

# False Commercial Speech and the First Amendment: Understanding the Implications of the Equivalency Principle

Martin H. Redish

Kyle Voils

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# FALSE COMMERCIAL SPEECH AND THE FIRST AMENDMENT: UNDERSTANDING THE IMPLICATIONS OF THE EQUIVALENCY PRINCIPLE

Martin H. Redish\* & Kyle Voils\*\*

## INTRODUCTION

In the late 1960s, the Phillip Morris Company introduced a cigarette known as “Virginia Slims.”<sup>1</sup> In an effort to give the cigarette a marketing personality, the company advertised it as a cigarette for women, apparently attempting to tie the brand to the burgeoning women’s liberation movement.<sup>2</sup> Its highly successful slogan was, “You’ve come a long way, baby.”<sup>3</sup> The slogan was designed to get women to realize how far they had come in terms of independence in what had previously been a man’s world, and identify that independence with the cigarette made especially for them.<sup>4</sup> One can debate the morality of such an advertising campaign, but however one feels about its merits or demerits, there is no doubt that the campaign’s slogan could easily be applied to commercial speech itself. Although it took almost seventy years, commercial speech went from being outside the First Amendment looking in to a status almost equivalent to that of the most protected forms of expression.<sup>5</sup>

For many years, commercial speech was summarily excluded from any meaningful level of constitutional protection under the First Amendment right of free speech.<sup>6</sup> In its 1976 decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>7</sup> the Court changed all of that by extending a not-insignificant

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\* Louis and Harriet Ancel Professor of Law and Public Policy, Northwestern Pritzker School of Law.

\*\* AB University of Tennessee; JD Northwestern School of Law.

<sup>1</sup> Ruth Rosen, *You’ve Come a Long Way Baby (Or Have You?)*, HUFFINGTON POST: BLOG (Feb. 21, 2013, 10:52 AM), [http://www.huffingtonpost.com/ruth-rosen/womens-movement\\_b\\_2733469.html](http://www.huffingtonpost.com/ruth-rosen/womens-movement_b_2733469.html) [<https://perma.cc/ZD2B-VY4U>].

<sup>2</sup> Cathryn Jakobson, *Why They Stretched the Slims*, N.Y. TIMES (June 8, 1986), <http://www.nytimes.com/1986/06/08/magazine/why-they-stretched-the-slims.html?pagewanted=all> [<https://perma.cc/3NV8-M5UU>].

<sup>3</sup> Rosen, *supra* note 1.

<sup>4</sup> See Jakobson, *supra* note 2; Rosen, *supra* note 1.

<sup>5</sup> See *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557 (2011) (holding that “[s]peech in aid of pharmaceutical marketing” is subject to “heightened judicial scrutiny”); *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (stating that “purely commercial advertising” does not enjoy the same safeguards as other types of speech).

<sup>6</sup> See *Breard v. City of Alexandria*, 341 U.S. 622, 645 (1951); *Valentine*, 316 U.S. at 54.

<sup>7</sup> 425 U.S. 748 (1976).

level of constitutional protection to commercial speech.<sup>8</sup> However, the Court quickly made clear that commercial speech is “afforded . . . a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values[.]”<sup>9</sup> As a result, the Court deemed itself free to uphold regulation of commercial speech when the regulatory authority established merely that damage “may” occur,<sup>10</sup> or that there is a “possibility” of harm resulting from the speech in question.<sup>11</sup> This degree of protection was far less than that given most categories of noncommercial speech, for which the showing of a “compelling interest” was usually required to justify suppression.<sup>12</sup>

The famed four-pronged test from *Central Hudson Gas & Electric Corp. v. Public Service Commission*,<sup>13</sup> adopted by the Court in 1980, at best appeared to extend commercial speech a form of intermediate scrutiny protection, still far below the strict scrutiny/compelling interest protection given more traditionally protected categories of noncommercial expression.<sup>14</sup> The Court purports to continue to apply that test to this very day.<sup>15</sup> Beginning in 1993, however, both the Court’s rhetoric and decisions began to change.<sup>16</sup> Since that year, it is difficult to find a Supreme Court decision upholding the suppression of truthful commercial speech. As a practical, if not a formal, matter, then, it could reasonably be said that today, truthful commercial speech receives a level of protection approaching, if not actually reaching, the level of protection received by noncommercial speech.<sup>17</sup> In fact, in recent years the Court appears to have adopted the principle that, contrary to statements in its decisions during the early years of the commercial speech doctrine, in the broad scheme of the First Amendment truthful commercial speech is deemed to have value equivalent to that of noncommercial speech.<sup>18</sup> To the extent commercial speech can be suppressed in situations where noncommercial speech would be protected, it must

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<sup>8</sup> *See id.* at 762–65.

<sup>9</sup> *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978).

<sup>10</sup> *See id.* at 457, 464–68.

<sup>11</sup> *See Friedman v. Rogers*, 440 U.S. 1, 13–16 (1979).

<sup>12</sup> *See* Martin H. Redish & Kelsey B. Shust, *The Right of Publicity and the First Amendment in the Modern Age of Commercial Speech*, 56 WM. & MARY L. REV. 1443, 1489 (2015).

<sup>13</sup> 447 U.S. 557, 566 (1980).

<sup>14</sup> *See id.* at 564–66.

<sup>15</sup> *See, e.g., Sorrell v. IMS Health Inc.*, 564 U.S. 552, 572 (2011).

<sup>16</sup> *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993) (holding that the City’s restriction on commercial speech was not a “reasonable fit” between the government’s interest and means).

<sup>17</sup> *See, e.g., Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 176 (1999) (holding that a prohibition on broadcasts concerning legal gambling was a violation of the First Amendment); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 (1996) (plurality opinion) (holding “that Rhode Island’s statutory prohibition against advertisements that provide the public with accurate information about retail prices of alcoholic beverages [was] . . . invalid”).

<sup>18</sup> *See infra* Section I.A.3.

be because of a showing of harm uniquely associated with commercial speech.<sup>19</sup> For purposes of convenience, we refer to this judicial assumption of equivalent value of commercial and noncommercial speech as the “equivalency principle.” We do not mean to suggest that the Supreme Court has at this point fully recognized the inexorable doctrinal implications of its own equivalency principle.<sup>20</sup> But there can be no doubt that the Court has in fact adopted the principle. Indeed, in its most recent statements on the issue, the Court has held that governmental regulation providing noncommercial speakers better treatment than comparably situated commercial speakers is deserving of strict scrutiny.<sup>21</sup>

The glaring exception to application of this equivalency principle to determine the scope of commercial speech protection is false commercial speech, which has long been categorically excluded from the protective reach of the First Amendment.<sup>22</sup> At first blush this categorical exclusion might appear to be understandable. False commercial speech, of course, serves no value in and of itself; indeed, it is reasonable to believe that it can only be harmful to society and the individuals who populate it, in a variety of ways. But in the abstract, at least, the same could be said of false noncommercial speech as well: Listeners or readers who base life-affecting decisions—either political or personal—in reliance on false information or opinion may suffer great harm. Moreover, false speech may unjustly injure the reputations of innocent individuals. Yet the Supreme Court has long recognized, at least in the context of noncommercial speech, that the relevant constitutional analysis is far more complex than this simplistic analysis might suggest.<sup>23</sup> Even though false speech in and of itself serves no value and often causes harm, occasions will arise in which false speech must be protected in order to foster broader values and societal needs.<sup>24</sup>

The question then arises, why has the equivalency principle, which has played such an important doctrinal role in the recent shaping of modern commercial speech doctrine, not played an equally important role in the context of the regulation of false commercial speech? There may well be a satisfactory answer to this question,

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<sup>19</sup> *Sorrell*, 564 U.S. at 579; *Discovery Network, Inc.*, 507 U.S. at 426.

<sup>20</sup> *See, e.g.*, Redish & Shust, *supra* note 12 (criticizing preferential protection of traditional media over commercial advertisers in response to suits for violation of the right of publicity).

<sup>21</sup> *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2224 (2015) (holding that Gilbert’s sign code imposing content-based restrictions on speech was subject to strict scrutiny); *Sorrell*, 564 U.S. at 557 (holding that “[s]peech in aid of pharmaceutical marketing . . . is a form of expression protected by the Free Speech Clause of the First Amendment” and thus “must be subjected to heightened judicial scrutiny”).

<sup>22</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980) (holding that for commercial speech to be protected by the First Amendment, it “must . . . not be misleading”).

<sup>23</sup> *See, e.g.*, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (requiring “actual malice” for a false statement about a public official to fall into a Free Speech exception).

<sup>24</sup> *See, e.g., id.*

but there can be no doubt that the Supreme Court has failed even to devote sufficient attention to the question to determine whether such an answer exists.

It is our position that the logic underlying the equivalency principle, which now appears to play so important a role in the context of First Amendment protection for truthful commercial speech, applies with equal force to the regulation of false commercial speech. In other words, to the extent false noncommercial speech is deemed to have value, if only indirectly, false commercial speech should be seen as serving the very same values. But it is important to note that this does not mean that the actual protection extended to false commercial speech needs to be equivalent to that received by false noncommercial speech in all instances in order to satisfy the equivalency principle. That principle, it should be recalled, does not require that regulators always provide identical treatment to commercial and noncommercial speech. Rather, all it demands is that to the extent the two categories of expression are to be distinguished in the level of First Amendment protection they receive, it must be because the harm caused by one is uniquely greater than the harm caused by the other, not because the value of one of the categories of expression is deemed to be greater than that of the other.<sup>25</sup> In short, the equivalency principle demands an assumption of equivalent *value*, not equivalent *consequences* or equivalent *protection*.

When the dust settles, a proper analysis will reveal that the result of application of the equivalency principle in the context of false commercial speech regulation will in some important respects differ little, if at all, from the way that false commercial speech is treated today.<sup>26</sup> But that will not be true in all cases as either a doctrinal or theoretical matter, and in any event the constitutional stakes involved extend well beyond the principle's doctrinal implications for the regulation of false commercial speech. That is because those who oppose the idea that commercial and noncommercial speech are equivalent as a matter of First Amendment value can today simply point to the significant doctrinal difference in the level of protection received by false commercial and noncommercial speech as persuasive evidence that the equivalency principle is nothing more than a doctrinal mirage.<sup>27</sup> In reality, the argument proceeds, the Court properly recognizes that commercial speech does not possess value equivalent to noncommercial speech.

The goal of this Article, then, is twofold. First, it is designed to demonstrate that the logic of the equivalency principle for commercial speech is as applicable to the context of false speech as it is to the context of truthful speech.<sup>28</sup> Second, it is designed to demonstrate that to the extent false commercial and noncommercial speech are in fact to be treated differently in specific contexts, it is not because of

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<sup>25</sup> See *infra* Part III.

<sup>26</sup> See *infra* Part III.

<sup>27</sup> See *infra* Sections II.A–II.B.

