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Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech

Rodney A. Smolla

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I. Introduction

In their provocative essay, *Commerce & Communication*,[1] Professors Ronald K.L. Collins and David M. Skover invite us to re-examine First Amendment doctrines concerning commercial speech in light of the realities of modern mass advertising in contemporary American culture.

Collins and Skover argue that the "logic of discourse" changes as modern advertising becomes less concerned with conveying information about products and more concerned with conveying image and fantasy.[2] This "debases" the normative values once associated with our cultural images and symbols, and actually alters the identity of the consumer, who comes to believe that products are invested with miraculous fetish-like powers.[3] Powerful advertisers can reshape the media in their own image, encouraging a "discourse in the service of waste" and turning what was once a "citizen-democracy" into a "consumer-democracy."[4] Political leaders in turn mimic the strategies of advertisers, further blurring the line between political and commercial discourse.[5]

In this Response I take issue with the striking claims advanced by Collins and Skover concerning the nature of modern advertising and its impact on American culture. I argue that the threats to public discourse posed by contemporary mass advertising are largely exaggerated.

In determining whether it is appropriate to adopt a First Amendment regime in which society is given the license to regulate heavily the content

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1. Ronald K.L. Collins & David M. Skover, *Commerce & Communication*, 71 TEX. L. REV. 697 (1993).

2. *Id.* at 710.

3. *Id.*

4. *Id.* at 711.

5. *Id.*

of commercial speech, it is obviously important to assess how much harm modern advertising really causes.[6] While I think that the basic descriptive portrait of contemporary advertising drawn by Collins and Skover is realistic, their accounting of the harm caused by such advertising is more a caricature of modern American life than a persuasive analysis. Their portrait is, to be sure, an arresting caricature—and like all good caricature, it draws cleverly from reality—but they fail to demonstrate that contemporary mass advertising really causes much palpable social harm; that any plausible new regime of commercial speech regulation would elevate American public discourse; or that such a regulatory regime would improve the conditions of American society, let alone be reconcilable with the core traditions of the First Amendment.

I wish to concentrate on three of the themes most central to the arguments advanced by Collins and Skover. The first theme is the Collins and Skover vision of the marketplace of ideas. Much of their indictment of mass advertising in my judgment is grounded in a vision of an ideal marketplace in which parties trade reliable and useful information in order to facilitate rational decisionmaking. As wonderful as this ideal sounds, is it a plausible aspiration for a marketplace in a truly open society? Can it be squared with the assumptions that currently govern (and I think should govern) modern First Amendment jurisprudence?[7] The second theme focuses on the influence of modern mass advertising on the values of the national community and the motifs of public discourse. Are the vexing problems of current American life really caused, in any demonstrable way, by modern commercial advertising? Or are cause and effect far more jumbled and inscrutable, so that the "sound bites" of modern political discourse and the "image bites" of contemporary advertising do not so much reflect a linear physics in which one "causes" the other as much as they both reflect the larger influencing patterns of contemporary culture?[8] The third theme focuses on the impact modern mass advertising has on individual consumers. Are we as individuals really shaped, in any deep and profound sense, by modern advertising? Are we in modern times really just "the sum of what we buy"?[9]

II. Advertising and the Current State of the Marketplace of Ideas

A. The First Amendment and Competing Visions of the "Marketplace"

Claims that commercial speech is undeserving of full—or perhaps of *any*—First Amendment protection are usually grounded in the judgment

6. Or, it might be said, to ask critically and skeptically, "Where's the Beef?" *Cf. id.* at 726.
7. *See infra* Part II.
8. *See infra* subpart III(B).
9. *See infra* subpart III(C).

that commercial speech does not fulfill any of the functions traditionally advanced to justify the fact that we give heightened constitutional protection to speech at all. Thus, if one sees freedom of speech primarily as an aid to democratic self-governance,[10] commercial speech is likely to be left out in the cold because it does not in any obvious or direct way appear to advance the processes of democracy.[11] If one sees freedom of speech primarily as a vehicle for individual autonomy and self-fulfillment, commercial speech—at least when "spoken" through the artificial voices of inanimate corporations—does not seem to qualify as speech that lifts the human spirit of the speaker.[12] And if the oldest of free speech metaphors, "the marketplace of ideas,"[13] is one's primary justification for enhanced protection of speech, commercial speech again falls short because its content seems largely devoid of anything that ought properly be called an "idea," or as Collins and Skover maintain, much that can honestly be described as "information."[14]

Collins and Skover do not offer either a satisfactory definition of commercial speech or a convincing explanation of why it should not receive the same high level of constitutional protection routinely granted to other genres of speech. Indeed, they turn classic First Amendment thinking upside down. Their argument is pervaded by the theme that commercial speech must *earn* its way into constitutional protection by offering something of value in its content. The only plausible value they appear to credit is the "informational" content of commercial speech,

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10. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971) (arguing that speech occupies a central role in maintaining democratic institutions).

11. *See* Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 353-54 (1978) (arguing against protection for commercial speech because it bears no relation to processes of politics and public decisionmaking); Thomas H. Jackson & John C. Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 5-6 (1979) ("[T]he first amendment guarantee of freedom of speech and press protects only certain identifiable values. Chief among them is effective self-government. Additionally, the first amendment may protect the opportunity for individual self-fulfillment through free expression. Neither value is implicated by governmental regulation of commercial speech.").

12. *See* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 196 (1989) (claiming that commercial speech lacks "crucial connections with individual liberty and self-realization"); C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 3 (1976) ("[C]ommercial speech is not a manifestation of individual freedom or choice; unlike the broad categories of protected speech, commercial speech does not represent an attempt to create or affect the world in a way which can be expected to represent anyone's private or personal wishes.").

13. *See generally* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 6-16 (explaining the history of the marketplace model in constitutional law and examining the model's assumptions).

14. *See* Collins & Skover, *supra* note 1, at 729-33. For a powerful critique of the argument that commercial speech does not contribute to traditional free speech values, see Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1223-51 (1983).

content that will assist consumers in making informed and rational choices in the marketplace.[15]

I would, however, approach the matter from the other direction. Commercial speech, as speech, should presumptively enter the debate with full First Amendment protection.[16] The theoretical question should not be what qualifies commercial speech for First Amendment coverage, but what, if anything, *disqualifies* it. In my view, there are no convincing arguments for disqualifying most modern mass advertising from constitutional protection. The argument for even *reducing* the level of protection to the intermediate standard of review granted by existing First Amendment doctrine is theoretically sound only if applied to a limited subclass of advertising: that subclass of advertising that does "*no more* than propose a commercial transaction."[17]

It is only the linkage between commercial speech and a commercial transaction that gives government the theoretical leverage to presume to regulate the speech at all.[18] Because government has virtually unchecked constitutional power to regulate transactions,[19] government may legitimately claim some special prerogative to regulate speech about transactions.[20] In classic First Amendment terms, however, the one thing the

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15. *See* Collins & Skover, *supra* note 1, at 730 (quoting Daniel H. Lowenstein, *"Too Much Puff": Persuasion, Paternalism and Commercial Speech*, 56 U. CIN. L. REV. 1205, 1228-29 (1988)).

16. *See* Jeffrey M. Shaman, *Revitalizing the Clear-and-Present-Danger Test: Toward a Principled Interpretation of the First Amendment*, 22 VILL. L. REV. 60, 69-70 (1977) (arguing in favor of protecting all speech under rigorous heightened review standards, without regard to categories such as "commercial speech" or "libel"). The Supreme Court's decision in R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992), certainly supports this proposition. For a further discussion of *R.A.V.*, see *infra* notes 43-55 and accompanying text.

17. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973), and holding that such speech does not lack First Amendment protection) (emphasis added).

18. *See* Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 374 (1979) ("[T]he commercial subject matter of the advertisement forms the basis of the government's claim to regulatory power.").

19. *See* Kenneth S. Weitzman, *Copyright and Patent Clause of the Constitution: Does Congress Have the Authority to Abrogate State Eleventh Amendment Sovereign Immunity After* Pennsylvania v. Union Gas Co.*?*, 2 SETON HALL CONST. L.J. 297, 333 (1991) ("Pursuant to the commerce clause, congressional authority is extremely broad, if not virtually unlimited today, and nearly anything even remotely connected with interstate commerce is subject to Congress' plenary powers.").

