12</sup> When the speech is commercial, however, there are no longer two sides in conflict. If the commercial speaker's protection is derivative of the listener's interests, then only the listener really matters. And if listeners' access to information is the value being protected, then listeners who are trying to reject that information neither need nor want such protection.

Highlighting the derivative nature of corporate and commercial speech interests helps to better explain certain exceptions, or apparent exceptions, that existing case law already makes to heightened scrutiny. For example, antitrust laws have long prohibited price collusion among competitors, without worrying about any First Amendment limits on the government's ability to stop one company from conveying price information to another.<sup>13</sup>

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8. See *infra* Part III.

9. See, e.g., *44 Liquormart*, 517 U.S. at 490-91.

10. See, e.g., *Citizens United*, 558 U.S. at 325.

11. See *infra* Part IV.

12. See *Hill v. Colorado*, 530 U.S. 703, 714 (2000) (casting the relevant question as "whether the Colorado statute reflects an acceptable balance between the constitutionally protected rights of law-abiding speakers and the interests of unwilling listeners" and finding that "each [side] has legitimate and important concerns"). *But see McCullen v. Coakley*, 134 S. Ct. 2518, 2546 (2014) (Scalia, J., concurring in the judgment) ("Protecting people from speech they do not want to hear is not a function that the First Amendment allows the government to undertake in the public streets and sidewalks.").

13. See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1781 (2004).

Within the framework developed here, this result is easily understood as a natural consequence of the information being passed solely from one commercial entity to another. Similarly, the Fair Credit Reporting Act's restrictions on disseminating consumer reports make perfect sense under a similar analysis.<sup>14</sup>

Understanding the "commercial difference" also has important implications for current controversies, ranging from cigarette and other product labeling to privacy regulation. In prior work, I examined the constitutionality of consumer privacy regulation, concluding that most such regulation should be subject to minimal First Amendment scrutiny as either a form of commercial compelled speech or a regulation of speech among commercial entities.<sup>15</sup> This Article provides the general theoretical framework for the conclusions of that earlier work and broadens the application of the framework beyond the examples explored there.

This Article draws upon a broad literature that so far has generally addressed the relevant issues in isolation, with respect to commercial speech, corporate speech, compelled speech, or the interface between privacy law and freedom of expression.<sup>16</sup> Bringing the disparate theories together within a single framework exposes the discontinuities among them and reveals why protection for commercial speech and compelled speech separately need not lead to the conclusion that commercial compelled speech should be equally protected or why skepticism about some types of privacy laws on free expression grounds need not suggest skepticism for all privacy laws on such grounds.

In what follows, Part I explains the theory of derivative speech interests and shows how a wide variety of conceptions of corporate or commercial speech fit the model. Part I.C describes why this framing does not necessarily change the results of the existing jurisprudence around corporate campaigning or commercial adver-

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14. See *infra* Part III.A.

15. See Felix T. Wu, *The Constitutionality of Consumer Privacy Regulation*, 2013 U. CHI. LEGAL F. 69, 94.

16. A notable exception is recent works on compelled commercial speech. See, e.g., Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539 (2012); Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867 (2015). My framework is distinct from the ones developed in those works. See *infra* note 165 and accompanying text.

tisements. The subsequent Parts describe the types of cases in which the derivative status of corporate and commercial speech makes an important difference. Part II explores the implications for speech compulsions. Part III examines transactions among commercial entities. Finally, Part IV addresses restrictions on unwanted marketing.

### I. DERIVATIVE SPEECH INTERESTS

Sometimes we recognize a First Amendment claim because there is intrinsic value in protecting the interests of the claimant. In the paradigmatic First Amendment case, the government has tried to prevent someone from speaking, and the silenced person is asserting a personal right not to have the government interfere with his or her speech.<sup>17</sup> There may also be other people whose speech rights are at stake, but the claimant's speech rights are at least among them.

In other cases, however, the entity asserting the First Amendment claim may not be one whose speech rights we actually care about. Instead, we allow such an entity to assert the claim in order to protect the interests of others. In such cases, we might say that the relevant speech interests are "derivative" rather than intrinsic.<sup>18</sup> It could be that the ultimate interests are those of the audience or recipients of the speech.<sup>19</sup> Or it could be that the First Amendment claim helps to protect someone else's ability to speak.<sup>20</sup>

Corporate speech and commercial speech should both be understood to be derivative speech interests. In each case, the major justifications for generally protecting freedom of expression point toward protecting corporate and commercial speech only to protect the speech interests of others, not to protect any direct interest of the corporate or commercial speaker. This understanding of

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17. See, e.g., *United States v. Alvarez*, 132 S. Ct. 2537, 2542 (2012) (plurality opinion) (involving a First Amendment claim raised by a person convicted of lying about having received the Congressional Medal of Honor); *Brandenburg v. Ohio*, 395 U.S. 444, 444-45 (1969) (per curiam) (involving a First Amendment claim raised by a Ku Klux Klan leader convicted of advocating violence under Ohio's criminal syndicalism statute).

18. See Dan-Cohen, *supra* note 3, at 1233-34.

19. Dan-Cohen calls these "passive" derivative speech interests. See *id.* at 1234.

20. Dan-Cohen calls these "active" derivative speech interests. See *id.*

corporate and commercial speech need not undermine the existing doctrinal structures that the Supreme Court has built around these types of speech, but it does have important implications that the subsequent Parts will explore.

### A. *Corporate Speech*

The status of corporations, as compared to natural persons, has been a pervasive and continuing source of controversy across many different areas of law.<sup>21</sup> Prominent among the controversies is the question of what sort of protection corporate speech receives under the First Amendment, particularly in the area of corporate campaign speech and financing. The Supreme Court has alternately recognized a First Amendment right of corporations to contribute to campaigns,<sup>22</sup> upheld a prohibition on using general corporate treasury funds to support or oppose political candidates,<sup>23</sup> and then reversed course by striking down a prohibition on the use of general corporate treasury funds for electioneering.<sup>24</sup> The Court's decision in *Citizens United v. FEC* in particular has generated not just academic commentary, but much public discussion about its merits both as a legal and social policy matter.<sup>25</sup>

The debate over *Citizens United* has sometimes been popularly framed as one about whether "corporations are people."<sup>26</sup> That

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21. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014) (holding that the Religious Freedom Restoration Act of 1993 does protect "a for-profit closely held corporation"); *FCC v. AT&T Inc.*, 562 U.S. 397, 409-10 (2011) (holding that a corporation does not have "personal privacy" within the meaning of the Freedom of Information Act); *Santa Clara County v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886) (syllabus) (noting the unanimous view of the Court that the Fourteenth Amendment's Equal Protection Clause applies to corporations).

22. See *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 775-76 (1978).

23. See *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 654-55 (1990), *overruled by Citizens United v. FEC*, 558 U.S. 310 (2010).

24. See *Citizens United*, 558 U.S. at 318-19; see also *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490, 2491 (2012) (per curiam) (reaffirming the holding of *Citizens United*).

25. See, e.g., Adam Liptak, *Supreme Court Gets a Rare Rebuke, in Front of a Nation*, N.Y. TIMES (Jan. 28, 2010), <http://www.nytimes.com/2010/01/29/us/politics/29scotus.html> [<https://perma.cc/9CS4-JZTB>] (discussing President Obama's attack on the *Citizens United* decision in his State of the Union address).

26. See Ashley Parker, 'Corporations Are People,' *Romney Tells Iowa Hecklers Angry Over His Tax Policy*, N.Y. TIMES (Aug. 11, 2011), <http://www.nytimes.com/2011/08/12/us/politics/12romney.html> [<https://perma.cc/BW8Q-JTF3>]; Ross Ramsey, *Court Stays the Course on*

framing, however, is not necessarily helpful to determine what rights (or obligations) corporations should have under the law or the Constitution. On the one hand, corporations certainly do not have the moral valence of human beings. On the other hand, corporations are legal constructs to which legal rights or duties can attach, just as they can to individuals.<sup>27</sup>

The academic debate over the nature of the corporation similarly does not determine how we ought to regard corporate speech.<sup>28</sup> One view of the corporation is that it should be understood as a “natural entity,” in the sense that it arises in society through private, rather than state, action.<sup>29</sup> The fact of private creation, though, does not determine the constitutional status of the thing created. Many objects of private creation, a building, say, surely lack constitutional rights.

Alternatively, a corporation may be nothing more than an aggregation of individuals.<sup>30</sup> Yet, while in some circumstances aggregation seems to maintain or even create constitutional rights,<sup>31</sup> in other circumstances, rights that are recognized at the individual level may not be recognized at the aggregate level.<sup>32</sup>

Finally, others have viewed a corporation as an artificial entity that owes its existence entirely to the state’s largesse.<sup>33</sup> The artificial entity view might suggest that because the corporation is a

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*Politics and Business*, N.Y. TIMES (June 28, 2012), <http://www.nytimes.com/2012/06/29/us/court-affirms-blessing-on-corporate-financed-political-ads.html> [<https://perma.cc/N5Z4-VZKZ>] (describing that “[t]he ‘corporations are people’ movement got a boost” in the wake of the Supreme Court’s decision in *Bullock*).

27. See 1 U.S.C. § 1 (2012) (“In determining the meaning of any Act of Congress, unless the context indicates otherwise ... the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”).

28. See James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565, 1573-74 (making a similar point with respect to corporations asserting a right to free exercise of religion).

29. See David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 211.

30. See *id.* at 222-23.

31. Freedom of association, for example, arises fundamentally from the aggregation of individuals rather than from a single individual standing alone. See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458-59 (1958).

32. Under the doctrine of associational standing, for example, not every association can assert the rights of its members. See *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977).

33. See Millon, *supra* note 29, at 206.

creation of the state, the state is free to impose whatever conditions it likes on its creation and that the corporation cannot have constitutional rights as against the state. The state's power to create or destroy, however, does not necessarily entail a power to restrict constitutional rights in the objects of its creation,<sup>34</sup> and thus, even under the artificial entity view, corporations might or might not deserve free speech rights.

Rather than looking to theories of the corporation, we need to look instead to theories of free expression to understand whether and why corporate speech deserves protection. Under any of the major theories of free expression, corporations might contribute in some way to the goals underlying those theories, but they do so instrumentally, rather than intrinsically.<sup>35</sup>

One major strand of free speech theory values free expression because of the integral role it plays in the self-development of individuals.<sup>36</sup> Speech and communication are necessary parts of defining one's identity. If the government restricts the abilities of its citizens to express themselves, then it is also limiting those citizens' abilities to construct their own identities and to choose their beliefs and values. Control over expression becomes control over thought.<sup>37</sup> Such a situation upends the democratic order, allowing the government to control the identities of its citizens, rather than the other way around.

Values of autonomy and self-development, however, are grounded in the intrinsic worth of human beings as such. They matter because people matter.<sup>38</sup> Corporations lack such intrinsic worth, and

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34. Somewhat analogously, for example, the state's power to create or eliminate limited public fora does not give the state carte blanche to discriminate among speakers within the fora it creates. *See, e.g.,* *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) ("Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms.").

35. *See generally* TAMARA R. PIETY, *BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA* (2012).

36. *See, e.g.,* THOMAS I. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 4-5 (1966); STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 5 (1993).

37. *See* Seana Valentine Shiffirin, *A Thinker-Based Approach to Freedom of Speech*, 27 *CONST. COMMENT.* 283, 294, 302 (2011).

38. *See, e.g., id.* at 287 (taking as a foundational assumption "that, for the most part, we are individual human agents with significant (though importantly imperfect) rational capacities, emotional capacities, perceptual capacities and capacities of sentience—all of which

there is little reason to attach intrinsic value to the “self-development” of corporations, if such a concept even exists.<sup>39</sup> Corporations themselves do not think or believe; they lack the “rational capacities, emotional capacities, perceptual capacities and capacities of sentience” that form the foundation for autonomy-based theories of free expression.<sup>40</sup>

Another strand of free speech theory values free expression for its role in fostering deliberative democracy.<sup>41</sup> Here too, individuals, not corporations, are the fundamental units of democracy, and it is the ability of individuals to make collective decisions that forms the basis for evaluating whether democratic ideals are being served.

Still another major strand of free speech theory posits that free expression is the means by which knowledge and truth are developed. Dissent should be tolerated not necessarily for its own sake, but because the dissenters might turn out to be right, and the dissenting views of one era might be the orthodoxy of the next.<sup>42</sup> Governments cannot and should not be relied upon to establish what is true. Instead, truth will emerge, so long as all views are permitted to vie with each other in the marketplace of ideas.<sup>43</sup>

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exert influence upon each other” and that “our possession and exercise of these capacities correctly constitute the core of what we value about ourselves”).