<sup>28</sup> See *infra* Part II.

variance in value of the two forms of speech, but rather because of variance in the nature and degree of harm caused by the two categories of speech.<sup>29</sup>

In this way, we will have accomplished two goals. We will have shown how and why First Amendment doctrine needs to be adjusted to take account of the proper application of the equivalency principle to false speech, and we will have disposed of the argument that the different treatment given false commercial speech demonstrates the invalidity of the equivalency principle when applied to truthful commercial speech.<sup>30</sup>

The first Part of this Article explores both the doctrinal evolution and theoretical merits of the equivalency principle.<sup>31</sup> It concludes first that Supreme Court doctrine has evolved to the point where government is no longer permitted to regulate truthful commercial speech in a manner differently from its regulation of noncommercial speech solely on the grounds that commercial speech is of lesser value to the interests fostered by the First Amendment.<sup>32</sup> To the extent commercial speech may be subjected to more invasive regulation than noncommercial speech, it must be due to government's efforts to prevent harms caused uniquely by commercial speech.<sup>33</sup> The Part then concludes that the Court's current approach is not only fully justified but actually dictated by a proper understanding of the theory of free expression.<sup>34</sup>

In the second Part, the Article explores the implications of the equivalency principle for regulation of false commercial speech.<sup>35</sup> On the basis of an analysis of First Amendment theory, the Article concludes that the equivalency principle logically applies to false, as well as truthful commercial speech.<sup>36</sup> In the case of unknowingly false commercial speech, we believe the equivalency principle dictates that even in the face of potentially substantial harm, the speech must be protected. The Court has reached this conclusion for unknowingly false defamatory speech of public figures, even though such speech may give rise to serious and unique harm to victims' reputations.<sup>37</sup> There is, we conclude, absolutely no principled basis on which to distinguish these two situations.<sup>38</sup> In the case of knowingly false commercial speech, however, we conclude that—as is the case for knowingly false defamation of public figures—the harm is sufficiently severe to justify the loss of constitutional protection.<sup>39</sup> As a doctrinal matter, this would differ from the constitutional treatment given most knowingly false non-defamatory noncommercial speech.<sup>40</sup> But that difference

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<sup>29</sup> See *infra* Part III.

<sup>30</sup> See *infra* Sections II.B–II.C.

<sup>31</sup> See *infra* Part I.

<sup>32</sup> See *infra* Section I.A.

<sup>33</sup> See *infra* Section I.A.3.

<sup>34</sup> See *infra* Section I.B.

<sup>35</sup> See *infra* Section I.B.

<sup>36</sup> See *infra* Part II.

<sup>37</sup> See *infra* Section II.B.

<sup>38</sup> See *infra* Section II.C.

<sup>39</sup> See *infra* Part III.

<sup>40</sup> See *infra* Section II.B.

is justified not by a difference in First Amendment value but rather by a significant difference in the nature and intensity of the harm caused by the different forms of knowingly false speech.

Thus, while as a practical matter knowingly false commercial speech would, under our suggested framework, generally be subject to more pervasive regulation than knowingly false noncommercial speech, this is not because it possesses lower First Amendment value than noncommercial speech, but rather because the nature, intensity, and immediacy of the harm it causes justifies the distinction in First Amendment protection. Avoidance of the harm constitutes a sufficiently compelling interest to justify suppression of knowingly false commercial speech while in most (though not all) cases the harm caused by knowingly false noncommercial speech does not. However, to the extent that false noncommercial speech does, in fact, give rise to dangers of harm identical to those caused by false commercial speech, such speech should be (and, to a certain extent, already is) subject to the same regulatory regime constitutionally permitted for false commercial speech.<sup>41</sup> The difference, in other words, is based on the nature and severity of the harm, not on the commercial nature of the expression.

## I. COMMERCIAL SPEECH AND THE EVOLUTION OF THE EQUIVALENCY PRINCIPLE

### A. *The Doctrinal Evolution of the Equivalency Principle*

#### 1. Early Protections for Commercial Speech

For many years, commercial speech received no First Amendment protection. Most famously, the Court in *Valentine v. Chrestensen*<sup>42</sup> stated that “[w]hether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment.”<sup>43</sup> Although, the Court held that while the Constitution demands that government restrictions of free speech must not be “unduly burden[some],” it stated explicitly that “the Constitution imposes no such restraint on government as respects purely commercial advertising.”<sup>44</sup>

Things stood this way for more than thirty years. However, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court dramatically altered the state of First Amendment doctrine, picking up where it left off in *Bigelow v. Virginia*.<sup>45</sup> While the Court had previously extended protection to an advertisement

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<sup>41</sup> See *infra* Part II.

<sup>42</sup> 316 U.S. 52 (1942).

<sup>43</sup> *Id.* at 54.

<sup>44</sup> *Id.*

<sup>45</sup> See *generally* *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975).

that “did more than simply propose a commercial transaction,”<sup>46</sup> the Court in *Virginia Board* extended First Amendment protection to pure commercial speech.<sup>47</sup> The *Virginia Board* Court first expounded on *Bigelow*, stating that the First Amendment protects speech even though “money is spent to project it . . . [, and] even though it is carried in a form that is ‘sold’ for profit.”<sup>48</sup> The Court, in holding that commercial speech is protected by the First Amendment, emphasized the importance of the “free flow of commercial information” to both individuals and society more generally.<sup>49</sup> Because private economic decisions abound in individuals’ lives, there is both a societal and individual interest in ensuring those decisions are “intelligent and well informed.”<sup>50</sup> Indeed, even if a speaker’s motivation is purely economic, “[t]hat hardly disqualifies him from protection under the First Amendment.”<sup>51</sup> Commercial speech therefore deserves protection even if it only proposes a transaction.<sup>52</sup> While *Virginia Board* was the first decision to explicitly extend First Amendment protection to “pure” commercial speech, it did not extend entirely the same degree of protection to commercial speech as it had to noncommercial speech.<sup>53</sup> Instead, the Court pointed to “commonsense differences” between commercial and noncommercial speech that might justify greater restriction of the former.<sup>54</sup> Most relevantly, the Court regarded commercial speech’s “greater objectivity and hardiness” as reducing, in comparison to noncommercial speech, the need to tolerate false or misleading commercial speech.<sup>55</sup>

The Supreme Court has held that the First Amendment protects some category of false, noncommercial statements of fact, because such speech is “inevitable in free debate” and strict punishment of all such speech therefore “runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press.”<sup>56</sup> In *Virginia Board*, however, the Court reasoned that commercial speakers are unlikely to similarly fear inadvertently violating false commercial speech regulations and thus refrain from engaging in commercial speech, because commercial speech’s greater objectivity allows speakers to “more easily verif[y]” its accuracy before they speak.<sup>57</sup> The Court further reasoned that truthful

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<sup>46</sup> *Bigelow*, 421 U.S. at 822.

<sup>47</sup> *Va. State Bd. of Pharmacy*, 425 U.S. at 762.

<sup>48</sup> *Id.* at 761 (citations omitted).

<sup>49</sup> *Id.* at 764–65 (remarking that some commercial advertisements “may be of general public interest”).

<sup>50</sup> *Id.* at 765.

<sup>51</sup> *Id.* at 762.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 771–72 n.24.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*; see, e.g., *Friedman v. Rogers*, 440 U.S. 1, 13, 15–16 (1979) (upholding a law preventing optometrists from practicing under trade names because “there is a significant possibility that trade names will be used to mislead the public”).

<sup>56</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

<sup>57</sup> *Va. State Bd. of Pharmacy*, 425 U.S. at 771–72 n.24.

commercial speech is hardier, or “more durable,” than noncommercial speech, because commercial speech is necessarily required in order to make profits.<sup>58</sup> Insofar as speakers are profit driven, then, they are unlikely to be “chilled by proper regulation” of false commercial speech.<sup>59</sup> In sum, the *Virginia Board* Court, relying on these so-called differences between commercial and noncommercial speech as justification,<sup>60</sup> held that while the First Amendment must in some instances protect false noncommercial speech, under no circumstances does it protect false commercial speech.<sup>61</sup>

## 2. *Central Hudson* and Limited Protections for Commercial Speech

While *Virginia Board* and its early progeny seemed to suggest only that some particular features of commercial speech might permit heavier restrictions, the Court’s decision in *Ohralik v. Ohio State Bar Ass’n*<sup>62</sup> broadly restricted the First Amendment protections for both truthful and false commercial speech.<sup>63</sup> According to the *Ohralik* Court, *Virginia Board* acknowledged “the ‘common sense’ distinction” between commercial and noncommercial speech,<sup>64</sup> namely that commercial speech “occurs in an area traditionally subject to government regulation[.]”<sup>65</sup> Ignoring that distinction and providing equal First Amendment protection to commercial and noncommercial speech, the Court reasoned, “could invite dilution, simply by a leveling process, of the force of the Amendment’s guarantee with respect to the latter kind of speech.”<sup>66</sup> To invite that dilution and “subject the First Amendment to such a devitalization”<sup>67</sup> all for the sake of commercial speech, which the Court stated has a “subordinate position in the scale of First Amendment values,” would simply be too risky.<sup>68</sup> Accordingly, the Court stated instead that commercial speech has “a

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> See *supra* notes 54–57 and accompanying text.

<sup>61</sup> 425 U.S. 771–73. Although *Virginia Board* was an obvious success for commercial speech advocates, the Court, in the years immediately following *Virginia Board*, solidified its position that false commercial speech could be more heavily restricted than false noncommercial speech. See, e.g., *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977) (holding that “leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena” (citations omitted)).

<sup>62</sup> 436 U.S. 447 (1978).

<sup>63</sup> *Id.* at 455–56.

<sup>64</sup> *Id.* (quoting *Va. State Bd. of Pharmacy*, 425 U.S. at 771 n.24).

<sup>65</sup> *Id.* at 456 (citing *Va. State Bd. of Pharmacy*, 425 U.S. at 771 n.24).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> See *id.* But see *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 434 n.2 (1993) (Blackmun, J., concurring) (“[T]he ‘limited measure of protection’ our cases had afforded commercial speech reflected the fact that we had allowed ‘modes of regulation that might be impermissible in the realm of noncommercial expression’ and not that we had relegated commercial speech to a ‘subordinate position in the scale of First Amendment values.’”).

limited measure of protection,” thus “allowing modes of regulation that might be impermissible in the realm of noncommercial expression” but also preserving the heightened protection for noncommercial speech.<sup>69</sup>

*Ohralik* thus continued the Court’s practice of allowing much more pervasive regulation of commercial speech than of noncommercial speech. The Court’s subsequent decision in *Central Hudson* enshrined in doctrine a method to ensure that commercial speech, regardless of falsity, is entitled to noticeably less First Amendment protection than noncommercial speech.

After reinforcing *Ohralik*’s justifications for affording commercial speech less First Amendment protection, the Court in *Central Hudson* adopted a four-part analysis for determining whether particular government regulations of commercial speech are unwarranted.<sup>70</sup> Such an approach ensures that commercial speech receives First Amendment protection only in appropriate cases and that, in those cases, commercial speech receives only the appropriate amount of protection against unjustified speech restrictions.