20. A good illustration of the appropriate regulation of commercial speech as an incident to the regulation of underlying transactions is provided by the pattern of Supreme Court cases involving attorney advertising and solicitation. The Court has generally struck down efforts by states to restrict attorney advertising. *See, e.g.*, Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) (invalidating state prohibitions against targeted, direct-mail advertising by attorneys); *In re* R.M.J., 455 U.S. 191 (1982) (holding that states may not limit the terms attorneys use to advertise their services as long as the terms used are not deceptive); Bates v. State Bar, 433 U.S. 350 (1977) (holding that the First Amendment gives lawyers the right to advertise the prices of routine services, such as simple real estate closings, uncontested divorces, uncontested adoptions, or personal bankruptcies). But in Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), the Court sustained a disciplinary action against an

government may not do is regulate speech because it "sells" a lifestyle, fantasy, ethos, identity, or attitude that happens to be regarded by most as socially corrosive.[21]

To the extent that advertisers are selling fantasies, lifestyles, identity, or anything other than "hard core" transactional information, they are doing what all other speakers routinely do. They are making these points, to be sure, out of utter self-interest; indeed, out of the most grasping of all forms of self-interest—the desire for financial profit. But the profit motive

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attorney for an in-person solicitation of a client in a hospital following an accident. Although the solicitation did involve speech, the Court made it clear that its amendment decisions upholding the rights of lawyers to advertise did not strip bar authorities of the power to regulate the type of potentially abusive behavior at issue in the in-person solicitation context. The decision in *Ohralik* stood in contrast to *In re* Primus, 436 U.S. 412 (1978), decided the same day as *Ohralik*, in which the Court upheld the First Amendment right of a lawyer to make a written communication of free legal assistance provided by lawyers with the ACLU, not in anticipation of a personal pecuniary gain, but rather in an effort to express personal political beliefs and to advance the civil liberties objectives of the ACLU.

21. At the core of modern First Amendment jurisprudence lies the elemental proposition that regulation of speech expressing an intent to stifle a message because of disagreement with it simply cannot be reconciled with the Constitution. *See, e.g.*, R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2548 (1992); United States v. Eichman, 496 U.S. 310, 319 (1990); Texas v. Johnson, 491 U.S. 397, 414 (1989); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988); Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806 (1985); Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983); Carey v. Brown, 447 U.S. 455, 462-63 (1980).

Perhaps the two cases that come closest to supporting the type of commercial speech regulation apparently contemplated by Collins and Skover are Posadas de Puerto Rico Associates v. Tourism Co., 478 U.S. 328 (1986), and Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981). But even these decisions do not support the sweeping regulation of commercial speech that the Collins and Skover thesis seems to invite. In *Posadas*, for example, the government of Puerto Rico was concerned by the social evils caused by casino gambling. *Posadas*, 478 U.S. at 332. As described by the Court, the legislature enacted a statute and regulations "restricting advertising of casino gambling aimed at the residents of Puerto Rico," *id.* at 330, based on the belief that "[e]xcessive casino gambling among local residents . . . would produce serious harmful effects on the health, safety and welfare of the Puerto Rican citizens, such as the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime." *Id.* at 341 (quoting Brief for Appellees at 37). By permitting casinos to target their advertising to tourists from outside the Commomwealth but not to the Puerto Rican population, the government sought to discourage gambling by its own citizens. *Id.* at 335. Applying the commercial speech standard, the Supreme Court had no difficulty finding Puerto Rico's interests "substantial" and its mechanism sufficiently well-tailored to vindicate those interests. *Id.* at 341.

Similarly, in *Metromedia*, the City of San Diego did not seek to eliminate commercial billboard advertising because of the content of the advertisements, but because of the "visual clutter" and safety hazards caused by the physical presence of billboards on the landscape. *See Metromedia*, 453 U.S. at 493 (identifying the City's interests as the elimination of "hazards to pedestrians and motorists" and the preservation and improvement of the city's appearance). Cases such as *Posadas* and *Metromedia* thus do not stand for the proposition that government may legislate at will upon commercial speech, drawing whatever distinctions it pleases. Rather, they stand for the proposition that when legislation is backed by truly substantial governmental interests, such as the perceived social evils of gambling or the environmental and aesthetic damage caused by billboards, commercial speech may be forced to yield.

alone is not enough, either in First Amendment doctrine or theory, to disqualify speech from full constitutional protection.[22]

The very "excesses" of modern advertising that might at first make it seem a likely candidate for heavy legal regulation are actually the attributes that most qualify such speech for the heightened constitutional protection we routinely grant other categories of speech.[23] Indeed, the distinction that is central to the Collins and Skover argument, a distinction that seeks to drive a wedge between the rational and irrational components of advertising,[24] is one that has been repudiated in virtually all other areas of current First Amendment doctrine.[25] The refusal of current First Amendment jurisprudence to accept a schism between the rational and irrational elements of speech (or, to use slightly different terms, between the intellectual and emotional content of speech) is sound—indeed, I would say vital to the American conception of freedom of speech.[26] Commercial speech should be no exception.[27]

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22. The Supreme Court has noted this point on several occasions. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, Justice Blackmun, writing for the majority, stated: "[S]peech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another. . . . Speech likewise is protected even though it is carried in a form that is 'sold' for profit." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976) (citation omitted); *see* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 384-85 (1973); New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964); Smith v. California, 361 U.S. 147, 150 (1959); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952); Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943); *see also* MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 64 (1984) (arguing that commercial speech may not be distinguished from political speech on the ground that the former must be hardier because of its underlying profit motive).

23. *See* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 652 (1990) (arguing that the ability to exchange commercial information may be more important than political or artistic expression since one's livelihood may depend upon effective commercial speech).

24. *See* Collins & Skover, *supra* note 1, at 702-05.

25. RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 46-47 (1992).

26. In its famous decision in Cohen v. California, 403 U.S. 15 (1971), the Court explained the "dual communicative function" of many forms of free expression:

> [M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.
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> Finally, and in the same vein, we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.

Id. at 26.

27. *Cf.* Burt Neuborne, *A Rationale for Protecting and Regulating Commercial Speech*, 46 BROOK. L. REV. 437, 448-53 (1980) (arguing that commercial speech deserves greater protection than it

The baggage carried by commercial speech is the bias of the intelligentsia. That segment of American culture that lives for a life of the mind, and indeed makes a living by living for the life of the mind, will naturally harbor some disdain for the coarser entries in the marketplace of ideas—those ideas that sell only goods and services.[28]

To the intellectual or the academic, speech that is rational, analytic, and contemplative will usually receive higher marks than speech that appeals to passion and prejudice. When the passion or prejudice is attached to some intellectual supposition, some academic minds, of course, may be comfortable granting it some measure of merit. The creative passions of the playwright, poet, musician, or artist will be treated by most academics as deserving the same freedom from censorship as the denser thought of the analytic philosopher or particle physicist. But when the passion is attached only to a product, when an effort is made to short-circuit the brain, discard *Consumer Reports*, and get people to buy something by engaging them in fantasies about their own personas and lifestyles, the academic is likely to be intolerant. For this crass speech does not appear to be any part of the "exposition of ideas,"[29] nor connected in any plausible manner to the pursuit of "truth, science, morality, and arts in general, in its diffusion of liberal sentiments."[30]

This judgment, however, itself reflects a bias that is undemocratic and intellectually elitist. It is not so much an upper-class bias or leisure-class

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currently receives to ensure that data necessary for economic and political decisionmaking is available); Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 431 (1971) (arguing that certain commercial speech, such as informational and artistic advertising, should receive protection); Ronald D. Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U. ILL. L.F. 1080 (agreeing with the result of a recent Supreme Court case that seemed to reject a notion of affording a different protection for commercial speech and arguing that the distinction between commercial and noncommercial speech is untenable and unwise).

28. *See* R.H. Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384 (1974). Coase observes:

> "Everyone tends to magnify the importance of his own occupation and to minimize that of his neighbor. Intellectuals are engaged in the pursuit of truth, while others are merely engaged in earning a livelihood. One follows a profession, usually a learned one, while the other follows a trade or a business." I would put the point more bluntly. The market for ideas is the market in which the intellectual conducts his trade. The explanation of the paradox is self-interest and self-esteem. Self-esteem leads the intellectuals to magnify the importance of their own market.

Id. at 386 (quoting Aaron Director, *The Parity of the Economic Market Place*, 7 J.L. & ECON. 1, 7 (1964)).

29. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). In *Chaplinsky*, the Court noted that obscene, profane, libelous, and fighting words—words that have no social value—are "no essential part of any exposition of ideas" and thus do not merit First Amendment protection. *Id.*

30. Roth v. United States, 354 U.S. 476, 484 (1957). Quoting from 1 JOURNALS OF THE CONTINENTAL CONGRESS 108 (Johnson Reprinting Corp. 1968) (1774), the *Roth* Court stated that one function of freedom of the press is to advance these ideas. *Id.*

bias as it is a vocational bias, a bias likely to be found in many academics and others who live by and for words and ideas. I am part of that vocational class and I share the bias, a bias that often looks with disdain upon much of mass culture—mass commercial culture, mass political culture, mass entertainment culture, mass journalistic culture.[31]

But what follows from this bias? In an open democracy, can it be that intellectuals have a mandate to push government to regulate mass culture in the service of elevating it? Or should we who pride ourselves on living in the "real" marketplace of ideas demonstrate the democratic liberality that the marketplace metaphor really stands for, and understand that mass culture will always be with us?

Mass culture will always dominate a democracy, and elite culture could not live without it. Elite culture ultimately feeds off of mass culture, using it for energy and fodder, seeking to transform and reform, for it is the raw stuff of social life from which novels, poems, plays, and law review articles criticizing mass advertising all ultimately come.

Many facets of modern public discourse are fatuous and vacuous. The classic First Amendment response of Louis Brandeis—that "the fitting remedy for evil counsels is good ones,"[32]—also supplies the best cultural response. The fitting remedy for shoddy thought is quality thought. If those who disdain mass culture want to do the world a favor, then write better books and articles, produce better plays and movies, design better scientific experiments and cures, do more thoughtful and penetrating journalism, and certainly continue to wage attack on all in the world of public discourse—political, artistic, scientific, and commercial—that is substandard.[33] But do not ask government to bring to bear the force of law to set standards of quality.

Modern lifestyle advertising certainly does not match the idealized marketplace of ideas posited by Professors Collins and Skover.[34] Mass

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31. I do not wish to preach. Like many of my colleagues, I too have a reflexive distaste for many of the silly and seductive commercials invented by modern advertisers, particularly those that appeal to our darker impulses. Like many of my colleagues, I have no use for 30-second political spots that sell candidates like cologne or for 30-minute political speeches that do little but soar to higher and higher platitudes. Like many of my colleagues, I often find it hard to find engaging entertainment on television and prefer to get my news and analysis from National Public Radio than from *Inside Edition*. It is one thing to share these preferences; it is quite another, however, to believe that one is entitled to see them enacted into law.

32. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

33. *Cf.* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 684 (1990) ("The first amendment preserves the independence of public discourse so that a democratic will within a culturally heterogeneous state can emerge under conditions of neutrality, and so that individuals can use the medium of public discourse to persuade others to experiment in new forms of community life.").

34. *See* Collins & Skover, *supra* note 1, at 698 (contrasting "the *ideal* marketplace, [in which]

market, lifestyle advertising is a far cry from the pristine, informational advertising of the want ads or the Yellow Pages. But whether this is a failure of the real to match the ideal depends on what one's ideal was in the first place.

Perhaps some believe that the "ideal" marketplace really would be one in which serious propositions of politics, policy, or philosophy are debated rationally, with the order and decorum of a meeting conducted under Robert's Rules. But the ideal marketplace could just as well be a cacophony rather than a symphony, in which all means of persuasion—gentle and harsh, logical and emotional, rational and irrational—vie with one another in an open bazaar of politicians, peddlers, proselytizers, panhandlers, and petitioners, all hawking their wares in a booming, buzzing confusion.

If one's notion of the value of the marketplace metaphor is that the market will *actually* produce truth, or even is the best *test* of truth, it is not so difficult a jump to favor at least moderate forms of market regulation so as to help truth along a bit, at least by ridding the market of that which cannot even articulate any conceivable claim to be advancing the pursuit of truth. Perhaps because Oliver Wendell Holmes used the words "test" and "truth" and "experiment" in his wonderful dissent in *Abrams v. United States*,[35] we tend to think of the marketplace of ideas in this "scientific hypothesis" sense, in which ideas vie with one another in a grinding historical process of examination and cross-examination, with the ideas at the top of the heap reflecting the best market judgment at any given moment of where truth lies.

But this notion of the marketplace is actually not what a real marketplace looks like at all. It is the variety of the real marketplace that gives it its excitement and color and life and quality. It is all the different fruits and vegetables and fish and foul piled up on iced carts in the farmers' markets of the plazas of the world's cities, all the different stocks traded on the stock exchanges, all the different compact disks and cassette tapes stacked in the giant record store, all the different books and magazines crowded into a great bookstore, and yes, all the microwave ovens, lawn mowers, athletic shoes, soft-drink cans, sweatshirts, and bicycles hung and heaped willy-nilly in the Wal-Mart, that compose all of these individual markets, and the mass market that holds them all.

Let the buyer beware! This is a market filled with hucksters, hustlers,

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there is a 'free trade in ideas'" with the current marketplace, which is "a marketplace of commercial symbols" (quoting Abrams v. United States, 250 U.S. 616, 660 (1919) (Holmes, J., dissenting) (emphasis in original)).

35. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Justice Holmes argued that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . [Our Constitution] is an experiment, as all life is an experiment." *Id.*

hype, and hyperbole. In an open society, the gullible will often be seduced by the catch-phrases of billionaire populists and billion-dollar ad campaigns. In an open society there is always pressure to believe that money and material will give life meaning. The very openness, however, that invites a Ross Perot to hint a run for the presidency and instantly garner a third of the potential vote, or that encourages advertisers to try to make us all materialists, will also give free wheel to the intellectual and entrepreneurial imaginations that hold the best promise for genuinely uplifting our quality of life.

B. *Advertising, Public Discourse, and the Futility of Attempting to Elevate the Market Through Regulation*

There is, concededly, a haunting verisimilitude to the claim that mass advertising does, in a diffused and collective sense, transform the culture, degrading the quality of all our ambient public discourse. Collins and Skover are most persuasive when pointing out that the commercial exploitation of the symbols and images of noncommercial culture is parasitic and tends to trivialize, dilute, and debase those symbols.[36]

Collins and Skover are on far weaker ground, however, when they intimate that regnlation is the answer to this problem. Regulating the marketplace on these grounds clearly cannot be squared with the assumptions underlying modern First Amendment theory.[37] But even if Collins and Skover choose not to accept those First Amendment assumptions—and they are of course free to urge that those assumptions be discarded—presuming to regulate mass advertising in order to defend high culture or to elevate public discourse is misguided social policy.

Collins and Skover use the American flag as a primary example of the debasement of cultural symbols through commercial exploitation, noting that "Betsy Ross's 'Old Glory' is waved constantly in hawking everything from clothes to cakes,"[38] and asking: "Why should the ideal of the flag (raised at Iwo Jima) be the stock-in-trade of jean and pastry ads? Do we not risk debasing the symbol of American sacrifice by these associations?"[39]

I accept that any use of the flag is likely to have symbolic significance, and that in the eyes of many, to use it to sell jeans or burn it to express exasperation with the Republican Party is to debase it. But the flag is not Betsy Ross's, nor the government's, nor the culture's, to shelter. The short answer to Collins and Skover is that the First Amendment

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36. *See* Collins & Skover, *supra* note 1, at 709-10.

37. *See supra* notes 23-27 and *infra* notes 43-55, and accompanying text.

38. Collins & Skover, *supra* note 1, at 711.

39. *Id.* at 713.

protects this type of symbolic debasement.[40] The long answer is that it should.

To help make the case against commercial speech, Collins and Skover note that the "mass advertising process takes from the culture, transforms what it takes, and then tenders back what it took and transformed."[41] But this process is not unique to mass advertising. It is, rather, what virtually all creative expression does all the time. This is precisely the interpretative transformation that takes place in great art and literature. Thus, the transforming process is not itself the evil. It is not the transforming of reality or the manipulation of cultural symbols and images that is bad; rather, it is the quality of the transformation that offends Collins and Skover. There is good art and there is schlock. There is "exploitation" of reality for the high artistic purpose of illuminating the human condition, and there is "exploitation" to make a fast buck. As far as the First Amendment is concerned, however, unless this transforming speech violates some legally cognizable interest, such as copyright protection or an invasion of personal privacy or reputation, all of this exploitation is protected.[42]

The Supreme Court recently dramatically reinforced the First Amend-

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40. *See* United States v. Eichman, 496 U.S. 310 (1990) (striking down the Federal Flag Protection Act, Congress's response to *Johnson*, *infra*, because of its implicit content restriction on speech); Texas v. Johnson, 491 U.S. 397 (1989) (overturning a conviction for flag desecration on the ground that symbolic dissent is protected by the First Amendment).