39. See PIETY, *supra* note 35, at 58 (“Corporations are not human beings, so they lack the expressive interests related to self-actualization and freedom that human beings possess. Corporations are not moral subjects or ends in themselves. They are a means to an end.”).

40. See Shiffrin, *supra* note 37, at 287.

41. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 12-16 (1948); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 24-26 (1971) (arguing that “the discovery and spread of political truth” is the only principled basis upon which to protect freedom of expression (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring))).

42. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[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.”).

43. See *id.* (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market .... That at any rate is the theory of our Constitution.”); see also Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 *CALIF. L. REV.* 2353, 2363 (2000) (“The theory of the marketplace of ideas focuses on ‘the truth-seeking function’ of the First Amendment.” (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988))). Daniel Farber takes the metaphor of the marketplace one step further, arguing that “because information is a public good, it is likely to be undervalued by both the market and the political system,” and therefore, information deserves special constitutional protection against regulation. Daniel A. Farber, *Commentary, Free Speech Without Romance:*

Truth-seeking theories of free expression are relatively listener-oriented and, thus, are most naturally regarded as ones in which speaker interests are derivative of listener interests, regardless of whether the speaker is a corporation. The concept of the marketplace of ideas paints a picture in which many competing ideas are all made available in the public square so that individuals have access to them all and, importantly, can exercise their own choices among them.<sup>44</sup> Those individuals, the listeners, are the ultimate beneficiaries of robust competition among ideas, much as antitrust law posits that consumers are the ultimate beneficiaries of robust competition in the market for goods and services.

Nevertheless, one might see truth-seeking theories as implicating speakers' interests as well as listeners' interests. The way to truth might not be only through listeners' access to competing views, but also through speakers giving voice to their own views. Many an idea that seems good in our heads may seem far less so once put into words.

But even if we acknowledge that speakers have an interest in truth seeking, that interest should still be regarded as derivative with respect to corporate speakers. Knowledge and truth can be understood as intrinsic values with respect to individuals, but for corporations, truth is fundamentally instrumental. Better information helps companies make money and increases overall economic efficiency. Those may be worthwhile social goals, but they are not the sorts of expressive goals protected by the First Amendment.<sup>45</sup> In other words, the ultimate value of knowledge is the knowledge that individual people have. Corporations may play an important intermediate role—more on that in subsequent Parts—but corporate knowledge is not an end in itself.

Thus, regardless of which of the major theories of free expression one might adopt, corporate speech is a derivative interest under any of them. The fundamental values that the First Amendment protects, whatever they are, inhere in individuals, not corporations.

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*Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 555 (1991).

44. See, e.g., *Hustler Magazine, Inc.*, 485 U.S. at 51.

45. See Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1217-21 (2005) (highlighting the dangers of blurring the line between political and economic rights in First Amendment jurisprudence).

The *Citizens United* case is perfectly consistent with this view of corporate speech. Despite the sharp disagreements among the Justices in the case about the relative value—and danger—of corporate campaign speech,<sup>46</sup> the competing opinions can all be read to focus at least in some measure on the derivative, rather than intrinsic, value of the speech. Perhaps unsurprisingly, the dissent quite explicitly adopted the view of corporate speech as a derivative speech interest.<sup>47</sup> The dissent then went on to argue that a business corporation cannot be understood to speak for any particular individuals, whether customers, employees, shareholders, or officers or directors.<sup>48</sup> The dissent further argued that protecting listeners' interests is precisely what regulation of corporate campaign speech is designed to do.<sup>49</sup>

But the majority opinion also described the relevant speech interests in derivative terms, focusing on the nature of the speech itself and particularly its value to listeners, rather than on any intrinsic rights in the corporation. The Court wrote that “[p]olitical speech is ‘indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.’”<sup>50</sup> Similarly, the Court focused on the need for corporate “voices and viewpoints” to “reach[] the public and advis[e] voters on which persons or entities are hostile to their interests.”<sup>51</sup>

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46. Compare, e.g., *Citizens United v. FEC*, 558 U.S. 310, 446 (2010) (Stevens, J., concurring in part and dissenting in part) (“Congress has demonstrated a recurrent need to regulate corporate participation in candidate elections to ‘[p]reserv[e] the integrity of the electoral process, preven[t] corruption, ... sustai[n] the active, alert responsibility of the individual citizen,’ protect the expressive interests of shareholders, and ‘[p]reserv[e] ... the individual citizen’s confidence in government.” (alterations in original) (quoting *McConnell v. FEC*, 540 U.S. 93, 206-07, 206 n.88 (2003))), with *id.* at 360 (majority opinion) (“The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy.... The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials. This is inconsistent with any suggestion that the electorate will refuse ‘to take part in democratic governance’ because of additional political speech made by a corporation or any other speaker.” (quoting *McConnell*, 540 U.S. at 144)).

47. See *id.* at 466 (Stevens, J., concurring in part and dissenting in part) (“Corporate speech, however, is derivative speech, speech by proxy.”).

48. See *id.* at 467.

49. See *id.* at 469-72.

50. *Id.* at 349 (majority opinion) (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978)).

51. *Id.* at 354.

The focus in *Citizens United* was on the electorate, the recipients of the political speech at issue, not on the corporate speakers.

To be sure, there is other language in the majority opinion that seems to personify corporations and to cast them as “disadvantaged”<sup>52</sup> or “disfavored”<sup>53</sup> speakers, whose “voices” have been “muffled.”<sup>54</sup> In each case though, such language is followed up with a focus on voters, or some other set of underlying individuals. In distinguishing cases in which the Court has allowed speakers to be disadvantaged, the Court wrote that “[b]y contrast, it is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes.”<sup>55</sup> Later, in specifying who had been disfavored, the Court characterized the campaign restrictions as creating “disfavored associations of citizens,” suggesting a concern for individual speakers that might underlie the corporate form.<sup>56</sup> Finally, the trouble with muffling voices was not the muffled entities’ inability to speak, but that then “the electorate [has been] deprived of information, knowledge and opinion vital to its function.”<sup>57</sup>

Thus, the competing opinions in *Citizens United* can be understood not as disagreeing about whether voters should be the ultimate focus of the inquiry, but as disagreeing about whether voters’ interests would ultimately be served by preventing corporate voices from “drowning out ... noncorporate voices,”<sup>58</sup> or by respecting those voters’ ability to receive all “voices and viewpoints” and then “to judge what is true and what is false.”<sup>59</sup> The dissenters saw

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52. *Id.* at 340-41 (“By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker’s voice.”).

53. *Id.* at 341 (“We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers.”).

54. *Id.* at 354 (“The censorship we now confront is vast in its reach. The Government has ‘muffle[d] the voices that best represent the most significant segments of the economy.’” (alteration in original) (quoting *McCannell v. FEC*, 540 U.S. 93, 257-58 (2003) (Scalia, J., concurring in part and dissenting in part))).

55. *Id.* at 341.

56. *Id.* at 356.

57. *Id.* at 354 (alteration in original) (quoting *United States v. CIO*, 335 U.S. 106, 144 (1948) (Rutledge, J., concurring in the result)).

58. *Id.* at 470 (Stevens, J., concurring in part and dissenting in part).

59. *Id.* at 354-55 (majority opinion); see also Kathleen M. Sullivan, *The Supreme Court, 2009 Term—Comment: Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 144-45

government intervention as appropriate to protect voters, whereas those in the majority found the very idea of protecting voters from speech to be illegitimate.<sup>60</sup> But all of the Justices seemed to agree that what ultimately matters is the relationship between government and voters, rather than the relationship between government and corporations and, in that sense, that corporate speech interests are derivative.

The Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*, while in the distinct context of religious freedom rather than freedom of expression, similarly emphasized the instrumental nature of corporate rights.<sup>61</sup> There the Court explained that the purpose of the "familiar legal fiction" of including corporations within the definition of persons "is to provide protection for human beings":

A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.... [P]rotecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.<sup>62</sup>

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(2010) (arguing that the competing opinions in *Citizens United* can be understood as a competition between the liberty and equality visions of free speech and that its outcome "is best explained as representing a triumph of the libertarian over the egalitarian vision of free speech").

60. See *Citizens United*, 558 U.S. at 356 ("When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves."); see also *McConnell v. FEC*, 540 U.S. 93, 258-59 (2003) (Scalia, J., concurring in part and dissenting in part) ("The premise of the First Amendment is that the American people are neither sheep nor fools, and hence fully capable of considering both the substance of the speech presented to them and its proximate and ultimate source.... Given the premises of democracy, there is no such thing as *too much* speech.").

61. 134 S. Ct. 2751, 2768 (2014).

62. *Id.*

As in *Citizens United*, the Court in *Hobby Lobby* made clear that corporate rights are essentially a fiction, a means by which the rights of natural persons are protected.<sup>63</sup>

Academic commentary on corporate speech supports the view that corporate speech interests are derivative. For example, in rejecting a distinction between commercial and noncommercial speech, Professor Martin Redish argues that the corporate nature of most commercial speech is no reason not to protect it.<sup>64</sup> In doing so, however, he emphasizes “the free speech benefits that may flow to the *listener* or *reader* from reading or hearing speech emanating from corporations,” whether or not “the speaker itself deserves the benefits of the constitutional protection,” as well as the ways in which “resort to the corporate form can be viewed as a type of ‘catalytic self-realization’ that facilitates individuals’ efforts to realize both their goals and their potential.”<sup>65</sup> Both of these are arguments about the derivative value of corporate speech, either to the audience or to individuals who underlie the corporate form. Thus, even those who view corporate speech as fully protected have done so on the basis of interests that lie outside the corporation itself.

### B. Commercial Speech

Much of what has been labeled “commercial speech” under First Amendment doctrine is also corporate speech, and thus, the derivative nature of corporate speech interests carries over to most real-world examples of commercial speech. Not all commercial speech is corporate though,<sup>66</sup> and moreover, the theory of commercial speech has not necessarily been thought to hinge on whether the speech is

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63. Of course, the outcome of the *Hobby Lobby* case perhaps suggests that the derivative nature of corporate interests may not make much difference to whether those interests should be protected, at least according to the Court, but the outcome in *Hobby Lobby* need not dictate similar outcomes in the circumstances addressed in this Article. See *infra* note 179.

64. See Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 86-87 (2007).

65. *Id.* at 87 (quoting Martin H. Redish & Howard M. Wasserman, *What’s Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 237 (1998)).

66. See, e.g., *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 457 (1978).

corporate.<sup>67</sup> Thus, the nature of commercial speech interests deserves its own analysis. What that analysis shows is that commercial speech interests are also derivative, in that it is the interests of the consumer-listeners that the doctrine is meant to protect.

Like corporate speech, protection for commercial speech has been both controversial and in flux over the past few decades. In the early part of the twentieth century, commercial speech fell wholly outside the First Amendment.<sup>68</sup> Then, in the 1976 decision *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Supreme Court held that commercial speech *was* protected by the First Amendment, albeit not necessarily to the same extent as noncommercial speech.<sup>69</sup> Not long after, the Court articulated the intermediate scrutiny test for commercial speech restrictions that it continues to apply today.<sup>70</sup> In the decades since, the Court has tended to strike down laws under the *Central Hudson* test, rather than uphold them, leading some commentators to suggest that in practice, the distinction between commercial and noncommercial speech may be disappearing.<sup>71</sup>

Throughout the evolution of the commercial speech doctrine, even as its protection under the First Amendment has seemingly gotten stronger, the Supreme Court has consistently viewed the doctrine

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67. See, e.g., Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 55 (2000).

68. See *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (“[T]he Constitution imposes no ... restraint on government as respects purely commercial advertising.”).

69. 425 U.S. 748, 770-73 (1976).

70. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980). The Court stated the test as follows:

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

*Id.*

71. See Redish, *supra* note 64, at 67-68 (“In every recent commercial speech case decided by the Supreme Court, the First Amendment argument prevailed.... While it would be incorrect to suggest that commercial speech is today deemed fungible with fully protected speech in all contexts, it is at least true that the gap between the two is far narrower than it was in 1976.” (footnote omitted)).

as designed to protect the interests of the audience. The Court has explained that “the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides.”<sup>72</sup> In *Virginia Board* itself, the Court emphasized the importance of the “free flow of commercial information” to both consumers and society as a whole.<sup>73</sup> Two decades later, in suggesting that some circumstances might warrant more stringent review of commercial speech restrictions, Justice Stevens focused on the effect on consumers to distinguish less troubling restrictions from more troubling ones.<sup>74</sup> The focus on the audience also helps to explain why false or misleading commercial speech falls entirely outside the First Amendment.<sup>75</sup> Such information harms consumers, rather than helps them, and pollutes, rather than promotes, the flow of information.<sup>76</sup>

Commentators have taken many different approaches to conceptualizing commercial speech and are sharply divided about whether the modern trend toward greater protection for commercial speech is desirable.<sup>77</sup> Nevertheless, there appears to be relatively broad agreement that commercial speech interests are primarily, if not exclusively, listener-based, and thus derivative.