The first step of *Central Hudson*’s four-part analysis concerns whether the commercial speech affected by some government regulation is protected by the First Amendment at all.<sup>71</sup> Given the Court’s view that the First Amendment protects commercial speech only because of the “informational function of advertising,” the First Amendment protects commercial speech only if it “accurately inform[s] the public about lawful activity.”<sup>72</sup> The First Amendment does not protect, and the government may thus freely suppress, any commercial speech that (1) provides false information to the public, (2) is “more likely to deceive the public than to inform it,” and (3) concerns unlawful activities.<sup>73</sup> While acknowledging that, “[i]n most other contexts, the First Amendment prohibits” content-based speech regulations such as these, the Court justified content-based regulation of commercial speech because its greater objectivity and hardiness protect it from the suffocation of overbroad regulation.<sup>74</sup>

If, however, the First Amendment applies because the commercial speech in question is “neither misleading nor related to unlawful activity,”<sup>75</sup> the government must then show that its regulation satisfies the final three parts of the *Central Hudson* test,<sup>76</sup> which essentially amounts to surviving intermediate scrutiny.<sup>77</sup> *Central Hudson*’s

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<sup>69</sup> *Ohralik*, 436 U.S. at 456.

<sup>70</sup> 447 U.S. 557, 566 (1980).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 563.

<sup>73</sup> *Id.* at 563–64 (citations omitted).

<sup>74</sup> *Id.* at 564 n.6 (citing *Consol. Edison Co. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 537–40 (1980); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 381 (1977)).

<sup>75</sup> *Id.* at 564.

<sup>76</sup> *Id.* at 566.

<sup>77</sup> *See id.* at 573 (Blackmun, J., concurring) (asserting that, while intermediate scrutiny might be appropriate for restrictions on false or misleading commercial speech, restrictions on truthful and lawful commercial speech must survive heightened scrutiny).

second part requires that the government “assert a substantial interest to be achieved by restrictions on commercial speech.”<sup>78</sup> Third, *Central Hudson* requires that the government’s commercial speech regulation “directly advance[s] the state interest,” thus prohibiting regulations that “provide[] only ineffective or remote support for the government’s purpose.”<sup>79</sup> Fourth, and finally, the test requires that commercial speech regulations are “narrowly drawn” to restrict only as much speech as necessary to advance or protect the state’s interest.<sup>80</sup>

### 3. Contemporary Commercial Speech Protection

While *Central Hudson* has never been overruled, several post-*Central Hudson* cases seem to afford commercial speech more protection than the *Central Hudson* test originally contemplated. Indeed, it seems that, in almost all facets, the Court now affords truthful commercial speech virtually as much First Amendment protection as it does noncommercial speech. The Supreme Court has not upheld governmental suppression of truthful commercial speech in more than twenty years. For example, consider *City of Cincinnati v. Discovery Network, Inc.*,<sup>81</sup> in which Discovery Network and its publisher challenged the City of Cincinnati’s refusal to allow them to use newsracks on public property to distribute commercial handbills as a violation of the First Amendment.<sup>82</sup> Because the respondents accepted the city’s interest in safety and esthetics as substantial and accepted the characterization of their speech as commercial speech, the Court considered only whether the city met its burden of showing “a ‘reasonable fit’ between its legitimate interests in safety and esthetics and its choice of a limited and selective prohibition of newsracks as the means chosen to serve those interests.”<sup>83</sup>

The Court held that there was not a reasonable fit between the city’s interests in preserving esthetics and its decision to selectively ban only those newsracks that contained commercial handbills.<sup>84</sup> The Court emphatically rejected the city’s argument

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<sup>78</sup> *Id.* at 564. *But see* *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74–75 (1983) (citing *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 95–96 (1977)) (suggesting that some commercial speech provides information of such great import, e.g., truthful information that aids parents in giving informed parental guidance, that the restriction of that information “constitutes a ‘basic’ constitutional defect regardless of the strength of the government’s interest”).

<sup>79</sup> *Cent. Hudson*, 447 U.S. at 564; *see, e.g.*, *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 769 (1976) (“The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is assumed people will have to the free flow of drug price information.”).

<sup>80</sup> *Cent. Hudson*, 447 U.S. at 565 (footnote omitted) (quoting *In re Primus*, 436 U.S. 412, 438 (1978)).

<sup>81</sup> 507 U.S. 410 (1993).

<sup>82</sup> *Id.* at 412.

<sup>83</sup> *Id.* at 416 (footnote omitted).

<sup>84</sup> *Id.* at 424–28.

that it could restrict the respondents' commercial speech but permit all noncommercial speech to continue using newsracks based only on the assertion that "commercial speech has only a low value."<sup>85</sup> Indeed, the Court stated that "the city's argument attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimates the value of commercial speech."<sup>86</sup> In fact, the discrimination against the respondents' commercial speech bore "no relationship *whatsoever*" to the city's interest in promoting newsracks, because "all newsracks, regardless of whether they contain commercial or noncommercial publications, are equally at fault."<sup>87</sup> The Court therefore rejected the city's "bare assertion that the 'low value' of commercial speech is a sufficient justification for its selective and categorical ban on newsracks dispensing 'commercial handbills.'"<sup>88</sup> Furthermore, the Court noted that the city's failure to consider promoting its interest in esthetics by "regulating the[ ] size, shape, appearance, or number" of newsracks showed that the city had not considered seriously whether there was a less restrictive way of advancing that interest.<sup>89</sup>

Having concluded that the city's commercial speech restriction did not establish a reasonable fit, the Court proceeded to consider whether the city's regulation was a reasonable "time, place, or manner" restriction that could be "adequately justified 'without reference to the content of the regulated speech.'"<sup>90</sup> Holding otherwise, the Court noted that "the very basis for the regulation is the difference in content between ordinary newspapers and commercial speech."<sup>91</sup>

The Court's refusal to allow commercial speech to be restricted merely because it is of purportedly lower value than noncommercial speech represents an important insight about the essence of commercial speech protection. The Court has stated that "an interest in preventing commercial harms . . . [is] the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech."<sup>92</sup> This statement seems to strongly suggest that the Court now affords more protection to commercial speech than "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values[.]"<sup>93</sup> Instead, *Discovery Network* suggests that commercial speech enjoys just as much protection as any other form of speech, but that its unique harms can sometimes justify more extensive regulation than would be permissible for noncommercial

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<sup>85</sup> *Id.* at 418–19.

<sup>86</sup> *Id.* at 419.

<sup>87</sup> *Id.* at 424, 426.

<sup>88</sup> *Id.* at 428.

<sup>89</sup> *Id.* at 417.

<sup>90</sup> *Id.* at 428 (first quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); then quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 228, 293 (1984)).

<sup>91</sup> *Id.* at 429.

<sup>92</sup> *Id.* at 426 (citations omitted).

<sup>93</sup> *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

speech.<sup>94</sup> That is a long way from the *Central Hudson* position that all commercial speech, regardless of context, is afforded less First Amendment protection than non-commercial speech.<sup>95</sup> Indeed, the Court's willingness to consider, after moving past the reasonable fit discussion, whether the city's regulation was "justified as a legitimate time, place, or manner restriction on protected speech" signals that it was willing to consider commercial speech as fully protected speech that may sometimes be subjected to more severe restrictions because of its unique harms.<sup>96</sup>

This view of the Court's changing attitude is strengthened by the Court's plurality in *44 Liquormart, Inc. v. Rhode Island*.<sup>97</sup> Justice Stevens, writing for a plurality, explicitly stated that the First Amendment only allows commercial speech to be more easily restricted by regulations "consistent with the reasons for according constitutional protection to commercial speech."<sup>98</sup> For example, regulations concerned with preventing false or misleading commercial advertisements, given the greater objectivity and hardness of such speech,<sup>99</sup> would be subject to "less than strict review."<sup>100</sup> However, the First Amendment requires a full, "rigorous review" of commercial speech regulations "unrelated to the preservation of a fair bargaining process[.]"<sup>101</sup> Indeed, the dangers of "bans on truthful . . . commercial speech cannot be explained away by appeals to the 'commonsense distinctions' that exist between commercial and noncommercial speech."<sup>102</sup>

The Court effectively adopted the equivalency principle, extending full First Amendment protection to truthful commercial speech in *Sorrell v. IMS Health Inc.*<sup>103</sup> *IMS Health* concerned a First Amendment challenge to a Vermont law that restricted the sale or use of pharmaceutical data for marketing purposes.<sup>104</sup> The law was designed to prevent pharmaceutical companies from making use of data concerning the prescribing history of individual doctors in order to shape their advertising appeals to those doctors.<sup>105</sup> However, the state statute was construed not to bar the use of the very same data by academic researchers.<sup>106</sup> The Court found the law to be a "content- and

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<sup>94</sup> *Discovery Network*, 507 U.S. at 426.

<sup>95</sup> *See* *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980).

<sup>96</sup> *Discovery Network*, 507 U.S. at 430.

<sup>97</sup> 517 U.S. 484 (1996) (plurality opinion).

<sup>98</sup> *Id.* at 501.

<sup>99</sup> *Id.* at 502 (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976)). *But see id.* at 523 n.4 (Thomas, J., concurring) ("The degree to which these rationales truly justify treating 'commercial' speech differently from other speech (or indeed, whether the requisite distinction can even be drawn) is open to question, in my view." (citations omitted)).

<sup>100</sup> *Id.* at 501.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 502 (citing *Va. State Bd.*, 425 U.S. at 771 n.24).

<sup>103</sup> 564 U.S. 552 (2011).

<sup>104</sup> *Id.* at 557, 561.

<sup>105</sup> *See id.* at 558–59.

<sup>106</sup> *Id.* at 563.

speaker-based” restriction on protected speech,<sup>107</sup> and thus required “heightened judicial scrutiny.”<sup>108</sup> The Court further held that “[c]ommercial speech is no exception” to the required heightened judicial scrutiny of content-based speech restrictions.<sup>109</sup> This application of heightened scrutiny to content- or speaker-based restrictions on commercial speech was a remarkable step forward for commercial speech protection, because, as Justice Breyer correctly noted in dissent, no such restriction of commercial speech “ha[d] ever before justified greater scrutiny when regulatory activity affects commercial speech.”<sup>110</sup> Indeed, wasn’t the inescapable consequence of the reduced protection for commercial speech that there would be discrimination between commercial and non-commercial speakers? By the Court’s reasoning in *IMS Health*, then, the Court’s own commercial speech doctrine amounts to a discrimination deserving of strict scrutiny.

While the *IMS Health* Court reaffirmed that “the government’s legitimate interest in protecting consumers from ‘commercial harms’ explains ‘why commercial speech can be subject to greater governmental regulation than noncommercial speech,’”<sup>111</sup> the Court found that Vermont had failed to tie its restriction to any unique commercial harm.<sup>112</sup> Further, Vermont did not assert that pharmaceutical “detailing” was false or misleading, nor that the law would proactively reduce some risk of false or misleading commercial speech.<sup>113</sup> Finally, while the Court did state that under the *Central Hudson* test the regulation would have to “show at least that the statute directly advance[d] a substantial governmental interest” and that there was a reasonable fit between the regulation and that interest, it apparently did so only to show that “the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied.”<sup>114</sup> Thus, the Court found the content- and speaker-based Vermont law to violate the First Amendment.<sup>115</sup>

*IMS Health* represents a capstone of sorts on the Court’s move toward acceptance of the equivalency principle. At the very least, a synthesis of *Discovery Network* and *IMS Health* strongly suggests that more invasive regulations of commercial speech can be justified only by uniquely commercial harms, not by the precept that commercial speech is inherently less valuable than noncommercial speech and thus receives less

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 565.