41. Collins & Skover, *supra* note 1, at 708.

42. The Supreme Court's recent decision in Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, 112 S. Ct. 501 (1991), illustrates how the current Court will view attempts to regulate speech on the basis of its content, even when the exploitative potential of the speech is quite vivid. In a unanimous decision, the *Simon & Schuster* Court struck down New York's Son of Sam law. N.Y. EXEC. LAW § 632-a (McKinney 1982 & Supp. 1992). The law required that an accused or convicted criminal's income from works describing his crime be deposited in an escrow account; the funds were to be made available to the victims of the crime and the criminal's other creditors. *Id.* Justice O'Connor, writing for the majority, struck down the statute and powerfully condemned content-based restrictions on speech. She stated: "A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." *Simon & Schuster*, 112 S. Ct. at 508. The Court cautioned that "it bears repeating" that "[i]n the context of financial regulation . . . the Government's ability to impose content-based burdens on speech raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." *Id.* (citing Leathers v. Medlock, 111 S. Ct. 1438, 1444 (1991)).

Despite New York's strenuous assertions to the contrary, the Court was adamant that the Son of Sam law was content-based legislation:

> The Son of Sam law is such a content-based statute. It singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specifled content. Whether the First Amendment "speaker" is considered to be Henry Hill, whose income the statute places in escrow because of the story he has told, or Simon & Schuster, which can publish books about crime with the assistance of only those criminals willing to forgo remuneration for at least five years, the statute plainly imposes a financial disincentive only on speech of a particular content.

Id.

ment principles governing content neutrality in its widely publicized "hate speech" decision, *R.A.V. v. City of St. Paul*.[43] The *R.A.V.* decision stands for the proposition that even when the government is regulating a class of speech that normally receives little or no First Amendment protection, the First Amendment's strict neutrality standards, which render presumptively unconstitutional discrimination based on content or viewpoint, still apply with full force.

The Court's opinion opens with a broad condemnation of content-based regulation of speech, a condemnation that goes out of its way to repudiate the mechanical "categorical approach" associated with *Chaplinsky v. New Hampshire*.[44] Thus, the Court in *R.A.V.* explained, "The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid."[45]

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43. 112 S. Ct. 2538 (1992). The case involved a challenge to a St. Paul, Minnesota ordinance that provided:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990). A minor was charged under the ordinance for burning a cross on an African-American family's yard. The Supreme Court reversed the conviction, holding the St. Paul ordinance unconstitutional because it engaged in impermissible content-based and viewpoint-based discrimination. *R.A.V.*, 112 S. Ct. at 2547.

44. 315 U.S. 568 (1942). There was a time when the Supreme Court appeared to embrace a relatively mechanieal approach to free speech doctrine, treating certain categories of speech as utterly outside the protection of the Constitution. The most famous exposition of this approach came in *Chaplinsky*, in which the Court listed "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting words'" as among those classes of speech "the prevention and punishment of which have never been thought to raise any Constitutional problem." *Id.* at 571-72.

45. *R.A.V.*, 112 S. Ct. at 2542 (citations omitted). Significantly, the Court, repudiating the "categorical approach" of *Chaplinsky*, explained:

> From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." We have recognized that "the freedom of speech" referred to by the First Amendment does not include a freedom to disregard these traditional limitations. Our decisions since the 1960's have narrowed the scope of the traditional categorical exceptions for defamation, and for obscenity, but a limited categorical approach has remained an important part of our First Amendment jurisprudence.
>
> We have sometimes said that these categories of expression are "not within the area of constitutionally protected speech," or that the "protection of the First Amendment does not extend" to them. Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity "as not being speech at all." What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content

At the heart of the Court's opinion in *R.A.V.* was the proposition that the First Amendment's restrictions on content-based and viewpoint-based discrimination apply even when the government regulation involves a type of speech that, as a class, normally receives no First Amendment protection. Although it is constitutionally permissible, for example, to criminalize the distribution of obscene speech, it is *not* permissible to single out some subset of obscene speech—such as obscene speech critical of the government—for specially disfavored treatment.[46] Similarly, while speech that meets the current constitutional definition of "fighting words" may be criminalized, it is not permissible to take one subclass of fighting words—such as racist fighting words—and treat that class more severely because of social disagreement with the racist message expressed.[47]

The Court also noted that it has "upheld reasonable 'time, place, or manner' restrictions, but only if they are 'justified without reference to the content of the regulated speech.'"[48] "And just as the power to proscribe particular speech on the basis of a noncontent element (*e.g.*, noise) does not entail the power to proscribe the same speech on the basis of a content element," the Court explained, "so also, the power to proscribe it on the basis of *one* content element (*e.g.*, obscenity) does not entail the power to proscribe it on the basis of *other* content elements."[49]

The strength of the principles articulated in *R.A.V.* is underscored by the Court's unwillingness to sustain the St. Paul ordinance on the theory that *even if* the ordinance engaged in viewpoint discrimination, the discrimination was justified in light of the compelling interests that

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> discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.

Id. at 2542-43 (citations omitted).

46. Justice Scalia wrote:

> Our cases surely do not establish the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression, so that the government "may regulate [them] freely" (White, J., concurring in judgment). That would mean that a city council could enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of the city government. Such a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and with our jurisprudence as well.

Id. at 2543 (citation omitted).

47. *Id.* at 2545.

48. *Id.* at 2544 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

49. *Id.* (emphasis in original). Under the Court's analysis, then, "the exclusion of 'fighting words' from the scope of the First Amendment simply means that . . . the unprotected features of the words are, despite their verbal character, essentially a 'nonspeech' element of communication." *Id.* at 2545. The Court thus treated fighting words as analogous to a noisy sound truck. Both sound trucks and fighting words are modes of communication that can be used to convey ideas. *Id.* "As with the sound truck, however, so also with fighting words: The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed." *Id.*

supported passage of the ordinance.[50] St. Paul, defending its ordinance, argued that even if the ordinance regulates expression based on hostility towards its protected ideological content, this discrimination was nonetheless justified because it was narrowly tailored to serve compelling state interests.[51]

The Court responded to this argument by conceding that the state's interests were compelling and by conceding that the ordinance promoted those interests.[52] The Court held, however, that the ordinance nevertheless failed the strict scrutiny test because it was not necessary to accomplish the asserted interests.[53] The Court stated that because there were adequate content-neutral alternatives available to St. Paul, the argument that the ordinance was necessary failed.[54]

The rules making content-based and viewpoint-based discrimination presumptively invalid apply to all government regulation of speech, even when it falls within a category such as fighting words or obscenity that normally receives little or no First Amendment protection. This principle applies to all speech, including commercial speech. In a passage that bears directly on the argument advanced by Collins and Skover, the Court stated:

> [A] state may choose to regulate price advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection) is in its view greater there. But a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion.[55]

If the poignant and incontestably compelling interests that supported the St. Paul ordinance—combatting race-hate and religious prejudice, and

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50. *Id.* at 2549. One might conceptualize this problem by posing the question of whether the First Amendment rule against viewpoint discrimination is conditional or absolute. If the standard governing viewpoint discrimination is the strict scrutiny test, the rule is merely conditional. Under the strict scrutiny test, laws regulating the content of speech will be upheld only when they are justified by compelling governmental interests and are narrowly tailored (or employ the least restrictive means) to effectuate those interests. *See, e.g.*, Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 112 S. Ct. 501, 511 (1991) (saying that the state has a compelling interest in compensating victims of crime, but little if any interest in limiting such compensation to the proceeds of the wrongdoer's speech about the crime); Sable Communications, Inc. v. FCC, 492 U.S. 115, 131 (1989) (holding that a ban on indecent telephone messages violates the First Amendment because the statute's denial of adult access to such messages exceeds that which is necessary to serve the compelling interest of preventing minors from being exposed to the messages).

51. The city argued that the ordinance helped to ensure the basic human rights of members of groups that historically have been subjected to discrimination, including the right of such group members to live in peace where they wish. *R.A.V.*, 112 S. Ct. at 2549.

52. *Id.*

53. *Id.* at 2550.

54. *Id.*

55. *Id.* at 2546 (citations omitted).

encouraging racial and religious harmony and tolerance—were insufficient to justify a law based on content even within the general category of fighting words (speech that generally receives little constitutional protection), then certainly the far more ephemeral interests advanced by Collins and Skover cannot justify the sort of content-based regulation of commercial speech they appear to contemplate.