This is clearest with respect to those who view commercial speech as deserving little or no protection under the First Amendment. For example, Professor Edwin Baker advances a primarily speaker-based view of the First Amendment that requires the government to respect the individual autonomy of speakers, and thus he

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72. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

73. *Va. State Bd. of Pharmacy*, 425 U.S. at 763-64; see also Tamara R. Piety, “A Necessary Cost of Freedom”? *The Incoherence of Sorrell v. IMS*, 64 ALA. L. REV. 1, 28-30 (2012).

74. See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (opinion of Stevens, J.) (“When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review.”).

75. See *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566.

76. See *Va. State Bd. of Pharmacy*, 425 U.S. at 771-72 (“The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.”).

77. Compare, e.g., C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981, 981 (2009) (“The world would do well not to follow the lead of the United States in its view that commercial speech is an aspect of free speech.”), with Redish, *supra* note 64, at 69 (“[C]riticism of commercial speech ... comes dangerously close to a constitutionally destructive form of viewpoint-based regulation.”).

ultimately rejects protection for commercial speech because listener interests are not at the core of the First Amendment under his views.<sup>78</sup> Professor Tamara Piety accepts that listeners might matter, but she too is ultimately skeptical of protection for commercial speech, arguing that the crucial question is “whether the net effect of commercial speech is to enhance listeners’ self-fulfillment and autonomy interests” and finding “reason to think that it is not.”<sup>79</sup>

Others have defended, at least in some measure, the current view of commercial speech as entitled to some, but subordinate, First Amendment protection, and that view too is consistent with a listener-based approach to commercial speech. In defending its intermediate status, Professor Robert Post defines commercial speech as “the set of communicative acts about commercial subjects that within a public communicative sphere convey information of relevance to democratic decision making but that do not themselves form part of public discourse.”<sup>80</sup> For Professor Post, a key distinction is between acts that have value as part of public discourse and acts that simply convey information.<sup>81</sup> Acts that are part of public discourse have intrinsic value to both speakers and listeners, whereas acts that merely convey information—the set into which commercial speech falls—derive their value from the value of that information to those who receive it.<sup>82</sup>

Even those who argue that there is no principled basis upon which to distinguish commercial from noncommercial speech have done so with at least a significant emphasis on the value of the speech to the listener. For example, in his seminal article arguing for protection of commercial speech, Professor Redish notes that “[s]ince advertising performs a significant function for its recipients, its values are better viewed with the consumer, rather than the

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78. See Baker, *supra* note 77, at 985.

79. PIETY, *supra* note 35, at 80.

80. Post, *supra* note 67, at 25.

81. See *id.* at 20.

82. Professor Post’s conception of commercial speech is not based solely, or even primarily, however, on the distinction between the value to the speaker and the value to the listener. Rather, the concept of “public discourse” is central to his theory of the First Amendment, so that he further distinguishes between conveying information that contributes to public discourse and conveying information that does not, with only the former receiving heightened protection under the commercial speech doctrine. See *id.* at 4, 24. In any event, when the focus is on conveying information and on the nature of the information conveyed, what matters is the listener’s perspective, rather than the speaker’s.

seller, as the frame of reference.”<sup>83</sup> Similarly, Professor Redish argues that if the First Amendment protects criticism of commercial products of the sort found in, say, *Consumer Reports*, then it should equally protect promotion of those same products by their producers.<sup>84</sup> Seeing these two forms of speech as two sides of the same coin makes sense primarily if one takes the consumer’s perspective. Surely the First Amendment value of *Consumer Reports* lies in its value to its readers, not its intrinsic value to the consumer organization itself.<sup>85</sup> Casting commercial speech as analytically similar to *Consumer Reports* thus also highlights the listener value of the speech.<sup>86</sup>

To be sure, commentators sometimes suggest that commercial speech may have First Amendment value for speakers as well. For example, some argue that commercial advertisements involve just as much artistry as artistic works that are fully protected under the First Amendment.<sup>87</sup> The implication then is that all of the reasons for protecting artistic works, including reasons that focus on the creators and disseminators of those works, apply equally to commercial advertisements.<sup>88</sup>

The trouble with this line of reasoning is that it wrongly assumes that speech protected in one way is necessarily protected in all. Debates over the regulation of commercial advertisements are about the regulation of advertisements as advertisements,<sup>89</sup> not about

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83. Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 434 (1971).

84. See Redish, *supra* note 64, at 131-32.

85. See Farber, *supra* note 43, at 566 (discussing the value of the information in product reviews to consumers).

86. See also Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 643 (1990) (arguing that restricting commercial speech can lead to the result that “the opinion of one of the groups most interested in the debate has been obliterated from public view” (emphasis added)).

87. See, e.g., *id.* at 639 (characterizing a television commercial as “a thirty-second mini-drama that can stand on its own as a piece of film”).

88. See Redish, *supra* note 83, at 446-47 (“[T]he first amendment does recognize an interest existing in the speaker as well as the listener, and purely persuasive materials may serve that end. Much advertising which does not convey concrete information nevertheless represents the artistic creation of an individual, and as such deserves recognition as first amendment speech.” (footnote omitted)).

89. See, e.g., Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153, 1164-65 (2012) (discussing the government’s aims in regulating commercial speech).

their regulation as artistic works. What is being targeted is not the artistic choices that might conceivably be “a form of individual self-expression” for the “ad-men,”<sup>90</sup> but rather the commercial messages that those artistic choices are being used to convey.

More generally, the invocation of a First Amendment interest in “individual self-expression” suggests the argument that commercial speech contributes to the individual self-expression of the seller, at least when the seller is not a corporate entity. The concept of individual self-expression has thus far mostly been raised on the buyer, or listener, side, with courts and commentators characterizing the receipt of commercial speech as being no less important to self-development than the receipt of many types of fully protected speech.<sup>91</sup> One could conceivably argue that the same self-development occurs on the speaker side, regardless of whether the speech is commercial or noncommercial.

Even with respect to the listener-centric version of this argument, there may be reasons to be skeptical. Buyers may have an interest in receiving commercial speech, but having an interest is not the same thing as having a First Amendment interest.<sup>92</sup> The interest could be a purely private, property interest—that of wanting to buy the best possible products at the lowest possible prices—rather than the broader social interest in individual self-expression.<sup>93</sup>

Moreover, even an interest in self-development or identity formation, while arguably a social rather than merely private interest, may not necessarily be an interest the First Amendment is designed to protect. One could easily view virtually any human activity as contributing in some way to individual self-development and

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90. Redish, *supra* note 83, at 447.

91. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 763 (1976) (“As to the particular consumer’s interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.”); Redish, *supra* note 83, at 445 (“Just as we require a free flow of information regarding the political process because we value the concept of political self-realization, so too, should we require an open exchange of ideas and information in the marketplace that will help the individual govern his personal life.”).

92. *See* Brudney, *supra* note 89, at 1183-86.

93. *See id.* at 1185 (“[C]ommercial speech’s persuasive or informative function is only to induce the purchase or sale of the products it proposes by or to individuals for their own consumption or enjoyment. Speech with so limited a function focuses only on individuals’ private or personal good, not on matters of public interest or the societal values or attitudes with which the First Amendment is concerned.” (footnote omitted)).

identity formation.<sup>94</sup> The First Amendment, though, is premised on the idea that speech is special. If the speech exception is not to swallow the rule, and I think it ought not do so, then the relevant First Amendment interest cannot be conceived of as broadly as self-development or identity formation generally. Otherwise, the First Amendment could require scrutiny of every government restriction.

Still, one could argue (and some have argued) that commercial speech contributes not just to identity formation generally, but specifically to the development of the capacity for rational thinking and decision-making, because information about commercial products, perhaps especially such information, encourages people to engage in these processes.<sup>95</sup> An interest in this kind of “rational self-fulfillment” is arguably an important First Amendment value.<sup>96</sup> But this view, even if persuasive, simply drives home the point that protection of commercial speech is justified by taking the perspective of the listener, rather than the speaker. It is the listener who engages in “consider[ing] the competing information, weigh[ing] it mentally in the light of the goals of personal satisfaction he has set for himself” and who is thereby using commercial speech to contribute to his “rational self-fulfillment.”<sup>97</sup> The commercial speaker does no such thing.

A final line of argument is to suggest that commercial speech should be as fully protected as noncommercial speech because there is simply no way to distinguish one from the other.<sup>98</sup> If the category is incoherent, then its use to diminish protection for certain types of speech must be illegitimate.<sup>99</sup> This would presumably mean that whatever speaker-based values the First Amendment protects generally would also be implicated by speech in the supposedly illusory category of “commercial speech.”

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94. See, e.g., Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1619-22 (1987).

95. See Redish, *supra* note 83, at 444 (“Some rational development is better than none, and given the current apathy on the part of many segments of the public towards issues of great political and social concern, it is arguable that for many, the only realistic means to stimulate use of the rational processes is to encourage the rational solution of problems that face individuals in their everyday life.”).

96. See *id.* at 443-44.

97. *Id.*

98. See Kozinski & Banner, *supra* note 86, at 638-48.

99. See Redish, *supra* note 64, at 122 (characterizing the use of the commercial speech category as unprincipled, and hence a form of “viewpoint discrimination”).

There is certainly truth in the claim that the Supreme Court has never been very clear on precisely what counts as commercial speech. At times, the Court has characterized commercial speech as that which “does ‘no more than propose a commercial transaction.’”<sup>100</sup> In other cases, the Court has held that the category extends beyond that narrow formulation, and it has articulated factors that, at least in conjunction with one another, can trigger the commercial speech doctrine.<sup>101</sup> In *Central Hudson*, the Court suggested that commercial speech is “expression related solely to the economic interests of the speaker and its audience.”<sup>102</sup> All of those formulations have been criticized as underinclusive, overinclusive, or both.<sup>103</sup>

It is precisely the speaker’s First Amendment interests, or lack thereof, though, that not only justify treating commercial speech differently, but also provide a coherent way to define the category, even if its boundaries are fuzzy. The seller hawking his wares is not thereby expressing himself in the First Amendment sense, *at least no more so than the very act of selling is itself expressive*. If commercial transactions fall outside the protection of the First Amendment—and they must if the First Amendment is to have any meaningful limits—then one can sensibly draw a distinction based on the extent to which certain speech is sufficiently akin to a commercial transaction to be treated like one, and thus to at least merit different First Amendment treatment from fully protected speech. The transactional nature of such speech sets it apart.

We can evaluate this question of whether speech is, or should be construed as, no more than a part of a commercial transaction, from either of two perspectives: the speaker’s perspective or the listener’s perspective. Those perspectives need not align. The category of what

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100. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976) (quoting *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973)).

101. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983) (pointing to the “fact that these pamphlets are conceded to be advertisements,” “the reference to a specific product,” and “the fact that [the speaker] has an economic motivation for mailing the pamphlets” and holding that the “combination of *all* these characteristics ... provides strong support for the ... conclusion that the informational pamphlets are properly characterized as commercial speech,” even though any one factor standing alone might not have been sufficient).

102. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 561 (1980).

103. *See, e.g., Kozinski & Banner, supra* note 86, at 639-41.

has traditionally been called “commercial speech” is precisely that which is merely transactional from the *speaker’s* perspective.

For example, in the case of an ordinary commercial advertisement, the advertiser’s interest is in the ability of the advertisement to increase sales of its goods or services—that is, to drive commercial transactions. For that reason, an ordinary commercial advertisement is commercial speech. We can remain agnostic, though, as to the interests of the audience viewing the advertisement. The recipients may be using the advertisement simply to increase the efficiency of their consumption of goods and services, and thus, the speech may be effectively transactional from the audience’s perspective as well. But alternatively, the advertisement may be serving the audience’s general interest in knowing more about the world, including about the goods and services that the advertiser sells. In that case, the value of the speech from the audience’s perspective potentially goes beyond its value for commercial transactions.

