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# The Public's Domain in Trademark Law: A First Amendment Theory of the Consumer

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## ARTICLES

### THE PUBLIC'S DOMAIN IN TRADEMARK LAW: A FIRST AMENDMENT THEORY OF THE CONSUMER

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## I. INTRODUCTION

Trademark law<sup>1</sup> has regularly been viewed through a First Amendment lens.<sup>2</sup> As the trademark has distanced itself from the good, both physically and conceptually, the communicative aspects of the trademark have moved to the forefront. Competitors use others' trademarks to convey information to the consumer either textually ("smells like Chanel but is less expensive") or visually (packaging the store-brand shampoo in the same type of bottle as the name-brand shampoo). Trademarks have become part of our vocabulary—we talk of "not wanting simply to put a Band-Aid on a situation" or about something being "the Rolls Royce of its class."<sup>3</sup> Appropriation artists use trademarks to make statements about the trademark holder or the corporate form more generally.<sup>4</sup> The effect that restrictions on these kinds of trademark uses can have on discourse is justly of concern to commentators, for there is risk to efficient and important speech when trademark owners are allowed to control uses of their marks beyond those that are likely to cause confusion as to source.

Each of these events involves an entity other than the trademark holder engaging in the act of using the trademark to speak to others. But there is, of course, a prior instance of trademark speech: the initial communication between producer and consumer. In this

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<sup>1</sup> Throughout this Article, I use the term "trademark law" in its broad sense to encompass trade dress and unfair competition law (i.e., for unregistered marks) and to apply to marks for goods as well as services.

<sup>2</sup> See, e.g., Lisa P. Ramsey, *Descriptive Trademarks and the First Amendment*, 70 TENN. L. REV. 1095, 1137 (2003) (noting that federal and state trademark laws are subject to scrutiny under First Amendment).

<sup>3</sup> See Alex Kozinski, Essay, *Trademarks Unplugged*, 68 N.Y.U. L. REV. 960, 972–73 (1993) (noting role that trademarks serve in public discourse); see also Robert C. Denicola, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols*, 1982 WIS. L. REV. 158, 195–96 ("Famous trademarks offer a particularly powerful means of conjuring up the image of their owners, and thus become an important, perhaps at times indispensable, part of the public vocabulary."); Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 397 (1990) ("Some trademarks have worked their way into the English language; others provide bases for vibrant, evocative metaphors.").

<sup>4</sup> See Sonia K. Katyal, *Semiotic Disobedience*, 84 WASH. U. L. REV. 489, 493–95 (2006) (describing trend of modern artists and activists who appropriate corporate logos and symbols to make artistic, social, and political statements).

conversation, the trademark holder uses the trademark as a shorthand to convey two separate but related concepts to the consumer: a statement that reduces search costs (“here is the product you want”) and a summary of the messages previously or simultaneously conveyed through advertising (“here is why you want it”). Barton Beebe labels these concepts as the “search” aspect of the mark and the “persuasion” aspect of the mark.<sup>5</sup> These two functions of the mark underlie the Supreme Court’s statement in *Qualitex Co. v. Jacobson Products Co.* justifying trademark protection on the grounds that trademark law both “reduce[s] the customer’s costs of shopping and making purchasing decisions” and ensures that producers “reap the financial, reputation-related rewards associated with a desirable product.”<sup>6</sup>

As the recipient of these messages, the consumer is an important part of the dialogue. Indeed, trademarks require, at least to some extent, an active consumer to negotiate with these dual messages—one who not only perceives the trademark as a source identifier but who also can call to mind (and then accept or reject) the various associations the mark comprises. Indeed, as I have noted elsewhere,<sup>7</sup> trademark law relies on the consumer’s ability to engage in this sort of associational dexterity. It assumes that

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<sup>5</sup> Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020, 2025–26 (2005); see also Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165, 1185–91 (1948) (distinguishing between “informative” and “persuasive” functions of trademarks). Justice Frankfurter famously made much the same point:

A trade-mark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol. Whatever the means employed, the aim is the same—to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears.

*Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 205 (1942).

<sup>6</sup> 514 U.S. 159, 163–64 (1995) (alteration in original) (internal quotation marks omitted) (holding that color alone can serve trademark function).

<sup>7</sup> See Laura A. Heymann, *Metabranding and Intermediation: A Response to Professor Fleischer*, 12 HARV. NEGOT. L. REV. 201, 220 (2007) (“[T]rademark law actually places a fair amount of trust and confidence in consumers to manage competing associations and negotiate among various meanings attached to the same words or phrases. It requires them not only to make and remember the association between the trademark and the product or producer but also to distinguish that mental link from others using the same or a similar mark.”).

consumers will see a graphic “swoosh” and recall, without any other assistance, that the symbol is associated with Nike; that the statement “I’m going from D.C. to New York on Delta” will not involve the use of a kitchen faucet; and that despite the absence of the word “car” in the sentence “I traded in my old Chevy for a new Ford,” neither “Chevy” nor “Ford” has become a generic term for “automobile.” Yet this same dexterity seems to go unrecognized in certain areas of trademark law—dilution being the prime example—that likewise depend on consumers’ skillful engagement with trademark associations.

In such areas, the law withholds information from the consumer, not because it will lead to confusion or fraud, but rather to control the types of judgments or associations the consumer will have with the trademark. If trademark law recognized the active work that consumers do in engaging with trademarks, it would incorporate a theory of the consumer that sees him as capable of engaging with these trademark associations without the law’s interference. But this does not seem to be the case. The characterization of the consumer is still a matter of considerable debate among courts and commentators, a debate that often divides along ideological lines.<sup>8</sup> And, in any event, both the “consumers are savvy” and the “consumers are susceptible” camps seem to talk about consumers as passive receivers of information rather than active participants in a trademark dialogue.<sup>9</sup> As Graeme Austin has noted, trademark law “constructs the consumer worldview in ways that minimize the relevance of consumers’ own independent thinking.”<sup>10</sup> Thus, the debate over the proper scope of trademark law often focuses on the

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<sup>8</sup> See Beebe, *supra* note 5, at 2051–54 (describing debate over sophistication of consumers); see also 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:92 (4th ed. 2008) (suggesting that courts’ views of consumers’ reasonableness may be outcome-driven); Laura A. Heymann, *The Reasonable Person in Trademark Law*, 52 ST. LOUIS U. L.J. 781, 785 (2008) (suggesting that courts’ judgments about consumer confusion reflect their distance from marketplace and context in which trademarks are encountered).

<sup>9</sup> See, e.g., Graeme W. Austin, *Trademarks and the Burdened Imagination*, 69 BROOK. L. REV. 827, 832 (2004) (noting that trademark law often treats consumers as “exhibiting . . . unthinking and irrational responses to branding messages”).

<sup>10</sup> *Id.*

rights of competitors to use a particular mark rather than on the rights of consumers.<sup>11</sup>

This is so even though trademark law today purports to be predominantly concerned with the consumer of information.<sup>12</sup> The basis of an infringement suit is whether the challenged use is “likely to cause confusion” in the relevant consumer,<sup>13</sup> and courts have been both more and less solicitous of that consumer’s knowledge, interpretative ability, and intellectual capacity.<sup>14</sup> Treating the consumer as sophisticated, however, does not change the fact that she is still seen as one who “consumes”—one entitled at most to a negative freedom from confusion without the benefit of any positive theory that actively carves out space for her role in the trademark conversation.

In order to create this space, trademark law would benefit from incorporating a vision of the consumer rooted in a theory of autonomy. This theory would acknowledge not only that consumers have an important, and perhaps dominant, role to play in the creation of trademark meaning, but also that the law should favor restraint when the meaning relates to the persuasive value of the trademark—an area in which true “deception” plays much less of a role. Autonomy acknowledges that the interpretive process should be left as free from interference as possible; hence, it is appropriate that trademark law have some role to play in filtering out noise from competitors that incite confusion as to source.<sup>15</sup> But this theory also counsels that, beyond this scope, the consumer be left free to make whatever associations she wants with the marks she

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<sup>11</sup> Cf. Michael Grynberg, *Trademark Litigation as Consumer Conflict*, 83 N.Y.U. L. REV. 60, 87 (2008) (proposing that trademark law focus on interests of harmed and benefited consumers rather than competing sellers).

<sup>12</sup> See 1 MCCARTHY, *supra* note 8, § 2:33 (“[P]rotection of trademarks is merely a facet of consumer protection. As a result, the plaintiff in trademark litigation may accurately be characterized as the ‘vicarious avenger’ of consumer interests.”). But see Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1848 (2007) (noting that trademark law historically protected producers rather than consumers).

<sup>13</sup> 15 U.S.C. §§ 1114(1), 1125(a)(1)(A) (2006).

<sup>14</sup> See Beebe, *supra* note 5, at 2040–42 (suggesting that judges and commentators find consumers more or less sophisticated depending on their agenda).

<sup>15</sup> Cf. Robert G. Bone, *Enforcement Costs and Trademark Puzzles*, 90 VA. L. REV. 2099, 2110 (2004) (contending that consumer autonomy cannot support “a right to accurate information or even a right not to be confused”).



encounters, even if those associations are not the ones the mark holder would prefer, or not the ones that would be optimal from the perspective of the individual's intellectual or personal development.<sup>16</sup>

An autonomy theory based on the consumer's need for active involvement in the creation of meaning and the construction of her identity as a consumer is aligned with the goals underlying one theory of the First Amendment. The First Amendment is often thought of as protecting the rights of speakers, but it can also be compellingly explained as concerned with the interests of listeners—the interest in receiving nonfraudulent information and in making one's own decisions based on that information without government interference.<sup>17</sup> Consistent with its use in other areas of speech, however, the First Amendment typically manifests itself in trademark law through a consideration of speaker's rights—specifically, a balancing of the right of the corporate (or parodic) speaker to convey messages to consumers against the consumer's right not to be defrauded or misled.<sup>18</sup> Here, however, I am proposing something of a reversal of the communicative direction: the consumer's interest in speaking to the direction of his life and the construction of his identity as against the corporate speaker's desire to control the persuasive nature of speech. Trademarks are, after all, simply an instance of speech, albeit

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<sup>16</sup> Cf. *id.* (arguing that “respect for individual autonomy” cannot justify liability for failure to provide “completely accurate information in the marketplace”).

<sup>17</sup> See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“[The] right to receive information and ideas, regardless of their social worth, is fundamental to our free society.” (citation omitted)).

<sup>18</sup> Other First Amendment analyses of various aspects of trademark law have focused on the needs of trademark owners or competitors to speak or on the government's failure to articulate a sufficiently compelling reason for regulation. See, e.g., Mary LaFrance, *No Reason to Live: Dilution Laws as Unconstitutional Restrictions on Commercial Speech*, 58 S.C. L. REV. 709, 711 (2007) (“[D]ilution laws violate the First Amendment because they restrict commercial speech without advancing any substantial government interest.”); Ramsey, *supra* note 2, at 1156 (“[T]here is no public benefit, and thus no substantial governmental interest, in encouraging companies to select and use descriptive trademarks or in enforcing property rights in such marks.”). See generally John V. Tait, Note, *Trademark Regulations and the Commercial Speech Doctrine: Focusing on the Regulatory Objective to Classify Speech for First Amendment Analysis*, 67 FORDHAM L. REV. 897 (1998) (arguing that trademarks should not be analyzed under commercial speech doctrine unless necessary to protect consumers from commercial harms).



commercial in nature, and so we might ask whether the law should not treat the individual as equally deserving of speech-enhancing autonomy when she is a consumer as we do when she receives political or literary speech.

Although it has not always predominated, an autonomy theory of the recipient of persuasive communications has strong undercurrents in other speech-related doctrines, including Establishment Clause cases, political speech cases, defamation cases, and commercial speech cases. In each of these areas, courts and commentators have identified the importance of recognizing the need for limited governmental intervention to enable recipients of information to make choices that shape their identities.<sup>19</sup> "Limited" does not mean "nonexistent," of course, and these cases recognize that intervention is appropriate to prevent fraudulent or misleading communications.<sup>20</sup> But where the speech at issue is designed to persuade, rather than defraud, an autonomy theory suggests that the law should retreat.

This interest seems to be much less prevalent, however, in trademark law, where it might play an equally helpful role in helping courts and Congress to decide whether it is appropriate for the law to intervene in the communication taking place between producer and consumer through the use of trademarks. In particular, recognition of consumers' autonomy interests suggests that the farther the doctrine moves away from instances in which consumer confusion as to source is the harm to be prevented—the paradigmatic trademark case—the less vigorous a role trademark law should play. So, for example, doctrines that provide a cause of action when the harm to be prevented is the dilution or diminishment in prestige value of the mark—theories that depend in part on the persuasive value of the mark rather than on its source-identifying aspects<sup>21</sup>—are less defensible when evaluated against the consumer's interest in making the autonomous choice

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<sup>19</sup> See discussion *infra* Parts II.B.1–3.

<sup>20</sup> See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771–72 (1976) (holding that First Amendment does not prevent state from regulating false commercial speech).

<sup>21</sup> See Brown, *supra* note 5, at 1191 (explaining dilution theory as based on persuasive value of symbols); see also *infra* notes 205–08 and accompanying text.

whether to accept the producer's attempt at persuasion or not. Similarly, initial interest confusion—the theory that the consumer is diverted at some point in the search process but ultimately is not confused at the point of sale—relies to some extent on the mark's persuasive value for its legitimacy.<sup>22</sup> The merchandising cases, to take one more example, define the harm to be prevented as the false suggestion to consumers that the mark holder has authorized the use of the mark on apparel—a harm that, once again, depends not on the consumer's ability to identify the source of goods but on the communicative aspects of the mark.<sup>23</sup> In each of these areas, trademark law intervenes to limit the consumer's decision making in response to the persuasive value of the mark, channeling consumers' mental associations with the mark and thus impinging on autonomy that is necessary to discourse and personal development.

All this is not to say that we should place a particularly high moral value on the persuasive value of trademarks.<sup>24</sup> Ralph Brown was not wrong to suggest sixty years ago that the value that the Gucci or Tiffany's trademarks contribute in excess of the quality of their respective goods is wasteful and that consumers might be better off if they directed their funds elsewhere; nor is it wrong to conclude that overall it would be welfare-enhancing if producers spent much less money and effort on creating this sort of persuasive communication.<sup>25</sup> But even if advertising causes some marks to

<sup>22</sup> See *infra* notes 229–30 and accompanying text.

<sup>23</sup> See *infra* notes 222–24 and accompanying text.

<sup>24</sup> Several marketing studies address the power of persuasion. See, e.g., Paul W. Miniard, Deepak Sirdeshmukh & Daniel E. Innis, *Peripheral Persuasion and Brand Choice*, 19 J. CONSUMER RES. 226, 226 (1992) (defining “peripheral persuasion” as “the influence stemming from stimuli perceived as irrelevant to making a reasoned evaluation or choice”); Richard E. Petty, John T. Cacioppo & David Schumann, *Central and Peripheral Routes to Advertising Effectiveness: The Moderating Role of Involvement*, 10 J. CONSUMER RES. 135, 137 (1983) (suggesting that persuasion is particularly effective when consumer involvement is low).

<sup>25</sup> See Brown, *supra* note 5, at 1169 (“Considering the economic welfare of the community as a whole, to use up part of the national product persuading people to buy product A rather than product B appears to be a waste of resources.”). But see, e.g., Lillian R. BeVier, *Competitor Suits for False Advertising Under Section 43(a) of the Lanham Act: A Puzzle in the Law of Deception*, 78 VA. L. REV. 1, 6 (1992) (“Far from creating a diversity of taste that would not otherwise exist, advertising and the use of brand names is an efficient way to convey information that facilitates the process of matching consumers’ preexisting tastes with products that can satisfy them.”).

have this level of persuasive value, that is not, by itself, a reason for the law to regulate it. If trademark law is truly committed to preserving and enhancing consumer choice, then trademark law's scope should reflect that commitment.