Commercial speech, far more than fighting words, warrants substantial constitutional protection.[56] And while the modern commercial speech standard is less demanding than "strict scrutiny," it is by no means flaccid.[57] The Court has on many occasions employed the standard to strike down government regulation of commercial speech.[58]

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56. The Supreme Court set forth the current standard governing regulation of commercial speech in Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980):

> 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. at 566. It would, to be sure, vastly overstate matters to claim that the pattern of Supreme Court decisionmaking in contemporary commercial speech cases is as yet clear, or that the essential animating principles in this area are well-settled. *See generally* David F. McGowan, *A Critical Analysis of Commercial Speech*, 78 CAL. L. REV. 359, 360-61 (1990); Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1182 (1988) (both describing the Supreme Court's inconsistent treatment of commercial speech).

57. The *Central Hudson* commercial speech test is less rigorous than the strict scrutiny level of judicial review normally applied to content-based regulation of speech. Under the strict scrutiny test, laws regulating the content of speech will he upheld only when they are justified by compelling governmental interests and are narrowly tailored (or employ the least restrictive means) to effectuate those interests. *See supra* notes 50-54 and accompanying text. The test for commercial speech differs from strict scrutiny in two ways. First, the regulation need not be justified by a compelling governmental interest; a substantial interest will suffice. *See* Posadas de P. R. Assocs. v. Tourism Co., 478 U.S. 328, 341 (1986) (cataloguing the evils created by casino gambling and concluding that Puerto Rico's ban on casino advertising promoted a substantial governmental interest, namely promoting the "health, safety, and welfare of its citizens"). Second, the means employed by the government need not be the least restrictive method of achieving its objective. Rather, as the Court recently explained in Board of Trustees v. Fox, 492 U.S. 469 (1989):

> What our decisions require is a "'fit' between the legislature's ends and the means chosen to accomplish those ends,"—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served," that employs not neeessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

Id. at 480 (quoting *Posadas*, 478 U.S. at 341 and *In re* R.M.J., 455 U.S. 191, 203 (1982)).

58. *See, e.g.*, Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91, 110-11 (1990) (striking down a state's regulation prohibiting attorney advertising on the ground that the state's belief that all advertising by professionals must be inherently misleading did not constitute a sufficient basis to ban such advertising altogether); Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 478 (1988) (holding that a state may not categorically prohibit lawyers from soliciting legal business by sending truthful and nondeceptive letters to potential clients known to face a particular legal problem); Pacific Gas & Elec.

As I have already emphasized, mass advertising is in many respects more like other forms of speech in the American marketplace than unlike them.[59] The "negative byproducts"[60] that must be listed next to any honest ingredient description of commercial speech make it look more like the other genres of speech protected by the First Amendment, not less. A major part of modern free speech doctrine involves the emancipation of the ideal of freedom of speech from the requirement that the speech at issue be "socially constructive," or the speaker be a "contributing member of society." With the sole exception of the doctrines surrounding regulation of obscenity,[61] modern First Amendment doctrine does not require speech

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Co. v. Public Utils. Comm'n, 475 U.S. 1, 20-21 (1986) (striking down a utility commission's order requiring a utility to put a third party's newsletter in its billing envelopes); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 639-49 (1985) (striking down a state disciplinary rule against soliciting or accepting legal employment througb advertisements containing information and advice regarding a specific legal problem, and a rule banning the use of illustrations in attorney advertisements); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 75 (1983) (stating that, as applied, the federal statute prohibiting the mailing of unsolicited advertisements for contraceptives is an unconstitutional restriction of commercial speech); *In re R.M.J.*, 455 U.S. at 205-07 (striking down the state's limitations on attorney advertising which included restrictions on the precise wording of an attorney's practice areas, a prohibition against identifying the jurisdictions in which an attorney is licensed to practice, and restrictions on who may receive cards announcing a change of address or firm name); *Central Hudson*, 447 U.S. at 572 (striking down a regulation banning a utility from advertising to promote the use of electricity); Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 633-39 (1980) (holding that the village could not restrict door-to-door or on-strect solicitation of contributions by charitable organizations to only those organizations that use at least 75% of their receipts for charitable purposes); First Nat'l Bank v. Bellotti, 435 U.S. 765, 784 (1978) (striking down a Massachusetts criminal statute that prohibited specified business corporations from making contributions or expenditures "for the purpose of . . . infiuencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation"); Bates v. State Bar, 433 U.S. 350 (1977) (holding that a disciplinary rule prohibiting attorneys from advertising in newspapers or other media is unconstitutional); Carey v. Population Servs. Int'l, 431 U.S. 678, 701 (1977) (holding that a prohibition of advertising or display of contraceptives was not justified on grounds that ads would be offensive and embarrassing to those exposed to them and that permitting such ads would legitimize sexual activity of young people); Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 96-97 (1977) (holding an ordinance prohibiting posting of "For Sale" or "Sold" signs on residential property an unconstitutional restriction on dissemination of information, despite the township's perception that such signs caused white homeowners to flee from a racially integrated community); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770-73 (1976) (stating that a ban on advertising prescription drug prices was not justified by the state's interest in maintaining the professionalism of licensed pharmacists); Bigelow v. Virginia, 421 U.S. 809, 825-29 (1975) (concluding that a paid commercial advertisement in a newspaper was protected by the First Amendment and overturning the conviction of a newspaper editor for encouraging or prompting an abortion through the sale of a publication).

59. *See supra* notes 18-22 and accompanying text.

60. By "negative byproducts" I mean the types of shortcomings documented so well by Collins and Skover: appeals to vanity or emotion and the use of exaggeration, hyperbole, and imaging to influence the reader or listener.

61. *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Miller v. California, 413 U.S. 15 (1973). In *Miller* the Court announced a new test governing obscenity, stating that the basic guidelines for the trier of fact must be:

to demonstrate any redeeming social value as a predicate to its protection.

Rather than require speech to have redeeming social value to qualify for First Amendment protection, our society protects a great deal that has little or no plausible social value in the eyes of many. Indeed, the things that most bother Collins and Skover about mass advertising are also things that characterize much of the speech in American mass culture. Whether Americans are talking about sex or politics (or both together), for example, our discourse is often not discourse at all, but rather fantasy and sound bite.

Vast quantities of the speech in the modern American marketplace consist of symbol, image, and fantasy. For example, the billion-dollar marketplace for pornographic speech (by which I mean speech that appeals to the prurient interest in sex but fails to meet the stringent First Amendment definition of "obscenity") is largely a trade in sexual fantasy. While we do permit this type of pornographic but not obscene speech to be kept off the airwaves, current First Amendment doctrine does not permit such speech to be banned in print media.[62]

Similarly, a great deal of our political discourse is vacuous and fantastical. Politics is now often reduced to slogan and sound bite. (Message: "Change.") (Message: "Trust.") There may or may not be a core of creative thought or hard analytic content underlying these surface political slogans. A candidate may have well-reasoned position papers and action plans that document his or her claim that trust or change is in order. Or a candidate may be debasing the currency of words by using them "not to convey meaning but as audible confetti."[63]

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

Id. at 24 (citations omitted). In Pope v. Illinois, 481 U.S. 497 (1987), the Supreme Court refined the *Miller* test, explaining that the redeeming literary, artistic, political, or scientific value test is not to be determined by reference to local community standards, but rather according to a "reasonable person" standard. *Id.* at 500-04.

62. *See* FCC v. Pacifica Found., 438 U.S. 726 (1978) (upholding the FCC's power to sanction indecent, although not obscene, speech in the context of broadcasting).

63. George F. Will, *'A Figure of Genuine Pathos,'* WASH. POST, July 29, 1992, at A23. George Will used this phrase as part of an attack on President Bush, suggesting that Bush withdraw from the presidential race. He argued:

> That is why the Bush campaign, like Bush himself, uses words not to convey meaning but as audible confetti. For example, when Ross Perot was a threat, Bush's people eviscerated him as emotionally unstable, anti-constitutional, a potential tyrant and actual ignoramus. When Perot withdrew, Bush's people promptly praised him as "wise" and "courageous." To them, words mean nothing because nothing means anything—nothing, that is except power or, more precisely, office. They do not even have the gravity that comes from craving power to effect change.

Id.