<sup>109</sup> *Id.* at 566.

<sup>110</sup> *Id.* at 588 (Breyer, J., dissenting) (citations omitted).

<sup>111</sup> *Id.* at 579 (majority opinion) (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993); then citing *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 502 (1996) (plurality opinion)).

<sup>112</sup> *Id.*; “[F]or example, . . . ‘a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud . . . is in its view greater there.’” *Id.* (third alteration in original) (quoting *R. A. V. v. City of St. Paul*, 505 U.S. 377, 388–89 (1992) then citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771–72 (1976)).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 571–72 (citations omitted).

<sup>115</sup> *Id.* at 578–80.

First Amendment protection. In that manner, *IMS Health* suggests that commercial speech regulations are subject to “a standard yet stricter than *Central Hudson*.”<sup>116</sup> Indeed, at least one Justice openly regards *IMS Health* as an application of strict scrutiny to commercial speech.<sup>117</sup>

### *B. The Theoretical Case for the Equivalency Principle*

While it is certainly valuable and informative to understand how the Supreme Court’s doctrine has evolved over the years, we of course understand that legal scholars give at best limited force to purely doctrinal arguments. In this instance, however, analysis of the underlying purposes of the First Amendment protection of free expression only reinforces the Court’s current doctrinal stance.

In undertaking this analysis, it is important to recall the Court’s definition of commercial speech: speech that does no “more than propose a commercial transaction.”<sup>118</sup> Expression either objecting to a commercial transaction or speech neutrally describing or commenting on commercial products or services, in contrast, are deemed fully protected noncommercial speech.<sup>119</sup> In light of this well-established distinction, none of the scholarly arguments employed to reduce the level of First Amendment protection for commercial speech on the basis of its lesser value to the goals of free speech protection has any merit.

Initially, it should be noted that the argument that commercial speech is deserving of a lower level of First Amendment protection because it does not concern the political process, which is the type of speech thought by many to be most closely aligned with the values fostered by that provision,<sup>120</sup> proves far too much. Most commentators would readily concede that full First Amendment protection extends to many more expressive categories than speech intertwined with the political process—for example, art, music, and literature. Of course, the response might be made that speech about the relative merits of commercial products and services is a far cry from art, music, or literature as a means of fostering the underlying value of personal and intellectual self-realization. Many years ago, one of us sought to respond to this argument by pointing out that speech about the relative merits of commercial products and services facilitates individual self-realization by providing information and opinion relevant to an individual’s *private* self-governing decisions.<sup>121</sup> The argument was

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<sup>116</sup> *Id.* at 588 (Breyer, J., dissenting).

<sup>117</sup> See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2235 (2015) (Breyer, J., concurring).

<sup>118</sup> See *supra* note 46 and accompanying text.

<sup>119</sup> See *Bigelow v. Virginia*, 421 U.S. 809, 821–22 (1975).

<sup>120</sup> See generally ALEXANDER MEIKELJOHN, *POLITICAL FREEDOM* (1960) (discussing First Amendment freedom of speech as a tool for self-governance); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971) (arguing that “Constitutional protection should be accorded only to speech that is explicitly political”).

<sup>121</sup> See Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 *GEO. WASH. L. REV.* 429, 438–43 (1971).

made that it would make little sense to protect political speech on the grounds that such speech facilitates collective self-government when the individual's role in making those self-governing decisions represents only a tiny fraction of the whole, but simultaneously deny protection to commercial expression when such communications facilitate the making of life-affecting decisions that belong—both in terms of choice and consequences—entirely to the individual.<sup>122</sup> In a fundamental sense, it was argued, *both* forms of expression facilitate the making of the individual's life-affecting, self-governing decisions, and therefore equally foster the key value underlying the constitutional protection of free expression—namely, realization of both the individual's personal goals and personal potential.<sup>123</sup>

In light of the Supreme Court's subsequent definition of commercial speech, however, it is unnecessary to delve into possible differences or similarities between speech that facilitates the recipient's private and collective self-government. While the Court has on occasion wavered in its definition<sup>124</sup> and has complicated that definition with multi-factor tests of limited clarity and coherence,<sup>125</sup> reduced to its core, the definition of "commercial speech" generally employed by the Court is speech that does no more than "propose[] a commercial transaction."<sup>126</sup> As a result, speech concerning the relative merits of commercial products and services that does something other than propose a commercial transaction—for example, *Consumer Reports Magazine*,<sup>127</sup> Ralph Nader's criticism of the safety of the Chevrolet Corvair,<sup>128</sup> or media revelations that Nike allegedly employed "sweat shop" labor in foreign countries to produce its shoes<sup>129</sup>—receives full First Amendment protection. In stark contrast, speech about the very same subjects disseminated to the very same audience is characterized as traditionally less protected "commercial speech" when it is expressed by the manufacturer or seller.<sup>130</sup> Purely as a logical matter, then, commercial speech protection cannot be distinguished from fully protected noncommercial

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<sup>122</sup> See generally *id.*

<sup>123</sup> *Id.* at 438–48.

<sup>124</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561–62 (1980) ("Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.").

<sup>125</sup> See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 68–69 (1983) (citing *Cent. Hudson*, 447 U.S. at 566).

<sup>126</sup> See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553–54 (2001) (referring to "speech proposing a commercial transaction").

<sup>127</sup> See, e.g., *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 513 (1984) (extending full First Amendment protection to *Consumer Reports*).

<sup>128</sup> See generally RALPH NADER, *UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE* (1965).

<sup>129</sup> See generally *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002), *cert. granted*, 539 U.S. 1099 (2003), and *cert. dismissed as improvidently granted*, 537 U.S. 654 (2003).

<sup>130</sup> See Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372, 372–73 (1979).

speech solely on the grounds that it deals with such mundane matters as the relative merits of commercial purchases. Speech that receives full First Amendment protection deals with the very same issues. Indeed, if a commercial seller did no more than reproduce the very same words said about its product in *Consumer Reports*, under the Court's definition of commercial speech, those exact same words would receive a considerably lower level of protection, for no reason other than the commercial motivation of the party uttering the expression in question. When one adds a listener-centric perspective to First Amendment theory, then, the Court's asserted distinction between speech proposing a commercial transaction and speech neutral about or opposing commercial transactions makes absolutely no sense.

Some would no doubt respond that it is the very fact of the speaker's commercial motivation that properly distinguishes the two types of expression, even though they deal with the exact same subject (and, indeed, may even say the exact same thing). Two different grounds have, over the years, been suggested to support this speaker-based distinction. First, it has been suggested that commercial promotion of sale is effectively part of the process of commercial sale and therefore is "linked inextricably" to the commercial transactions themselves.<sup>131</sup> Therefore, the argument proceeds, commercial speech constitutes a form of conduct, rather than expression. As one of us argued a number of years ago, however, "[i]t is only at the point of sale that commercial advocacy is even arguably so temporarily linked to the acts of purchase and sale that it can realistically be deemed an element of these acts."<sup>132</sup> The mere fact that speech *advocates* action does not make the speech *part of* that action.

The second argument designed to distinguish speech *about* or *opposing the sale* of commercial products and services from speech *advocating purchase* of commercial products and services is the theory, associated primarily with Robert Post,<sup>133</sup> that speech designed for the purpose of commercial profit is automatically not speech designed to contribute to public discourse, and it is only the latter type of expression that is deserving of full First Amendment protection.<sup>134</sup> There is no need to rehash all of the arguments pointing out the serious flaws in this theory, since one of us has already done so in detail.<sup>135</sup> Suffice it to say at this point that while Post has on occasion suggested that a court should engage in a case-by-case evaluation of speech and its speaker to determine whether the speech represents "an effort to engage in public opinion,"<sup>136</sup>

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<sup>131</sup> *Friedman v. Rogers*, 440 U.S. 1, 10–11 n.9 (1979); *see also* Farber, *supra* note 130, at 386–90.

<sup>132</sup> MARTIN H. REDISH, *MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY* 33 (2001).

<sup>133</sup> *See generally* Robert Post, *The Constitutional Status of Commercial Speech*, 48 *UCLA L. REV.* 1 (2000).

<sup>134</sup> *See id.* at 14–15.

<sup>135</sup> *See* MARTIN H. REDISH, *THE ADVERSARY FIRST AMENDMENT: FREE EXPRESSION AND THE FOUNDATIONS OF AMERICAN DEMOCRACY* 43–69 (2013).

<sup>136</sup> Post, *supra* note 133, at 18.

an “engagement . . . in the public life of the nation,”<sup>137</sup> or an individual’s “attempt to render the state responsive to [her] views,”<sup>138</sup> it is certainly true that “[a] good deal of speech, not just commercial speech, would be excluded from public discourse if Post applied this approach consistently.”<sup>139</sup>

In any event, it is not immediately clear why commercial speech does not qualify as a contribution to public discourse. The speech is certainly not distributed privately or secretly to only a limited audience. Nor is it clear why—as is true of most speakers—commercial speakers may not have multiple motives for their expression. It is by no means obvious why expression cannot be intended simultaneously for purposes of personal gain and for purposes of contributing to public discourse. Post’s assumption of mutual exclusivity has no basis in logic or reality.

The most troublesome aspect of such a speaker-oriented approach is that it ignores the simple fact that free expression is as much about the *listener* as it is about the *speaker*. Indeed, at least one leading free speech theorist has actually argued that the *only* legitimate value served by free expression is to the listener.<sup>140</sup> While this viewpoint is, we believe, fatally narrow, it is certainly true that free and open expression provides potentially valuable information and opinion to the listener that enables her to make life affecting choices, and in so doing facilitate realization of her life goals.<sup>141</sup> In facilitating individual self-realization, the listener’s receipt of communication fosters First Amendment values, regardless of its impact on the speaker. But if this is so, what possible difference, in terms of the values fostered by the expression, does the motivation of the speaker make? The speaker can be motivated solely by purposes of private gain, and the expression may nevertheless make an important contribution to public discourse. In any event, numerous speakers have an agenda of personal gain—hidden or open—for their expression and in no other area of First Amendment protection is the level of protection reduced because of this fact.<sup>142</sup> There is therefore no principled reason for categorically reducing the level of First Amendment protection to commercial speech on the basis of the speaker’s profit incentive.

The greatest concern with defining the less-protected category of commercial speech solely on the basis of the speaker’s profit motivation is that it inevitably leads to blatant viewpoint-based stratification in the level of free speech expression. A speaker who argues *against* commercial purchase is extended full First Amendment protection, while a speaker who seeks to respond to that argument by *advocating*

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<sup>137</sup> *Id.* at 20.

<sup>138</sup> *Id.* at 27.

<sup>139</sup> REDISH, *supra* note 132, at 66.

<sup>140</sup> *See generally* MEIKELJOHN, *supra* note 120; *see also* REDISH, *supra* note 135, at 38.