## II. THE NATURE AND SCOPE OF AUTONOMY

### A. THE PHILOSOPHICAL VIEW

If consumer autonomy is to be a relevant consideration in determining the proper scope of trademark law, we must first outline what is meant by autonomy. The version of autonomy that I have in mind is of the Kantian variety. For Kant, autonomy means the conscious ability to make choices different from those dictated either by natural law, by inclination, or by others.<sup>26</sup> Indeed, as one commentator has noted, autonomy "demands tension between an individual and the group, tension that is resolved in decision-making."<sup>27</sup> The value of choice is not in what choice is ultimately made, but rather in the fact that the choice is personal to the individual. This is contrasted with a Millian theory of autonomy, which takes the consequentialist view that society should prefer autonomy because it leads to the overall well-being of society.<sup>28</sup> In general, the Millian theory states that individuals are likely to achieve an optimal result if they are allowed to govern their own affairs, so long as they do so without causing harm to anyone else.<sup>29</sup>

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<sup>26</sup> See IMMANUEL KANT, *Groundwork of the Metaphysics of Morals*, in PRACTICAL PHILOSOPHY 43, 89 (Mary J. Gregor ed. & trans., 1996) ("Autonomy of the will is the property of the will by which it is a law to itself . . ."); see also Paul Guyer, *Kant on the Theory and Practice of Autonomy*, SOC. PHIL. & POL'Y, July 2003, at 70, 75-76 (providing concise understanding of Kant's conception of autonomy).

<sup>27</sup> Bernard Berofsky, *Identification, the Self, and Autonomy*, SOC. PHIL. & POL'Y, July 2003, at 199, 202.

<sup>28</sup> See JOHN STUART MILL, ON LIBERTY 113 (Henry Holt, 1898) (1859) ("In proportion to the development of his individuality, each person becomes more valuable to himself, and is therefore capable of being more valuable to others.").

<sup>29</sup> See *id.* at 101 ("The liberty of the individual must be thus far limited; he must not make himself a nuisance to other people. But if he . . . merely acts according to his own inclination and judgment in things which concern himself . . . he should be allowed, without molestation, to carry his opinions into practice at his own cost.").

But a typical Kantian theory of autonomy does not favor choice simply for choice's sake. Rather, the ability to make unfettered choices is valued as a means of directing the ultimate course of one's own life.<sup>30</sup> In so doing—in saying “[t]his is mine; that is not”<sup>31</sup>—a person “constitutes himself.”<sup>32</sup> Importantly, the Kantian nonconsequentialist approach values autonomy even if it leads to suboptimal results for the individual.<sup>33</sup> As Kant wrote, “[a]utonomy of the will is that quality of the will, by which it is a law to itself (independently on every quality of the objects of volition).”<sup>34</sup> Autonomy therefore encompasses not simply the ability to choose but also the possibility of making what society might characterize (too simply) as the *wrong* choice because it exists contrary to self-interest.<sup>35</sup> Thus, as Christopher Heath Wellman suggests, a consequentialist might argue that a government's imposition of religion on its citizens will not provide the best overall results, while a nonconsequentialist opposes government establishment of religion because “this interference with my religious self-determination

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<sup>30</sup> Marina Oshana, *How Much Should We Value Autonomy?*, SOC. PHIL. & POL'Y, July 2003, at 99, 101; see also C. Edwin Baker, *Autonomy and Informational Privacy, or Gossip: The Central Meaning of the First Amendment*, SOC. PHIL. & POL'Y, July 2004, at 215, 220 (describing “meaningful autonomy” as capacity to lead meaningful life without unnecessary intrusion of others).

<sup>31</sup> Berofsky, *supra* note 27, at 209.

<sup>32</sup> HARRY G. FRANKFURT, *THE IMPORTANCE OF WHAT WE CARE ABOUT: PHILOSOPHICAL ESSAYS* 170 (1988); see also Steven Wall, *Freedom as a Political Ideal*, SOC. PHIL. & POL'Y, July 2003, at 307, 307–08 (“An autonomous life is one in which a person charts his own course through life, fashioning his character by self-consciously choosing projects and assuming commitments from a wide range of eligible alternatives, and making something out of his life according to his own understanding of what is valuable and worth doing.”).

<sup>33</sup> See KANT, *supra* note 26, at 83–86 (arguing that autonomy—giving law to one's self—is always preferable to heteronomy—being beholden to outside influences); see also Christopher Heath Wellman, *The Paradox of Group Autonomy*, SOC. PHIL. & POL'Y, July 2003, at 265, 266 (advocating nonconsequentialist account of value of autonomy in part because “individuals retain their positions of dominion even when their decision-making clearly does not maximize overall happiness”). Thus, as Wellman notes, “even if all of the evidence suggests that [an individual's choice] would be horribly detrimental to her well-being, she remains at liberty to make this move because it is *her* life.” *Id.*; see also Jonathan Jacobs, *Some Tensions Between Autonomy and Self-Governance*, SOC. PHIL. & POL'Y, July 2003, at 221, 224–26 (describing influence on other moral theorists of Kant's conception of morality as grounded in rational autonomy).

<sup>34</sup> EMANUEL KANT, *ESSAYS AND TREATISES ON MORAL, POLITICAL AND VARIOUS PHILOSOPHICAL SUBJECTS* 98 (William Richardson trans., 1798).

<sup>35</sup> See, e.g., Berofsky, *supra* note 27, at 199 (suggesting that one's refusal “to express or realize a dimension of self” does not imply that he has “failed to act autonomously”).

treats *me* wrongly."<sup>36</sup> In such a system, an individual acts no less autonomously if he does not engage in self-conscious reflection on the process that leads him to a particular choice, so long as that choice is the product of his own values.<sup>37</sup> This may mean that an individual's exercise of her autonomy leaves her in a worse position, overall, than before, but this is not, according to nonconsequentialists, a reason to deny that individual the ability to act autonomously going forward. Ultimately, nonconsequentialists conceive of autonomy as deontological, as something to which individuals are entitled, as opposed to resting on teleological claims.<sup>38</sup> This is not to say that other deontological considerations might not trump one's interest in autonomy, but simply that consequences in and of themselves are not the deciding factor. The attractiveness of a nonconsequentialist view is that it is absolute; it does not require empirical analysis of whether the validation of autonomy in any particular case serves identified ends or whether the interests served in any one case are outweighed by a non-autonomy-respecting restriction.<sup>39</sup> The focus of autonomy is process, not product.

Because autonomy is inextricably linked with the ability to choose, it is necessary for a full exercise of autonomy to have a range of choices.<sup>40</sup> From a deontological perspective, the government's attempt to restrict the choices available to an individual on the ground that certain choices are not welfare-enhancing treats that individual as incapable of rejecting certain options on her own, thus

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<sup>36</sup> Wellman, *supra* note 33, at 266.

<sup>37</sup> See Berofsky, *supra* note 27, at 220 ("[O]ne cannot be counted autonomous unless one is actually guided by values and principles endorsed by autonomous reflection.").

<sup>38</sup> See Wellman, *supra* note 33, at 272 ("The chief reason why no autonomy-related amendments within consequentialism will ultimately suffice is because agents are *entitled* to their self-determination, and *entitlement* is a fundamentally deontological notion that cannot be fully cashed out in consequentialist terms."); see also Baker, *supra* note 30, at 225 (distinguishing "formal autonomy"—which responds to deontological claims—from "meaningful autonomy"—which is more teleological).

<sup>39</sup> See Baker, *supra* note 30, at 228 (suggesting that consequentialist approach to speech-related interests requires balancing of competing interests).

<sup>40</sup> STEVEN WALL, LIBERALISM, PERFECTIONISM, AND RESTRAINT 128 (1998) (describing autonomy as "the ideal of people charting their own course through life, fashioning their character by self-consciously choosing projects and taking up commitments from a wise range of eligible alternatives").



interfering with her autonomy.<sup>41</sup> Respect for autonomy does not mean, however, that the law may never regulate systems affording individuals the ability to make choices; it simply means that intervention is more appropriate when it serves to maximize choice or, put differently, to ensure that others do not engage in behavior that minimizes choice. Although these lines may be difficult to draw at the margins, autonomy theory provides a basis on which to judge the appropriateness of a government's attempt to shape its citizens' identity-creating activities.

As a threshold matter, autonomy theory could incorporate one of two theories of the individual: It can view the individual as someone whose autonomy is preserved whether he enjoys it to its full extent or not, or it can tie the level of autonomy to the individual's capacity to use it. In the version I am describing here, the theory takes (to use Richard Fallon's terminology<sup>42</sup>) more of an "ascriptive"—or aspirational—view than a "descriptive" view of autonomy. Like tort law's construction of the "reasonable person," an ascriptive view is not empirically based; it constructs a model of how individuals should act rather than how they actually do act.<sup>43</sup> It admits that the exercise of this version of autonomy may be "insufficiently informed, self-aware, and self-critical to count as autonomous under any very stringent standards of descriptive autonomy,"<sup>44</sup> but it accepts this criticism in light of its view of the appropriate role of law. To give individuals only the autonomy they "deserve" is to question the very nature of autonomy.

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<sup>41</sup> See Baker, *supra* note 30, at 226 ("[A] state acts improperly when its aim is to suppress individual choice as a means of carrying out even the state's good aims.").

<sup>42</sup> See Richard H. Fallon, Jr., Essay, *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 879–93 (1994) (describing ascriptive and descriptive conceptions of autonomy). While both models have their difficulties, the ascriptive model must minimize the difficulty that some groups, such as children, will have in conforming to aspirational goals. As with tort law, it might therefore be appropriate to modify what is "reasonable" for such groups. Cf. RESTATEMENT (SECOND) OF TORTS § 283A (1965) ("If the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances.").

<sup>43</sup> See Heymann, *supra* note 8, at 782 ("The reasonable person in tort law is someone who sets a standard of care, who models how the law tells us we should act as we go about our lives.").

<sup>44</sup> Fallon, *supra* note 42, at 893.

## B. AUTONOMY AS FIRST AMENDMENT THEORY

One possible use of the Kantian theory of autonomy is to describe the appropriate scope of the First Amendment. As Ronald Dworkin has noted, this justification views it as an “essential and ‘constitutive’ feature of a just political society that government treat all its adult members, except those who are incompetent, as responsible moral agents” who can be trusted to make judgments for themselves among competitors for their attention and mindshare.<sup>45</sup> Accordingly, we should be skeptical of laws that regulate speech on the ground that it may be effective or persuasive, even if the result is ultimately detrimental to the recipient of the speech. As described earlier,<sup>46</sup> this view contrasts with an instrumental view of the First Amendment in its deontological basis; it cares not whether the autonomy is used toward any particular end.<sup>47</sup> It therefore may overlap with—but not be entirely consonant with—a theory of the First Amendment that seeks to maximize truth-seeking. As reflected in Justice Holmes’s “marketplace of ideas,”<sup>48</sup> the truth theory posits that although truth may never be attained, the best hope of reaching it is through the free flourishing of a multiplicity of ideas, rather than through prejudgment of particular messages by the government.<sup>49</sup> If too much speech is banned by the government, speakers will be chilled—not only those directly subject to the law at issue, but also those near the zone of prohibition who fear that they too may be subject to the law.<sup>50</sup> Restrictions on

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<sup>45</sup> RONALD DWORKIN, *FREEDOM’S LAW* 200 (1996); see also *id.* (“Government insults its citizens, and denies their moral responsibility, when it decrees that they cannot be trusted to hear opinions that might persuade them to dangerous or offensive convictions.”).

<sup>46</sup> See *supra* notes 18–22 and accompanying text.

<sup>47</sup> See, e.g., Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 312 (2003) (describing ascriptive vision of First Amendment, which respects autonomy “regardless of whether it furthers any particular instrumental value”).

<sup>48</sup> See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . .”).

<sup>49</sup> See *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988) (describing “truth-seeking function of marketplace of ideas”); *id.* at 56 (“[I]t is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.” (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978))).

<sup>50</sup> See, e.g., *Reno v. ACLU*, 521 U.S. 844, 871–72 (1997) (noting “chilling effect on free



government intervention are favored so that the speaker has "breathing room," avoids a "chilling effect," and can contribute to the marketplace of ideas.<sup>51</sup> In order to avoid this chilling effect, truth theorists suggest, the First Amendment should be interpreted so as to tolerate a certain amount of uncertainty and falsity, with the idea that the truth ultimately will come out.<sup>52</sup> The result ultimately benefits the listener—the consumer in the marketplace—but it does so by adjudicating the rights of the speaker.

But no individual's autonomy can be fully formed merely by shouting into the wind. An important component of free communication is the ability to receive messages and determine the worth of those messages for oneself.<sup>53</sup> An autonomy theory of the First Amendment, therefore, should be focused as much on the listener as on the speaker. While the truth theory is about product, listener-focused autonomy theory is about process. It is not concerned with the result of an individual's decision making so long as the process by which the decision is made is not corrupted. Thus, it focuses not on the right to speak one's mind free from governmental intrusion, but rather on the right of the audience to receive messages intended to persuade.<sup>54</sup> The theory assumes that, given a marketplace of ideas free from fraud and deception, a listener has the moral right to decide for herself which ideas are

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speech" created by vague speech regulations).

<sup>51</sup> See OWEN M. FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* 37–38 (1996) (noting importance of uninhibited public debate).

<sup>52</sup> See, e.g., Mark Spottswood, *Falsity, Insincerity, and the Freedom of Expression*, 16 WM. & MARY BILL RTS. J. 1203, 1219 (2008) (discussing view that suppressing false speech may result in "chilling effect" suppressing some truthful speech).

<sup>53</sup> See SUSAN H. WILLIAMS, *TRUTH, AUTONOMY, AND SPEECH: FEMINIST THEORY AND THE FIRST AMENDMENT* 41–44 (2004) (discussing conscious choice as primary aspect of autonomy); see also Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 610 (1982) ("[B]y adopting a democratic system we are expressing a belief that presumably individuals are capable of deciding what is best for them.").

<sup>54</sup> See WILLIAMS, *supra* note 53, at 20 ("[G]overnmental attempts to manipulate the choices of citizens by restricting the information to which they have access . . . would represent a failure to respect autonomy because such efforts rest on a distrust of citizens' ability to choose for themselves."); Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159, 163–67, 170 (1997) ("A system of free expression based on Kantian autonomy . . . would not merely concern itself with protection against government suppression.").

most persuasive. Thus, the government has the right to regulate the market to allow for free decision making on the part of listeners, but does not have the right to interfere with listeners' ultimate thought processes. For example, an autonomy theory would grant the government the right to regulate deliberate false statements on the ground that they "interfere with a person's control over her own reasoning processes,"<sup>55</sup> although it might be less supportive of regulating innocent falsehoods because such statements are not intended to invade the listener's autonomous domain.<sup>56</sup>

As with the theory more generally, proponents of an autonomy theory of the First Amendment must decide whether the theory relies on an ascriptive or descriptive view of how individuals make decisions—whether the theory operates under the presumption that, once false or fraudulent communications are restricted, individuals should be assumed to possess sufficient faculties to engage with persuasive communications, or whether our inherent fallibilities must be taken into account. As Richard Fallon has suggested, an ascriptive theory might suggest that regulation of advertising that persuades people to engage in unhealthful activities (smoking, for example) is undesirable, as such regulation purports to interfere with individual choice.<sup>57</sup> On the other hand, to the extent we believe that smoking is harmful, a descriptive theory would suggest that regulating such advertising may ultimately promote individual autonomy because it recognizes the inability of some consumers to

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<sup>55</sup> David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 354 (1991); see also Spottswood, *supra* note 52, at 1222 ("Multiple authors have posited that we should treat deliberate lies differently from innocent mistakes, because only lies violate the autonomy of listeners . . .").

<sup>56</sup> In the defamation context, for example, the Supreme Court has held that, at least with respect to matters of public concern or matters involving public officials or public figures, liability cannot attach without some level of fault or scienter. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) (matters of public concern); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967) (public figures); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (public officials).

<sup>57</sup> See Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark*, 1994 SUP. CT. REV. 1, 31 ("To censor speech on the ground that the listener could not be trusted to evaluate its content would . . . affront the listener's autonomy in most cases.").

resist such persuasion and frees them to make choices in other areas of their lives.<sup>58</sup>

In order to consider whether this theory has any lessons for trademark law, it might be useful to focus more closely on the autonomy interest as it appears in First Amendment cases where the goal of the restricted speech is to persuade. Where the Court has recognized an autonomy interest, it has been of the ascriptive variety, rather than the descriptive variety that is more prevalent in trademark law.<sup>59</sup> The Court's analysis of autonomy does not consider whether listeners are capable of negotiating with the messages they receive; the Court either assumes such a capability exists or disregards the issue. To be sure, the case law in this area is far from coherent or unified. My goal here is not to engage directly with competing theories of the First Amendment, to resolve the inconsistencies in the Court's use of autonomy theory,<sup>60</sup> or to suggest that autonomy theory predominates in the Court's approach to First Amendment cases. Rather, my aim is to note the presence of the theory in areas in which listeners are asked to interpret communications and then to explore exporting these considerations to trademark law. I focus here on cases in three areas: election-related communications, the Establishment Clause endorsement cases, and defamation law.<sup>61</sup> In each of these areas, the Court suggests an ascriptive view of autonomy, constructing a reader who makes choices about the value of the speech with which she is presented without overly solicitous protection from the Court.<sup>62</sup>

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<sup>58</sup> See *id.* at 32 ("[I]f image-based cigarette advertising manipulates some of its targets into states of addiction, regulation might do more to promote than to frustrate descriptive autonomy.").