The fact that we are asking the question of whether the speech is merely transactional, but only from the speaker’s perspective, helps to explain several aspects of the commercial speech doctrine as it has developed. First, it explains why commercial speech includes that which “does no more than propose a commercial transaction,”<sup>104</sup> but the category is not limited to that speech. Proposing a commercial transaction is surely a part of the transaction itself, but it need not be the only way to be a part of the transaction. Moreover, the idea that it is the speaker’s perspective that matters explains why tests for commercial speech often look to the interests and motivations of the speaker.<sup>105</sup> Looking for economic interests and motivations, however, is merely the means to determine whether speech is transactional, rather than being the defining characteristic of commercial speech.<sup>106</sup>

Finally, the asymmetric nature of the inquiry explains why even those who agree on what commercial speech is potentially disagree on how to treat it. Speech can be merely transactional from the

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104. See *supra* note 100 and accompanying text.

105. See *Bolger*, 463 U.S. at 67 (considering the “economic motivation” of the speaker); *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 561 (considering the “economic interests of the speaker”).

106. See Redish, *supra* note 64, at 87-88 (“The institutional media ... are as much profit-making corporations as is any commercial advertiser.”).

speaker's perspective and still leave the full range of options as to how to characterize it from the listener's perspective. It is one's view of the listener's perspective that determines the appropriate treatment under the First Amendment. But it is the listener's perspective that matters. In other words, the commercial speaker's First Amendment claim is derivative.

### *C. Derivative Interests in Traditional Settings*

To say that corporate and commercial speech interests are derivative is not necessarily to undercut their strength. One could recognize those interests as derivative, and largely listener-based, and nevertheless advocate heightened, even strict, scrutiny in the core cases in which those interests have traditionally arisen.

The issue of corporate speech has arisen largely in the context of corporate campaigning.<sup>107</sup> Even if the intrinsic interests at stake in such cases are those of the voters who are the target of such campaigns, rather than the corporations mounting the campaigns, one could justify heightened scrutiny of government attempts to restrict such campaigning.<sup>108</sup> Particularly in the political context, one could argue that voters need the fullest possible information in order to make informed voting decisions.<sup>109</sup> Thus, we might be skeptical of any government regulation that restricts the speech available to voters.<sup>110</sup> One might even suggest that certain viewpoints are only likely to be voiced by corporations, rather than individuals—for example, viewpoints that are pro-business or anti-labor.<sup>111</sup> In that case, restricting corporate campaigning might deprive voters of information necessary to evaluate particular sides of contested issues.<sup>112</sup>

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107. See, e.g., *Citizens United v. FEC*, 558 U.S. 310 (2010).

108. See, e.g., *id.* at 354-55.

109. See, e.g., *id.* at 354.

110. See, e.g., *id.* at 355-56.

111. Cf. Redish, *supra* note 64, at 69 (arguing that attacks on commercial speech protection “constitute[], facilitate[], or, at the very least, come[] dangerously close to a constitutionally destructive form of viewpoint-based regulation”). But see Robert C. Post, *Viewpoint Discrimination and Commercial Speech*, 41 *LOY. L.A. L. REV.* 169, 169 (2007) (arguing that Professor Redish's conception of viewpoint discrimination “is too confused and uncertain to carry the weight that Redish imposes on it”).

112. See *Citizens United*, 558 U.S. at 356 (“When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or

Similarly, the question of commercial speech has been prominent in the context of commercial advertisements, particularly advertisements for vices such as tobacco, liquor, and gambling.<sup>113</sup> Even if we think that advertisers do not have an intrinsic right against interference with their advertisements, we might think that consumers do have an intrinsic right not to have the government dictate what information about lawful products they can receive.<sup>114</sup> We might be particularly wary of what seem to be paternalistic laws that hide information from people supposedly for their own good.<sup>115</sup>

To be sure, the arguments in favor of fully protecting corporate campaigning or commercial advertisements are not necessarily persuasive. One could instead think that corporate participation in campaigns distorts the available speech, rather than simply adding to it.<sup>116</sup> One could largely take the same view of most commercial advertisements.<sup>117</sup>

Framed in this way, these debates can be understood as a microcosm of much larger debates over the proper relationship between the government and citizens under the Constitution. On the one hand, there is the libertarian perspective, under which the prime directive is to ensure that the government does not interfere unduly with the private choices of individuals.<sup>118</sup> Under this perspective, any government interference with the receipt of infor-

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what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.”)

113. See generally *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (tobacco); *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173 (1999) (gambling); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (liquor).

114. See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

115. See *44 Liquormart*, 517 U.S. at 503 (opinion of Stevens, J.) (“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. That teaching applies equally to state attempts to deprive consumers of accurate information about their chosen products.”); *id.* at 518 (Thomas, J., concurring in part and concurring in the judgment) (“In cases such as this, in which the government’s asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace ... such an ‘interest’ is *per se* illegitimate.”).

116. See *Citizens United*, 558 U.S. at 469-72 (Stevens, J., concurring in part and dissenting in part).

117. See PIETY, *supra* note 35, at 64-65.

118. See Sullivan, *supra* note 59, at 145.

mation is suspect.<sup>119</sup> An alternative is to take an egalitarian perspective, which posits that the government's role is to try to create a level playing field within which individuals can exercise their choices.<sup>120</sup> Under this perspective, restrictions on corporate and commercial speech may be appropriate to correct disparities between the power of corporations or commercial sellers and individuals.<sup>121</sup> In this way, debates over corporate campaigning and commercial advertisements are not only analytically similar to each other; they are similar to debates over, say, affirmative action as well.<sup>122</sup>

These questions are not settled one way or another merely by recognizing the derivative nature of corporate or commercial speech interests. Indeed, given the centrality of the broader questions to which they connect, it would be quite startling if they were. Framing the issue in terms of derivative interests does not resolve whether the government can restrict corporate campaigning or commercial advertisements. In other types of situations, however, the derivative nature of the speech interests does matter, and it is to those situations that we now turn.

## II. IMPLICATIONS FOR COMPELLED SPEECH

One implication of corporate and commercial speech interests being derivative is that compelling these forms of speech need not raise the usual First Amendment concerns. In the context of fully protected speech, the Supreme Court has held that compelling speech is just as problematic as restricting it.<sup>123</sup> But that shorthand equivalence elides the fact that the rationales for scrutinizing speech compulsions differ substantially from the rationales for

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119. *See id.*

120. *See id.* at 144-45.

121. *See id.*

122. *Compare, e.g., Grutter v. Bollinger*, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part) ("The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all."), *with Gratz v. Bollinger*, 539 U.S. 244, 301 (2003) (Ginsburg, J., dissenting) ("Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated.").

123. *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

scrutinizing speech restrictions. When primarily listener interests are at stake, there is little reason to be concerned about compelled speech.

*A. The Misfit Between Listener Interests and Scrutiny of Compelled Speech*

At first glance, it is not at all clear why compelled speech should be problematic under the First Amendment. For example, if we are concerned primarily about protecting the marketplace of ideas, then compelled speech seems only to be adding to that marketplace, and so long as we do not then restrict how people can respond to the compelled speech, we should be confident that truth and right thinking will win out in the end regardless of what has been compelled.<sup>124</sup>

The problem, if there is one, seems to be in the way that such compulsions interfere with the “individual freedom of mind.”<sup>125</sup> Compelling individuals to speak, even in circumstances in which it is clear that they might or might not be sincere, fails to accord due respect for those individuals as autonomous, thinking human beings whose views are independent of those of the state.<sup>126</sup> It also undermines First Amendment values of sincerity and truth that should be nurtured in citizen-speakers.<sup>127</sup> And it coerces thought in a manner that is illegitimate because it bypasses the speaker’s critical faculties in favor of persuasion through repetition.<sup>128</sup>

In other words, compelled speech is problematic because of its effects on the speaker. These speaker-based rationales for scrutinizing compelled speech are irrelevant when our primary concern is with listeners rather than speakers. From the listeners’ point of view, compelled speech is not much different from the government

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124. Cf. *Barnette*, 319 U.S. at 664 (Frankfurter, J., dissenting) (“It is not even remotely suggested that the requirement for saluting the flag involves the slightest restriction against the fullest opportunity on the part both of the children and of their parents to disavow as publicly as they choose to do so the meaning that others attach to the gesture of salute.”).

125. *Wooley*, 430 U.S. at 714 (quoting *Barnette*, 319 U.S. at 637).

126. See Vincent Blasi & Seana V. Shiffrin, *The Story of West Virginia State Board of Education v. Barnette: The Pledge of Allegiance and the Freedom of Thought*, in *FIRST AMENDMENT STORIES* 99, 124-25 (Richard W. Garnett & Andrew Koppelman eds., 2012).

127. See *id.* at 125-27.

128. See *id.* at 128-29.

choosing and promoting a view, which it is permitted to do under the government speech doctrine.<sup>129</sup> Unlike the speaker, the listener is being persuaded through reason, and with respect for the listener's ability to make autonomous choices.<sup>130</sup> In situations in which the speaker has no intrinsic speech interest, then the compelled speech harms neither the speaker nor the listener.

One straightforward conclusion of this analysis is that, from a First Amendment perspective, compelling a corporation to speak harms nothing with respect to the corporation itself.<sup>131</sup> Corporations are not autonomous, thinking beings that the state must respect as such. Nor are they citizens to be nurtured. Repeated utterances do not have the psychological effects on corporations that they do on individuals.

The rationales for scrutinizing speech compulsions are equally misplaced with respect to noncorporate commercial speech. To see why, we first need to understand what we mean by commercial compelled speech. As previously described, the defining characteristic of commercial speech is that it should be regarded from the speaker's perspective as no more than a part of a commercial transaction.<sup>132</sup> When the government compels such speech, it is commercial compelled speech.

This focus on the connection to a commercial transaction is necessary to make sense of the category of commercial compelled speech. Many of the usual indicia of commercial speech do not translate well into the realm of compelled speech. For example, it makes no sense

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129. See *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559 (2005).

130. See Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1302-03 (2014). There may be circumstances in which the means for conveying a message are so manipulative that they impinge upon the autonomy of the listener. See *id.* at 1304-08. For purposes of such an analysis, however, it should make no difference whether the government directly conveys the message or conveys it through private parties. If the latter, it would not be the compulsion itself that would be the source of any First Amendment difficulties.

131. See Blasi & Shiffrin, *supra* note 126, at 127 n.123 (stating that the rationale in *Barnette* applies "only to natural persons," rather than "corporate entities").

132. See *supra* Part I.B. Being a part of the transaction itself is not the same as being the subject of a transaction. Much noncommercial speech is bought and sold. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) (addressing books, movies, and newspapers); Jennifer M. Keighley, *Physician Speech and Mandatory Ultrasound Laws: The First Amendment's Limit on Compelled Ideological Speech*, 34 CARDOZO L. REV. 2347, 2366 (2013) (addressing physician speech).

to look for an economic motivation in a compelled speaker<sup>133</sup> because the very point of the compulsion is to overcome the absence of any motivation to speak at all. Similarly, because the government dictates the form of the speech, the form need not have any particular relationship to whether the speech is commercial.<sup>134</sup>

When the speech that is compelled is incidental to a commercial transaction, it is far less likely to raise the usual concerns over compelling speech. Scrutiny of compelled speech is rooted in concerns over a disrespect for, or undue influence over, the speaker's capacity for thought and decision-making.<sup>135</sup> But commercial speech does not implicate the *speaker's* capacity for thought and decision-making, at least no more so than commercial transactions do. Whether compelled or not, commercial speech is conveyed by the speaker with a measure of detachment not found in ordinary speech. A pledge of allegiance is meaningless without its being recited by the person compelled.<sup>136</sup> Commercial speech can be attached to the product being sold,<sup>137</sup> or posted on a website,<sup>138</sup> and have the intended effect. The point of the pledge is its effect on the speaker, while the point of commercial compelled speech is the availability of the speech to the listener, rather than any effect on the speaker. The result is that the speaker-based concerns over compelled speech do not apply to commercial compelled speech.

Thus, until one can identify some other speech interest at stake,<sup>139</sup> the starting point of the analysis should be that because corporate and commercial speakers do not themselves have intrinsic speech interests, their speech can be compelled without triggering any form of heightened First Amendment scrutiny. Thus far, courts have largely gotten this analysis exactly backwards, assuming the existence of a general First Amendment prohibition on compelled

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

134. *Cf. id.*

135. See *supra* notes 125-28 and accompanying text.

136. *Cf. W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 626 (1943).

137. See *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1212 (D.C. Cir. 2012) (involving cigarette labels), *overruled in part by* *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc).

138. See *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 522, 524 (D.C. Cir. 2015) (involving conflict minerals disclosures on a company's website).

139. See *infra* Part II.C.

speech from which any exceptions need to be justified.<sup>140</sup> But when the interests usually at stake with respect to compelled speech are absent, it is coverage under the First Amendment, rather than its absence, that needs justification.