It is extremely difficult, however, to account for all the historical forces within a culture that create our sound-bite mentality. To argue that our political language has degenerated into sound-bite imagery because modern mass advertising has caused us to think in fifteen-second bursts dominated by image flashes and fantasy is a fascinating hypothesis,[64] but not a particularly persuasive demonstration of cause and effect. I have no doubt that the beat and style of modern mass advertising has had its influence on politics. But politics has also influenced advertising, and the criss-crossing causal currents are fluid and difficult to chart.[65]

To some degree, in both politics and commerce, the voter and consumer get the marketplace they deserve.[66] The candidacy of Ross Perot is said to have tapped into a well of frustration with contemporary politics. But this frustration is often vague and inarticulate, and may reflect habits of mind on the part of some voters that encourage sound bites and slogans. Rather than think through the details of public policy and face hard political choices, many voters may be only too happy to whine about government and grasp whatever trendy platitudes come along.[67]

III. "Commodification" and the Transforming Power of Modern Mass Advertising: Are We the Sum of What We Buy?

The indictment against contemporary mass advertising is ultimately distilled by Collins and Skover into what I regard as their most daring hypothesis. Modern advertising does not simply attempt to convince us to buy products. It does not simply *act upon* consumers by attempting to persuade them or even seduce them. Modern advertising, rather, seeks to *create* the buyer, using imagery and fantasy to actually *constitute* the

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64. *See* Collins & Skover, *supra* note 1, at 725-26.

65. The pacing of all modern life is now frenetic. The reduction of many television commercials from one minute to 15 seconds has created an entirely new visual syntax.

66. As Lewis H. Lapham recently wrote:

> Ask any American what money means, and nine times in ten he or she will say that it is synonymous with freedom, that it opens the doors to feeling and experience . . . . No matter what their income, a depressing number of Americans believe that if only they had twice as much money, they would inherit the state of happiness promised them by the Declaration of Independence.

Lewis H. Lapham, *Captain Money*, HARPERS, Aug. 1992, at 7, 7.

67. Joseph Mianowany, chief political writer for United Press International, assessed Ross Perot's presidential candidacy along these lines. Mianowany wrote:

> The sad part is that even while they decry sound-bite politics, too many Americans simply don't want to be bothered spending the time and energy to go beyond the sound bites. It's much easier to simply complain about the system. That way, you can sound intelligent and concerned without having to make any hard choices.
>
> What voters don't seem to understand is that as long as they refuse to dirty their hands with details, the politicians won't do so either.

Joseph Mianowany, . . . *And Voters Begging to Be Suckered*, WASH. POST, June 20, 1992, at A15.

consumer,[68] who will then, of course, remain loyal to the creator.

I cannot accept that we are "largely the sum of what we buy."[69] Concededly, we may, in a limited and figurative sense, be the sum of what we *buy into*, including our "investments" in fantasy. But the mere fact that the commercial marketplace is filled with images calculated to aggrandize our fantasies does not mean we *are ourselves transformed* into fantastical beings.

A. From Information to Image and Lifestyle

Collins and Skover challenge us to "get real" in our assessment of modern commercial speech policies, provocatively demonstrating that modern mass advertising is dominated by the marketing of image and lifestyle, rather than information about products and services.[70] They describe a quainter era in the early days of mass marketing in which advertising was largely concerned with functional information about the design and utility of products.[71] After the 1920s, this style of advertising began to give way to "product-image" advertising, in which commodities were placed in natural settings or landscapes, and to the "personification" of products, giving them human or animal characteristics so that a perfume could itself be sexy, or a gas pump could put a tiger in your tank.[72]

There was a certain Darwinian inevitability to this evolution, wrapped up in the very nature of the mass production of similar goods; for when brand image is the only distinctive feature of a product, there is not much to sell other than image.[73] Thus, commercial speech today is largely a free trade in images, rather than ideas. Mass advertising encodes goods and services with symbolic meanings, meanings that speak more to the lifestyle of the consumer than the attributes of the product.[74]

More significantly, whereas there was once a time when the huckster might try to sell the consumer on the fantastical qualities of the *product*—the miracle hair-restorer sold by the carnival con man would not only cure baldness but everything from arthritis to an ingrown toenail—today Madison Avenue attempts to sell fantasies about the *consumer*.[75]

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68. *See* Collins & Skover, *supra* note 1, at 716.

69. *Id.* at 698.

70. *See id.* at 704, 709-10.

71. *Id.* at 700-02.

72. *Id.* at 702 (citing ROLAND MARCHAND, ADVERTISING THE AMERICAN DREAM: MAKING WAY FOR MODERNITY 1920-1940, at 358 (1985)).

73. *See id.* at 704 (quoting LEO BOGART, STRATEGY IN ADVERTISING 5 (2d ed. 1990) and CHARLES GOODRUM & HELEN DALRYMPLE, ADVERTISING IN AMERICA: THE FIRST 200 YEARS 45 (1990)).

74. *Id.* at 700.

75. *Id.* at 708.

B. Assessing the Impact of Image Advertising

All of us, all the time, are invited by modern advertising to imagine that we are something we are not. We are cajoled to imagine ourselves as more sexy or chic or athletic or smart or rich than we really are, and to consume accordingly. The menu of potential fantasies is almost limitless. Products thus become fantasy-facilitators. But does this marketing of fantasy actually alter self-identity?

The sheer quantity and volume of mass advertising might lead us to believe that it cannot help but transform us. Calling it a "junkyard of commodity ideology," Collins and Skover well document its ubiquity.[76] Every day, we are told,

> [T]welve billion display ads, two and one-half million radio commercials, and over three hundred thousand television commercials are *dumped* into the collective consciousness. Advertising *consumes* almost "sixty percent of newspaper space, 52 percent of magazine pages, 18 percent of radio time, [and] 17 percent of network television prime time."[77]

The choice of the terms "dumped" and "consumes" are telling. Are they apt?

It is certainly true that our "collective consciousness" is exposed to a massive bombardment of commercial messages each day. But are these messages "dumped" into our consciousness in a more meaningful sense, consuming valuable intellectual space, taking up pages in newspapers or magazines that would be better devoted to other speech, or what is worse, cluttering our brains like unwanted megabytes eating the memory space on our computer disk drives?

Collins and Skover argue that these messages really do influence us, indeed actually transform us in deep and significant ways.[78] One of Collins and Skover's most powerful insights is that advertising agencies now sell audiences to manufacturers, rather than products for manufacturers.[79] Advertisers, indeed, do not merely use demographics and psychographics to identify the particular consumer preferences of different target audiences among consumers. Rather, advertisers use these tools to "sell" to the manufacturer a discrete pre-existing audience that will be predisposed to like a product, as well as to design an ad campaign that

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76. *Id.* at 707.

77. *Id.* at 707 (citing LEO BOGART, STRATEGY IN ADVERTISING 1-2 (2d ed. 1990); quoting Leo Bogart, *The American Media System and Its Commercial Culture*, GANNETT FOUNDATION OCCASIONAL PAPER NO. 8, at 6 (Mar. 1991) (Gannett Foundation Media Center, New York, NY)) (emphasis added).

78. *See id.* at section I(C)(2).

79. *Id.* at 704.

will appeal to the identified audience.[80] The advertising agency actually attempts to create the audience by encouraging a group identity and by instilling in the audience a set of group fantasies that comprise, if you will, the particular sect's consumer religion.

This argument is ingenious but not convincing. Sixty percent of the newspaper space may be filled with advertising, but that advertising does not command sixty percent of the average reader's attention. We are inured to most of these advertisements and commercials; they wash over us without even dampening the skin. We often do not stop to even read or watch the ads at all, and when we do, they rarely penetrate or connect with our consciousness, let alone transform our identity. True, we are all persuaded and seduced from time to time by these ads, encouraged to make irrational or impulsive consumer choices. But that kind of persuasion and seduction is endemic to social life; we run across it constantly and develop mechanisms to filter it out and fend it off.

Commercials are not the only junk food in the speech market—indeed, when compared to shallow news reporting, vacuous television shows, or political doublespeak, commercials are not even the most harmful to mental health. If consumers consume too much intellectual junk food, the onus should be on consumers to change their diets. No one must watch the television commercial to view the show—though admittedly it is inconvenient to avoid it—and certainly no one must pay attention. Newspapers and magazines cost the same whether or not the advertisements are read. However, newspapers and magazines would not exist without advertising.[81]

C. *Taking into Account the Multidimensional Aspects of Modern Advertising*

The Collins and Skover portrait of modern lifestyle advertising is realistic in the sense that it accurately describes one highly prevalent mode of contemporary advertising. The portrait ought not be understood as an accurate depiction of the entire landscape. Nor is that landscape as threatening as Collins and Skover make out.

That advertisers sell audiences to manufacturers, for example, is interesting, but not necessarily dangerous. The segmented marketplace is not itself an intrinsic evil. Using psychographics, that evolutionary advance on demographics, advertisers are able to aim their pitches at

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80. *See id.* at 704-06.