<sup>59</sup> Cf. Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 446 (1971) ("Although the first amendment assumes that man has a will and an intellect, its concern is that he *should* use them; it does not turn on whether he *does* use them.").

<sup>60</sup> See Fallon, *supra* note 42, at 876 (noting complexity of First Amendment autonomy theory); Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 SUP. CT. REV. 123, 134–36 (analyzing First Amendment autonomy theory).

<sup>61</sup> For a similar description of Kantian philosophy in other areas of the Supreme Court's First Amendment jurisprudence, discussing cases concerning the incitement of unlawful action, fighting words, and obscenity, as well as libel and commercial speech, see Wells, *supra* note 54, at 179–87.

<sup>62</sup> For a thorough treatment of the Supreme Court's view of rational audiences in First

1. *McIntyre v. Ohio Elections Commission*. Ascriptive autonomy is evident in cases concerning election-related speech. In these cases, the Court has attempted to distinguish speech that has the potential to corrupt the process—and therefore is properly the subject of regulation—from speech that merely has the potential to persuade listeners.<sup>63</sup> Although the First Amendment inquiry typically focuses on the plaintiff speaker—who is seeking to preserve her right to participate in the political process without restrictions as to the type of message she is permitted to convey—any recognition of a speaker's right necessarily requires an implicit recognition of an autonomous and capable listener, even if not every recipient can realistically be described as such. In other words, if the proposed governmental restriction—typically based on justifications such as protecting the listener from misleading communications—must fail, it fails even despite the risk that some listeners might well be suboptimally persuaded.

Take, for example, *McIntyre v. Ohio Elections Commission*.<sup>64</sup> Margaret McIntyre, under the pseudonym “Concerned Parents and Tax Payers,” wrote and distributed leaflets opposing a proposed school tax levy to attendees at a public meeting concerning the levy.<sup>65</sup> She was subsequently charged under an Ohio statute prohibiting the distribution of political literature without the

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Amendment cases, see generally Lyrisa Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal* (Univ. of Fla. Legal Studies Research Paper No. 2009-16, 2009), available at <http://ssrn.com/abstract=1365979>. A rationality- or autonomy-based approach to regulating persuasive communications leaves the reader/recipient as the final interpretive authority, as she is the one who ultimately evaluates the communication. I have suggested elsewhere that a reader-response approach to intellectual property doctrine may prove fruitful. See generally Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445 (2008) (applying reader-response theory to copyright law); Laura A. Heymann, *The Birth of the Authonym: Authorship, Pseudonymity, and Trademark Law*, 80 NOTRE DAME L. REV. 1377 (2005) (hereinafter Heymann, *The Birth of the Authonym*) (same as to trademark law).

<sup>63</sup> See Raleigh Hannah Levine, *The (Un)Informed Electorate: Insights into the Supreme Court's Electoral Speech Cases*, 54 CASE W. RES. L. REV. 225, 266–67 (2003) (describing Court's focus on speech that is “unduly influential” rather than informative). But see *id.* at 251 (concluding that Court's recent cases “show that the Court [is] willing to restrict . . . speech when it suspects . . . that the speech is likely to unduly confuse or improperly influence voters”).

<sup>64</sup> 514 U.S. 334 (1995).

<sup>65</sup> *Id.* at 337.

identification of the author.<sup>66</sup> Mrs. McIntyre argued that the statute infringed upon her First Amendment right to engage in otherwise lawful discourse anonymously, framing the issue from the perspective of the anonymous speaker—the “street corner leaf-letter” whose speech might be chilled by an identification requirement.<sup>67</sup> The State (and its amici) defended the statute in part by referring to consumer protection-like activities: identification was necessary to prevent fraud and confusion on the part of the voting public.<sup>68</sup>

The Court’s decision thus pits the speaker’s right to speak anonymously—whether motivated by “fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible”<sup>69</sup>—against the reader’s right to receive relevant information that arguably aids in interpretation.<sup>70</sup> In resolving this dispute in favor of the speaker (the lonely pamphleteer who subsequently becomes the hero of the story<sup>71</sup>), the Court necessarily constructs an autonomous reader. In other words, by concluding that the First Amendment requires the government, at least in some circumstances, to permit anonymous speech—notwithstanding the argument that anonymity withholds potentially useful information from the recipient—the Court

<sup>66</sup> *Id.* at 338 & n.3.

<sup>67</sup> See Brief of Petitioner at 9, *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995) (No. 93-986) (outlining McIntyre’s constitutional claims).

<sup>68</sup> See Brief of Respondent at 32, *McIntyre*, 514 U.S. 334 (No. 93-986) (“[D]isclosure of the identity of the writer helps the public to appraise the source and evaluate the value and sincerity of the message.”); see also Brief of Amici Curiae for the States of Tennessee et al., in Support of Respondent at 7, *McIntyre*, 514 U.S. 334 (No. 93-986) (“Disclosure is justified by the state’s interest in providing voters with a means to better evaluate the contents of political literature.”); Brief of the Council of State Governments et al. as Amici Curiae in Support of Respondent at 10, *McIntyre*, 514 U.S. 334 (No. 93-986) (“Communications advocating a particular election outcome which are unaccompanied by proper identification carry a high potential for confusing and deceiving voters.”).

<sup>69</sup> *McIntyre*, 514 U.S. at 341–42; see also *id.* at 342 (noting that anonymity also “provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent”).

<sup>70</sup> See *id.* at 348 (discussing Ohio’s asserted interest in “providing the electorate with relevant information”).

<sup>71</sup> See, e.g., *id.* at 357 (describing anonymous pamphleteering as “an honorable tradition of advocacy and of dissent”); see also *id.* at 359 (Thomas, J., concurring in judgment) (arguing that First Amendment protects anonymous political leafletting). But see *id.* at 385 (Scalia, J., dissenting) (criticizing majority’s view of anonymous pamphleteers).



implicitly suggests its reliance on the capability of recipients to function without such information.<sup>72</sup> Without such a reader—someone capable of engaging with speech despite its anonymous nature, then determining its value for herself—the speaker's claimed right to speak anonymously would have to give way. Otherwise the risk would simply be too great.

The Court emphasizes this point by characterizing the speaker's identity as "no different from other components of the document's content that the author is free to include or exclude."<sup>73</sup> As such, the inclusion of an author's identity cannot be regulated on the ground that a recipient might find that identification makes the accompanying sentiments more or less persuasive; rather, anonymity is itself something the reader is trusted to take into account. In this vein, the Court quotes approvingly from a New York court's 1974 opinion:

Don't underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is "responsible," what is valuable, and what is truth.<sup>74</sup>

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<sup>72</sup> See *id.* at 348–49 (majority opinion) (arguing that omission of author's identity does not affect reader's ability to evaluate author's message).

<sup>73</sup> *Id.* at 348.

<sup>74</sup> *Id.* at 348 n.11 (quoting *People v. Duryea*, 351 N.Y.S.2d 978, 996 (Sup. Ct. 1974)); see also *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 258–59 (2003) (Scalia, J., concurring in part and dissenting in part) ("The premise of the First Amendment is that the American people are neither sheep nor fools, and hence fully capable of considering both the substance of the speech presented to them and its proximate and ultimate source."); *id.* at 286 (Kennedy, J., concurring in part and dissenting in part) ("The First Amendment guarantees our citizens the right to judge for themselves the most effective means for the expression of political views and to decide for themselves which entities to trust as reliable speakers."). In her brief to the Court, Mrs. McIntyre argued: "[I]t is inconceivable that the government could require speakers to discuss the weaknesses as well as the strengths of their political positions, even if 'full disclosure' would lead to a better informed electorate." Brief of Petitioner, *supra* note 67, at 33.

This language has strong ascriptive autonomous undertones.<sup>75</sup> It assumes that a participant in the political process—the “common man,” no less—is capable and discerning, and it structures the government’s response accordingly. It does not consider the wide range of abilities or literacy among the voting public or take an incremental approach to regulation; instead, it constructs a reader with capacity, with the ability to engage in interpretation and make associations without the need for governmental intervention.<sup>76</sup> As one commentator noted, “[t]he citizen/consumer’ in the ‘marketplace’ . . . is quite capable of evaluating the ‘products’ that compete for his or her attention, no matter how they are presented.”<sup>77</sup>

It is true, of course, that the Court does not acknowledge the aspirational nature of its assessment. It does not, for example, state that although the “common man” might be “intelligent enough to evaluate the source of an anonymous writing,”<sup>78</sup> particular individuals may be far less equipped. But this lacuna only serves to demonstrate the line the Court appears to draw: When the content at issue can be characterized as having the capability to change the recipient’s mind about whether the speech is “responsible,” “valuable,” and “truth[ful],”<sup>79</sup> rather than deceptive (as the State of Ohio urged in *McIntyre*<sup>80</sup>), courts need not consider the fact that listeners may reach different conclusions about the nature of the speech. As the Court emphasized, listeners “must be” permitted to

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<sup>75</sup> One commentator has characterized this view as an “aspirational” approach that “express[es] an overriding faith in human nature and man’s capacity for self-governance.” Brian K. Pinaire, *Strange Brew: Method and Form in Electoral Speech Jurisprudence*, 14 S. CAL. INTERDISC. L.J. 271, 289 (2005).

<sup>76</sup> In *McIntyre* and other opinions, the Court has distinguished campaign financing, suggesting that disclosure requirements are warranted in that context because of the need to avoid corruption of the electoral process. See, e.g., *McIntyre*, 514 U.S. at 356 (“In candidate elections, the Government can identify a compelling state interest in avoiding the corruption that might result from campaign expenditures.”); see also *McConnell*, 540 U.S. at 206 n.88 (noting governmental interest in “[p]reserving the integrity of the electoral process [and] preventing corruption” in context of campaign-related speech (first alteration in original) (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 (1978))).

<sup>77</sup> Pinaire, *supra* note 75, at 291.

<sup>78</sup> *Duryea*, 351 N.Y.S.2d at 996.

<sup>79</sup> *Id.*

<sup>80</sup> See 514 U.S. at 348 (discussing Ohio’s argument that its interest in preventing fraudulent statements justified its disclosure requirements).



engage in this deliberative exercise, as it is "for them" to live with the consequences of their decision.<sup>81</sup>

*First National Bank of Boston v. Bellotti*<sup>82</sup> provides another example of lurking autonomous interests. In *Bellotti*, the Court invalidated a state law prohibiting certain corporations from making expenditures for the purpose of influencing the vote on various referenda.<sup>83</sup> In rejecting the state's characterization of the harm to be prevented—that listeners might find particular types of corporate communications persuasive—the Court again turned to autonomy-based language:

[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced by [corporations], it is a danger contemplated by the Framers of the First Amendment.<sup>84</sup>

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<sup>81</sup> *Id.* The *Duryea* court's reference to the "truth" of the underlying speech might also be read as supporting a Millian view of the First Amendment. Cf. Sullivan, *supra* note 60, at 133 (referring to "Millian notion that the unregulated clash of individual expression will produce truth in the long run"). The court's emphasis, however, on the recipients of the speech and their role in the process, as opposed to the ultimate result of that process, suggests an autonomy theory rather than a Millian one.

<sup>82</sup> 435 U.S. 765 (1978).

<sup>83</sup> *Id.* at 767. The Massachusetts statute, in pertinent part, prohibited banks and other specified businesses "from making contributions or expenditures 'for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation.'" *Id.* at 767-68 (alteration in original) (citing MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977)). The plaintiff corporations wished to expend funds to publicize their views on a proposed constitutional amendment to be put before voters in an upcoming election; the amendment permitted the imposition of a graduated individual income tax. *Id.* at 769.

<sup>84</sup> *Id.* at 791-92 (footnotes omitted); see also *id.* at 791 n.31 ("Government is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves. The First Amendment rejects the 'highly paternalistic' approach of statutes . . . which restrict what the people may hear." (citations omitted)); see also *Brown v. Hartlage*, 456 U.S. 45, 60 (1982) ("The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech.").

Here, again, the Court draws a distinction between the types of harm asserted and thus the types of regulation permitted. If, the Court noted, the state had provided evidence that "corporate advocacy threatened imminently to undermine democratic processes" by drowning out other voices, thereby limiting choice and "denigrating rather than serving First Amendment interests," then regulation of such corporate speech might be constitutionally permissible.<sup>85</sup> But because the state's claim really involved the perceived danger that corporate advocacy might succeed in persuading voters—a concern not about process but about product—the Court concluded that autonomy interests should prevail.<sup>86</sup> The Court was not simply concerned with the "right to receive information"<sup>87</sup> (against which some form of regulation might be justified to ensure that only preferable information is received), but with the right to "evaluate" the information received.<sup>88</sup>

The Court has not consistently used autonomy interests, however, to justify its approach to speech-restricting legislation under the First Amendment. Indeed, in later election law cases, the Court has upheld certain governmental disclosure requirements relating to communications to voters that on their face would be inconsistent with autonomy interests.<sup>89</sup> Even in these cases,

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<sup>85</sup> *Bellotti*, 435 U.S. at 789. Interestingly, the Court suggests—in dicta—a position contrary to that which it had taken in *McIntyre*. Compare *id.* at 792 n.32 ("Corporate advertising, unlike some methods of participation in political campaigns, is likely to be highly visible. Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." (citing *Buckley v. Valeo*, 424 U.S. 1, 66–67 (1976))), with *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348 n.11 (1995) ("People are intelligent enough to evaluate the source of an anonymous writing." (quoting *People v. Duryea*, 351 N.Y.S.2d 978, 996 (Sup. Ct. 1974))).

<sup>86</sup> *Bellotti*, 435 U.S. at 790 ("[T]he fact that advocacy may persuade the electorate is hardly a reason to suppress it . . .").

<sup>87</sup> Cf. *id.* at 807–08 (White, J., dissenting) ("I recognize that there may be certain communications undertaken by corporations which could not be restricted without impinging seriously upon the right to receive information. . . . None of these considerations, however, are implicated by a prohibition upon corporate expenditures relating to referenda concerning questions of general public concern having no connection with corporate business affairs.").

<sup>88</sup> *Id.* at 792 (majority opinion).

<sup>89</sup> See, e.g., *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 201 (2003) (upholding disclosure requirements in campaign finance context); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 654–55 (1990) (upholding statute prohibiting corporations from making campaign expenditures from general treasury funds); see also *McConnell*, 540 U.S.

however, the Court has taken care to distinguish potential interference with the political process from the possibility of persuasion. In *Austin v. Michigan State Chamber of Commerce*, for example, the Court did not characterize the state statute at issue as seeking “to equalize the relative influence of speakers on elections,” but rather as aiming to prevent the risk of corruption of the political process by large corporate contributions to candidates for political office.<sup>90</sup> The Court offered a weaker, but similar, distinction in *McConnell v. Federal Election Commission*.<sup>91</sup> Accordingly, these cases are not ultimately inconsistent with an autonomy interest; to the contrary, they suggest the Court’s view that autonomy cannot properly function without clear channels of communication that eliminate attempts (i.e., through fraudulent communications) to interfere with individual choice.

2. Capitol Square Review and Advisory Board v. Pinette. Another First Amendment data point might come from the Supreme Court’s Establishment Clause cases—in particular, the way in which the Court has discussed the limitations that the Clause imposes on religious displays as a form of communication. This is relevant to the present inquiry because the question, at heart, asks whether the viewer of a nongovernmental, religious-themed display can be trusted to negotiate with the message conveyed even though the sponsorship of that display might be unclear on its face (as in *McIntyre*).