### *B. The Zauderer Standard*

The rationales for scrutinizing compelled speech do not apply when the only First Amendment interests are those of the listeners. In particular, because commercial speech is defined by the speech being merely transactional from the speaker's perspective, commercial compelled speech should generally merit no First Amendment scrutiny.

This understanding of the relationship between compelled speech and commercial speech is what should inform the proper interpretation of the Supreme Court's decision in *Zauderer v. Office of Disciplinary Counsel*,<sup>141</sup> a key case that lower courts have consistently misinterpreted. In *Zauderer*, the Court applied a relatively relaxed form of scrutiny to a requirement that attorneys include certain information in advertisements.<sup>142</sup> Lower courts have interpreted the case as creating an exception, and a narrow one at that, to the usual rule of heightened scrutiny under the First Amendment.<sup>143</sup> The key question with respect to *Zauderer*, though, is not why the Court applied a lower form of scrutiny than *Central Hudson*.<sup>144</sup> The question is why the Court applied any kind of scrutiny at all.<sup>145</sup>

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140. See, e.g., *R.J. Reynolds*, 696 F.3d at 1211-12 (analyzing the appropriate level of First Amendment scrutiny by first describing a general rule that “[a]ny attempt by the government ... to compel individuals to express certain views ... is subject to strict scrutiny” and then stating that “[c]ourts have recognized a handful of ‘narrow and well-understood exceptions’ to the general rule that content-based speech regulations—including compelled speech—are subject to strict scrutiny” (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994))); see also *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 71 (2d Cir. 1996) (taking as a starting point for the court's analysis that “[t]he right not to speak inheres in political and commercial speech alike”).

141. 471 U.S. 626 (1985).

142. See *id.* at 651-53.

143. See *infra* notes 151-53 and accompanying text.

144. *But see* *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 27 (D.C. Cir. 2014) (en banc) (suggesting that “one could think of *Zauderer* largely as an *application* of *Central Hudson*, where several of *Central Hudson*'s elements have already been established” (internal quotation omitted)).

145. That is to say, scrutiny above rational basis review. The *Zauderer* standard has

*Zauderer* involved an attorney disciplinary action based on the attorney's failure to make certain disclosures in his advertisements.<sup>146</sup> The attorney advertised that he took cases on a "contingent fee basis" and that "[i]f there is no recovery, no legal fees are owed by our clients," but he failed to disclose that clients might still be liable for costs, as opposed to attorneys' fees, even if they lost their case.<sup>147</sup>

The Court rejected the application of strict scrutiny to the disclosure requirement in the case, distinguishing earlier cases involving noncommercial compulsions. It explained:

Ohio has not attempted to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." The State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available. Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal.<sup>148</sup>

The Court then went on to hold that while some scrutiny under the First Amendment was appropriate, a relatively minimal level of scrutiny would suffice:

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sometimes been characterized as a form of rational basis review. *See, e.g., R.J. Reynolds*, 696 F.3d at 1212 (describing the *Zauderer* standard as "akin to rational-basis review"). To the extent that scrutiny under the *Zauderer* standard is substantially weaker than an application of the *Central Hudson* test, it is perhaps more like rational basis review. At the same time though, the analysis the Court did to establish that the "disclosure requirements are reasonably related to the State's interest in preventing deception of consumers" seems more extensive than what one would ordinarily expect from rational basis review. *Zauderer*, 471 U.S. at 651. For example, it seemed to matter to the Court that "the possibility of deception is ... self-evident ... in this case," rather than "speculative," whereas even a speculative interest could pass rational basis review so long as it is rational. *Id.* at 652-53.

146. *See Zauderer*, 471 U.S. at 631, 633.

147. *Id.* at 630-31, 633.

148. *Id.* at 651 (internal citations omitted) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

We do not suggest that disclosure requirements do not implicate the advertiser's First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.<sup>149</sup>

Because the laypersons at whom the advertisements were targeted would have no idea about the distinction between "legal fees" and "costs," the Court found the possibility of deception to be "self-evident" and the required disclosure to be a perfectly reasonable way of trying to cure that deception.<sup>150</sup>

Lower courts have consistently framed the standard articulated in *Zauderer* as an exception to a general rule of heightened scrutiny of compelled speech, grappling only with the question of just how far the *Zauderer* "exception" extends. For example, the D.C. Circuit held en banc that *Zauderer* applies even when the government's interest in disclosure is something other than "preventing deception of consumers," overruling previous panel decisions that had held or suggested otherwise.<sup>151</sup> While recognizing that the interest in avoiding deception need not be the only legitimate interest, the D.C. Circuit continued to require some sufficient government interest in order to justify applying the *Zauderer* standard.<sup>152</sup> Moreover, the D.C. Circuit appears to have continued to limit *Zauderer* to disclosures of "purely factual and uncontroversial information."<sup>153</sup> Both of these limits to *Zauderer* assume that relaxed scrutiny is the exception, rather than the rule.

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149. *Id.*

150. *Id.* at 652-53.

151. See *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 22-23 (D.C. Cir. 2014) (en banc), *overruling* *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 371 (D.C. Cir. 2014), and *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013), and *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012).

152. See *Am. Meat Inst.*, 760 F.3d at 23 ("Beyond the interest in correcting misleading or confusing commercial speech, *Zauderer* gives little indication of what type of interest might suffice.").

153. *Id.* at 27 (quoting *Zauderer*, 471 U.S. at 651); see also *R.J. Reynolds*, 696 F.3d at 1216 (quoting *Zauderer*, 471 U.S. at 651).

But as previously explained, there is little justification for scrutinizing compulsions directed to corporate or commercial speakers.<sup>154</sup> Thus, relaxed scrutiny of such compulsions ought to be the rule, not the exception. If anything, what requires explanation is why the Court in *Zauderer* bothered to evaluate the government's interest for anything beyond bare plausibility.

In fact, the Court appears to have scrutinized the compelled disclosure in *Zauderer* not because it was a compelled disclosure per se, but because it was a regulation of attorney advertising. The First Amendment issue that it identified was that of “chilling protected commercial speech.”<sup>155</sup> And it repeatedly referred to the First Amendment rights as those of the “advertiser.”<sup>156</sup> The state's regulation was described as only an attempt “to prescribe what shall be orthodox in *commercial advertising*.”<sup>157</sup>

Viewed as a regulation of advertising, it makes sense that the Court treated the *Central Hudson* test as the baseline for evaluating the state's disclosure requirement and that the Court needed to justify its departure from that baseline. The *Central Hudson* test was designed to establish the level of scrutiny for government attempts to restrict commercial advertising.<sup>158</sup> Because the required disclosure in *Zauderer* was triggered by the attorney advertising,<sup>159</sup> it could be understood as a limitation on that advertising: effectively, Ohio was saying that attorneys could not advertise “no fees” without also explaining that “no fees” did not mean no costs. The speech that really mattered for First Amendment purposes in *Zauderer* was the original “no fees” claim, not the required add-on, and scrutiny was necessary to ensure that the “no fees” speech would not be chilled.<sup>160</sup>

In that sense, *Zauderer* might be an exception, but an exception only to the scrutiny that would otherwise apply to a *restriction* on commercial speech. What it says is that if a disclosure is of “purely factual and uncontroversial information,” then it can be required of

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154. See Part II.A.

155. *Zauderer*, 471 U.S. at 651.

156. *Id.*

157. *Id.* (emphasis added).

158. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563-64 (1980).

159. *Zauderer*, 471 U.S. at 652.

160. See *id.* at 653 & n.15.

an advertisement without unduly chilling that advertisement, and thus, the government needs only a sufficient interest to support such a requirement, rather than needing to satisfy the full *Central Hudson* test.<sup>161</sup>

*Zauderer* says nothing about what happens if the disclosure requirement is triggered not by commercial advertising, but by some other nonspeech commercial activity. Without the threat that a disclosure requirement might chill speech, the analysis should fall back to the baseline of no scrutiny for compulsions of corporate or commercial speakers.

The D.C. Circuit has gotten this exactly backwards, somehow finding that the more relaxed scrutiny in *Zauderer* was justified *only because* commercial advertising was involved, and declining to apply the *Zauderer* standard beyond the contexts of “advertising or product labeling at the point of sale.”<sup>162</sup> Such a result runs directly contrary to an analysis of the First Amendment interests at stake. The D.C. Circuit applied heightened scrutiny to, and struck down, an SEC rule requiring certain securities issuers to state whether the minerals they use are “conflict free” because the disclosures were “to be made on each reporting company’s website and in its reports to the SEC” rather than in “advertising or ... point of sale disclosures.”<sup>163</sup> Nowhere in its opinion did the court explain what First Amendment interests were being protected by the scrutiny it imposed, let alone why the distinction it drew would sensibly protect those interests.<sup>164</sup>

Nor is it necessary to limit relaxed scrutiny to compelled disclosures of “purely factual and uncontroversial information,” as the

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161. *See id.* at 651.

162. *Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518, 522, 524 (D.C. Cir. 2015).

163. *Id.* at 522.

164. *See id.* at 535-36 (Srinivasan, J., dissenting). The majority opinion attempted to support its distinction with two Supreme Court cases, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), and *United States v. United Foods, Inc.*, 533 U.S. 405 (2001). *See Nat’l Ass’n of Mfrs.*, 800 F.3d at 523 (majority opinion). Neither case supports the majority’s analysis. *Hurley* involved a noncommercial speaker. *See Hurley*, 515 U.S. at 559 (“The issue in this case is whether Massachusetts may require *private citizens* who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey.” (emphasis added)). *United Foods* was part of a distinct line of cases involving compelled funding of advertisements that in any event eventually resulted in a permissive First Amendment standard. *See Wu, supra* note 15, at 86-87.

D.C. Circuit has done.<sup>165</sup> As I have argued previously, distinguishing between factual and normative compulsions is murky and a shaky basis upon which to hinge the level of scrutiny.<sup>166</sup> Virtually any seemingly factual disclosure conveys some implicit viewpoint. The inclusion of trans fat contents on a nutrition label surely suggests that trans fats matter, and given the social context, it probably suggests they should be avoided.

More importantly, if compelling corporate or commercial speakers does not interfere with any First Amendment interests because the entity compelled has none, then it does not matter whether the speech is factual or normative. To be sure, less factual information might also be less tied to a commercial transaction and therefore less likely to be commercial compelled speech. But the compulsion of information tied to a transaction should not be scrutinized just because the information might implicitly convey a viewpoint.<sup>167</sup>

*Zauderer* may have limited its holding to factual disclosures, but that was because the case was about restricting commercial advertisements. Requiring a nonfactual, controversial disclosure in a commercial advertisement might well discourage the speaker from advertising in the first place, in a way that a factual, noncontroversial disclosure would not. Of course, the same could be said of commercial transactions—that requiring disclosures could discourage those transactions. The crucial difference is that commercial

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165. See *Nat'l Ass'n of Mfrs.*, 800 F.3d at 527. Some commentators have argued in favor of a similar distinction. See Keighley, *supra* note 16, at 569 (“[W]hen the government moves beyond compelled speech that provides descriptive information about a given product or service, to compelled speech that urges the audience to take a certain course of action, the government no longer compels the provision of factual and uncontroversial information. Instead, the government compels ‘normative speech,’ and such compelled speech should not be subject to rational basis review.”); Post, *supra* note 16, at 901 (defending the view “that government may require the disclosure only of purely factual and ‘uncontroversial’ information”); see also Corbin, *supra* note 130, at 1303-04 (arguing that compelled speech is more problematic “when it attempts to persuade rather than just inform” or when it is “manipulative”).

166. See Wu, *supra* note 15, at 77, 81.

167. Cf. *Nat'l Ass'n of Mfrs.*, 800 F.3d at 530 (“The label ‘[not] conflict free’ is a metaphor that conveys moral responsibility for the Congo war. It requires an issuer to tell consumers that its products are ethically tainted, even if they only indirectly finance armed groups. An issuer, including an issuer who condemns the atrocities of the Congo war in the strongest terms, may disagree with that assessment of its moral responsibility.” (alteration in original) (quoting *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 371 (D.C. Cir. 2014))).

advertisements are protected by the First Amendment, but commercial transactions are not.<sup>168</sup>

Thus, for example, in *R.J. Reynolds Tobacco Co. v. FDA*, the D.C. Circuit was wrong to impose heightened scrutiny on the FDA's requirement of graphical warning labels on cigarette packages.<sup>169</sup> The FDA had sought to update the mandatory cigarette warning labels with new text and with graphical images to accompany each of the new warnings.<sup>170</sup> The D.C. Circuit held that because the graphical warnings did not consist solely of "purely factual and uncontroversial information," the mandatory warnings were subject to at least intermediate scrutiny—scrutiny which the regulation was not able to bear.<sup>171</sup>

But *R.J. Reynolds* is a corporate, commercial speaker, and thus the government's insistence that certain speech be made available as part of the transaction of buying and selling cigarettes harms no First Amendment interests. This remains true even if some of the messages implicitly or explicitly encourage consumers to quit smoking.<sup>172</sup> Such messages are certainly against the cigarette companies' financial interests, but they hardly constitute some form of disrespect for the rational faculties of the cigarette sellers, even if those sellers were individuals. The compulsion of even normative commercial messages potentially merits little First Amendment scrutiny.