81. American newspapers have been facing an economic mini-crisis in recent years, attempting to cope with serious declines in advertising revenue. This problem was the principal focus of the American Newspaper Publishers Association annual convention in Vancouver in 1991. *See generally Looking for a Break in the Overcast Skies*, PRESSTIME, June 1991, at 28, 28.

customized markets.[82] But this is only natural—of course advertisers want to advertise in places likely to be effective, and of course the content of the magazine, newspaper, or television show will be linked to the nature of the product. Indeed, one of the competitive problems for newspapers is that they are not easily adapted to this form of targeting. Whereas advertisers can rather easily link a particular product to a television show's viewer profile or to a magazine's readership, the traditional "great metropolitan newspaper" is distributed across a large and relatively undifferentiated audience.[83]

To the extent that there are legitimate fears arising from this form of targeted advertising, they are not global but specific. It ought to be an elemental ethical norm, for example, that the news and editorial content of serious news organizations not be influenced by advertisers. It is one thing to place sporting goods ads in the sports pages, and another to pull the punches in a critique of the safety of some new sporting fad to pacify the local sporting goods store. Additionally, pockets do exist within the marketplace where legal regulation of advertising that would otherwise run afoul of the First Amendment may be legitimate, such as advertising directed at children.[84]

On balance, however, the image of modern advertising conveyed by Collins and Skover expands reality to the same extent as much of the advertising they chastise. Old-fashioned product-information advertising, for example, has not gone entirely out of fashion. The advertisements for "new technology" equipment, such as personal computers,[85] fax

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82. Collins & Skover, *supra* note 1, at 706.

83. *See Schermer Outlines How Newspapers Can Be Reinvented*, PRESSTIME, June 1991, at 30, 30.

84. First Amendment doctrines protective of speech are in some circumstances relaxed when the speech at issue poses a special danger to children because the paternalism that is normally an anathema to First Amendment jurisprudence is deemed appropriate for the teaching and sheltering of children. For example, the Court's controversial ruling in FCC v. Pacifica Foundation, 438 U.S. 726 (1978), is grounded largely in the perceived pervasiveness of broadcasting and the dangers posed by vulgar broadcasting to children. For a further discussion of my views on *Pacifica*, including my criticisms, see RODNEY A. SMOLLA, JERRY FALWELL V. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL 195-201 (1988). *See also* Osborne v. Ohio, 495 U.S. 103, 108-11 (1990) (holding that Ohio may proscribe the possession and viewing of child pornography); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 276 (1988) (permitting educators editorial control over the contents of a school-sponsored, student-run newspaper); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 680-86 (1986) (permitting school officials to regulate lewd speech by students at a school assembly); New York v. Ferber, 458 U.S. 747, 750 (1982) (allowing New York to "criminalize[] . . . the use of a child in a sexual performance").

85. A typical personal computer advertisement will, for example, be dominated by technical information, often intertwined with subjective characterization of the product's performance. For example, a current ad for a laptop computer describea the screen as "bright and crisp" in the same paragraph in which technical information is conveyed:

> The backlit, 10-inch VGA . . . screens are bright and crisp. Resolution is 640 × 480, 64 gray scale, on the LCD. With . . . video RAM, you can also display 1024 × 768 resolution on a monitor display simultaneously.

machines,[86] or stereo components,[87] are heavily product-information oriented. For many of these products, basic functional attributes and technical capabilities of the machines being sold remain the dominant elements in the advertising content.

Similarly, mundane classified ads in newspapers remain an important part of the contemporary commercial speech universe, accounting for nearly one-third of the advertising revenue for newspapers.[88] Indeed, newspaper advertising revenue remains highly information bound, delivering pricing information on sales in department stores or grocery stores for many of the products that are pitched through mass market advertising in other media.

Furthermore, much of what at first blush appears to be pure "lifestyle" advertising may have more straightforward informational content than we might at first acknowledge. Women's magazines, for example, are thick with advertising for fashion, cosmetics, and perfumes. It is hard to sell a fragrance without using suggestive imagery, so fragrance advertisers can hardly be blamed for not always dealing in hard information. Fragrance manufacturers often do, however, provide magazine readers with the best possible consumer information—in the form of a fragrance sampler (not a "snifter" but a "sniffer," I would say) that can be sniffed to find out exactly how the product smells. Cosmetics and clothing advertisements also convey important information in their content, demonstrating what the product looks like—which for those products is what matters most. To be sure, a lot of fantasy is being sold in these ads, but we ought to be

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PC WORLD, June 1992, at 64 (Gateway 2000 advertisement).

86. A recent advertisement for a new variation on fax machine technology, for example, explains the product's function to consumers in addition to conveying technical data:

> With [the product], you'll never waste your valuable time working for your fax machine. Let's say you're in New York. And your PC is in L.A. With [the product], you don't have to touch or even be near your PC to get and distribute or retrieve a document. Using a specially encoded . . . form, you simply check a few boxes. Fax the form back to your PC and it distributes everything for you. Automatically.

PC WORLD, June 1992, at 83 (Xerox advertisement).

87. The advertising copy for a stereo speaker currently on the market, for example, contains the following paragraph:

> The [speaker] measures 39 inches high, 17 inches wide, and 12 inches deep, and each speaker weighs 45 pounds. The rated system sensitivity is 90 dB sound-pressure level (SPL) at 1 meter with 2.83 volts of full-band pink-noise input, and its nominal impedance is 6 to 8 ohms. The usable power-input range is specified as 5 to 400 watts. The frequency response (nonanechoic) is given as 24 to 18,000 Hz ± 3 dB (this appears to be the summed output from the two speakers with the microphone on the center listening axis).

(copy on file with the *Texas Law Review*).

88. *See Ad Spending Drops*, PRESSTIME, June 1991, at 70, 70 (reporting that expenditures for U.S. daily newspaper advertising in the first quarter of 1991 totalled $6.8 billion, $2.3 billion of which was for classifieds).

circumspect in condemning them as nothing but fantasy. There is often a great deal of useful information in them, and "information credit" should be given where credit is due. Thus "lifestyle" advertising is certainly a significant, and maybe even the dominant, part of modern advertising, but by no means is it the *only* contemporary advertising style.[89]

The instant one recognizes (as Collins and Skover do) that modern advertising is multidimensional, the task of designing coherent First Amendment policies for such advertising becomes problematic. For the question posed is not, "What should we make of modern commercial speech doctrines in light of the fact that it is primarily comprised of the selling of fantasy?" but rather, "What should we make of modern commercial speech doctrines in light of the fact that it is partly comprised of the selling of fantasy?" This is an important distinction because it illustrates one of the greatest perils of attempting to regulate commercial speech with legal rules—indeed, of attempting to regulate any genre of speech. Precisely because speech is so often "a combination-of-ingredients product" (to demonstrate how much my own discourse is filled with the jingles of commercialism), it is extremely difficult to regulate speech on the basis of the characteristics of any one communicative strain. Thus, even if the packaging of fantasies in connection with the sale of a stereo system (Message: "This stereo system will make your nights at home more romantic.") were somehow worthy of less First Amendment dignity than technical information on the attributes of the stereo system (Message: "The rated system sensitivity is 90 dB sound-pressure level (SPL) at 1 meter with 2.83 volts of full-band pink-noise input, and its nominal impedance is 6 to 8 ohms."), it does not follow that we could very easily regulate one without regulating the other unless we are willing to engage in forms of regulation more oppressive and heavy-handed than most people would tolerate in an open society. Even when dealing with commercial speech, it must be remembered that the government bears the burden of proving that the regulation it has imposed is justified and that it has crafted its regulation so as to separate "the harmless from the harmful."[90]

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89. Collins and Skover do give advertising its due in this respect, admitting:

> Advertising today need not be one-dimensional. To a greater or lesser degree, it may tap into all the historical marketing formats: information, image, personality and lifestyle advertising. The choice or mix of advertising forms depends on the intended audience, the product or service type, the social context for use, and the advertising medium employed.

Collins & Skover, *supra* note 1, at 706.

90. Board of Trustees v. Fox, 492 U.S. 469, 480 (1989) (quoting Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 478 (1988) (quoting Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 646 (1985))).

IV. Conclusion: A Nonscientific Thought Experiment

The ideas advanced by Collins and Skover are fresh and provocative. Their excellent essay is as lively and catchy as even the best fare of modern mass advertising. And, as I have already conceded, they are certainly under no obligation to accept any of the assumptions underlying contemporary commercial speech jurisprudence.[91]

Stuck, however, with the existence of the First Amendment, they are, at least in the practical world of legal doctrine and precedent, bound by the First Amendment principle placing the burden of persuasion upon those who presume to regulate expression—even commercial expression—a burden that requires the would-be regulator to demonstrate that the regulation is warranted.[92]

The assertion that image advertising causes significant individual harm is not only unsupported by any solid evidence, but it also runs contrary to the everyday experience of consumers. The argument is arresting and intriguing, but is it real, or is it just one of those beguiling arguments that sounds good but is not grounded in reality? My intuition is quite the opposite of Collins and Skover's; indeed, I have the nagging sense that the argument that mass advertising really sinks in and hurts us suffers from much the same nonlinear and nonlogical argument techniques that Collins and Skover so criticize.[93] It strikes me as highly implausible that people really regard themselves, or those around them, as profoundly transformed by modern advertising. That most people do not regard themselves as terminally gullible does not prove, of course, that they are right—an entire culture may be duped—but it certainly raises the ante of skepticism.[94]

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91. *See supra* text accompanying note 37.