At its core, the constitutional concern over government endorsement of religion respects the autonomy of individuals in their religious preferences. Government endorsement—or perceived government endorsement—conveys a declaration of “religious truth”<sup>92</sup> as well as, as Justice O’Connor has noted, a declaration (or

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at 276 (Thomas, J., concurring in part and dissenting in part) (suggesting that *McIntyre* should be read to invalidate disclosure requirements in election-related speech “solely based on the governmental interest in providing information to the voters”).

<sup>90</sup> 494 U.S. at 660.

<sup>91</sup> 540 U.S. at 206 n.88 (distinguishing “campaign speech” from “genuine issue ads”).

<sup>92</sup> See Shari Seidman Diamond & Andrew Koppelman, *Measured Endorsement*, 60 MD. L. REV. 713, 727 (2001) (arguing that Establishment Clause prohibits government declarations of religious truth); see also Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1372 (2000) (defining “endorsement” of religion in terms of “whether [a challenged practice] sent a message that a particular religion, or

insinuation) of inclusion or exclusion in the political community, depending on one's position relative to the display.<sup>93</sup> Thus, the purpose of the Establishment Clause is to establish a bulwark against such a message and to preserve individual autonomy and self-governance—"the freedom to make judgments for oneself concerning what is good and right, without governmental influence, through the exercise of one's practical reason."<sup>94</sup> This is true whether or not the viewer is particularly offended or otherwise influenced by the message that government endorsement conveys. A plaintiff need not show, for example, that she was excluded from some government benefit on the basis of her religious beliefs (or lack thereof) or that she suffered some sort of demonstrable psychic or physical harm as a result of the display; it is sufficient that the display infringed on her autonomy by suggesting that her government endorses a particular religious preference.<sup>95</sup>

One might say that the place that autonomy occupies in the endorsement cases is not this simple. In order for the government endorsement of religion to convey any truth at all, the recipient of that message not only must believe it to be true (or, at least, possibly true) but also must be persuadable enough for that message to carry some weight. The viewer of a religious display who intuitively senses some level of government sponsorship but attributes no weight to it in his deliberations over religious truth has arguably suffered no constitutional injury. If the point of the Establishment Clause is to

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religion in general, was officially approved").

<sup>93</sup> See *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."). Although Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, dissented from the majority opinion in *Lynch*, finding no endorsement in the inclusion of a crèche in a municipal Christmas display, they agreed with Justice O'Connor's explanation for the doctrine. See *id.* at 701 (Brennan, J., dissenting) ("Those who believe in the message of the nativity receive the unique and exclusive benefit of public recognition and approval of their views. . . . The effect on minority religious groups, as well as on those who may reject all religion, is to convey the message that their views are not similarly worthy of public recognition nor entitled to public support.").

<sup>94</sup> Neal R. Feigenson, *Political Standing and Governmental Endorsement of Religion: An Alternative to Current Establishment Clause Doctrine*, 40 DEPAUL L. REV. 53, 67 (1990) (citing D. RICHARDS, *TOLERATION AND THE CONSTITUTION* 67-73 (1986)).

<sup>95</sup> See *Green v. Bd. of County Comm'rs*, 450 F. Supp. 2d 1273, 1286 (E.D. Okla. 2006) ("All a plaintiff need do is view the [state-sponsored image] and take offense.").

prevent the government from persuading the individual as to religious preferences, one might then conclude that the Clause envisions that individual as needing protection. Consistent with the election law cases described earlier,<sup>96</sup> a truly autonomous individual should, perhaps, be permitted to receive all religious messages—government sponsored or not—and consider for herself whether to credit the government's religious message. Thus, the First Amendment's prohibition against government establishment of religion treats government endorsement of religion in the same way that it treats campaign financing<sup>97</sup> or, as we shall see, false speech:<sup>98</sup> as a corruption of the process, not as an attempt at persuasion. The Establishment Clause creates a prohibition against the government participating in the discussion at all, whether persuasively or not.<sup>99</sup> The individual's right is not a right to be free from persuasion by her government; it is a right to exclude the government from even trying.

In circumstances when the government is not the speaker, however, the Court's language again relies on an ascriptively autonomous viewer: someone who is deemed to have the capacity to assess the display and decide for herself whether to be persuaded by the religious message it conveys. In *Capitol Square Review and Advisory Board v. Pinette*, the Court considered whether a state's denial of an application by the Ku Klux Klan to display an unattended cross on the statehouse square was justified by the conclusion that, had the application been granted, viewers of the cross would have believed it to be a state endorsement of religion.<sup>100</sup> A plurality consisting of Justices Scalia, Kennedy, Thomas, and then Chief Justice Rehnquist rejected the conclusion that the mere presence of a privately sponsored symbol in close proximity to a government building mandates a finding of endorsement, even if

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<sup>96</sup> See *supra* Part II.B.1.

<sup>97</sup> See *supra* note 76 and accompanying text.

<sup>98</sup> See *infra* Part II.B.3.

<sup>99</sup> See *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 590 (1989) ("[T]his Court has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization . . .").

<sup>100</sup> 515 U.S. 753, 757–59 (1995).



some viewers might reach that conclusion.<sup>101</sup> Justice O'Connor, joined by Justices Souter and Breyer, rejected the plurality's conclusion that endorsement cannot be present where the government neither intends nor encourages any message of endorsement.<sup>102</sup> Rather, she concluded that the effect of the message is key, and so the endorsement test should focus on the perception of a "reasonable, informed observer";<sup>103</sup> if this observer perceives endorsement, even mistakenly, Justice O'Connor concluded, then it is a court's duty to hold the display invalid.<sup>104</sup> But she cautioned that this test—a test that would prohibit a religious display whenever "some passersby would perceive a governmental endorsement thereof"<sup>105</sup>—is aimed not at any particular individual but rather at someone akin to the "reasonable person" in tort law who represents "a more collective standard to gauge 'the "objective" meaning of the [government's] statement in the community.'"<sup>106</sup> Such a person, Justice O'Connor asserted, is not an empty vessel, limited in his worldview to the four corners of the display in front of him, but rather "must be deemed aware of the history and context of the community and forum in which the religious display appears" to determine whether government endorsement is present in a particular case.<sup>107</sup> The reasonable person, moreover, "would

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<sup>101</sup> *Id.* at 765 ("Surely some [uninformed members of the community] . . . might leap to the erroneous conclusion of state endorsement. But . . . given an open forum and private sponsorship, erroneous conclusions do not count.").

<sup>102</sup> *Id.* at 777 (O'Connor, J., concurring in part and concurring in judgment).

<sup>103</sup> *Id.* at 773.

<sup>104</sup> *Id.* at 777.

<sup>105</sup> *Id.* at 779.

<sup>106</sup> *Id.* (alteration in original) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)). Justice O'Connor continued:

I therefore disagree that the endorsement test should focus on the actual perception of individual observers, who naturally have differing degrees of knowledge. Under such an approach, a religious display is necessarily precluded so long as some passersby would perceive a governmental endorsement thereof. . . . Thus, "we do not ask whether there is any person who could find an endorsement of religion, whether some people may be offended by the display, or whether some reasonable person might think [the State] endorses religion."

*Id.* at 779–80 (alteration in original) (quoting *Ams. United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1544 (6th Cir. 1992)).

<sup>107</sup> *Id.* at 780.

certainly be able to read and understand an adequate disclaimer,<sup>108</sup> with Justice Souter's added caveat that not every disclaimer would be effective.<sup>109</sup>

Both the plurality's and Justice O'Connor's constructed viewer, then, is someone who is entrusted with the task of assessing the message conveyed by a religious display, even if that assessment turns out to be mistaken. The plurality takes a decidedly antipaternalistic view, disregarding rather than acknowledging the costs of such mistakes. Justice O'Connor's "reasonable, informed observer" is similarly positioned but more generously described: as with *McIntyre*'s "common man," the "reasonable, informed observer" is someone who has the capacity to situate a persuasive message among other communications and make judgments as to whether or not to accept it. In either case, the Court does not appear particularly concerned about the outcome of those judgments (i.e., whether they would leave the viewer worse off), so long as the process of interpretation is left free from governmental interference. And, even more so than in *McIntyre*, the "reasonable, informed observer" is truly ascriptive. As lower courts have concluded, she would be aware of the various historical uses of the phrase "In God We Trust";<sup>110</sup> the approximate length of time a plaque had been installed on a courthouse and whether the government had highlighted or celebrated the plaque since its installation;<sup>111</sup> and the practices of a public school in allowing groups to distribute literature on campus.<sup>112</sup> She would know the history of Supreme Court First Amendment litigation;<sup>113</sup> a city's policies regarding

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<sup>108</sup> *Id.* at 782.

<sup>109</sup> *Id.* at 794 n.2 (Souter, J., concurring in part and concurring in judgment). The Court recommended a similar attribution requirement in *Bellotti*. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.32 (1978) ("Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected.")

<sup>110</sup> *Lambeth v. Bd. of Comm'rs*, 407 F.3d 266, 272 (4th Cir. 2005).

<sup>111</sup> *Freethought Soc'y of Greater Phila. v. Chester County*, 334 F.3d 247, 251 (3d Cir. 2003).

<sup>112</sup> *Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274, 287 (4th Cir. 1998).

<sup>113</sup> See, e.g., *Skoros v. City of New York*, 437 F.3d 1, 35 (2d Cir. 2006) (attributing to reasonable observer knowledge of Supreme Court's holiday display jurisprudence); *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 176-77 (3d Cir. 2002) (attributing to reasonable observer knowledge of history of dispute between city and religious groups).



placement of holiday displays on city streets by private groups;<sup>114</sup> and the policies of a municipality regarding the type of installations it typically erects.<sup>115</sup> Indeed, the reasonable, informed observer often displays a remarkable breadth of knowledge, including, as one court suggested, knowledge of the following facts:

For many years, the Kenton County Courthouse has closed on Good Friday. The orders and resolutions of the various courts and county and state officers made specific reference to Good Friday. The courthouse usually closed for the entire day, although by law only half a day was a state holiday.

...

The observer would also be aware that there is an abundance of local church services in this area on Good Friday. Many churches offer services in the early morning, during the lunch hour, and after working hours. Thus, it is not necessary for the courthouse employees to be off work to attend services.

Under the Supreme Court criteria, the observer would also be aware of the history of this controversy. He or she would know that as soon as objections to the sign [posted on the courthouse door announcing Good Friday closing and depicting crucifixion of Christ] surfaced in 1996, the courthouse authorities removed the sign. The observer would also know that the official posting the sign immediately disclaimed any intent to endorse religion.

The observer is presumed to know that some officials stated that they closed because it was traditional; others

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<sup>114</sup> *Elewski v. City of Syracuse*, 123 F.3d 51, 55 (2d Cir. 1997). *But see id.* at 59 n.6 (Cabranes, J., dissenting) ("The majority has in mind not a 'reasonable, informed observer' but an omniscient observer, whose experience sweeps in not just what is visible to the naked eye or to an aware citizen of the community but the unseen closed-door meetings of local retailers and politicians as well.").

<sup>115</sup> *See Am. Jewish Congress v. City of Beverly Hills*, 65 F.3d 1539, 1545 (9th Cir. 1995) (suggesting reasonable observer might infer City's participation in erection of 27-foot, 5,500-pound menorah), *withdrawn and superseded by* 90 F.3d 379 (9th Cir. 1996).

that they closed because there would be problems getting services such as heat and maintenance.<sup>116</sup>

This "reasonable, informed observer" is, as Justice O'Connor acknowledged, a legal fiction.<sup>117</sup> This observer interprets the display not only through the context of the image before him, but also through the context of the legal, political, and historical framework surrounding the display. He is, at heart, a judicial being armed with perfect information,<sup>118</sup> a standard of perception below which

<sup>116</sup> *Granzeier v. Middleton*, 955 F. Supp. 741, 747–48 (E.D. Ky. 1997) (footnote omitted). The court concluded that "from the perspective of the observer informed of all these facts, the courthouse closing does not appear to endorse the Christian religion." *Id.* at 748 (footnote omitted).

<sup>117</sup> See *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779–80 (1995) (O'Connor, J., concurring in part and concurring in judgment) ("[The reasonable] observer is similar to the 'reasonable person' in tort law, who 'is not to be identified with any ordinary individual, who might occasionally do unreasonable things,' but is 'rather a personification of a community ideal of reasonable behavior . . .'" (quoting W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 175 (5th ed. 1984))).

<sup>118</sup> In *Pinette*, Justice Stevens suggested that Justice O'Connor's observer "comes off as a well-schooled jurist." *Pinette*, 515 U.S. at 800 n.5 (Stevens, J., dissenting); see also, e.g., Susan Hanley Kosse, *A Missed Opportunity to Abandon the Reasonable Observer Framework in Sacred Text Cases: McCreary County v. ACLU of Kentucky and Van Orden v. Perry*, 4 *FIRST AMEND. L. REV.* 139, 144–49 (2006) (contrasting Justice O'Connor's conception of reasonable person with Justice Stevens's and noting confusion among lower courts in wake of *Pinette*); Kirsten K. Wendela, Comment, *Context Is in the Eye of the Beholder: Establishment Clause Violations and the More-Than-Reasonable Person*, 80 *CHI.-KENT. L. REV.* 981, 999–1000 (2005) (characterizing Justice O'Connor's reasonable person as "[a]n [u]nrealistic [e]xpectation").

Not every court interprets the standard as broadly. For example, the Third Circuit reasoned:

We agree with Justice Stevens that assuming the reasonable observer is aware of "history and context" when viewing a municipality's religious display is "a highly unlikely supposition." In our view, when testing for endorsement, we must take into account the perspective of those citizens within the community who hold minority religious views.

Thus, we cannot agree that an observer of the display who is a new resident to Jersey City, has no understanding of the history of the community, but has a strong sense of his or her own faith, a faith not depicted in the display, is somehow less "reasonable" an observer than the Christian or Jewish observer who has lived in Jersey City for twenty years. It follows that this new resident of Jersey City should be entitled to no less Establishment Clause protection than a long-time resident.

Accordingly, we conclude that the reasonable observer of Jersey City's display cannot be presumed to have knowledge of Jersey City's different cultural and religious celebrations.

*ACLU of N.J. v. Schundler*, 104 F.3d 1435, 1448–49 (3d Cir. 1997) (footnote and citation

the law declines to recognize interpretive difficulties.<sup>119</sup> Despite the language Justice O'Connor uses, then, the "reasonable, informed observer" is not an attempt to assess actual audience viewpoint at all.<sup>120</sup> Consistent with the plurality's vision, it is a label for a judicial determination—based on all the facts and circumstances—of whether religious endorsement exists as a matter of law. This is confirmed by the fact that, as Justice O'Connor's formulation suggests, empirical evidence—in the form of surveys and the like—is not relevant to this inquiry.<sup>121</sup> Thus, in its ultimate outcome, the "reasonable, informed observer" test yields much the same result as the *Pinette* plurality, which would dispense with even the facial attempt to attribute a view to an observer and simply decide the endorsement question as a matter of law.<sup>122</sup>

Why does Justice O'Connor create such a mythical being? In her view, it is because of the unworkable nature of empirical evidence,

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omitted).

<sup>119</sup> See Feigenson, *supra* note 94, at 84 ("To some extent, of course, speaker and audience must share a context, a sense of what the words may mean; otherwise communication would not be possible at all. But the contexts may differ, and in that case what the audience understands is not determined by the words alone, but by something the audience itself brings to the communicative act: the relations between those words and other things the audience knows and believes." (footnote omitted)); see also *id.* at 87 (arguing that "objective observer" standard misrepresents how audiences actually perceive messages); Benjamin I. Sachs, Case Note, *Whose Reasonableness Counts?*, 107 YALE L.J. 1523, 1525 (1998) ("[R]eligious symbols are perceived differently by adherents and nonadherents of the religion associated with the symbol on display.").

<sup>120</sup> For example, Professor Kent Greenawalt argues:

Most people who pass by a centrally located public space in a large city probably will *not be aware* of the history of the community and forum to the degree O'Connor assumes for her reasonable person. Thus, it is entirely possible that *most actual people*, even most people who would be reasonable in every other respect, might perceive an endorsement when Justice O'Connor's reasonable person, aware that the square is open equally to all private displays, would not.

Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clause*, 1995 SUP. CT. REV. 323, 372.

<sup>121</sup> See *Granzeier*, 955 F. Supp. at 748 n.17 ("The court must place itself in the position of the observer, but need not use polling data or similar materials, because the inquiry is an 'objective inquiry that this court is fully equipped to conduct with the facts at hand.'" (quoting *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996))).