### *C. Limitations on Compelled Corporate or Commercial Speech*

The government's ability to compel corporate or commercial speech is not unlimited, however, and there are a number of situations in which compelled corporate or commercial speech might appropriately merit some greater level of First Amendment scrutiny. Greater scrutiny might apply to compulsions directed at certain types of corporations, particularly those that are more expressive in nature. Greater scrutiny might also apply when the compulsion is a condition of the compelled entity's own speech. Finally, we might

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168. See *supra* Part I.B.

169. See 696 F.3d 1205, 1208 (D.C. Cir. 2012), *overruled in part* by *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc).

170. *Id.* at 1208-09.

171. *Id.* at 1216-17, 1222.

172. See *id.* at 1216-18.

scrutinize any government compulsion in which the government attempts to hide its own speech as that of another.

*1. Distinctions Among Corporate Speakers*

Corporations come in a wide variety of types, and some might more plausibly assert speaker-based interests than others. The key concept developed by Professor Meir Dan-Cohen is that of “role-distance.”<sup>173</sup> When a person’s role within an organization is closely tied to her own personal identity, we say that the role-distance is small; when the organizational and personal roles are relatively distinct, we say that the role-distance is large.<sup>174</sup> When the role-distance is small, we might worry that a compulsion on the corporate entity will function like a compulsion on an individual or set of individuals, in such a way as to raise the “freedom of mind” concerns previously discussed.

For the usual for-profit corporation, no one, whether employee, executive, or shareholder, has such a small role-distance,<sup>175</sup> and as a result, compulsions applied to such corporations are unproblematic. This is particularly true with respect to major publicly traded corporations,<sup>176</sup> which are often the ones trying to assert speech rights. Employees, executives, and shareholders of such corporations are particularly likely to have detached roles.<sup>177</sup> For example, compelling R.J. Reynolds to place a particular image on its cigarette packages is far removed from compelling speech from any particular employee, executive, or shareholder of the company. Even with respect to a close corporation, corporate laws themselves operate to encourage and enforce a certain measure of separation between individual and corporate identity.<sup>178</sup> Absent circumstances that would support piercing the corporate veil, even the owners of a close corporation should generally be regarded as occupying a detached role.<sup>179</sup>

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173. Dan-Cohen, *supra* note 3, at 1237-38.

174. *See id.* at 1238.

175. *See* Nelson, *supra* note 28, at 1586-91.

176. *See id.* at 1587-91.

177. *See id.*

178. *See id.* at 1591-95.

179. Arguably, the Supreme Court’s *Hobby Lobby* decision cuts against the proposition that the role of a close corporation’s owner should be regarded as a detached one, given that the Court upheld such a corporation’s ability to raise a claim under the Religious Freedom

Membership in a church, on the other hand, is an example of a role that is much more tightly bound to an individual's identity.<sup>180</sup> Thus, to compel a church to speak should attract greater scrutiny, even though the church may be organized as a nonprofit corporate entity.

Media entities may well be ones that engender more “nondetached” roles. For example, in finding that a newspaper’s “exercise of editorial control and judgment” should be protected, the Supreme Court characterized the First Amendment intrusion as one of “intrusion into the function of editors.”<sup>181</sup> In speaking specifically about editors, rather than simply about the newspaper as a whole, the Court’s holding may have been animated by an understanding of editors as occupying a nondetached role. That is, editors may be understood as speaking not only for the newspaper, but for themselves as well, in a way that the average corporate executive does not. One can imagine similar results with respect to a director of a movie, for example, even if the director is understood to also be speaking for the movie studio. Thus, compulsions directed at media entities, entities in the business of speech, may raise constitutional questions beyond those raised by compulsions directed at corporate entities generally. This means that the First Amendment treatment of media corporations need not extend to all corporations.<sup>182</sup>

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Restoration Act in order to vindicate the owners’ claim that their “exercise of religion” had been burdened. *See* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2769 (2014). The *Hobby Lobby* decision, however, need not control the question of how to regard corporate compelled speech under the First Amendment. For one thing, *Hobby Lobby* was a statutory case, not a constitutional one, and Congress can grant statutory rights to corporations independent of any theory of the First Amendment. *See id.* at 2767 (“By enacting RFRA, Congress went far beyond what this Court has held is constitutionally required.”). Moreover, freedom of religion and freedom of speech are distinct constitutional rights, with potentially distinct contours. In particular, while the Supreme Court has been hesitant to evaluate what counts as a religious belief, it has shown little hesitation in evaluating what counts as speech. *Compare id.* at 2777-78 (framing the appropriate question with respect to RFRA as “whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*” and rejecting “a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable)”), *with* *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 64-65 (2006) (finding that “a law school’s decision to allow recruiters on campus is not inherently expressive” and “[n]othing about recruiting suggests that law schools agree with any speech by recruiters”).

180. *See* Nelson, *supra* note 28, at 1616-17.

181. *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

182. This runs counter to the argument that some have made that First Amendment

## 2. *Compulsions Conditioned on Speech*

Compulsions that are triggered by the compelled entity's speech merit greater scrutiny than compulsions that are triggered by something other than expression. In such cases, we could be concerned that the compulsion will chill the entity's voluntary speech, to the detriment of the audience for that speech.

Most, if not all, of the existing Supreme Court cases scrutinizing compulsions directed at commercial entities can be explained by the Court's concern to avoid chilling those entities' speech.<sup>183</sup> For example, the case of *Miami Herald Publishing Co. v. Tornillo* involved a Florida statute that required newspapers to print a reply from any political candidate criticized by a newspaper editorial.<sup>184</sup> In holding the statute unconstitutional, the Court characterized the compulsion as one that could chill the newspaper's own speech, because the paper might avoid coverage and criticisms that would trigger the right of reply.<sup>185</sup> Later, in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, the Court applied similar reasoning in striking down a requirement that a privately owned utility company include materials in its billing envelopes from a ratepayers group with views contrary to those of the utility.<sup>186</sup> In that case, the compulsion was not directly triggered by the utility's speech, but because access was "awarded only to those who disagree with appellant's views and who are hostile to appellant's interests, appellant must contend with the fact that whenever it speaks out on a given issue, it may be forced ... to help disseminate hostile views."<sup>187</sup> Under such circumstances, the utility might well decide that "the safe course is to avoid controversy,' thereby reducing the free flow of information and ideas that the First Amendment seeks

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protection for the "institutional media" implies that the corporate nature of the speaker cannot be a basis for reduced First Amendment scrutiny. See Redish, *supra* note 64, at 87-88.

183. See Wu, *supra* note 15, at 85-88.

184. 418 U.S. at 244.

185. See *id.* at 257 ("Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced.").

186. 475 U.S. 1, 4, 7 (1986) (plurality opinion).

187. *Id.* at 14.

to promote.”<sup>188</sup> Thus, the focus was again on ensuring the free flow of information.

Even when the problem has not been one of chilling competing views, the Court has also expressed concern over compulsions that might simply displace the entity’s own speech. In *Tornillo*, the Court noted the practical constraints that precluded an “infinite expansion of [the newspaper’s] column space to accommodate the replies that a government agency determines or a statute commands the readers should have available.”<sup>189</sup> In *Pacific Gas & Electric Co.*, the concurring opinion of Justice Marshall, who provided the crucial fifth vote in the case, emphasized that “[b]y appropriating, four times a year, the space in appellant’s envelope that appellant would otherwise use for its own speech, the State has necessarily curtailed appellant’s use of its own forum.”<sup>190</sup>

The Court has sometimes in parallel adopted rationales that suggest that the compulsions are inherently problematic, as when the Court suggested that the forced inclusion of the ratepayers group’s speech “impermissibly requires [the utility] to associate with speech with which [it] may disagree,” causing it to “be forced either to appear to agree with [the ratepayers group’s] views or to respond.”<sup>191</sup> Even then, though, the Court emphasized “[t]he danger that [the utility] will be required to alter its own message.”<sup>192</sup> What was protected by the First Amendment was “the message itself,”<sup>193</sup> rather than the corporate messenger, which is consistent with the

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188. *Id.* (quoting *Tornillo*, 418 U.S. at 257).

189. *Tornillo*, 418 U.S. at 257.

190. *Pac. Gas & Elec. Co.*, 475 U.S. at 24 (Marshall, J., concurring in the judgment). Similarly, in holding that intermediate scrutiny applied to the requirement that cable operators carry local broadcast stations, the Court characterized the requirement as more of a restriction than a compulsion. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636-37 (1994) (“By requiring cable systems to set aside a portion of their channels for local broadcasters, the must-carry rules regulate cable speech in two respects: The rules *reduce* the number of channels over which cable operators exercise unfettered control, and they render it more difficult for cable programmers to compete for carriage on the *limited channels remaining*.” (emphasis added)).

191. *Pac. Gas & Elec. Co.*, 475 U.S. at 15 (plurality opinion).

192. *Id.* at 16; see also *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 64 (2006) (“The compelled-speech violations in *Tornillo* and *Pacific Gas* also resulted from interference with a speaker’s desired message.”).

193. *Pac. Gas & Elec. Co.*, 475 U.S. at 16.

view that what really matters is whether speech has been restricted, rather than whether the corporation has been compelled.

### 3. *Deception About the Source of Speech*

Finally, greater scrutiny of compelled speech might also be warranted if the government fails to make it clear that it is the ultimate source of the compelled speech. In general, if our focus is on listeners, then not only is the government justified in trying to eliminate deceptive speech, it should not itself be the source of deception. This means, first, that the government probably should not be permitted to compel speech that would be false or misleading under the *Central Hudson* test, speech that would be within its power to restrict without First Amendment constraints.<sup>194</sup>

This also means that the government should not be permitted to deceive as to the source or identity of the ultimate speaker. There are circumstances in which we want to protect the anonymity of private speakers in order to protect their speech. Otherwise, fear of either government or private retribution might lead such speakers to self-censor their speech.<sup>195</sup> No such rationale applies when it is the government that is speaking. Governments are not subject to retribution in the same way as private speakers.

Indeed, the potential for political “retribution” against the government should not only be permissible; it should be encouraged. Compelling a commercial entity to say something it does not agree

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194. See *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 539 (D.C. Cir. 2015) (Srinivasan, J., dissenting) (“[M]isleading disclosures would not qualify for *Zauderer's* relaxed standard.”). On the limits of the government’s ability to lie more broadly, see generally Helen Norton, *The Government's Lies and the Constitution*, 91 *IND. L.J.* 73 (2015).

195. See *Doe v. Reed*, 561 U.S. 186, 200 (2010) (“Plaintiffs explain that once on the Internet, the petition signers’ names and addresses can be combined with publicly available phone numbers and maps, in what will effectively become a blueprint for harassment and intimidation.” (internal quotation omitted)); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341-42 (1995) (“The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry.”); *Talley v. California*, 362 U.S. 60, 65 (1960) (“Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts.”).

with can be framed as the government simply co-opting the resources of a private party in order to disseminate its own government speech, an act not so different from the imposition of a special tax.<sup>196</sup> The check on abuse of such government power is mainly political, namely, the ability of majorities to decide who will be elected to office, and thus what messages the government will espouse.<sup>197</sup> In order for such political accountability to function, however, the electorate needs to understand that the message is indeed the government's, and thus subject to political control. If the government could co-opt private parties to spread a message without revealing that it is a government message, it could improperly insulate itself from that accountability.<sup>198</sup>

### III. IMPLICATIONS FOR SPEECH AMONG COMMERCIAL ENTITIES

Recognizing the distinction between derivative and intrinsic speech interests also matters in those situations in which none of the parties to the transaction have intrinsic interests. These provide another category of cases in which diminished First Amendment scrutiny is warranted.