<sup>141</sup> For a more detailed description of this self-realization theory, *see generally* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

<sup>142</sup> *See generally* REDISH, *supra* note 132 (discussing First Amendment speech in American democracy).

commercial purchase is denied full First Amendment protection. Examples, as already noted, include Ralph Nader receiving full First Amendment protection for his attack on the Chevrolet Corvair while General Motors receives a significantly lower level of protection of its responsive defense, or media commentators receiving full First Amendment protection for their allegations that Nike uses sweat shops, while Nike receives a much lower level of protection for its counter-speech.<sup>143</sup> Surely, the First Amendment cannot be satisfied by such a blatantly selective disparity in First Amendment protection.<sup>144</sup>

Finally, it might be argued that commercial speech is deserving of a lower level of protection because there is greater concern about the motivation of the regulator in the context of noncommercial speech. When government regulates political speech, the argument could be made that there is always a real concern that the regulators are motivated by political hostility—a concern generally assumed to be irrelevant in the case of commercial speech regulation. But this argument once again proves too much, because the relevant dichotomy is not between commercial and *political* speech, but rather between commercial and *noncommercial* speech. As previously explained, the latter category includes far more than political speech.<sup>145</sup> Indeed, as already shown, it includes all speech about the relative merits of commercial products and services communicated by any speaker who is not seeking to engage in commercial sale.<sup>146</sup> If anything, there is a stronger basis of suspicion of regulatory motives for suppressing speech when speech about commercial products is made by the seller, since there always exists the danger that competitors have enlisted the help of the regulators to take away the speaker's competitive advantage. Lastly, excessive regulatory zeal, which fails to take into account the fundamentally important value of free expression, is as likely a basis for pathological suppression of expression as is political motivation.

### *C. The Equivalency Principle and the Danger of Dilution*

It might be suggested that use of the equivalency principle to assume value fungibility between commercial and noncommercial speech gives rise to the serious danger of dilution. In other words, because it is generally assumed that commercial speech must be extensively regulated, the assumption that commercial and noncommercial speech are on some level fungible would require us to allow far more extensive regulation of noncommercial speech than is generally deemed acceptable.<sup>147</sup> As

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<sup>143</sup> See *supra* notes 128–30 and accompanying text.

<sup>144</sup> *R. A. V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) (“St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis [sic] of Queensberry rules.”).

<sup>145</sup> See *supra* notes 116–30 and accompanying text.

<sup>146</sup> See *supra* notes 123–30 and accompanying text.

<sup>147</sup> See, e.g., Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85

a result, in the hope of expanding the reach of First Amendment protection, we will have counterproductively reduced the scope of such protection. Simply put, this is known as the danger of dilution.

The first point to note in response is that, as we will show in subsequent discussions, the mere fact that commercial speech is assumed to serve First Amendment values in the same manner as noncommercial speech does not necessarily mean that the two are always to be treated identically for First Amendment purposes.<sup>148</sup> Where commercial speech gives rise to significantly greater risks of serious harm than would most noncommercial speech, such expression may logically be regulated more invasively than noncommercial speech, despite the assumption of value equivalency.<sup>149</sup> But wholly beyond that point, the greatest flaw in the dilution argument is that it is, at its core, question begging: it assumes the answer to the issue in dispute—i.e., whether commercial speech should be deemed to serve the same values as noncommercial speech. One cannot logically answer that question by saying we should not treat them identically, because noncommercial speech has greater value. That is the very question at issue. If one ultimately decides that commercial speech is in fact value-equivalent to noncommercial speech, then any dilution that might result is totally proper. In short, the dilution argument ignores the key question subject to debate.

To be sure, there may be instances in which noncommercial speech gives rise to the very same harm as commercial speech. For example, imagine two situations: (1) a commercial advertiser, with knowledge of his statement's falsity, makes a false claim about his product's scientific qualities. For a variety of reasons discussed subsequently,<sup>150</sup> such expression should be deemed to give rise to harm of such intensity as to justify suppression; (2) a scientist, for whatever reason, writes an article in a popularly distributed magazine making the exact same claim for the product's scientific properties, with full knowledge of the claim's falsity. Under the equivalency principle, the expression in both hypotheticals serve the very same First Amendment value, and both give rise to the same potential for harm. Therefore, logically, the two examples of expression are deserving of identical treatment, even though one is classified as commercial and the other as noncommercial.

Another key point missed by the dilution argument is that an important concern underlying the equivalency principle concerns the impact of suppression on the nature of the relationship between government and citizen. In the noncommercial setting, government is denied power to suppress truthful speech out of a fear that citizens will make "wrong" choices, because such paternalism on the part of government is inconsistent with the fundamental premises of liberal democracy: government may not manipulate citizens' lawful choices by selective suppression of free

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COLUM. L. REV. 449, 451 (1985) (arguing "that continually applicable doctrines be formulated with emphasis on how well they would serve in the worst of times").

<sup>148</sup> See *infra* Part III.

<sup>149</sup> See *infra* Part III.

<sup>150</sup> See *infra* Part III.

expression. But if this fundamental precept of democratic thought applies in the context of noncommercial speech, there is no reason to deem it automatically inapplicable to commercial speech. Citizens are either sheep, or they are not. We cannot rationally deem selective suppression of speech designed to manipulate lawful behavior by citizens politically pathological in one context but benign in the others. Thus, rejection of the equivalency principle gives rise to a serious danger of what can be called *reverse* dilution. If one rejects the equivalency principle, government is allowed to suppress even truthful commercial speech for fear that the recipients of the information will make the wrong decision on the basis of it. But people cannot be deemed too stupid to process truthful information advocating lawful activity in the commercial realm yet trustworthy to do so in the political realm. Thus, if one accepts the initial premise that citizens cannot be trusted to make *commercial* decisions on the basis of truthful advocacy and debate, one could quite easily transfer that skepticism about citizen capability to political judgments, thereby justifying widespread selective suppression of political debate.

Most importantly, the fundamental concern of the dilution argument is undermined by the definition of commercial speech that the Court has adopted. Recall once again that the category has been defined not by the subject of the expression but rather by the motivation of the speaker.<sup>151</sup> The result, as already shown, is a pathological viewpoint-based dichotomy of protection in important public debates, grounded in nothing more than distaste for the motivation of the speaker.<sup>152</sup>

## II. FALSE COMMERCIAL SPEECH AND THE EQUIVALENCY PRINCIPLE

### *A. The Doctrinal Status of False Commercial Speech*

In the prior Part, we explored the equivalency principle's application, both doctrinally and normatively, to the regulation of truthful commercial speech. In an important sense that discussion served as a prelude to the issue at hand: the extent to which the equivalency principle should similarly be applied to false commercial speech. It is important to understand that we are not asking whether false commercial speech should receive absolute protection. False noncommercial speech in no way receives absolute protection; indeed, in certain situations it receives no constitutional protection at all. The equivalency principle demands only a relative judgment, requiring that however noncommercial speech is treated, commercial speech is deemed to be of equivalent First Amendment value. In other words, the equivalency principle demands a type of "most favored nation" status for commercial speech.

It is important to note that application of the equivalency principle would not dictate that in all instances commercial speech would be protected as often as false

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<sup>151</sup> See *supra* notes 124–30.

<sup>152</sup> See *supra* notes 124–30.

noncommercial speech would be protected. It means, simply, that if commercial speech is not to be protected when parallel noncommercial speech would be protected, that difference in constitutional treatment is due not to a judgment about the relative value of the speech in question to the purposes served by the First Amendment right of free expression, but rather because commercial speech gives rise to the danger of more significant harm than does the similarly situated noncommercial speech.

There can be no doubt, however, that, at least purely as a doctrinal matter, the equivalency principle has never been applied to false commercial speech. This is so, despite the fact that a strong doctrinal case can be made for the proposition that this principle has been doctrinally adopted by the Court for truthful commercial speech.<sup>153</sup>

Recall that the very first prong of the *Central Hudson* test involves an inquiry into whether the commercial speech in question is false or misleading, or uttered on behalf of an illegal product or activity.<sup>154</sup> If the answer to either of those inquiries is in the affirmative, the speech was automatically and categorically excluded from the scope of First Amendment protection.<sup>155</sup> The level of awareness on behalf of the commercial speaker of the speech's falsity, under the *Central Hudson* test, was wholly irrelevant.<sup>156</sup> Rather, the *Central Hudson* standard was one of strict liability.<sup>157</sup> While, as already shown, the level of First Amendment protection for truthful commercial speech has changed dramatically since the Court's adoption of the *Central Hudson* test in 1980,<sup>158</sup> the categorical exclusion of First Amendment protection for false commercial speech has budged not an inch.<sup>159</sup> As the following discussion shows, this categorical exclusion of First Amendment protection differs dramatically from the level of First Amendment protection given to false noncommercial speech.

### *B. False Noncommercial Speech and the First Amendment*

As the middle of the twentieth century approached, it would probably have been safe to say that at least most forms of false expression were categorically excluded from the First Amendment's protective scope.<sup>160</sup> This was particularly true of defamatory

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<sup>153</sup> See *supra* Part I.

<sup>154</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563–64 (1980).

<sup>155</sup> See *id.*

<sup>156</sup> See *id.* at 563–66.

<sup>157</sup> See *id.*

<sup>158</sup> See *supra* notes 13–21 and accompanying text.

<sup>159</sup> See *supra* note 22 and accompanying text.

<sup>160</sup> See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”(footnote omitted)); see also *Beauharnais v. Illinois*, 343 U.S. 250, 266–67 (1952) (holding that a prohibition on group defamation did not violate the First Amendment).

speech—false expression that damaged an individual’s reputation.<sup>161</sup> In subsequent years, however, the Court recognized that the issue is far more complex than the simple categorical rejection of First Amendment protection for false speech assumed. In *New York Times Co. v. Sullivan*,<sup>162</sup> the Court held that the First Amendment precludes imposition of liability for defamation of a public official unless the plaintiff proves by the heavier-than-normal burden of clear and convincing evidence that the defendant acted with “actual malice.”<sup>163</sup> The Court reasoned that the First Amendment requires that debate about public officials be “uninhibited, robust, and wide-open[.]”<sup>164</sup> The Court recognized “[t]hat erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive[.]’”<sup>165</sup>

Although several of the Justices believed that such defamatory expression deserved absolute protection regardless of the speaker’s awareness of falsity,<sup>166</sup> a majority was unwilling to go that far. While the majority was willing to extend First Amendment protection even to negligently false defamation, it drew the line at outright lying—hence the exception for defamation that constituted “actual malice.”<sup>167</sup> Despite its name, that phrase has never had anything to do with ill will or malicious intent. Rather, it refers to knowledge of falsity or reckless disregard of the statement’s truth or falsity.<sup>168</sup> “Reckless disregard” has been given an extremely narrow definition, requiring a showing that a false publication was made with a “high degree of awareness of . . . probable falsity.”<sup>169</sup> For recklessness to be established, the Court has stated, “[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.”<sup>170</sup>

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<sup>161</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 268–69 (1964) (recognizing its own precedent of not protecting libelous speech).

<sup>162</sup> 376 U.S. 254 (1964).

<sup>163</sup> *Id.* at 279–80, 285–86.

<sup>164</sup> *Id.* at 270.

<sup>165</sup> *Id.* at 271–72 (third alteration in original) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

<sup>166</sup> *Id.* at 293–97 (Black, J., concurring); *id.* at 297–305 (Goldberg, J., concurring).

<sup>167</sup> *See id.* at 279–80 (majority opinion).

<sup>168</sup> *Id.* at 280.