<sup>122</sup> *Pinette*, 515 U.S. at 765 (plurality opinion) (refusing to analyze perceived endorsement from perspective of "outsiders or individual members of the community uninformed about [the defendant's] practice").

the "fundamental difficulty inherent in focusing on actual people."<sup>123</sup> So one might reasonably conclude that the "reasonable, informed observer" test is one of practicality or convenience—much like Justice Holmes's reminder that we cannot judge the reasonable man in tort law by the defendant's own degree of intelligence, lest we end up with as many degrees of reasonableness as there are people.<sup>124</sup> It might seem, therefore, as if allocating this decision to courts rather than to the viewers themselves would be contrary to the notion of autonomy, permitting courts to make certain decisions for the viewer rather than letting her decide for herself. But it is the construction of the observer as educated and contextual that, in fact, connotes that she is free to be persuaded—or not—by the display. The "reasonable, informed observer" is permitted to engage with far more communication than an observer treated less autonomously would be. Except in instances involving actual government sponsorship, the observer is left to wrestle with and respond to what she sees. Thus, as with the advocacy cases discussed above,<sup>125</sup> the religious display cases suggest a view of the First Amendment (tied, of course, to a different clause) based on the right of the recipient of a persuasive communication to choose—or allow herself—to be persuaded. In the election cases, the Court held that the government could not impinge upon this right by assuming that voters were too gullible; here, the Court holds that the government may not assume that its citizens are uneducated. In neither set of cases is the Court concerned with whether either of these assumptions is true, suggesting that its views are motivated by an ideal of how government should view individuals and not by the actual harm suffered in any particular case.

3. *New York Times v. Sullivan*. Yet another source of autonomy-based reasoning in the First Amendment cases is found in *New York*

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<sup>123</sup> *Id.* at 780 (O'Connor, J., concurring in part and concurring in judgment).

<sup>124</sup> See O.W. HOLMES, JR., *THE COMMON LAW* 108 (Boston, Little, Brown & Co. 1881) ("The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men. . . . The law considers, in other words, what would be blameworthy in the average man, the man of ordinary intelligence and prudence, and determines liability by that.").

<sup>125</sup> See *supra* Part II.B.1.

*Times Co. v. Sullivan*.<sup>126</sup> In *Sullivan*, the Court held that a public official could not sustain a defamation suit brought against the publishers of an editorial advertisement criticizing performance of his official duties simply because the material at issue was factually false.<sup>127</sup> Rather, the official needed to meet a higher standard of proof by showing that the statement was made “with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>128</sup>

As in *McIntyre*,<sup>129</sup> the hero of the Court’s opinion in *Sullivan* is the speaker: the citizen active in the governance of his community, who may misspeak or get things wrong from time to time, but who should nonetheless be permitted to speak without the threat of a libel suit. “[E]rroneous statement is inevitable in free debate,” the Court noted, and so “it must be protected if the freedoms of expression are to have the breathing space that they need . . . to survive.”<sup>130</sup> Indeed, the Court suggested, “[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about ‘the clearer perception and livelier impression of truth, produced by its collision with error.’”<sup>131</sup> This language, on its face, indicates a truth theory of the First Amendment, a description of the political marketplace in which public officials bear the cost of misstatements.

But, as in *McIntyre*, the doctrine’s tolerance of false statements necessarily presumes a listener who is capable of engaging with them. As long as the process is preserved—here, so long as the false statement is not made knowingly or with reckless disregard and thus involves no attempt by the speaker to interfere with the listener’s autonomy—the Court seems relatively unconcerned about

<sup>126</sup> 376 U.S. 254 (1964).

<sup>127</sup> *Id.* at 279–80. Under the Alabama law applied, a publication tending to impute misconduct to a public official was libelous per se; the burden of proving truth rested with the defendant. *Id.* at 267.

<sup>128</sup> *Id.* at 280.

<sup>129</sup> See *supra* note 60 and accompanying text.

<sup>130</sup> *Sullivan*, 376 U.S. at 271–72 (internal quotation marks omitted); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (“The First Amendment requires that we protect some falsehood in order to protect speech that matters.”).

<sup>131</sup> *Sullivan*, 376 U.S. at 279 n.19 (quoting JOHN STUART MILL, *ON LIBERTY* 15 (Blackwell 1947) (1859)).



the possible effect such false statements might have on listeners.<sup>132</sup> One possible explanation for this echoes Justice O'Connor's "reasonable, informed observer": in the realm of political discourse, the Court assumes that listeners are educated, that statements about public officials will be understood in context, and that the listener brings a sense of history to the table. If this were not the case, we might expect that the *Sullivan* Court would have highlighted—if only by noting the harm to the plaintiff—the risk that the listener might be persuaded by the false statement about the plaintiff. To the contrary, the Court, quoting its earlier decision in *Cantwell v. Connecticut*, declared:

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.<sup>133</sup>

Here again, therefore, language that on its face focuses on the speaker's First Amendment rights implies an objectively autonomous listener.<sup>134</sup> The risk that the listener may hear

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<sup>132</sup> See *id.* at 281 (suggesting that it is responsibility of listeners to debate information about character and qualifications of public officials (citing *Coleman v. MacLennan*, 98 P. 281, 286 (1908))).

<sup>133</sup> *Id.* at 271 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940)).

<sup>134</sup> See DWORKIN, *supra* note 45, at 200 (discussing importance to conception of free speech that citizens be trusted to hear dangerous and persuasive opinions and be allowed to make up their own minds). But see David A. Strauss, *Principle and Its Perils*, 64 U. CHI. L. REV. 373, 382 (1997) (reviewing DWORKIN, *supra*) (arguing that any determination of "how much breathing room is needed" to ensure open discourse cannot be resolved "simply by invoking a principle of listener autonomy" but instead requires "complex, normative empirical calculations").

exaggeration or false statements does not justify regulation of the speech, even if such activity may persuade the listener to adopt the speaker's view.<sup>135</sup>

The same tolerance for persuasive communications underlies the Court's opinion in *Milkovich v. Lorain Journal Co.*, in which the Court declined to recognize the existence of an absolute First Amendment privilege for communications asserted to be opinion by their speaker.<sup>136</sup> Although it rejected an overly simple distinction between fact and opinion to distinguish between actionable and nonactionable speech, the Court held that "a statement on matters of public concern must be provable as false"—or reasonably imply false facts—before liability can attach under state defamation law, regardless of whether the speaker framed his statement with words connoting an opinion.<sup>137</sup> Thus, the statement that "Joe's Diner has cockroaches in its kitchen" is likely, if false, to be actionable (as is, "Joe's Diner, in my opinion, has cockroaches in its kitchen"), while the statement that "the hamburgers at Joe's Diner are not worth the five dollars it charges for them" is not. This is so even though the latter statement may well influence a potential consumer's decision to eat at Joe's and may do so in a way that results in a consumer making the "wrong" choice (if the listener—or even a vast majority of speakers—might conclude that Joe's hamburgers are indeed well worth the five dollars). Here again, then, the Court restrains the law from regulating speech merely because it might be persuasive; the speech must be deemed valueless as a matter of First Amendment concern before recipients can be prohibited from receiving it. And as in *McIntyre* and *Pinette*, courts do not rely on

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<sup>135</sup> Richard Epstein has described this risk in commercial terms. See Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782, 812 (1986) ("The actual malice rule, in effect, is a rule that the law regards bad information as favorably as good information so long as it was only produced with gross negligence. It is tantamount to a rule that a merchant can escape the consequences of selling contaminated goods so long as he did not mean to hurt his consumers.").

<sup>136</sup> 497 U.S. 1, 21 (1990).

<sup>137</sup> *Id.* at 19; see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974) ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact." (footnote omitted)). The *Milkovich* Court reserved judgment on whether the same rule would apply to a nonmedia defendant. 497 U.S. at 20 n.6.



empirical evidence to determine whether a particular statement implies a false fact; rather, they construct a reasonable reader to make this determination.<sup>138</sup>

Defamation law presumes that those who have heard the challenged statement are likely to be persuaded, at least some of the time, that the statement has merit; otherwise, the plaintiff's reputation would suffer no injury. But *Milkovich*'s constitutional exclusion of statements that are not fact-based,<sup>139</sup> and *Sullivan*'s exclusion of even some fact-based statements made without the requisite state of mind,<sup>140</sup> suggests that this presumption is not unbounded. Under these cases, there are some statements that might be made about a plaintiff that might well have the effect of changing the listener's mind about the plaintiff—either through purported opinion (*Milkovich*) or through the false assertion of fact (*Sullivan*)—that remain constitutionally protected on the theory that either more opinion or truthful statements will, through their juxtaposition with the challenged statements, win out.<sup>141</sup>

This faith in the deliberative process, in turn, presumes a listener with the capacity to hear these statements and decide for herself whether to believe them. Implicit in the Court's holding in *Sullivan* is that the reader has the capacity to assess the truth of a statement about a public official. If false speech about a public official made without malice is not actionable, it is the listener, rather than the courts, who must separate truth from false speech.<sup>142</sup> Like Justice O'Connor's reasonable observer and *McIntyre*'s reader of anonymous

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<sup>138</sup> See David McCraw, *How Do Readers Read? Social Science and the Law of Libel*, 41 CATH. U. L. REV. 81, 99–100 (1991) (describing Court's reasonable reader approach); see also *supra* note 121 and accompanying text.

<sup>139</sup> See 497 U.S. at 21 (finding no constitutional protection for opinion speech).

<sup>140</sup> See 376 U.S. at 279–80 (holding that action for defamation against public official requires actual malice).

<sup>141</sup> It is true that the autonomy theory does not, by itself, explain the *Gertz* Court's reluctance to extend the same protection to defamation of a private individual. See Redish, *supra* note 53, at 644–45 (offering categorical balancing as plausible alternative to self-realization principle in attempting to explain Court's decision in *Gertz*).

<sup>142</sup> See Lyriisa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1585 (2007) (“*Sullivan* also rests on the premise that public officials will not suffer unduly as a result of the inevitable false statement. For this premise to be realized, however, the public must be capable of sorting through the ‘half-truths’ and ‘misinformation’ to glean the foundations of ‘enlightened opinion.’”).

writings, the recipient of *Sullivan*-type or *Milkovich*-type information is presumed to bring to the interpretive effort information that can help her judge the value of the message she has received. The message itself does not give her this information, and the courts, by declaring that these messages are not actionable, will not mediate the conversation.

In highlighting the nod to autonomy interests in these various cases, I do not intend to overstate matters. The listener autonomy principle is not paramount—or even squarely delineated—in any of these cases. And I acknowledge, as David Strauss has indicated, that a listener autonomy principle is not likely to resolve the complex questions presented by these cases, nor should it.<sup>143</sup> But in each case, once the channels of communication have been cleared, the Court has demonstrated a certain level of tolerance for error and misguided belief through its reluctance to permit governmental regulation of speech, a tolerance that, I suggest, resonates in an ascriptive view of the autonomous listener. Critics may suggest that this view is incompatible with the truth-seeking function of the First Amendment, in that an autonomy view not only acknowledges the possibility of error but also anticipates it. But deliberation is a cumulative process, and it is only through experience that individuals can develop the skills they need to interpret persuasive communications.<sup>144</sup> And in any event, the types of communications at issue in these cases—the wisdom of a government policy, the adequacy of a religious belief, the assessment of a public official's conduct—are often considerations that do not admit of truth or falsity.

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<sup>143</sup> See Strauss, *supra* note 134, at 382 (arguing that these complex questions “can be answered only by making both complex, normative empirical calculations and assessments of the relative importance of preventing defamation, on the one hand, and allowing robust speech on the other[, and cannot] be resolved simply by invoking a principle of listener autonomy”).

<sup>144</sup> As Rochelle Dreyfuss has suggested, the same interest is present in trademark law. See Rochelle Cooper Dreyfuss, *Reconciling Trademark Rights and Expressive Values: How to Stop Worrying and Learn to Love Ambiguity*, in *TRADEMARK LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH* 261, 290 (Graeme B. Dinwoodie & Mark D. Janis eds., 2008) (suggesting that because consumers faced with uncertainty in marketplace “seek out more information and learn about other considerations that influence purchasing decisions, . . . [a]n approach that cuts off learning imperils competition, blocks the effective interchange of ideas, and even undercuts the benefits of trademark law”).

At the very least, an autonomy justification is worth considering even if it cannot be dispositive. And, more to the point, it is curious that this view is not as prevalent in trademark law, despite trademark law's focus on the governmental regulation of persuasive communications,<sup>145</sup> albeit in a commercial setting.

### III. THE LACK OF AUTONOMY IN TRADEMARK LAW

Although First Amendment jurisprudence seems most concerned with the sellers in this intellectual bazaar, a functioning market must also have available buyers. It is equally important, therefore, that First Amendment theories focus on listeners and readers as much as on speakers. But when the marketplace imagery becomes less theoretical and more real, First Amendment doctrine shifts. Commercial speech regulation is subject to a lesser degree of scrutiny under the First Amendment, primarily because commercial activity has traditionally been an area of governmental regulation that is not likely to be chilled by governmental intervention.<sup>146</sup> Yet even within the Court's modern commercial speech doctrine lurks a recognition of the importance of treating recipients of information

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<sup>145</sup> See Margreth Barrett, *Domain Names, Trademarks, and the First Amendment: Searching for Meaningful Boundaries*, 39 CONN. L. REV. 973, 976 (2007) (describing trademark law as regulating proposals of commercial transactions).

<sup>146</sup> For an overview of the Court's current commercial speech analysis, see *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562, 564 n.6 (1980). See also *id.* at 566 ("At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."). Commentary on *Central Hudson* abounds. See, e.g., Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 634–38 (1990) (criticizing purported bases for affording commercial speech less protection than other forms of speech); Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777, 779 (1993) (describing dissatisfaction with view that commercial speech should not receive same degree of constitutional protection as other genres of speech); *id.* at 783 (contending that view that commercial speech is undeserving of full First Amendment protection "reflects a bias that is undemocratic and intellectually elitist"); Rebecca Tushnet, *Trademark Law as Commercial Speech Regulation*, 58 S.C.L. REV. 737, 740–41 (2007) (noting criticism of Court's commercial speech jurisprudence and *Central Hudson* decision in particular).

as capable, autonomous beings, particularly when the governmental regulation focuses on "the substance of the information communicated rather than the commercial aspect of it."<sup>147</sup> (Indeed, a recipient-focused view of the First Amendment in the commercial speech arena obviates the need to decide whether corporations have speech rights equivalent to those of individuals, since it is the individual recipients whose interests are at issue.) Here again, then, we see the Court's two-pronged concern: first, with ensuring that the channels of communication are free from fraudulent attempts to interfere with consumer autonomy (for example, by communicating false facts about a product); and second, with thereafter allowing consumers to engage with and make choices based on the information they receive.<sup>148</sup> In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* (*Virginia Pharmacy Board*), for example, the Court invalidated the Commonwealth of Virginia's ban on the advertising of prescription drug prices by pharmacists,<sup>149</sup> noting that, far from protecting consumers, the ban interfered with consumers' autonomy in making choices for themselves:

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<sup>147</sup> 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996) (plurality opinion) (internal quotation marks and alteration omitted). A recipient-focused theory of the First Amendment is not a recent phenomenon. See, e.g., Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 *BROOK. L. REV.* 5, 29 (1989) (suggesting that "hearer-centered variant" of First Amendment theory would permit government to prohibit speech that has no value to autonomous decision making); Redish, *supra* note 59, at 446 (acknowledging First Amendment interests of listeners); cf. Tushnet, *supra* note 146, at 739–40 ("Recipient-focused theories [of commercial speech doctrine] should allow more regulation of speech than speaker-focused theories, given that recipient-focused theories do not consider the commercial speaker to have a distinct autonomy interest in speaking about its products.").

<sup>148</sup> See Neuborne, *supra* note 147, at 25 ("[H]earers have an instrumental first amendment interest in receiving information that will inform them and/or help them operate systems based on choice more efficiently and autonomously. Hearers have little or no interest, though, in receiving demonstrably false or otherwise harmful information."). As Neuborne points out, there is a risk of "rampant paternalism" in determining whether speech is categorized as fraudulent, and this tendency:

should be held in check by respect for a hearer's right to make autonomous choices—even silly ones—so long as the choices are lawful, and by a healthy skepticism about the capacity of government speech regulators to be trusted with the power to control information flow even in the absence of a toleration based speaker.