#### A. *Transactions Among Commercial Entities*

In the paradigmatic corporate or commercial speech scenario, the speaker may be corporate or commercial, but the listener is an individual, with at least some noncommercial interests. In that case, we may protect the speech in order to protect the listener's First Amendment interests. If the listener is just as corporate or commercial as the speaker though, then the basis for protecting the speech disappears, and restrictions on that speech should merit little scrutiny.

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196. See *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559 (2005) ("We have generally assumed, though not yet squarely held, that compelled funding of government speech does not alone raise First Amendment concerns.").

197. See Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 589-90 (2008).

198. See *Johanns*, 544 U.S. at 571-72 (Souter, J., dissenting); Norton, *supra* note 197, at 596.

For example, this framing demonstrates why the Fair Credit Reporting Act (FCRA) should be regarded as obviously constitutional. On its face, the FCRA appears to restrict speech, since it prohibits “consumer reporting agencies” from disclosing “consumer reports” to third parties, except under specified conditions.<sup>199</sup> From the perspective of a consumer reporting agency, a consumer report is merely an item of commerce, something to be sold for profit, rather than a means of expression. Still, we might want to protect consumer reports under the First Amendment if they had expressive value for the recipients, as they might if the recipients were individuals, acting in their capacity as citizens.

In fact, the FCRA precludes the possibility that noncommercial individuals are the ones receiving consumer reports because it defines a “consumer report” in terms of the commercial purposes to which it is put. A “consumer report” under the FCRA is:

[A]ny written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for:

- (A) credit or insurance to be used primarily for personal, family, or household purposes;
- (B) employment purposes; or
- (C) any other purpose authorized under section 1681b of this title.<sup>200</sup>

By definition, the recipient of a consumer report will be using it as an input into a commercial transaction, such as deciding whether to extend credit to the subject of the report. In that way, from the listener’s perspective, the material restricted by the FCRA is transactional, not expressive, much as a commercial advertisement is transactional from the speaker’s perspective. But this means that an FCRA consumer report is commercial from both the speaker’s

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199. See 15 U.S.C. § 1681b(a) (2012) (“Subject to subsection (c) ... any consumer reporting agency may furnish a consumer report under the following circumstances and no other.”).

200. *Id.* § 1681a(d)(1).

and the listener's perspectives. The result is that even though we might want to protect a commercial advertisement in order to protect the listener's First Amendment interests, there is nothing to protect and no reason to impose any heightened scrutiny in the FCRA context because neither speaker nor listener has a relevant First Amendment interest.

The FCRA has in fact withstood First Amendment challenges, but only after facing scrutiny under the *Central Hudson* test.<sup>201</sup> In *Trans Union*, the D.C. Circuit appropriately recognized that "the information about individual consumers and their credit performance communicated by Trans Union target marketing lists is solely of interest to the company and its business customers," but it failed to recognize that the consequence should have been minimal scrutiny.<sup>202</sup> The D.C. Circuit attempted to draw guidance from the Supreme Court's decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, but that decision relied mainly on the credit reports at issue involving no "matter[s] of public concern," a characterization that on its face applied regardless of whether the recipients were commercial or noncommercial.<sup>203</sup> While the ultimate result of the *Trans Union* case was the same as if minimal scrutiny had been imposed, that will not always be the case.<sup>204</sup>

Another situation that ought to involve minimal First Amendment scrutiny is that of regulation of data brokers or of transfers of personal data among commercial entities.<sup>205</sup> For example, in *Sorrell v. IMS Health Inc.*, the Court invalidated a Vermont law that prohibited the sale, disclosure, or use of pharmacy records about the prescribing practices of individual doctors for marketing purposes.<sup>206</sup> The main form of disclosure targeted by the regulation was the transfer of the data from the pharmacy through an intermediary like IMS Health to the pharmaceutical companies, which would then use the information to customize their sales pitches to doctors.<sup>207</sup> Ultimately, the Court ruled that the infirmity in the

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201. See *Trans Union Corp. v. FTC*, 245 F.3d 809, 818-19 (D.C. Cir. 2001).

202. *Id.* at 818.

203. 472 U.S. 749, 761-62 (1985).

204. See Wu, *supra* note 15, at 81-82.

205. See *id.* at 90.

206. See 564 U.S. 552, 557 (2011). Those records are referred to as "prescriber-identifying information." *Id.* at 558.

207. See *id.* at 558. The process of promoting drugs to doctors is known as "detailing." *Id.*

Vermont law was in denying to the pharmaceutical companies access to the prescriber-identifying information, while permitting access by many others, including groups interested in countering the pharmaceutical companies and promoting the use of generic drugs.<sup>208</sup> In dicta, however, the Court suggested that perhaps the restriction on transfer was itself directly problematic, insofar as “the creation and dissemination of information are speech within the meaning of the First Amendment.”<sup>209</sup>

Whatever the merits of treating the transfer of information from the pharmacy to the pharmaceutical company as “speech” in the abstract,<sup>210</sup> this “speech” occurs entirely between two parties, neither of which have intrinsic First Amendment interests. In the usual case, both parties will be major for-profit corporations. But even if the transaction was between individuals, it would still be commercial with respect to both the speaker and the listener. For the pharmacist-speaker, the prescription data is an item of commerce because its value is entirely private, no more than the counterparty’s willingness to pay for it.<sup>211</sup> It is not a means for the pharmacist to express herself.<sup>212</sup> Similarly, for the pharmaceutical company-recipient, the data is an input into the commercial transaction of marketing drugs to doctors. This commercial use is certainly not the only possible use that could be made of the data, but it is the one the statute covered.<sup>213</sup> Just as the FCRA merits minimal scrutiny because it is limited to recipients who are receiving the information for commercial purposes,<sup>214</sup> so too should a regulation on the transfer of prescription data merit minimal scrutiny when it is limited to recipients making a commercial use of the data.

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at 557.

208. *See id.* at 564.

209. *Id.* at 570.

210. *See* Ashutosh Bhagwat, *Sorrell v. IMS Health: Details, Detailing, and the Death of Privacy*, 36 VT. L. REV. 855, 875-76 (2012) (arguing that such a transfer should receive full First Amendment protection “only when the speech contributes meaningfully to the democratic process of self-governance”).

211. *Cf.* *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 53 (1st Cir. 2008) (describing the situation as one “in which information itself has become a commodity,” not unlike “beef jerky”).

212. *See id.*

213. *See Sorrell*, 564 U.S. at 558-59.

214. *See supra* text accompanying notes 199-204.

*B. Privacy Invasions by Commercial Entities*

Some commentators have argued that privacy laws burden freedom of expression and should receive heightened scrutiny under the First Amendment.<sup>215</sup> This potentially includes not only laws that stop people from talking about others,<sup>216</sup> but also laws that inhibit the gathering and creation of information in the first place.<sup>217</sup> Those that have advocated First Amendment scrutiny of privacy laws have not generally distinguished between commercial entities and individuals acquiring the same information.<sup>218</sup>

The broader question of whether there is or should be a First Amendment right to gather information is beyond the scope of this Article. Even if there should be, however, it should be one that attaches to noncommercial individuals, rather than corporate or commercial entities. In the context of privacy laws, the person from whom the information is being extracted is often not a willing participant in the transaction.<sup>219</sup> There is no willing “speaker,” and thus, no speaker-based interests to protect. When the entity collecting the information lacks intrinsic First Amendment interests, restrictions on that collection merit little First Amendment scrutiny, just as in the case of a commercial speaker transacting with a commercial recipient.

Thus, even if we protect the newsgatherer or the photographer or acts of gathering information that “inform[] people,”<sup>220</sup> we need not similarly protect, for example, the large-scale consumer data tracking that is now pervasive.<sup>221</sup> An entity that gathers information about users’ web browsing in order to target advertisements to those users is collecting information that is, from that entity’s perspective, nothing more than a component of commercial activity. In this way,

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215. See Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 60 (2014); Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1051-52 (2000).

216. See Volokh, *supra* note 215, at 1050-51.

217. See Bambauer, *supra* note 215, at 61.

218. See *id.* at 106-09.

219. See, e.g., *Dietemann v. Time, Inc.*, 449 F.2d 245, 246 (9th Cir. 1971) (involving a recording made of a conversation in someone’s home without his consent).

220. See Bambauer, *supra* note 215, at 60-61, 77-81.

221. See, e.g., Julia Angwin, *The Web’s New Gold Mine: Your Secrets*, WALL STREET J. (July 30, 2010), <http://www.wsj.com/articles/SB10001424052748703940904575395073512989404> [<https://perma.cc/4S7X-83ZC>].

the targeted advertising company is similarly situated to the recipient of a consumer report under the FCRA or the pharmaceutical companies in *Sorrell*.<sup>222</sup> As in those cases, the targeted advertising company lacks intrinsic First Amendment interests. Because regulation of targeted advertising does not generally impinge upon the users' First Amendment interests, there are no First Amendment interests at stake in such regulation, and thus any First Amendment scrutiny of such regulations should be minimal.<sup>223</sup>

### C. Indirect Regulation of Noncommercial Transactions

In some situations, though surely not all, commercial entities might be receiving or collecting information that they will ultimately pass on to individuals.<sup>224</sup> In those cases, we might be concerned that restricting the activities of these commercial entities might ultimately restrict noncommercial ones, and thus First Amendment scrutiny would still be appropriate, even if the interest of the commercial entities were understood as merely derivative.

At the outset, it is important to note that not every restriction on a commercial entity impinges upon a derivative interest. The pharmaceutical companies in *Sorrell* did not acquire prescriber-identifying information in order to thereby pass that information on to individuals.<sup>225</sup>

Even when there may be an underlying noncommercial interest at stake, however, and therefore some First Amendment inquiry is appropriate, recognizing the commercial interest as a derivative one circumscribes the nature of any resulting First Amendment review. The direct effects of a privacy regulation on a commercial entity like

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222. See *supra* Part III.A.

223. To the extent that a regulation impedes willing users' ability to provide information for use in advertising, perhaps there are still some First Amendment interests at stake. The nature and strength of such interests, however, are quite different from those premised on intrinsic interests on the part of the advertisers. See *infra* Part IV.

224. Professor Bambauer gives the example of LexisNexis. See Bambauer, *supra* note 215, at 106-07.

225. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 558 (2011). The data intermediary IMS Health does provide data to a wide range of recipients, though. See *Our Company*, QUINTILES IMS, <http://www.imshealth.com/en/about-us/our-company> [<https://perma.cc/PKS3-WL49>] ("Customers include pharmaceutical, consumer and health medical device manufacturers and distributors, providers, payers, government agencies, policymakers, researchers and the financial community.").

LexisNexis are legitimate. It is only the indirect effects on potential noncommercial recipients that are cause for concern.

When the government legitimately targets one kind of activity, but the government action might have problematic indirect speech effects, First Amendment review is substantially more deferential than when the direct effects of the government action are the subject of review. Consider, for example, the scrutiny applied to a content-neutral regulation. Such a regulation is constitutional:

if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>226</sup>

The *O'Brien* test has often been called an intermediate scrutiny test,<sup>227</sup> just as the *Central Hudson* test has been called an intermediate scrutiny test in the context of commercial speech.<sup>228</sup> The “intermediate scrutiny” of the *O'Brien* test is not nearly as exacting as the “intermediate scrutiny” of the *Central Hudson* test, though. If the *Central Hudson* test has been applied in a manner that sometimes borders on strict scrutiny, the *O'Brien* test has sometimes been applied in a manner that borders on rational basis review.

Consider the *O'Brien* case itself, which involved the constitutionality of a law against burning draft cards.<sup>229</sup> The defendant in that case argued quite reasonably that the burning of a draft card made no real difference to the actual operation of the draft system.<sup>230</sup> It was not as if the holder of the draft card were burning the actual record of his registration held by the government. The draft card itself was a mere receipt, a document that recorded relevant facts, such as the identity and registration status of a particular individual, but that did not itself make any of those facts more or less true.<sup>231</sup> And yet the Court found that burning the draft card would

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226. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

227. *See, e.g.*, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 26-27 (2010).

228. *See, e.g.*, *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995).

229. *See O'Brien*, 391 U.S. at 375.

230. *See id.* at 378.

231. *See id.*

impede “the smooth and proper functioning” of the draft system.<sup>232</sup> According to the Court, Congress had a “substantial interest” in preventing the destruction of these “receipts,” so as to avoid “a mix-up in the registrant’s file,” to make it easier for the registrant to contact his local board, and to remind the registrant to notify the board of any address changes.<sup>233</sup> In justifying the law under these rationales, the Court made no real attempt to ask whether there was a serious problem with any of these issues or whether the regulation would be at all effective in addressing these problems.