<sup>169</sup> *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

<sup>170</sup> *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *see also id.* at 732 (showing of reckless disregard requires proof that “allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.” (footnote omitted)). In *St. Amant*, according to a subsequent lower court decision,

the record did not support a finding of reckless disregard for the accuracy of statements even though the defendant had no personal knowledge of the plaintiff’s activities, relied solely on an affidavit, failed to verify the information by those who might have known the facts, did not consider whether the statements defamed the plaintiff, and mistakenly believed

That the Court has drawn a clear distinction between recklessness and gross negligence was underscored in its subsequent decision in *Harte-Hanks Communications, Inc. v. Connaughton*.<sup>171</sup> The Court there noted that the standard that Justice Harlan had advocated in his plurality opinion in *Curtis Publishing Co. v. Butts*,<sup>172</sup> where he had suggested that a public figure need only make “a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers[,]”<sup>173</sup> “was emphatically rejected by a majority of the [Curtis] Court in favor of the *stricter New York Times actual malice rule*.”<sup>174</sup> A synthesis of these decisions reveals that the Supreme Court has construed the First Amendment to impose a highly demanding showing in order to establish the reckless disregard sufficient to satisfy *New York Times*’s actual malice standard.<sup>175</sup> For purposes of the First Amendment, recklessness does not include the mere failure to investigate, even if such failure is appropriately characterized as grossly negligent.<sup>176</sup> Rather, recklessness demands a showing that the defendant inexplicably ignored a strong basis for suspicion of falsity.<sup>177</sup> This is not merely a difference in degree from any form of negligence. It is, rather, a difference in kind.

While the *New York Times* doctrine was employed originally with regard to defamation of public officials, it was quickly expanded to include defamation of public figures, even if they did not hold governmental office.<sup>178</sup> In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,<sup>179</sup> which involved a suit against an information provider for an allegedly inaccurate report, the Court adopted as the central inquiry for the reach of the doctrine whether “matters of public concern” are involved.<sup>180</sup>

That the Court has extended the doctrine far and wide into the world of commerce is demonstrated by its decision in *Bose Corp. v. Consumers Union of United States, Inc.*<sup>181</sup> *Bose* involved a commercial disparagement suit brought by a corporation against the publisher of *Consumer Reports* for allegedly false critical comments

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he was not responsible for the broadcast because he was merely quoting the affiant’s words.

Campbell v. Citizens for an Honest Gov’t, 255 F.3d 560, 570 (8th Cir. 2001) (citation omitted).

<sup>171</sup> 491 U.S. 657 (1989).

<sup>172</sup> 388 U.S. 130 (1967) (plurality opinion).

<sup>173</sup> *Id.* at 155.

<sup>174</sup> *Harte-Hanks*, 491 U.S. at 666 (emphasis added).

<sup>175</sup> See *supra* notes 160–71 and accompanying text.

<sup>176</sup> See *supra* notes 160–71 and accompanying text.

<sup>177</sup> See *supra* notes 160–71 and accompanying text.

<sup>178</sup> See, e.g., *Curtis*, 388 U.S. at 155.

<sup>179</sup> 472 U.S. 749 (1985).

<sup>180</sup> *Id.* at 751, 761; see also *id.* at 762 n.8 (“The protection to be accorded a particular credit report depends on whether the report’s ‘content, form, and context’ indicate that it concerns a public matter.”).

<sup>181</sup> 466 U.S. 485 (1984).

about its speakers.<sup>182</sup> The magazine is designed to be an objective commentator on the relative merits of commercial products and services.<sup>183</sup> Without the slightest analysis, the Court simply assumed that the disparagement claim was limited by the First Amendment doctrine of *New York Times Co. v. Sullivan*, rendering the publisher liable only if the plaintiff could establish by clear and convincing evidence that the defendant uttered the false statements with “actual malice”—either knowledge of their falsity or reckless disregard of their truth or falsity.<sup>184</sup> However, as already noted, that doctrine has been held categorically inapplicable to regulation of commercial speech, defined not as speech *concerning* commercial sales and transactions but rather as speech *promoting* commercial sale.<sup>185</sup> In this context, the Court has consistently applied a strict liability standard, categorically excluding all false commercial speech from the scope of First Amendment protection.<sup>186</sup>

In certain noncommercial speech contexts, the Court appears to have held that even consciously false speech is protected by the First Amendment. In *United States v. Alvarez*,<sup>187</sup> the Court found unconstitutional the Stolen Valor Act, which made it a crime to falsely claim receipt of military decorations or medals and provided for enhanced penalties if the Congressional Medal of Honor is involved,<sup>188</sup> even when the defendant’s falsehood was unambiguously uttered with knowledge of its falsity.<sup>189</sup> The plurality opinion by Justice Kennedy rejected the government’s argument that false speech was inherently valueless and therefore undeserving of First Amendment protection.<sup>190</sup> The opinion distinguished the three examples of criminal punishment for false speech to which the government pointed on the grounds that each of those instances inherently involved “legally cognizable” harm caused by the falsehoods.<sup>191</sup> In contrast, the plurality could find no harm caused by the false assertion that one was a Congressional Medal of Honor winner.<sup>192</sup>

One could well debate the validity of the plurality’s cavalier dismissal of harm flowing from the defendant’s false assertion. For one thing, the inherent value of the medal itself could arguably be diluted as a result of the defendant’s false assertion. For another thing, the defendant in *Alvarez* made the knowingly false assertion while

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<sup>182</sup> *Id.* at 488.

<sup>183</sup> See Paul Hiebert, *Consumer Reports in the Age of Amazon Review*, ATLANTIC (Apr. 13, 2016), <http://www.theatlantic.com/business/archive/2016/04/consumer-reports-in-the-age-of-the-amazon-review/477108/> [<https://perma.cc/74ZH-BEJF>].

<sup>184</sup> *Bose*, 466 U.S. at 497–502.

<sup>185</sup> See *supra* Section I.A.1.

<sup>186</sup> See *supra* note 22 and accompanying text.

<sup>187</sup> 132 S. Ct. 2537 (2012) (plurality opinion).

<sup>188</sup> 18 U.S.C. § 704(b)–(c) (2006), *invalidated by* United States v. Alvarez, 132 S. Ct. 2537 (2012).

<sup>189</sup> *Alvarez*, 132 S. Ct. at 2551 (plurality opinion).

<sup>190</sup> *Id.* at 2544–47.

<sup>191</sup> *Id.* at 2545–47.

<sup>192</sup> See *id.* at 2545.

attending his first public meeting as a member of the local water district board, a government entity, arguably giving rise to a claim of fraud on the public.<sup>193</sup> But for present purposes, the correctness of the Court's conclusion under the specific facts of the case is irrelevant. The key point, rather, concerns where the Court chose to place the First Amendment inertia when it comes to knowingly false speech. Rather than begin analysis with the premise that speech is not protectable unless it can be shown to have value—i.e., directly further the values served by the constitutional guarantee of free expression—it began with the completely opposite premise: Speech is protected, regardless of value, unless it can be shown to cause legally cognizable harm.<sup>194</sup>

The doctrinal disparity between the First Amendment treatment given to false commercial speech and false noncommercial speech should now be obvious. False commercial speech never receives protection, while the Court begins with a rebuttable presumption in favor of protection for false noncommercial speech.<sup>195</sup> To summarize the Court's approach to generally disseminated false noncommercial speech: For the most part, unknowingly false noncommercial speech is protected against penalization even where the speech gives rise to serious and unique harm, such as reputational harm. However, knowingly false noncommercial speech that gives rise to serious and unique harm is unprotected. False noncommercial speech that gives rise to nothing more than general political harm to society caused by deception of the electorate is protected even if it is communicated with knowledge of falsity.<sup>196</sup> Thus, the Court's disparate treatment of false commercial speech clearly

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<sup>193</sup> See *id.* at 2542.

<sup>194</sup> See *id.* at 2545–47. Justice Kennedy's plurality opinion spoke for himself and three other Justices. Justice Breyer, joined by Justice Kagan, concurred in the judgment. Unlike the plurality, Justice Breyer did not rest his conclusion "upon a strict categorical analysis." *Id.* at 2551 (Breyer, J., concurring). Rather, he found the Act unconstitutional by means of intermediate scrutiny. *Id.* at 2551–52. He noted that

[f]alse factual statements can serve useful human objectives, for example: in social contexts, where they may prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child's innocence; in public contexts, where they may stop a panic or otherwise preserve calm in the face of danger; and even in technical, philosophical, and scientific contexts, where . . . examination of a false statement (even if made deliberately to mislead) can promote a form of thought that ultimately helps realize the truth.

*Id.* at 2553 (citation omitted). None of these contexts, of course, was fostered by Alvarez's falsehood. See generally *Alvarez*, 132 S. Ct. 2537 (plurality opinion).

<sup>195</sup> See *id.* at 2544–45.

<sup>196</sup> It should be noted that in the special context of a one-on-one professional fiduciary relationship, such as doctor-patient, even negligently false speech will be unprotected. However, this is a situation of unique vulnerability on the part of the recipient of the information, and the special obligation imposed on the professional speaker due to the professional relationship between speaker and listener. In any event, it seems reasonable to conclude that such speech will usually go well beyond the "promotion" of a commercial transaction, and therefore it is not properly characterized as "commercial speech."

constitutes a stark aberration from the equivalency principle, which the Court appears to have recently adopted in the case of truthful commercial speech.<sup>197</sup> Whether this disparity can be rationally justified, however, is quite a different matter. It is to that question that we now turn.

*C. Can the False Commercial/Noncommercial Speech Distinction Be Justified?*

Why is false commercial speech automatically excluded from the scope of First Amendment protection while the constitutional treatment of false noncommercial speech is far more complex? The answer the Court has given to that question, interestingly, was provided in a context in no way confined to the protection given to false commercial speech. Rather, the Court in *Virginia Board*, the decision which first extended significant First Amendment protection to commercial speech, sought to provide reasons why *all* commercial speech was inherently deserving of a lower level of First Amendment protection.<sup>198</sup> But in doing so, the Court at most provided arguable rationales for distinguishing *false* commercial and noncommercial speech.<sup>199</sup>

The Court suggested two grounds on which to distinguish commercial speech from other forms of speech protection: (1) that “[t]he truth of commercial speech . . . may be more easily verifiable by its disseminator than . . . news reporting or political commentary [sic],”<sup>200</sup> and (2) that “[s]ince advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation.”<sup>201</sup> Justice Stewart, concurring, added that commercial advertisers do not suffer from the burdens on “the press, which must often attempt to assemble the true facts from sketchy and sometimes conflicting sources under the pressure of publication deadlines[.]”<sup>202</sup>

Even if one were to accept the validity of these distinctions, the equivalency principle would not necessarily be undermined. These distinctions in no way turn on a comparative assessment of the value of the expression itself, but rather on the basis of factors supposedly unique to commercial speech that reduce the harm to First Amendment values flowing from suppression. Nevertheless, there are serious reasons to doubt the validity of the asserted distinctions.

Initially, one may question whether as a general matter the truth of commercial claims is, in all instances, more easily verifiable than the truth of noncommercial assertions. Numerous statements made in the course of political debate involve simple assertions of fact, which are presumably verifiable with relative ease. Indeed, it is just such assertions whose accuracy political fact checkers measure regularly.<sup>203</sup>

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<sup>197</sup> See *supra* Section I.A.