*Id.* at 27.

<sup>149</sup> 425 U.S. 748, 771–72 (1976).

It appears to be feared that if the pharmacist who wishes to provide low cost, and assertedly low quality, services is permitted to advertise, he will be taken up on his offer by too many unwitting customers. . . . They will respond only to costly and excessive advertising, and end up paying the price. . . . All this is not in their best interests, and all this can be avoided if they are not permitted to know who is charging what.

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. If they are truly open, nothing prevents the "professional" pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer. But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.<sup>150</sup>

In this passage, we see much the same theme as in the cases previously discussed:<sup>151</sup> the Court's interpretation of the First Amendment as permitting government regulation only so far as to "truly open" the "channels of communication"—that is, to regulate false, misleading, or deceptive speech—but no farther.<sup>152</sup> Once the

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<sup>150</sup> *Id.* at 769–70. Although the case predates *Central Hudson*, there is nothing in the latter case to suggest that the autonomy interest was disapproved. See also Sullivan, *supra* note 60, at 134 ("The Court . . . emphasized a kind of autonomy as one driving principle of *Virginia Board*—not the autonomy of the *speaker* to fulfill his rational capacities, but the autonomy of the *listener* in making up his own mind.").

<sup>151</sup> See *supra* Part II.B.

<sup>152</sup> See *Virginia Pharmacy Board*, 425 U.S. at 771–72 (noting that First Amendment does not prohibit state from regulating false or misleading commercial speech).



government attempts to regulate how individuals interpret commercial speech or how they make purchasing decisions based on that speech, its activities are likely to be deemed illegitimate.

In more recent commercial speech cases, the Court's language has shifted, focusing more on the rights of the corporation as speaker than on the interests of the consumer. But intimations of an autonomy interest still exist. In *44 Liquormart, Inc. v. Rhode Island*,<sup>153</sup> for example, a plurality of the Court reinforced this concern, even while applying the more deferential *Central Hudson* test:

Precisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching, they usually rest solely on the offensive assumption that the public will respond "irrationally" to the truth. The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good. That teaching applies equally to state attempts to deprive consumers of accurate information about their chosen products . . . .<sup>154</sup>

Thus, even in the realm of commercial speech, the Court has indicated that it is useful to consider whether the purpose of the governmental regulation at issue is consistent with consumer autonomy. Regulation that attempts to clear the market of false or misleading speech enables such autonomy; regulation that attempts to direct how consumers respond to such speech interferes with autonomy and is therefore more suspect.<sup>155</sup> As Kathleen Sullivan noted, "what is crucial is not whether we are in the world of

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<sup>153</sup> 517 U.S. 484 (1996).

<sup>154</sup> *Id.* at 503 (plurality opinion) (citation omitted).

<sup>155</sup> See Sullivan, *supra* note 60, at 127–28 ("The Court [in *44 Liquormart*] would appear to view suppressing commercial speech by reason of its message or communicative impact as suspicious, even though suppressing commercial speech for other reasons . . . is allowable if it does not go too far.").

commercial speech, but what aspects of commercial speech—its message or its harms—government seeks to regulate.”<sup>156</sup>

Trademark law is, of course, a form of commercial speech regulation. But, as commentators have noted, current doctrine does not explicitly incorporate First Amendment values<sup>157</sup> or give prominence to a positive view of consumer interests.<sup>158</sup> Where First Amendment issues do arise, the defendant is typically using the plaintiff’s trademark to engage in some sort of expressive activity, such as parody or commentary.<sup>159</sup> This is not to say, however, that autonomy interests cannot be used to explain certain existing aspects of trademark doctrine—namely, those instances in which a court declines to enjoin the defendant’s use of the plaintiff’s mark despite evidence (or a presumption) that some consumers will be confused.<sup>160</sup> In such cases, as in the cases discussed earlier,<sup>161</sup> the result might be justified by viewing consumers as adaptable, particularly in today’s marketplace, and therefore able to be entrusted with figuring out how to engage with shifting trademark meanings.<sup>162</sup> For example, when a court declares that a formerly trademarked term has become generic, it is necessarily assuming that consumers for whom that term still bears trademark

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<sup>156</sup> *Id.* at 128; see also *id.* at 144 n.81 (citing cases outside commercial speech area in which “interference with the communicative impact of speech [has] also triggered the Court’s concern”).

<sup>157</sup> See, e.g., Tushnet, *supra* note 146, at 744 (arguing that current trademark doctrine fails to implement First Amendment norms).

<sup>158</sup> See, e.g., Grynberg, *supra* note 11, at 61–62 (“Trademark’s traditional seller-conflict account gives insufficient weight to the interests of nonconfused consumers and their potential losses . . .”).

<sup>159</sup> See, e.g., *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 901 (9th Cir. 2002) (considering use of “Barbie” trademark in pop song).

<sup>160</sup> See *Cliff Notes, Inc. v. Bantam Doubleday Dell Publ’g Group, Inc.*, 886 F.2d 490, 495 (2d Cir. 1989) (“[S]omewhat more risk of confusion is to be tolerated when a trademark holder seeks to enjoin artistic expression such as a parody . . .”).

<sup>161</sup> See *supra* Part II.B.

<sup>162</sup> Indeed, some commentators, myself included, have taken the view that consumers are primarily responsible for the creation and development of trademark meaning. See, e.g., ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* 8 (1998) (attributing meaning of brand to “expressive work of consumers”); Beebe, *supra* note 5, at 2021 (“Trademarks exist only to the extent that consumers perceive them as designations of source. Infringement occurs only to the extent that consumers perceive one trademark as referring to the source of another.”); Heymann, *The Birth of the Authornym*, *supra* note 62, at 1423 (suggesting that trademark’s meaning depends on consumers’ interpretation).

significance will either adopt the new meaning of the term or suffer from some cognitive dissonance.<sup>163</sup> Similarly, the “descriptive fair use” provision of the Lanham Act, which permits the use of another’s trademark “otherwise than as a mark” so long as the mark is “descriptive of and used fairly and in good faith only to describe the [defendant’s] goods or services . . . or their geographic origin,”<sup>164</sup> assumes some level of consumer confusion will be present when a defendant uses another’s trademark in its descriptive sense.<sup>165</sup> Indeed, as the Supreme Court recently articulated, there would be no need for the defense at all were this not the case.<sup>166</sup>

Thus, the existence of the defense indicates some level of confidence in the consumer. Whatever confusion may exist, it does not rise to the level at which courts must step in and protect the consumer—she will inevitably figure out which use of the term is as a trademark and which use is merely descriptive. And the touchstone for any trademark infringement case—whether the defendant’s use of the plaintiff’s mark is likely to cause confusion among the relevant consumer base—itself incorporates a mild antipaternalism in that it responds only to a certain level of confusion by the “reasonably prudent consumer,” not to every instance of confusion that a consumer might experience.<sup>167</sup> But in each of these examples, whatever autonomy interest exists is passive—if anything, it is a post hoc explanation of the effect of a court’s decision not to grant the trademark holder the relief it seeks. Absent from the cases is a more positive theory of the consumer,

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<sup>163</sup> See Grynberg, *supra* note 11, at 115 (“Declaring a mark generic . . . raises the search costs of consumers who still use the term in question as a trademark.”).

<sup>164</sup> 15 U.S.C. § 1115(b)(4) (2006).

<sup>165</sup> KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc., 543 U.S. 111, 119 (2004).

<sup>166</sup> See *id.* at 120 (“[I]t would make no sense to give the defendant a defense of showing affirmatively that the plaintiff cannot succeed in proving [confusion]; all the defendant needs to do is to leave the factfinder unpersuaded that the plaintiff has carried its own burden on that point.”); see also Tushnet, *supra* note 146, at 743–44 (describing doctrines in trademark law “designed to separate legitimate from illegitimate sources of misunderstanding”).

<sup>167</sup> See *Survivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625, 630 (9th Cir. 2005) (describing “reasonably prudent consumer” test); 6 MCCARTHY, *supra* note 8, § 32:188 (“The lowest reported figure [of confusion] is 8.5 percent, which the court found to be ‘strong evidence’ of a likelihood of confusion where other evidence was also strongly supportive.”); Tushnet, *supra* note 146, at 744 (explaining that courts “discount confusion that results from pure miscomprehension”).

similar to that found in the First Amendment cases described earlier,<sup>168</sup> that justifies narrowing the scope of trademark law on the ground that it restricts consumer autonomy.

How might such a theory operate in practice? We might begin, as suggested earlier,<sup>169</sup> by separating the two messages that are communicated by a trademark: the message that indicates to the consumer the source of the good or service ("here's what you want") and the message that embodies the goodwill of the producer ("here's why you want it").<sup>170</sup> Having done so, we can align each of these messages with a type of speech common to First Amendment cases. The source message is akin to a statement of fact, the falsity of which constitutes a corruption of the communicative process, and the goodwill message is akin to a statement of opinion or persuasion, which relates to the ultimate decision made by the recipient of the message. When a consumer relies on the first message, she is making a choice between producers in the marketplace; when she relies on the second message, she is contributing—in however small a way—to the course of her own life and the identity that she constructs through that choice. To take one example, a consumer engages with the Coca-Cola trademark in two ways: first, to ensure that she is buying Coca-Cola and not Pepsi (the source-identifying function), and second, to constitute herself as someone who drinks Coca-Cola and not Pepsi at that particular moment (the persuasion function), whether because of personal taste, image, perception of corporate practices, or any other reason.<sup>171</sup> A consideration of consumer autonomy would therefore counsel that governmental regulation (through trademark law) is much more appropriate when addressing the former message than it is when addressing the latter. Thus, as Martin Redish explains, "if an individual wishes to buy a car because he believes it will make

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<sup>168</sup> See *supra* Part II.B.

<sup>169</sup> See *supra* Part I.

<sup>170</sup> Cf. Beebe, *supra* note 5, at 2025 (defining "search sophistication" and "persuasion sophistication").

<sup>171</sup> Jessica Litman has identified an instance where the trademark becomes mostly a matter of persuasion: "the effort and expense that goes into distinguishing a Ford Taurus from a Mercury Sable and persuading customers to buy one rather than the other, when, after all, they're essentially the same car." Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717, 1726 (1999).

him look masculine,<sup>172</sup> it is difficult, on an autonomy rationale, to see why the law should restrict that choice, even if we might hope that the decision rests on a weightier ground.<sup>173</sup> "Recognition of the individual's unencumbered right to make life-affecting decisions," Redish notes, "logically precludes the determination by external forces that certain grounds upon which to make such decisions are better than or preferable to others."<sup>174</sup>

The modern trademark is a far different creation from its earlier incarnation, when a trademark conveyed only a source-identifying message, consistent with its origin as a guild marker.<sup>175</sup> With the development of advertising techniques starting in the 1920s, trademarks moved from functioning primarily at the point of sale (i.e., as a heuristic for repeat customers) to having a psychological effect on consumers well before the consummation of any actual sale and a lingering effect thereafter.<sup>176</sup> Many who will never own a

<sup>172</sup> Redish, *supra* note 53, at 619.

<sup>173</sup> *Id.* at 630 (describing effect of autonomy as self-realization on commercial speech doctrine); see also Neuborne, *supra* note 147, at 29 ("[T]he toleration based respect for individual dignity that fuels speaker-centered speech protection should also lead to a refusal to permit the government to manipulate hearers into 'preferred' choices by controlling the flow of information to them."); Smolla, *supra* note 146, at 786 ("In an open society there is always pressure to believe that money and material will give life meaning. The very openness, however, that . . . encourages advertisers to try to make us all materialists[] will also give free wheel to the intellectual and entrepreneurial imaginations that hold the best promise for genuinely uplifting our quality of life."). But see, e.g., Ronald K.L. Collins & David M. Skover, *Commerce & Communication*, 71 TEX. L. REV. 697, 745 (1993) (noting "dissonance between today's commercial expression and the noble purposes of the First Amendment"); Tamara R. Piety, "Merchants of Discontent": *An Exploration of the Psychology of Advertising, Addiction, and the Implications for Commercial Speech*, 25 SEATTLE U. L. REV. 377, 381 (2001) (suggesting First Amendment protection of advertising should be reevaluated because advertising often appeals to addictive impulses).

<sup>174</sup> Redish, *supra* note 53, at 630 n.135. I am not suggesting that a consideration of autonomy-related interests should eliminate any constitutional protection for commercial speech whatsoever. Cf., e.g., C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 3 (1976) ("[A] complete denial of first amendment protection for commercial speech is not only consistent with, but is required by, first amendment theory.").

<sup>175</sup> See, e.g., Jerre B. Swann, *An Interdisciplinary Approach to Brand Strength*, 96 TRADEMARK REP. 943, 963 (2006) (describing trademark as serving three possible functions: "liability" (identifying responsible artisan); "preclusive" (establishing boundaries of guild's monopoly); or "ownership" (facilitating recovery of goods)); see also *id.* at 964 (noting shift in early twentieth century in trademark's function from source signal to quality).

<sup>176</sup> See Stephen L. Carter, *The Trouble with Trademark*, 99 YALE L.J. 759, 761 (1990) ("Successful trademarks are valuable because of the information that they convey. The consumer sees the mark and knows what the mark represents: a consistent quality, a



Rolls Royce have some sort of perception associated with the mark, and at least some of those who do own one have a continuing engagement with the mark each time they drive around town. Moreover, as earlier noted, trademarks have recently taken on yet another communicative function: as an element of cultural discourse.<sup>177</sup> Trademarks are now used as a linguistic shorthand in addition to an economic one, as a way of describing something more efficiently or creating a shared discourse through a common cultural referent. When we hear about something being as difficult as “nailing Jell-O to the wall” or refer to something as the “Cadillac of its class,” those of us who are familiar with the product and its advertising persona understand what the speaker is saying. When a manufacturer engages in comparative advertising, the trademark is being used to communicate the meaning of the mark, separate from its function as an indicator of the source of the good or service. But none of these uses interferes with the consumer’s ability to find the goods or services she wants.

Even though an element of discourse underlies all of these personas, focusing only on the rights of speakers—either the trademark holders or competitors speaking to consumers, or the consumers unmooring the trademark from its direct connection to the good and using it to speak to others—seems to miss another important focus: the rights of consumers as listeners and readers. As demonstrated by Julie Cohen and Jessica Litman in the copyright sphere, there is also a role for the consumer to “talk back” to the trademark directly in its first persona, a role with First Amendment-type implications.<sup>178</sup> This conversation occurs because

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reputation for service, and any of the other things that when wrapped together are thought of as a business’s goodwill.”).

<sup>177</sup> See *supra* note 3 and accompanying text; see also Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1710–13 (1999) (noting encroachment of trademark law on social discourse); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 134 (1993) (noting costs of publicity rights on free expression and cultural pluralism).

<sup>178</sup> See Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347, 370 (2005) (describing “situated user” as concerned with “pathways to consumption” rather than simply “the fact of consumption”); Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1878 (2007) (calling for increased attention to role of readers and listeners in copyright law); cf. Madow, *supra* note 177, at 134 (“Publicity rights are about . . . who gets to decide what ‘Madonna’ will mean in our culture: what meaning(s) her image will be used

trademark law is not—despite the language used by some commentators<sup>179</sup>—about regulating certain words; rather, it is about protecting certain associations with those words. Under an infringement rationale, the term “Delta” may be associated with both an airline and faucets but probably not with an airport shuttle service or kitchen sinks. Under a dilution rationale, the term “Kodak” may be associated with film and cameras but not with pianos. Trademark law essentially tells consumers which associations are permissible and which are not.<sup>180</sup>

Thus, to the extent we are willing to recognize an autonomy interest in trademark law—the same autonomy interest underlying First Amendment cases involving other mental associations and persuasive communications—we should encourage the same construction of self-image through choice by exhibiting greater skepticism of aspects of trademark law that interfere with that autonomy.<sup>181</sup> This would suggest that trademark law is more defensible when it is focused on confusing or misleading uses of

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to generate and circulate, and what meaning(s) she will have for us.”).

<sup>179</sup> See, e.g., ROGER SHUY, *LINGUISTIC BATTLES IN TRADEMARK DISPUTES* 2 (2002) (“[T]rademark law is about the right to monopolize the use of language.”); Carter, *supra* note 176, at 769 (“Trademark protection matters because it allows a firm to remove a word from the market language, in the sense that it allows the firm to prevent others from using the word or anything confusingly similar to it. This creates what might be called language exclusivity.”).