Contrast this with the commercial speech cases involving restrictions on advertising for alcohol, cigarettes, and gambling.<sup>234</sup> In applying the *Central Hudson* test in those cases, courts have rigorously scrutinized the government’s evidence to determine how much the government’s interests would in fact be advanced by the challenged regulations.<sup>235</sup> What potentially justifies the difference between the stringent *Central Hudson* review and the relatively more relaxed *O’Brien* review is that in the commercial speech cases, the effects on speech are the direct and intended effect of the regulations, rather than merely a byproduct, leading the courts to be much more skeptical of such regulations.

In the context of indirect regulation of noncommercial transactions, it is the more relaxed *O’Brien*-type review that should apply.<sup>236</sup> Thus, just as a content-neutral regulation is valid so long as it is tailored to the permissible noncontent aim and does not have excessive impermissible content-based effects,<sup>237</sup> regulation of commercial data collection, itself a permissible aim, should at a minimum be permitted so long as the regulation is tailored to that aim and does not have excessive effects on the ability of individuals to collect information. Such an analysis recognizes that the commercial actor directly collecting the information lacks intrinsic First Amendment interests, while accounting for the interests of noncommercial individuals that the regulation may affect.

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232. *Id.* at 381.

233. *Id.* at 378-80.

234. See cases cited *supra* note 113.

235. See, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505-07 (1996) (opinion of Stevens, J.).

236. See Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 *STAN. L. REV.* 1373, 1418 (2000).

237. See *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989).

#### IV. IMPLICATIONS FOR COMMERCIAL SPEECH DIRECTED AT UNWILLING LISTENERS

The derivative nature of corporate and commercial speech also has important implications in cases involving listeners who wish to block out a commercial entity's speech. In a noncommercial context, the listener's interests potentially need to be balanced against the speaker's.<sup>238</sup> In a commercial context, though, once we understand that the commercial speaker's interests are merely derivative of the listener's interests, then it becomes easy to see that as between the commercial speaker and the unwilling listener, it is only the interests of the unwilling listener that matter. Thus, unwilling listener cases are much more easily resolved in commercial contexts than in noncommercial ones.<sup>239</sup>

For example, there is no sensible argument that "do-not-call" regulations violate the First Amendment.<sup>240</sup> The telemarketing calls restricted by the do-not-call regulations are corporate or commercial speech,<sup>241</sup> and thus are protected only to protect the recipients' access to such speech. If those recipients have specifically indicated that they do not wish to receive such calls, the telemarketers have no intrinsic First Amendment interest in speaking nevertheless.<sup>242</sup> While the Tenth Circuit ultimately upheld the do-not-call regulations against a First Amendment challenge, it did so only after applying the *Central Hudson* test.<sup>243</sup> In so doing, the court relied heavily on the evidence the government had put forward about the extent of the problem of unwanted telemarketing and the inadequacy of proposed alternatives.<sup>244</sup> There should have been no need, however, to clear a hurdle designed to preserve listeners' access to

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238. See *supra* note 12.

239. See *Jaynes v. Commonwealth*, 666 S.E.2d 303, 313 (Va. 2008) (striking down a law prohibiting false routing information in unsolicited bulk e-mail, where the law was "not limited to instances of commercial or fraudulent transmission of e-mail").

240. See *Mainstream Mktg. Servs., Inc. v. FTC*, 358 F.3d 1228, 1232-33 (10th Cir. 2004).

241. See *id.* at 1236 ("The national do-not-call registry's telemarketing restrictions apply only to commercial speech.")

242. See *supra* Part I.

243. See *Mainstream Mktg. Servs., Inc.*, 358 F.3d at 1236, 1246.

244. See *id.* at 1241, 1244-45.

information in a case about whether those listeners could refuse to receive that information.

And the level of scrutiny can make a real difference to the outcome of a case, particularly when privacy interests are involved.<sup>245</sup> In an earlier case, *U.S. West, Inc. v. FCC*, the Tenth Circuit had come to the opposite conclusion about the constitutionality of an FCC order restricting telecommunications carriers from using customer information for marketing purposes, striking down the order after applying the *Central Hudson* test.<sup>246</sup> In that case, the court expressed its “concerns” about the privacy justification the government proffered, and it required the government to “specify the particular notion of privacy and interest served” and to establish that the interest was “substantial.”<sup>247</sup> Construing the relevant privacy interest narrowly to be that of avoiding embarrassment,<sup>248</sup> the court found no evidence that embarrassing disclosures would occur in the absence of the challenged order, and thus no evidence of real harm to justify the order.<sup>249</sup>

But if the First Amendment claim here is supposed to protect the customer’s access to marketing information, and that customer objects to having his personal information used for those marketing purposes, there is simply no First Amendment claim to raise at all. Any First Amendment interest that the carrier has is derivative of the interests of the very individual against whom the carrier is opposed.

It is possible that some of the customers were not in fact unwilling recipients, and that those customers’ interests in receiving marketing information on the basis of their data were burdened by the

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245. See Wu, *supra* note 15, at 81-82.

246. See *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1240 (10th Cir. 1999). The challenged order applied to “customer proprietary network information,” which included call data, and it largely prohibited carriers from using or disclosing the information except to provide the relevant telecommunications service. See *id.* at 1228 & n.1; see also 47 U.S.C. § 222 (2012).

247. *U.S. West*, 182 F.3d at 1234-35.

248. See *id.* at 1235. The government had justified the order on the basis that information about “to whom, where, and when a customer places a call” was information that could be “extremely personal to customers” and “equally or more sensitive [than the content of the calls].” *Id.* at 1235 (alteration in original) (quoting Implementation of the Telecommunications Act of 1996, 13 FCC Rcd. 8061, 8064, 8133 (1998)). The potential for embarrassment is but one possible privacy interest at stake in the use or disclosure of call data. See Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1935 (2013).

249. See *U.S. West*, 182 F.3d at 1237-38.

order's requirement to opt in to the use of their data. One could then argue that scrutiny might be warranted in order to ensure access by these willing customers to valuable marketing information, particularly if an opt-in requirement is seen as a substantial barrier to the flow of that information.<sup>250</sup> The First Amendment might be implicated to the extent necessary to protect the speech interests of willing listeners, the ones who wanted to have their information used for marketing.

Framed in this manner, however, the First Amendment interests are easily seen to be far less weighty than the courts have generally characterized them, and thus even if some scrutiny might be warranted in these circumstances, it surely should not be at the level of the *Central Hudson* test. The government regulation does not constrain the speech that consumers can choose to receive.<sup>251</sup> In order to receive a particular kind of marketing, the consumer need only affirmatively choose to receive it.<sup>252</sup> Moreover, just as the economic incentive of the commercial speaker is thought to be sufficient to minimize any chilling effect from the imposition of liability for misleading commercial speech,<sup>253</sup> that same economic incentive can overcome the barriers created by the need to obtain opt-in consent. Commercial speakers have every incentive to make it as easy as possible for consumers to opt in to marketing.<sup>254</sup>

This same analysis could have been applied in the case of *Sorrell v. IMS Health Inc.*<sup>255</sup> In that case, the Supreme Court ultimately grounded its decision to strike down the Vermont law not in the law's restriction of the transfer of data from pharmacies to pharmaceutical companies, but in the law's restriction of the pharmaceutical companies' marketing practices to doctors.<sup>256</sup> Here too, as in *U.S. West*, the real First Amendment interests were not those of the companies marketing to doctors, but those of the doctors interested

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250. See Michael E. Staten & Fred H. Cate, *The Impact of Opt-In Privacy Rules on Retail Credit Markets: A Case Study of MBNA*, 52 DUKE L.J. 745, 766 (2003).

251. See *id.* at 765.

252. See *id.*

253. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976).

254. See Jeff Sovern, *Opting In, Opting Out, or No Options at All: The Fight for Control of Personal Information*, 74 WASH. L. REV. 1033, 1101 (1999).

255. 564 U.S. 552 (2011).

256. See *id.* at 571.

in receiving information about brand-name drugs from the companies.<sup>257</sup> And again, the law at issue did not prevent the doctors from receiving detailing visits, or even detailing visits tailored to their prescription practices.<sup>258</sup> The doctors need only have opted in to such marketing. On that view, it would seem that the Court's heightened scrutiny was misplaced.

Still, the Court's decision seems to have been animated by its view that the Vermont law was not really about marketing that the doctors did not want, but rather about marketing that the state did not want. As the Court put it, the defect in the law was that it "burdened a form of protected expression that it found too persuasive."<sup>259</sup> This rationale is very much in line with the core rationale expressed by the Court in its corporate and commercial speech cases, namely that the First Amendment casts doubt on any regulation meant to limit particular advertising messages.<sup>260</sup> If the Court viewed the Vermont statute to have been aimed at suppressing the message that doctors should prescribe brand-name drugs, then perhaps some First Amendment skepticism was warranted.

Read in this way, the *Sorrell* decision is a narrow one. It perhaps limits the government's ability to restrict marketing on the basis of the message conveyed, but it does not limit the government's ability to restrict marketing on the basis of whether the listener wants it.<sup>261</sup> It should thus pose no impediment, for example, to a regulation requiring websites to honor a do-not-track or do-not-target signal.<sup>262</sup> Such a requirement might seem superficially similar to the one at issue in *Sorrell*, insofar as both requirements restrict the use of

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257. *See id.* at 578.

258. *Id.* at 573.

259. *See id.* at 580.

260. *See, e.g.*, 44 *Liquormart v. Rhode Island*, 517 U.S. 484, 503 (1996) (opinion of Stevens, J.).

261. *See Sorrell*, 564 U.S. at 575 (suggesting that a statute designed to give physicians greater control over the use of their information might pass muster because then the statute's design would be "unrelated to any purpose to advance a preferred message"). *But see id.* ("Many are those who must endure speech they do not like, but that is a necessary cost of freedom."); Piety, *supra* note 73, at 4-5 (arguing that *Sorrell* represents a "major doctrinal shift" in "turning the rationale for commercial speech doctrine upside down by putting the speaker, rather than the public interest, at the center of the analysis").

262. *Cf.* Agatha M. Cole, Note, *Internet Advertising After Sorrell v. IMS Health: A Discussion on Data Privacy & the First Amendment*, 30 *CARDOZO ARTS & ENT. L.J.* 283, 309-10 (2012).

certain personal information for marketing purposes. A restriction on behavioral advertising, however, would be aimed not at limiting particular messages, but at recognizing the consumers' preferences not to have their information used to market to them in particular ways.

Similarly, the First Amendment imposes no impediment to the government regulating marketing techniques that unduly take advantage of consumer weaknesses. Thus, for example, the government can restrict in-person solicitation by lawyers, at least to the extent that such solicitation involves "fraud, undue influence, intimidation, overreaching, and other forms of vexatious conduct."<sup>263</sup> Again, because the First Amendment value of the solicitation speech lies in its value to the recipient, rather than the speaker, there can be no infringement on First Amendment rights in a regulation that protects the recipient in that encounter. If there is a potential First Amendment problem, it would lie only in the possibility that a regulation aimed at protecting some listeners ends up restricting valuable speech to other listeners.<sup>264</sup> More broadly, the First Amendment should not restrict government attempts to control forms of undue influence in marketing.<sup>265</sup> In the marketing transaction, the First Amendment interests are those of the consumers, and thus, unless there is a conflict among consumers, consumer protection measures cannot run afoul of the First Amendment.<sup>266</sup>

## CONCLUSION

Courts and commentators have tended to think that the corporate or commercial nature of speech makes either no difference or all the difference. In fact, the choice need not be so stark. By understanding the derivative nature of these speech interests, one can see why commerciality can make a difference in some scenarios and not

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263. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 461-62 (1978) (internal quotation omitted).

264. *See id.* at 468-69 (Marshall, J., concurring in part and concurring in the judgment) (expressing "concern that disciplinary rules not be utilized to obstruct the distribution of legal services to all those in need of them").

265. *See* Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995, 1038-40 (2014).

266. "Consumer protection" here means protecting consumers from overreach by sellers, not "protecting" consumers from themselves.

others. Compelled speech, transactions among commercial entities, and unwanted speech are all settings in which commercial speech can be regulated with minimal First Amendment scrutiny, even if the equivalent regulation of noncommercial speech would attract much more stringent review.

Underlying the commercial difference is the speech difference—that is, the idea that there is something different about speech as compared to other human activity. Failing to recognize the difference between commercial and noncommercial speech in the settings in which it should matter is often rooted in a failure to differentiate between speech and commercial conduct. The blurring of that distinction creates a situation in which First Amendment protection becomes unhinged from any theoretical underpinnings. When that occurs, both free speech and sensible government regulation lose out.