92. As the Supreme Court has emphasized, "the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing . . . the harmless from the harmful." *Fox*, 492 U.S. at 480 (quoting *Shapero*, 486 U.S. at 478 (quoting *Zauderer*, 471 U.S. at 646)); *see also supra* note 92 and accompanying text.

93. *See* Collins & Skover, *supra* note 1, at 712 (arguing that "[t]his kind of thinking—which accepts proof that is not proof—is an *essential* intellectual factor in our economy" (quoting JULES HENRY, CULTURE AGAINST MAN 48 (1963)) (emphasis in original)). My rejoinder to this passage is that this kind of thinking is a factor in our economy, but hardly the dominant or essential factor, and that if it is, the authors need to offer more in the way of proof. They document very persuasively that we are invited by commercials to think in nonlinear, nonlogical ways, but they do not document that these commercials actually cause us to think this way—at least in comparison to the ststic level of illogical thought and bebavior that is common to most humans. Perhaps their "proof" is that the products pushed by these advertisers actually sell, and that these purchases are, on balance, not "good buys." But they have a long way to go to document that sweeping proposition, for certainly there are quality goods and services sold in the American economy, some of which may be touted through image and lifestyle advertising.

94. Daniel Farber and Philip Frickey speak to this point:

> This preference for practical belief over grand deduction seems especially appropriate in legal theory. Lest it lose its vital human component, law must be concerned not only with the applicability of legal rules, but also their appropriateness in particular circumstances.

Let me use, as a case for thought experiment, one of the advertising lines now used by Gatorade in commercials featuring the Chicago Bulls' basketball superstar, Michael Jordan:

Like Mike!

If I could be like Mike!

I select this example because I can offer a first-hand account of its effect upon me by sharing my own fantasies.[95] For indeed, if *I* could be like Mike and play for the Chicago Bulls, I would drink Gatorade every day.[96]

I am not convinced that either for me or the kids of the world, these invitations to fantasy cause much palpable harm. If we are to "get real" in assessing modern advertising and First Amendment protection for commercial speech,[97] let's really get real and have the proponents of regulation make the case with the genuine evidence and convincing argument that it is really needed.

What harm to the consumer does this fantasizing do? Who is hurt? Who is "created" or "reconstituted" or "debased" or "commodified"? Are the Nike basketball shoes I buy being turned into religious fetishes?[98] I

> Moreover, legal outcomes cannot survive if they are incompatible with the webs of belief of the community in general and the legal community in particular.

Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1643 (1987).

95. This first-hand account, of course, is simply subjective anecdotal evidence. I offer it, however, with an invitation to readers to check it against their own experience. I have asked my colleagues and friends about the amount of advertising they "consume" and how it affects them. Does advertising cause them to think differently of themselves? To make irrational purchases? To speak and write in ways that lose any grounding in reality or logic? Have they found cultural symbols debased and trivialized?

My nonscientific polling indicates that many people have much the same complaints as Collins and Skover about many of the excesses of mass media advertising; I share most of those concerns myself. And most people concede that mass advertising does have some negative influence upon them and encourages some irrational purchases. Most people, however, profess to have relatively strong advertising immune systems and do not feel that they are being transformed in any alarming sense. These testimonials are hardly scientific proof, but they certainly raise suspicion about the inherent plausibility of the strong indictment against mass advertising and demonstrate the problem with the paucity of causal proof that pervades that indictment.

96. Gatorade advertisements clearly encourage some of us to imagine that we really could be like Mike. If they have this affect on me, a 39-year-old pick-up player with only a slim chance (less, I admit, than 30 percent) of someday making the roster of the Chicago Bulls, think how they must affect the millions of kids out there, still filled with the limitless promise of American life, swelled with the hopes that live eternal within the human breast.

97. *See supra* text accompanying note 70.

98. Nike is another manufacturer that employs the Michael Jordan fantasy in its advertising and I am here to testify that it has not hurt me. I get pleasure from these impish dreams. Is that so evil? For a few fleeting moments, an image of Michael Jordan flashes across my stream of consciousness as I tie my shoes, along with something I wish I had said to a colleague during our most recent faculty meeting, and a flash reminder of what I need to pick up at the grocery store after playing, and a thought to be sure to stop at the bank first, and scores of other broken-syntax images that flutter through my head in these occasional precious respites from the pace of professional life. Sure, the

will concede that these advertisements influence me to consume, and all too often to consume extravagantly, and what is far worse, particularly in light of the stresses we are placing on the environment, to consume wastefully. Like many others, I buy more things than I really need—often, I admit, because these material things give me a fleeting sense of well-being.[99] I am not, however, a narrow-minded materialist, stripped of all spirituality, poetry, or meaningful interpersonal relationships in my life. So what if I enjoy a little dreaming now and then, even when prompted by my athletic shoes? At worst, I go out and get some exercise—encouraged, of course, to "Just do it!" Many forces in this world combine to influence our personas, and modern mass advertising certainly is among them, but its pernicious influence on the making of any specific individual, if it could ever be documented at all, would surely prove infinitesimal.

Even more fundamentally, debate over the harm caused by the fantastical nuances of a Nike ad positively pales in significance by comparison to debate over the actual social and economic problems posed by Nike's entire enterprise. It is true, Nike does profit from advertising. It is a consistently profitable company, with over three billion dollars in gross sales in 1991, $200 million of which Nike attributes to the endorsements of Michael Jordan.[100] Nike's 1991 net profit was $287 million.[101] However, rather than attempt to regulate the content of Nike advertising, governments ought to tackle the far more intractable issues posed by the economics of how multinational corporations do business in the world market. In 1980, for example, Nike closed its last footwear factory in the United States, in Saco, Maine, relocating most of its factories in nations such as South Korea and Indonesia, where labor costs are dramatically cheaper.[102] In the Sung Hwa factory in Tangerang, outside of Jakarta, Indonesia, one factory worker earns 2100 Indonesia rupiah, or $1.03 per day, for her labor in a Nike factory, which is less than the

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image of Michael flashed by—but give me a break! I did not think I really *was* Mike. I did not really think I could *be* Mike. I didn't really think I could be *like* Mike, in any sense that you could call delusional. I have not lost touch with all reality. And having spent a lot of time on a lot of different basketball courts with a lot of nine-year-olds who, I am sure, share many of my basketball fantasy impulses, I am willing to venture with confidence that the millions of youthful Nike consumers out in the world have not lost sight of reality either.

99. And I will at times hum the words to Madonna's song, singing to myself, "We are living in a material world, and I am a material girl." MADONNA, *Material Girl*, *on* LIKE A VIRGIN (Sire Records 1984). The words are catchy and capture a bit of guilty truth.

100. *See* Jeffrey Ballinger, *The New Free-Trade Heel: Nike's Profits Jump on the Backs of Asian Workers*, HARPER'S, Aug. 1992, at 46, 46.

101. *Id.*

102. *See id.* In the late 1980s, when South Korean workers gained the right to organize unions and strike, they demanded higher wages, which ate into Nike's profits. Nike then established new factories in countries such as Indonesia. *Id.*

Indonesian government's figure for "minimum physical need."[103] The labor cost to manufacture a pair of Nikes that sells for eighty dollars in the United States is approximately twelve cents.[104]

The appropriate social response to these realities, none of which appear in Nike ads, is complex. Perhaps the hot engine of Nike advertising and its use of a world labor pool and a world sales market have the effect of encouraging free world trade, and thus worldwide industrialization and development. Perhaps Nike's presence is good for Tangerang, Indonesia, even if bad for Saco, Maine. But perhaps, also, it ought to be incumbent upon Nike to pay a living wage to its workers in Indonesia, and perhaps American trade policy should be calibrated to require that. These are social and economic issues in which the question of whether the market should be regulated or free is fairly joined. These are social and economic issues that need to be addressed and solved. These are the types of realities upon which public discourse ought to focus its ever-shortening attention span.

103. *Id.* at 46-47.
104. *Id.* at 47.