<sup>180</sup> The Supreme Court’s recent trademark jurisprudence might be read as suggesting, if not an outright respect for consumer autonomy, at least the notion that consumers are not in need of as much protection as some trademark holders contend. See, e.g., *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 119 (2004) (“[T]he common law of unfair competition . . . tolerated some degree of confusion from a descriptive use of words contained in another person’s trademark.”); *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 433 (2003) (“[T]he mere fact that consumers mentally associate the junior user’s mark with a famous mark . . . will not necessarily reduce the capacity of the famous mark to identify the goods of its owner . . .”), *superseded by statute*, Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, 120 Stat. 1730; see also Graeme B. Dinwoodie, *The Trademark Jurisprudence of the Rehnquist Court*, 8 MARQ. INTELL. PROP. L. REV. 187, 207 (2004) (characterizing Rehnquist Court as viewing “certainty for competitors—rather than consumers, as one might expect of trademark law”—as important consideration).

<sup>181</sup> Cf. Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You*, 52 STAN. L. REV. 1049, 1087 n.155 (2000) (“If speech is constitutionally protected even if it intends to influence people’s conduct by . . . partisan shading of the facts, then it’s hard to see why it should become unprotected just because its recipients plan to use it to influence consumers’ buying habits.” (internal quotation marks, alterations, and citation omitted)).

marks and much less defensible when it is focused on controlling associations with marks for reasons beyond their confusing or misleading effects.<sup>182</sup>

From a linguistic perspective, trademarks are constructed by the consumer. Although linguistics recognizes that a certain degree of shared meaning must exist in order for communications to be effective,<sup>183</sup> it also incorporates an insight from literary criticism's reader response theory: the idea that readers have as much control over meaning as writers.<sup>184</sup> To borrow from Barthian semiotics,<sup>185</sup> trademarks involve both "connotation" and "denotation." "Denotation," as a system of signification, describes the process by which the signifier "rock" relates to the signified "a mineral formation in consolidated form"; "connotation" exists as a second layer, in which meaning depends on context or social construction, thus describing the process in which "rock" relates to the signified "a large diamond, usually on a ring."<sup>186</sup> As Stuart Hall notes, although communication requires some alignment between the speaker's desired meaning and the reader's received meaning, the reader need not accept the desired meaning full stop: he can adjust the meaning or—in some cases—oppose it altogether.<sup>187</sup> The latter

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<sup>182</sup> Cf. Kozinski & Banner, *supra* note 146, at 635 (arguing that advent of modern advertising dispels Court's assumption in *Virginia Pharmacy Board* that truth of commercial speech is more easily verifiable). But see *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976) (suggesting that commercial speech is more easily verifiable than other types of speech because advertiser presumably knows more about products or services he provides than others).

<sup>183</sup> See, e.g., Kristen Osenga, *Linguistics and Patent Claim Construction*, 38 RUTGERS L.J. 61, 89 (2006) ("Although every speaker may not define a term identically, for words to have meaning, the definition must stay within a common boundary when referring to reality.").

<sup>184</sup> See Dave Morley, *Text, Readers, Subjects*, in *CULTURE, MEDIA, LANGUAGE* 163, 171 (Stuart Hall et al. eds., 1980) ("The meaning(s) of a text will also be constructed differently depending on the discourses (knowledges, prejudices, resistances) brought to bear on the text by the reader.").

<sup>185</sup> For an analysis of Roland Barthes's theory distinguishing orders of signification, see JOHN FISKE, *INTRODUCTION TO COMMUNICATION STUDIES* 90–91 (1982).

<sup>186</sup> See Stuart Hall, *Encoding/Decoding*, in *CULTURE, MEDIA, LANGUAGE*, *supra* note 184, at 128, 132–33 (describing and distinguishing between denotation and connotation); Marina Camargo Heck, *The Ideological Dimension of Media Messages*, in *CULTURE, MEDIA, LANGUAGE*, *supra* note 184, at 122, 124 (same).

<sup>187</sup> See Hall, *supra* note 186, at 136–38 (discussing three hypothetical positions of viewers in televisual discourse including "negotiated" and "oppositional" codes).

case is where what Hall calls "the 'politics of signification'—the struggle in discourse"—exists.<sup>188</sup>

The marketing literature and the practices that it reflects suggest a similar preference for consumer autonomy in engaging with the persuasive value of trademarks. In 1960, Robert J. Keith, a director of the Pillsbury Company, wrote a short but influential description of the modern "marketing revolution," suggesting that "[c]ompanies revolve around the customer, not the other way around."<sup>189</sup> The company's purpose was no longer to create products consistent with its available resources, argued Keith, "but to satisfy the needs and desires, both actual and potential, of our customers."<sup>190</sup> Modern advertising underwent a similar shift. Advertisers no longer rely on simply communicating facts about a product, in the model of the old Sears catalog or the advertisement for a mercantile shop;<sup>191</sup> now they require consumers to do interpretive work involving wordplay, metaphor, and cultural meaning. Indeed, as Linda Scott notes, engaging with advertising has always been part of literary culture, in the ways in which consumers read advertisements as well as in the way advertising transmits culture.<sup>192</sup> Today's advertising often emphasizes subtlety

<sup>188</sup> *Id.* at 138.

<sup>189</sup> Robert J. Keith, *The Marketing Revolution*, J. MARKETING, Jan. 1960, at 35, 35. More recent commentators have suggested that the idea of a "revolution" in marketing is a fallacy and that such consumer-centric notions existed even in what Keith described as the "production era." *Id.* at 36; see also, e.g., D.G. Brian Jones & Alan J. Richardson, *The Myth of the Marketing Revolution*, 27 J. MACROMARKETING 15, 22 (2007) ("Clear and significant evidence suggests that ideas and practices characteristic of the sales and marketing eras existed during the time when a production orientation is commonly believed to have dominated business practice.").

<sup>190</sup> Keith, *supra* note 189, at 37.

<sup>191</sup> See Mark Bartholomew, *Advertising and the Transformation of Trademark Law*, 38 N.M. L. REV. 1, 13–14 (2008) (describing shifting focus of twentieth-century advertising from dissemination of information to appealing to consumers' emotions); Collins & Skover, *supra* note 173, at 702–03 (identifying shift from "product-information advertising" to "product-image advertising" between 1920s and early 1950s).

<sup>192</sup> See Linda M. Scott, *Images in Advertising: The Need for a Theory of Visual Rhetoric*, 21 J. CONSUMER RES. 252, 261 (1994) [hereinafter Scott, *Images in Advertising*] ("It is an important by-product of advertising that a range of art styles are made part of the common language of the populace."); Linda M. Scott, *Spectacular Vernacular: Literacy and Commercial Culture in the Postmodern Age*, 10 INT'L J. RES. MARKETING 251, 261 (1993) ("Advertisements [in newspapers], like other printed matter, were originally read aloud to groups at home, at work, or in public meeting places like taverns and coffee houses.").

and imagery over direct transmission of factual information, requiring consumers to engage in interpretive acts similar to those used with novels or artwork.<sup>193</sup>

In order for this shift in control over brand meaning and interpretation to work, marketers must grant consumers a fair amount of autonomy in their decision making. This is not to say that producers do not expend considerable effort and resources in attempting to influence that decision—indeed, it is precisely because of the autonomy of consumers that producers must invest such funds. In the 1950s, a significant critique of advertising suggested that consumers did not possess a sufficient degree of autonomy to resist the siren call of advertisers.<sup>194</sup> But more recent examples in the marketing literature seem to suggest a recognition of—if not a preference for—autonomy.<sup>195</sup> This autonomy, not surprisingly, is linked—as it is in the philosophical literature<sup>196</sup>—to choice and decision making.<sup>197</sup> This literature recognizes that consumers' engagement with advertising is part of an ongoing dialogue in which consumers are not merely passive receptacles for advertising messages, but—whether consciously or not—accept, respond, or reject the messages they receive.<sup>198</sup> This seems to be true whether

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<sup>193</sup> See, e.g., Scott, *Images in Advertising*, *supra* note 192, at 265 (discussing cosmetics ad depicting product submerged in glass of iced water with lime as assuming "an implied viewer who exercises selectivity, uses experience with the genre of advertising, and engages in metaphorical thinking").

<sup>194</sup> See Brown, *supra* note 5, at 1182–83 (questioning consumers' freedom of choice); see also Bartholomew, *supra* note 191, at 30–31 (noting that several social critics of 1950s and 1960s believed that modern advertising threatened personal autonomy).

<sup>195</sup> See, e.g., Ruby Roy Dholakia & Brian Sternthal, *Highly Credible Sources: Persuasive Facilitators or Persuasive Liabilities?*, 3 J. CONSUMER RES. 223, 224 (1977) (describing cognitive response analysis as asserting that "persuasion entails the rehearsal of one's own attitude-relevant thoughts as well as those contained in a communication"); Marian Friestad & Peter Wright, *The Persuasion Knowledge Model: How People Cope with Persuasion Attempts*, 21 J. CONSUMER RES. 1, 3 (1994) ("[W]e do not assume that people invariably or even typically use their persuasion knowledge to resist a persuasion attempt. Rather, their overriding goal is simply to maintain control over the outcome(s) and thereby achieve whatever mix of goals is salient to them.").

<sup>196</sup> See *supra* Part II.A.

<sup>197</sup> See Avery M. Abernethy & George R. Franke, *The Information Content of Advertising: A Meta-Analysis*, J. ADVERTISING, Summer 1996, at 1, 1 (noting empirical evidence that consumers prefer advertising that aids in decision making); Linda M. Scott, *The Bridge from Text to Mind: Adapting Reader-Response Theory to Consumer Research*, 21 J. CONSUMER RES. 461, 476–78 (1994) (advocating reader response approach to consumer research).

<sup>198</sup> See Scott, *supra* note 197, at 464 ("[R]eading as consumers' means understanding the



the advertising in question is highly informative or appeals to emotions; consumers that have become skeptical of informational claims in advertising may still respond to emotional appeals.<sup>199</sup>

A necessary part of this process, therefore, is the ability to make mistakes: to spend money frivolously, to engage in indiscretions, to assign value to the status of a good rather than to any inherent difference in quality. Consumers have demonstrated an interest in identifying themselves as, say, Coke drinkers or Pepsi drinkers, and in a commercial age this alignment is as much a part of one's personal development as the decision to vote for a school tax levy or not. As Sidney J. Levy notes, "the discretionary society might better be termed the indiscretionary society, since it is often the freedom to be indiscreet and to indulge one's imprudent choices that makes the freedom seem real."<sup>200</sup> Consumers learn from this freedom in a feedback loop—they may purchase the high-end sports car or handbag and believe that the prestige associated with the trademark entirely justifies the high price, or they may be disappointed to discover that they are in much the same station in life as before (albeit many dollars poorer).<sup>201</sup> Indeed, the law

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text as an effort to sell, which in turn implies not only issues of brand awareness or product attribute beliefs, but also outright skepticism and resistance."); *id.* at 473 (recommending shift in consumer research from seeing consumer as "a mind whose sole function is to absorb brand information" to seeing advertisements as "text[s] that the consumer is *using* to fulfill a purpose of his or her own"); see also STEPHEN BROWN, POSTMODERN MARKETING 138 (1995) ("Consumers are no longer portrayed as malleable, simple-minded dupes held in marketing's mendacious thrall, but as astute, discerning, self-aware individuals who *enjoy* shopping and identity transformation, are fluent in the language of advertising and revel in the whole consumption experience, yet at the same time remain capable of ironic detachment, doughty resistance and subverting rather than succumbing to the machinations of marketing and multinational capital."). Not every commentator is as sanguine. See, e.g., Janice Winship, *Sexuality for Sale*, in CULTURE, MEDIA, LANGUAGE, *supra* note 184, at 217, 220 (describing interpretation of sexually-themed advertisements as involving "contradictory modes in which we, as readers, are *inescapably ensnared* in the signification process" (emphasis added)).

<sup>199</sup> Carl Obermiller, Eric Spangenberg & Douglas L. MacLachlan, *Ad Skepticism: The Consequences of Disbelief*, J. ADVERTISING, Fall 2005, at 7, 15.

<sup>200</sup> Sidney J. Levy, *The Discretionary Society*, in BRANDS, CONSUMERS, SYMBOLS & RESEARCH 319, 323–24 (Dennis W. Rook ed., 1999); cf. Richard A. Epstein, *Privacy, Property Rights, and Misrepresentations*, 12 GA. L. REV. 455, 470 (1978) (characterizing libertarian view of privacy law as believing that suppression of truthful information "is unwarranted, even if the person who hears it might misuse or misinterpret it").

<sup>201</sup> See Phillip Nelson, *Advertising as Information*, 82 J. POL. ECON. 729, 751 (1974) ("It does not pay consumers to make very thoughtful decisions about advertising. They can respond to advertising for the most ridiculous explicit reasons and still do what they would

supports this kind of learning curve, since it does not seek to regulate the fantasy or fictional aspects of advertising. A cologne manufacturer can run a commercial suggesting that wearers of its product will instantly become attractive to women, or a sportswear manufacturer can suggest that buying its athletic shoes will transform a consumer into a professional basketball player, and the law does not intervene, leaving it to consumers to learn the harsh reality on their own.<sup>202</sup>

Focusing on the reader/consumer as an autonomous being with First Amendment interests might therefore lead us to reconsider certain aspects of current trademark doctrine as being either consistent with or antagonistic to this viewpoint.<sup>203</sup> Cabined appropriately, trademark infringement doctrine—focusing on likelihood of confusion—seems aligned with the consumer/reader's First Amendment interests. Consumers will have difficulty exercising their autonomy to direct the outcome of their lives if they are being misled. But modern expansions of the doctrine prove more problematic. These aspects of trademark law focus on the persuasive aspects of the mark and not on the informational aspects;<sup>204</sup> to the extent these aspects can be said to "mislead," it is only because the law has determined that choices based on these persuasive aspects would not be beneficial to consumers. An

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have done if they made the most careful judgments about their behavior. . . . If it were not in consumer self-interest to respond to advertising, then consumers' sloppy thinking about advertising would cost enough that they would reform their ways.").

<sup>202</sup> See Litman, *supra* note 171, at 1729 n.73 ("If consumers willingly suspend their disbelief a little because it is pleasant to imagine that eating Snackwell's cookies will make one thin, [or] that reading *Forbes* magazine will make one rich, . . . perhaps it is a cheap way for folks to get a little of what they want without actually being fooled—or being fooled much."); Smolla, *supra* note 146, at 802–03 (arguing that there is little harm in consumers fantasizing about such claims and that regulation of such ads is unwarranted); Sullivan, *supra* note 60, at 157 ("[M]ost of what Madison Avenue sells is product image. Even under the existing notion that the government has broad leeway to control misleading commercial speech, it is not generally claimed that such imagistic associations are deceptive."); cf. BeVier, *supra* note 25, at 38 (suggesting that courts adjudicating false advertising claims "ought to interpret ads so that only those representations that present substantial risk of distorting consumer decisionmaking become predicates for liability").

<sup>203</sup> There are, of course, other bases for explaining various expansions of trademark law. See, e.g., Bone, *supra* note 15, at 2143–80 (discussing sponsorship confusion and trade dress law).

<sup>204</sup> See *supra* notes 21, 25 and accompanying text.

autonomy theory of consumers, however, would conclude that consumers should make this determination on their own.

Consider, first, dilution law. Although dilution doctrine has been characterized as improperly treating trademarks as property or as protecting undesirable prestige value,<sup>205</sup> it is also vulnerable from a consumer autonomy perspective. In a paradigmatic dilution action, the consumer is not confused as to the source of the defendant's good or service—she knows, for example, that the maker of “Kodak pianos” is not affiliated with the camera manufacturer—but now considers the Kodak mark to be less unique or distinctive (or, in the case of a tarnishment action, considers the mark less favorably).<sup>206</sup> Where there was once a single Kodak, the dilution cause of action sees a thousand, turning what was once special into something commonplace or disreputable. As a result, one theory postulates, the consumer takes longer to make the mental connection between the mark and the product because she must first mentally discard the other associations with that mark.<sup>207</sup> A trademark owner claiming dilution is therefore saying, as I have noted elsewhere: “[W]e have spent a lot of money and effort on telling consumers what they should think about our brand, and the defendant's activities have caused them to think something different.”<sup>208</sup>

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<sup>205</sup> See Brown, *supra* note 5, at 1191–94 (describing historical rationale behind dilution doctrine as protecting mark holder's reputation and ability to expand); Robert N. Klieger, *Trademark Dilution: The Whittling Away of the Rational Basis for Trademark Protection*, 58 U. PITT. L. REV. 789, 851 (1997) (noting undesirability of bestowing senior mark holders with property rights in trademarks); Lemley, *supra* note 177, at 1698–99 (criticizing expansion of dilution doctrine).