<sup>198</sup> See *supra* Section I.A.

<sup>199</sup> See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761–72 & n.24 (1976).

<sup>200</sup> *Id.* at 772 n.24.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 777 (Stewart, J., concurring).

<sup>203</sup> See MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 64 (1984).

In contrast, many claims about commercial products involve scientific assertions that are often subject to complex and controversial debate.<sup>204</sup> Secondly, there is no reason to assume that commercial speech is inherently “hardier” because of the existence of the profit motive.<sup>205</sup> Numerous noncommercial publications are driven by profit motive as much as commercial speakers are. And countless contributors to public discourse have a personal interest—often financial—in acceptance of their public claims. If commercial speakers are assumed not to be deterred by penalization if their speech turns out to be false, it is unclear why self-interested noncommercial speakers are any more likely to be deterred. Logically, if any distinction is to be drawn it should be one between self-interested and non-self-interested speech, on the grounds that the variety of self-interested speech is inherently suspect. Whatever one thinks of such a distinction (and we suspect that virtually everyone would quite wisely reject it), that distinction is by no means equivalent to the commercial/noncommercial distinction. Obviously, countless self-interested speakers engage in noncommercial speech.<sup>206</sup> Indeed, commercial speakers are often likely to be among the most risk averse of speakers, always concerned about the possibility of government penalization for their actions.<sup>207</sup> The issue, for First Amendment purposes, should not be whether the speaker will be deterred from speaking *at all*; but rather, whether the speaker will be chilled from making specific statements for fear they will be deemed false when with perfect knowledge we would know that they are in fact true and quite relevant to the listeners’ decision-making.

Finally, one may legitimately question arguments based on deadline pressure. Noncommercial stories of long-range interest have no immediate deadline pressure.<sup>208</sup> In contrast, “some advertisers who . . . attempt[] to defeat a competitor or to gain first entry into a new market” may find timing to be critical.<sup>209</sup> As a result they, much like many noncommercial speakers, face significant time pressure.<sup>210</sup> In any event, there is no reason to believe that the *New York Times Co.* “actual malice” test extends only to the commercial press. Rather, it extends to private speakers who face no deadline pressures.<sup>211</sup>

Some might seek to distinguish between false commercial and noncommercial speech on the grounds that the latter categorically constitutes a contribution to public discourse while the former categorically does not. Robert Post has made just such an argument.<sup>212</sup> But as already shown, the idea that commercial speech inherently

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<sup>204</sup> *See id.*

<sup>205</sup> *See id.*

<sup>206</sup> *See generally* REDISH, *supra* note 135 (demonstrating that American government is an adversary democracy).

<sup>207</sup> *See* REDISH, *supra* note 203, at 143–44.

<sup>208</sup> *Id.* at 64.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *See id.*

<sup>212</sup> *See supra* notes 133–34 and accompanying text.

makes no contribution to public discourse is grounded in nothing more than the conclusory assertion that it fails to do so.<sup>213</sup>

It might be argued that while *truthful* commercial speech could conceivably make legitimate contributions to public discourse, *false* commercial speech does not. Once again, however, we should note that, logically, the same could be said of false noncommercial speech, which, in and of itself, fosters no First Amendment value. Of course, in *New York Times Co.*, the Court recognized this fact but nevertheless decided to protect certain forms of false political speech in order to avoid a chilling of potentially valuable truthful speech.<sup>214</sup> But for reasons just explained, there is no legitimate basis on which to assume that commercial speakers are not subject to a similar form of chill. While commercial speakers are always incentivized to promote their products and services due to their inherent profit incentive, as already noted many noncommercial speakers are similarly motivated by speaker self-interest.<sup>215</sup> The issue is not whether the speakers will speak, but what they will say. It is quite plausible that because of their profit incentive, commercial speakers will be inherently risk averse in what claims they make for their products. Such risk aversion could conceivably deter them from communicating information about their products that, if they had perfect knowledge prior to communicating, they would know would be accepted as truthful. This describes the classic chilling effect that the *New York Times Co.* Court sought to avoid in shaping the actual malice doctrine in the first place.<sup>216</sup>

This does not mean that false commercial speech should always receive the same level of First Amendment protection given false noncommercial speech. To the extent they differ, however, it is not due to the lower value of commercial speech in general or false commercial speech in particular. Rather, it is because of the varying intensity of harm caused by the different forms of false speech.

When one synthesizes the *New York Times Co. v. Sullivan* line of cases in the defamation context with the Court's more recent decision in *Alvarez*,<sup>217</sup> one is left with the following doctrinal framework for First Amendment protection of false non-commercial speech: conscious falsehoods that cause legally cognizable harm are not protected. However, in the case of unintentional false speech, protection is extended even in the face of cognizable harm.<sup>218</sup> The Court, in drawing such a distinction, is motivated by its desire to avoid chilling valuable expression. In the case of conscious falsehood, the Court has concluded that where noticeable harm is caused, the expression loses its protection.<sup>219</sup> However, where no legally cognizable harm results, even consciously false speech is protected.<sup>220</sup> What this synthesis shows is that the

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<sup>213</sup> See *supra* Section I.B.

<sup>214</sup> See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).

<sup>215</sup> See *supra* note 206 and accompanying text.

<sup>216</sup> *N.Y. Times Co.*, 376 U.S. at 266, 276.

<sup>217</sup> See *supra* Section II.B.

<sup>218</sup> See *supra* Section II.B.

<sup>219</sup> *United States v. Alvarez*, 132 S. Ct. 2537, 2545 (2012) (plurality opinion).

<sup>220</sup> See *id.*

Court's treatment of consciously false speech turns not on an assessment of value but rather on an assessment of harm. It logically follows that application of the equivalency principle to false commercial speech does not mean that false commercial speech is to be no more refutable than false noncommercial speech, but rather simply that to the extent false commercial speech is to be suppressed more extensively, it will be as a result of the greater harm it causes, rather than its lesser value.

The best way to understand this harm-based dichotomy is by development of a taxonomy of categorical harms to which false speech may give rise, and then application of that taxonomy to the commercial/noncommercial distinction. In that way, we will be able to understand how one can simultaneously adhere to the equivalency principle, yet, in certain contexts, still provide lesser protection to false commercial speech.

### III. APPLYING THE EQUIVALENCY PRINCIPLE TO FALSE COMMERCIAL SPEECH: THE TAXONOMY OF HARMS

Recall that under the equivalency principle, commercial speech cannot be given lesser First Amendment protection on the grounds that it is of less value to the interests of the First Amendment.<sup>221</sup> To suggest that the exact same fully protected speech conveyed to the exact same audience is somehow of less value simply because the speaker is motivated by commercial profit is either wholly illogical or nothing more than ideologically driven discrimination against the capitalistic system of which the speech is a central element.<sup>222</sup> It does not necessarily follow, however, that all false commercial speech must receive the same level of First Amendment protection extended to noncommercial speech. It simply means that to the extent the two categories of speech are to be treated differently, it must be for some principled reason other than gradation in First Amendment value.

To the extent that commercial speech may be given lesser protection, it can be due to one of two conceivable reasons: (1) protected commercial speech is not negatively impacted in the same way that noncommercial speech would be impacted by the same manner of regulation;<sup>223</sup> or (2) commercial speech gives rise to a unique level of harm to which noncommercial speech does not.<sup>224</sup> The prior Part demonstrated the speciousness of the former basis of distinction.<sup>225</sup> The second basis of distinction, however, is more complex and actually may in fact justify reduced constitutional protection for false commercial speech in certain contexts.

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<sup>221</sup> See *supra* Part I.

<sup>222</sup> For a detailed exploration of this theory see generally REDISH, *supra* note 135, at 75–121.

<sup>223</sup> See *supra* Section II.C.

<sup>224</sup> See *supra* Section II.C.

<sup>225</sup> See *supra* Section II.C.

As to the first grounds for distinction, we have already shown that every basis used to justify providing a lower level of protection for false commercial speech than false noncommercial speech ultimately fails.<sup>226</sup> Thus, under the equivalency principle, to the extent that false commercial and noncommercial speech are to be distinguished for purposes of constitutional protection, it must be on the second ground—that false commercial speech gives rise to a uniquely significant danger of harm. This insight leads to the recognition of the need for a framing of a taxonomy of categorical harms to which false speech can give rise, and then a determination of whether false commercial speech gives rise to harms society deems of sufficient gravity to justify suppression—harms to which false noncommercial speech categorically may not give rise.

We discern five categorical harms to which false speech may conceivably give rise: (1) financial; (2) political; (3) reputational; (4) health and safety; and (5) interpersonal. By “financial,” we mean the listeners’ loss of money as a direct result of reasonable reliance on the false speech of the speaker. This basically describes the classic situation of commercial fraud. By “political,” we mean harm that flows in the form of governmental choices not consistent with the true desires or interests of the listeners, caused by the listener’s reliance on false representations about the speaker’s qualifications for office or past accomplishments. By “reputational,” we mean harm caused by false statements about a person that cause her reputation to be undermined or damaged among the listeners or readers. By “health and safety,” we mean harm to the well-being of the listeners caused by the listeners’ reasonable reliance on the speaker’s false statements about the impact of a product or practice on the listeners’ health (for example, “drink this product once a day and it will make you feel great” when in reality doing so will cause serious internal harm). By “interpersonal,” we mean personal decisions that the listener may make because of the listeners’ reliance on the speaker’s false statements (for example, inducing the listener to engage in sexual relations on the basis of the false assertion that the speaker is an astronaut, or that the speaker is free of sexually transmitted diseases). We believe that to the extent that false speech gives rise to harm, that harm will fall within one of these five categories. Note, however, that the categories are not necessarily mutually exclusive. For example, false speech could simultaneously undermine health and safety as well as cause damage to listeners’ financial interests. A false claim that a product will improve health when in reality it will undermine health simultaneously threatens health and safety and gives rise to financial harm.

If one examines the noncommercial speech doctrinal landscape, one quickly sees—as we have previously shown—that it is by no means the case that all false noncommercial speech is protected. In numerous situations, harm-causing, knowingly false noncommercial speech is excluded from the scope of First Amendment protection. For example, this is clearly so for reputational harm, *even when the speech concerns core elements of the political process*.<sup>227</sup> If one candidate or her

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<sup>226</sup> See *supra* Section II.C.

<sup>227</sup> See *supra* Section II.B.

supporter in the midst of the campaign defames her opponent with knowledge of the statement's falsity, that speech is unprotected by the First Amendment, even though it is properly characterized as pure political speech.<sup>228</sup> Similarly, noncommercial speech that intentionally defrauds listeners or readers out of money is no more protected than fraud in the purely commercial context. If one needs proof of this fact, one need only consider the examples of writers Stephen Glass and Jayson Blair, both of whom intentionally falsified stories for their publications (the *New Republic* and the *New York Times*, respectively).<sup>229</sup> Both were potentially subject to liability for fraud, and no one even suggested that their actions were protected by the First Amendment merely because their articles appeared in fully protected publications or concerned matters of public importance.<sup>230</sup> And this result makes perfect sense, as both practical and constitutional matters. Similarly, if a candidate for office knowingly misrepresents his qualifications in an effort to convince potential contributors to make contributions to his campaign, that speech should be as punishable as any commercial fraud—behavior that neither should be nor is ever protected by the First Amendment.

Similarly, speech promoting the health and safety benefits of a product uttered with knowledge of the falsity of that speech should never receive First Amendment protection. This is true, regardless of whether or not the speech comes in the form of commercial or noncommercial speech. By way of illustration, consider the following hypothetical situation: The manufacturer of bee pollen takes out an advertisement claiming health effects of the product, with knowledge that such a claim is false. No one, presumably, would dispute that such expression falls outside the protective reach of the First Amendment. Now assume that instead of including the speech in the form of an advertisement, the manufacturer writes a book that makes the very same knowingly false claims. Assuming the book reaches roughly the same audience that is reached by the advertisement, by what logic could we deny First Amendment protection to the former but grant it to the latter? The two forms of expression are, in our hypothetical, assumed to give rise to the exact same nature and degree of harm; the two forms of expression are both assumed to have been made with full knowledge of falsity. The only distinction is that the former comes in the form of traditional commercial speech while the latter comes in the form of traditionally protected noncommercial speech. Having anything turn on this distinction for First Amendment purposes does nothing more than place form over substance.

Consider also a different hypothetical: Assume that the speaker stands to make no commercial profit out of convincing the listeners of health benefits or lack of health

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<sup>228</sup> See *supra* Section II.B.

<sup>229</sup> See *New York Times: Reporter Routinely Faked Articles*, CNN (May 11, 2003, 4:30 PM), <http://www.cnn.com/2003/US/Northeast/05/10/ny.times.reporter/> [<https://perma.cc/5YSZ-XDUL>]; Hanna Rosin, *Hello, My Name Is Stephen Glass, and I'm Sorry*, NEW REPUBLIC (Nov. 10, 2014), <https://newrepublic.com/article/120145/stephen-glass-new-republic-scan-dal-still-haunts-his-law-career> [<https://perma.cc/7JSB-DJPJ>].

<sup>230</sup> See *New York Times: Reporter Routinely Faked Articles*, *supra* note 229; Rosin, *supra* note 229.

risks of a particular product. Instead, the speaker makes the claims with full knowledge of their falsity, simply as a prank or purely out of vindictiveness. Should the fact that the speech is not uttered for purposes of commercial profit lead to the conclusion that it is deserving of First Amendment protection? Such a conclusion, would, of course, be pure nonsense. The speech gives rise to the exact same level of serious harm, whether it is uttered for purposes of commercial profit or for purposes of vindictiveness or misguided playfulness. Such knowingly false speech no more serves First Amendment values than does commercially motivated knowingly false speech.

Note, however, that under our proposed model, in the case of unknowingly, widely communicated false speech,<sup>231</sup> even in the presence of these unique harms, the noncommercial expression will be protected.<sup>232</sup> Therefore, under the equivalency principle, unknowingly false, widely communicated commercial speech should be protected, even when it gives rise to similarly unique harms.

In contrast, knowingly false but non-defamatory speech uttered in the course of political debate is, as a categorical matter, usually assumed not to give rise to sufficient harm to exclude that speech from the scope of First Amendment protection.<sup>233</sup> This is so, even though the voters might be deceived and as a result cast their votes in ways in which they would not have done had they known the truth.<sup>234</sup> Such generic “political” harm is apparently deemed to be so diffuse and its individual harm so diluted that it is deemed not to rise to the level required to exclude even knowingly false speech from the scope of First Amendment protection.

One might well debate the wisdom of this view. Stealing a citizen’s vote could arguably be deemed as harmful as stealing a citizen’s money. But we are willing to accept it, if only for purposes of argument. As for knowingly false expression causing interpersonal harm, we suppose the level of protection turns on the nature of that harm. Speech tricking another into having sexual relations on the basis of knowingly false representations, we assume, would not receive protection, even though the speech is of course not motivated by the desire for commercial profit. The Court in *Alvarez*, on the other hand, seemed to assume that at least some knowingly false speech causes no harm at all.<sup>235</sup> While we frankly doubt the accuracy of this conclusion,<sup>236</sup> we accept it for purposes of our taxonomy.

In the context of noncommercial speech, then, protection for knowingly or recklessly false expression turns entirely on the categorical nature of the harm caused.

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<sup>231</sup> Recall, however, that in the case of one-on-one communication between a professional and an individual in the course of a professional fiduciary relationship, common sense dictates that the First Amendment’s role must be far more limited. *See supra* note 196.

<sup>232</sup> This is certainly true of unknowingly false defamatory speech of public figures, pursuant to the *New York Times Co.* actual malice test. *See supra* notes 162–65 and accompanying text.

<sup>233</sup> *See State ex rel. Pub. Disclosure Comm’n v. 119 Vote No! Comm.*, 957 P.2d 691, 697–99 (Wash. 1998).

<sup>234</sup> *Id.*

<sup>235</sup> *See supra* Section II.B.

<sup>236</sup> *See supra* Section II.B.

Under the equivalency principle, protection for knowingly or recklessly false commercial speech should turn on the exact same criteria. It would not follow, however, that the end result would be that knowingly false commercial speech is protected as often as knowingly false noncommercial speech is protected. That is simply because the harm caused by knowingly false commercial speech will generally fall under the heading of financial harm, health or safety harm, or both. And those harms are categorically (and reasonably) considered more serious than the far more diffuse “political” harm caused by the protected category of knowingly false noncommercial speech.

We must emphasize that we are not urging that false commercial speech receive identical treatment to that received by false noncommercial speech. We are urging, rather, that under the persuasive logic of the equivalency principle—the guiding directive the Court seems to have adopted and applied in the case of truthful commercial speech—false commercial speech be evaluated by the same standard that knowingly false noncommercial speech is measured: Protection turns on the nature and degree of the harm to which the speech gives rise. But because most knowingly false commercial speech will usually give rise to either direct financial, safety, or health harms, it is highly likely that even under the equivalency principle, more knowingly false commercial speech will be suppressed than knowingly false noncommercial speech.

#### IV. THE PROBLEM OF MISLEADING SPEECH

To this point, our analysis has focused on the question of how knowingly false commercial speech is to be treated for First Amendment purposes. We have concluded that it is generally to be denied constitutional protection, even though at least some knowingly false noncommercial speech is protected, not because it is less valuable for First Amendment purposes, but solely because of the categorically more severe nature of the harm generally caused by knowingly false commercial speech.<sup>237</sup> We have purposely chosen not to consider the issue of how falsity is defined, because under the equivalency principle we are demanding only “most favored nation status” for commercial speech. In other words, when, and only when, noncommercial speech would be characterized as false may commercial speech be characterized as false. For present purposes, we are therefore agnostic to the definition of falsity. To this point, however, our analysis has omitted a particularly thorny problem: the issue of First Amendment protection for commercial speech that is not technically false, but can be properly characterized as misleading. In many ways, technically true but misleading speech can be thought to cause financial or health/safety harms equivalent to those caused by directly false statements (though, as the Supreme Court has demonstrated, the harms caused by misleading speech are more easily curable than are those caused by directly false statements, by the use of required disclaimers).<sup>238</sup>

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<sup>237</sup> See *supra* Part III.

<sup>238</sup> *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

At first blush, it may appear that because of our adherence to the equivalency principle we are placed in a dilemma: Either we abandon the equivalency principle and allow misleading commercial speech to be regulated, we adhere to the equivalency principle and protect truthful but misleading commercial speech resulting in significant societal harm, or we cause the very dilution whose existence we have denied<sup>239</sup> by imposing sweeping restrictions on the manner in which public debate is normally conducted. More careful analysis, however, reveals that no such dilemma exists. Once we recall the harm-centric approach to the regulation of false speech,<sup>240</sup> it is relatively easy to distinguish the regulation of misleading commercial speech from that of misleading noncommercial speech. Recall that most false or misleading noncommercial speech will not give rise to either direct financial or safety/health harms.<sup>241</sup> To the extent such speech does in fact give rise to such harms, we see no constitutional basis for denying government power to regulate misleading speech through required use of disclaimers, just as is done in the case of commercial speech.

There is one conceivable role the First Amendment should potentially play in the context of the regulation of misleading speech. The mere fact that speech—commercial or noncommercial—gives only one side of a debate should not permit government to deem that speech misleading and therefore regulable by means of either suppression or required use of disclaimers. The First Amendment protects advocacy,<sup>242</sup> and commercial advertisers, like speakers generally, are permitted to advocate on behalf of their views and beliefs. To be sure, when an advertised product is found to give rise to potentially significant health risks that may well influence a reasonable person's decision whether to use the product, under the taxonomy of categorical harms we propose that government should be permitted to require those disclosures, even if the speech absent those disclosures cannot properly be characterized as misleading. But once again, this is not because the speech is commercial, but because it gives rise to the proximate danger of significant threats to health and safety. We submit that even noncommercial speech found likely to be viewed by roughly the same group of listeners as commercial speech making the identical claims on behalf of the product in question should logically be subjected to an identical level of regulation as the commercial speech is.<sup>243</sup> We deem this not to be a form of dilution, but rather simply tempering the First Amendment inquiry with principled analysis and common sense.

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<sup>239</sup> See *supra* Section I.C.

<sup>240</sup> See *supra* Part III.

<sup>241</sup> See *supra* Part III.

<sup>242</sup> See generally REDISH, *supra* note 135, at 89–90.

<sup>243</sup> We qualify this First Amendment standard, for both commercial and noncommercial speech, by emphasizing that we refer to required disclaimers only for undisputed dangers. When the speaker—again, commercial or noncommercial—reasonably disputes the existence of such dangers, the required disclaimers become a form of forced expression inconsistent with the First Amendment.

## CONCLUSION

The idea that false commercial speech is deserving of any level of First Amendment protection will no doubt shock scholars and jurists alike. Mere intuition, if nothing else, should tell us that false commercial speech automatically falls outside the First Amendment's scope. This is so, even if truthful commercial speech does not. Indeed, the Supreme Court has proceeded on just this notion since the beginning of its commercial speech doctrine.<sup>244</sup> But as one of us has previously argued, intuition is not always the best way to shape First Amendment doctrine.<sup>245</sup> The irony of reliance on right-brained intuitionism to categorically reject First Amendment protection for false commercial speech resembles the kind of knee-jerk, summary dismissal of protection for truthful commercial speech many years ago.<sup>246</sup> We would like to think that First Amendment thought has come a long way since those days.<sup>247</sup> We are hopeful that our analysis of false commercial speech and the equivalency principle will at some point in the near future similarly be able to overcome the kind of emotive shock that scholars will no doubt have in response to our proposal.

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<sup>244</sup> See *supra* Section I.A.

<sup>245</sup> See generally Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67 (2007).

<sup>246</sup> See, e.g., Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 14 (1979) (arguing that “[w]hatever else it may mean, the concept of a first amendment right of personal autonomy in matters of belief and expression stops short of a seller hawking his wares”). As one of us has written about Jackson’s and Jeffries’ argument, “[t]his statement effectively replaces reason with rhetoric.” REDISH, *supra* note 135, at 67.

<sup>247</sup> See *supra* Section I.A.3.