<sup>206</sup> See 15 U.S.C. § 1125(c) (2006) (providing cause of action for dilution of famous marks).

<sup>207</sup> See, e.g., *Ty Inc. v. Perryman*, 306 F.3d 509, 511 (7th Cir. 2002) (suggesting that association of mark with variety of unrelated products imposes “higher imagination cost[s]”); Barton Beebe, *A Defense of the New Federal Trademark Antidilution Law*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1143, 1148 (2006) (“The idea underlying the concept of [dilution by] blurring is that the defendant's use of a mark similar or identical to the plaintiff's mark will ‘blur’ the link between the plaintiff's mark and the goods or services to which the plaintiff's mark is traditionally attached.”); Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507, 519–21 (2008) (“[B]lurring takes place when a single term activates multiple, nonconfusing associations in a consumer's mind.”).

<sup>208</sup> Heymann, *supra* note 7, at 218 (internal quotation marks omitted).

From a consumer autonomy perspective, it is questionable that the trademark owner should have control over this association. Assuming that the consumer encountering "Kodak pianos" is not engaging with the trademark for its search value—in other words, she is not using the mark to buy pianos from the same producer from which she buys film—then she is reacting, if at all, to the meaning she attributes to the Kodak brand. It might mean that the association of "Kodak" with "pianos" now takes precedence in her mind over the association of "Kodak" with "film," or it might mean that it takes her longer to call up the association of "Kodak" with "film." But it is only if we believe that the film company has the right to claim priority in the consumer's mind about what "Kodak" will mean to her that a dilution action seems defensible.<sup>209</sup> So long as the consumer is clear about which producer she is dealing with, autonomy considerations would suggest that she has a right superior to that of the film company to decide which company she thinks of first when she hears the term. Indeed, this decision may well be tied to other aspects of her self-determination, much as whether the term "Delta" means "airline" or "faucet" to any particular consumer may depend on whether that consumer dedicates more time to air travel or to home improvement.

Even if the purported harm consists of what some commentators have termed a "halo effect"<sup>210</sup> (a harm about which other commentators have conveyed skepticism<sup>211</sup>), the autonomy concern is the same. To take one example, the name "Rolex" is synonymous to many consumers with high quality and exclusivity. A bakery that calls itself the "Rolex Bakery" will probably not confuse consumers

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<sup>209</sup> Indeed, since dilution protection applies only to marks that are famous, these would seem to be precisely the kinds of marks that would be capable of surviving such an onslaught. Beebe, *supra* note 207, at 1162; Tushnet, *supra* note 207, at 541–42 ("Fame may preserve the unidirectionality of associations from a junior brand to a senior by keeping the senior brand's own associations at the forefront of consumers' minds.").

<sup>210</sup> See Swann, *supra* note 175, at 967 ("Cognitive research establishes that copycat packaging, even though bearing a clearly distinguishable brand name so as to avoid confusion . . . benefits from a 'halo effect' of a leading brand's packaging."). Trademark proponents like Swann also argue that this effect, while beneficial for the trademark defendant, impairs the recall for the trademark plaintiff. *Id.* at 967–68.

<sup>211</sup> See Beebe, *supra* note 207, at 1164–65 (noting that misappropriation of trademark *per se* is not actionable under U.S. law); Tushnet, *supra* note 207, at 524–25 (discussing doubt about "free riding" meaning of dilution).

into thinking that the watchmaker has gone into the baked goods business, but the bakery might benefit from the associations surrounding the term "Rolex." The bakery, the argument goes, now gets to free-ride on Rolex's reputation. It doesn't have to spend time and effort establishing a reputation for high-quality goods but can simply use the Rolex name to create that impression in consumers' minds. And this is true (under the "halo effect" theory) even if the bakery clearly states that it is not associated in any way with the watch company. If this is the harm at issue, the theory is one that especially seems to deny consumer autonomy. As long as the consumer understands that the Rolex Bakery is not affiliated with the watchmaker (and in an age of pervasive branding, this may be open to question<sup>212</sup>), it should be left to the consumer to determine whether the persuasive effect of the "Rolex" mark is enough to make her want to patronize the bakery.

As another example of how autonomy considerations might affect doctrine, consider the expansion of traditional trademark infringement to include additional concepts of "confusion." Even in the standard infringement suit—where the trademark holder must show that the defendant's activity has created a likelihood of confusion as to source among the relevant consumer market—courts have had a love-hate relationship with consumers: Consumers are sometimes very savvy about marketing strategies and products, and sometimes not, in need of assistance and sometimes not, with little to guide reaction as to when assistance is needed.<sup>213</sup> Although the marketing literature seems to take account of the interpretive skills required of today's consumer, courts' characterizations of consumers have used the transformation of the mark from simple source identifier to more complex transmitter of aura and associations to opposite effect. Mark Bartholomew suggests that when trademarks were used more directly to convey information, courts were correspondingly more trusting of consumers, only recognizing

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<sup>212</sup> See Sara Stadler Nelson, *The Wages of Ubiquity in Trademark Law*, 88 IOWA L. REV. 731, 789 (2003) (suggesting that trademark owners dilute their own marks through broad uses).

<sup>213</sup> See, e.g., Ann Bartow, *Likelihood of Confusion*, 41 SAN DIEGO L. REV. 721, 723 (2004) (querying why judges in trademark litigation "so often write about representative members of the public as if we are astoundingly naïve, stunningly gullible, and frankly stupid").



confusion that persisted after a "reasonable investigation of the defendant's product."<sup>214</sup> As trademarks became more numerous and were communicated to consumers through techniques designed to persuade as well as to inform, courts (perhaps not surprisingly) came to view consumers as requiring a higher degree of protection. Faced with an ever-increasing array of competitors for mindshare, consumers were thought to select products quickly and with little forethought.<sup>215</sup>

But even in today's market, where trademarks carry multiple messages, the use of trademark law to regulate the marketplace is consistent with consumer autonomy, since without such regulation consumers would not be able to obtain the products they want without considerable investigation as to the qualities of those products.<sup>216</sup> In this respect, trademark law parallels the First Amendment cases in that it works to clear the market of fraudulent efforts to interfere with autonomy.<sup>217</sup> Consistent with the Kantian view that individual autonomy is to be respected by government only so long as it does not interfere with the autonomy rights of others,<sup>218</sup> trademark law is well within its bounds to ensure that producers do not engender confusion among their consumers by sending misleading signals about the source of their product, whether intentionally or unintentionally.

But other theories of infringement do not map as well onto these concerns. Consider the common practice of a producer using packaging similar to a competitor's trade dress in order to convey to consumers that the products are comparable. The store-brand

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<sup>214</sup> Bartholomew, *supra* note 191, at 7. Bartholomew cites several examples, including *McLean v. Fleming*, 96 U.S. 245, 255 (1877), in which the Court required "careful inspection to distinguish the spurious trade-mark from the genuine" in order to maintain a cause of action, and *Allen B. Wrisley Co. v. Iowa Soap Co.*, 122 F. 796, 798 (8th Cir. 1903), in which the circuit court required reasonable examination of packaging.

<sup>215</sup> Bartholomew, *supra* note 191, at 10 ("While the Victorian-era consumer was expected to exercise some caution in the commercial world, the early 1900s consumer was 'apt to act quickly, and [was] therefore not expected to exercise a high degree of caution.'" (alteration in original) (citing *Paris Med. Co. v. W.H. Hill Co.*, 102 F. 148, 151 (6th Cir. 1900))).

<sup>216</sup> See Bone, *supra* note 15, at 2117-18 (characterizing trademark law as protecting against source-identifying word marks, direct competitors, and source confusion at point of purchase).

<sup>217</sup> See discussion *supra* Part II.B.

<sup>218</sup> Wells, *supra* note 54, at 167.

shampoo, laundry detergent, or garbage bags are likely to be packaged in bottles or boxes that closely resemble those of the name-brand products to indicate to consumers the equivalence in their formulas or materials. As several commentators have noted, the likelihood of confusion in such situations is low.<sup>219</sup> The store-brand product is almost certainly placed on the shelf next to the name-brand product (the geographic proximity serving as both a communication and a convenience), giving the consumer a ready opportunity to differentiate between the two products.<sup>220</sup> More important, as long as the store-brand product is marked with the name of the store, the consumer is not likely to use the trade dress in order to identify a producer; rather, she will interpret it as an attempt to persuade her that she will be just as happy with the lower-priced store brand as with the name-brand product. Thus, consideration of her autonomy interest would counsel a finding of infringement (or false advertising) only when the defendant has made a false statement (e.g., claiming it is the name brand or claiming it is the identical formulation when it is not) but not when the trade dress is used merely for its persuasive effect.<sup>221</sup>

Autonomy interests might also cause courts to think differently about cases involving theories of confusion as to authorization or endorsement. The merchandising cases are typical examples of such theories, where courts find a likelihood of confusion when a defendant puts the plaintiff's logo (such as a sports team or college logo) on a hat or T-shirt without authorization.<sup>222</sup> The argument is

<sup>219</sup> See, e.g., *Bartow*, *supra* note 213, at 766 ("[A]ny question about whether consumers can tell the difference between [store-brand and name-brand products] can usually be straightforwardly answered as follows: Of course they can.").

<sup>220</sup> See *McNeil Nutritionals, LLC v. Heartland Sweeteners, LLC*, 511 F.3d 350, 353–54 (3d Cir. 2007) ("Consumers are generally aware of the name of the store in which they are shopping. They are aware that stores have private-label brands that in most cases are merchandised next to the national-brand products. Prices for the products are typically displayed prominently. Consumers can, therefore, see the cost difference between store brands and national brands.").

<sup>221</sup> Rochelle Dreyfuss has advocated approaching this distinction through a multifaceted concept of trademark use. See Dreyfuss, *supra* note 144, at 270 ("[U]se [of a trademark] to persuade (through, for example, comparative ads and gripe sites) . . . [should] not be considered the type of use with which trademark law is concerned.").

<sup>222</sup> *Boston Professional Hockey Ass'n v. Dallas Cap & Emblem Manufacturing, Inc.*, 510 F.2d 1004 (5th Cir. 1975) is the paradigmatic case. See also, e.g., *Pebble Beach Co. v. Tour 18 I Ltd.*, 155 F.3d 526, 544 (5th Cir. 1998) ("For a party to suggest to the public, through its use

that the presence of the logo conveys to consumers the false message that the entity affiliated with the logo has authorized the appearance of the logo on the defendant's product, even though the entity likely had no other involvement with the production of the good.<sup>223</sup> In this sense, the logo functions in the same way as a celebrity endorsement: a familiar face who lends his authority to the product and persuades the consumer to select it, thus creating a transfer of meaning flowing from the endorser and through the goods to the consumer.<sup>224</sup>

But even assuming this is descriptively correct, it is unclear why trademark law should have much work to do here. Even if the consumer views the presence of the logo as a signal of endorsement,

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of another's mark or a similar mark, that it has received permission to use the mark on its goods or services suggests approval, and even endorsement, of the party's product or service and is a kind of confusion the Lanham Act prohibits."); *Univ. of Ga. Athletic Ass'n v. Laite*, 756 F.2d 1535, 1546 n.28 (11th Cir. 1985) ("[I]n our view, most consumers who purchase products containing the name or emblem of their favorite school or sports team would prefer an officially sponsored or licensed product to an identical non-licensed product. Were this not true, the word 'official' would not appear in so many advertisements for such products."); *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 204-05 (2d Cir. 1979) ("In order to be confused, a consumer need not believe that the owner of the mark actually produced the item and placed it on the market. The public's belief that the mark's owner sponsored or otherwise approved the use of the trademark satisfies the confusion requirement." (citations omitted)).

<sup>223</sup> As James Gibson, among others, has noted, the fuzziness of the terminology is reflected in the legal analysis. See James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 910-11 (2007) ("[A]s courts employ a variety of decreasingly analogous synonyms for sponsorship and approval, the focus shifts from whether the plaintiff sponsored or approved of the defendant's product to whether the plaintiff acquiesced in the defendant's use of the plaintiff's mark."). Indeed, given the prevalence of product placements in film and television programs, consumers might be forgiven for thinking that the entity affiliated with the logo paid the apparel manufacturer for the placement of the logo rather than the reverse.

<sup>224</sup> See Grant McCracken, *Who Is the Celebrity Endorser? Cultural Foundations of the Endorsement Process*, 16 J. CONSUMER RES. 310, 314 (1989) ("Consumers must take possession of these meanings and put them to work in the construction of their notions of the self and the world."). McCracken asserts that this effort is due, at least in part, to a breakdown in traditional social structures that have obviated the need for individual self-determination. See *id.* at 318 ("[I]ndividualism and alienation have conspired to give individuals new freedom to define matters of gender, class, age, personality, and lifestyle. The freedom to choose is now also an obligation to decide . . ."); see also Madow, *supra* note 177, at 142-43 ("Indeed, it is only because celebrity images carry and provoke meaning that they can enhance the marketability of the commodities with which they are associated. Their 'associative' or 'publicity' value derives from their semiotic power." (footnote omitted)). This is true, as Madow notes, whether the celebrity image that is involved is the actor herself or the character she plays. *Id.* at 199 n.350.

she is not engaging with the mark in its source-identifying sense. In other words, she is probably not using the mark to glean anything about the qualities of the apparel to which the logo is affixed.<sup>225</sup> Rather, she is engaging with the persuasive aspect of the mark. As with the celebrity endorser, the logo is conveying the message that it is in some way preferable to buy the branded product—that a T-shirt with a Boston Red Sox logo is a “better” T-shirt than one without the logo. This is not because the logo communicates source—that is, that the Red Sox produce high-quality T-shirts—but because the logo itself is of (expressive) value. Consumers who purchase a branded T-shirt want to be like other purchasers (if only insofar as they enjoy the same sports team), just like consumers who respond to a celebrity endorsement want, in some small way, to be like the celebrity (if only insofar as they enjoy the same product). Once again, considerations of consumer autonomy would leave it to the consumer to decide whether this is a legitimate assertion. There is little qualitative difference for autonomy purposes among these statements: “The hamburgers at Joe’s Diner are not worth the five dollars it charges for them”; “Tiger Woods thinks that you should buy this razor”; and “This is a more desirable T-shirt because it has a Red Sox logo on it.” Each statement depends on the persuasiveness of the speaker for effect, and so each remains the domain of the consumer to regulate, even if we might characterize his choice to believe any of these assertions as foolish.<sup>226</sup>

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<sup>225</sup> It is possible that the consumer believes that the trademark owner would license its mark for use only on high-quality goods, but I suspect this is unlikely. In any event, the consumer can assess many of these qualities for herself through inspection.

<sup>226</sup> Ellen Goodman notes how this operates in the commercial news media:

The agenda of the commercial media, assuming nothing but a profit motive, is to attract audience attention. In offering content on this basis, the editor makes a validity claim combining truth and sincerity. She says, in effect, “You like this communication,” or “I think you will like it.” The same cannot be said for the sponsor. The sponsor seeks not to please the audience with its communication, but to use communication to induce action. An editor speaking a sponsor’s promotional message and advancing the sponsor’s agenda cannot redeem a claim to either sincerity or truth.

Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 119 (2006).

Trademark law, by contrast, is better left to ensuring the absence of false statements of fact. As long as the defendant has not falsely suggested authorization,<sup>227</sup> any further use of a mark of the type discussed here should be permissible. And to the extent the consumer is simply seeking out the mark for its pure communicative function—to signal affiliation with the team or school it represents—then autonomy has an even greater role to play and trademark law a lesser one. In this scenario, the use of the trademark by the consumer is at the core of identity formation. She is purchasing the good because she accepts whatever meaning is conveyed by the mark *apart from* its indication of the quality of the good.<sup>228</sup>

Another expansion of what constitutes “confusion,” which might be rethought with the infusion of autonomy concerns, is the doctrine of initial interest confusion. In the typical initial interest confusion case, the defendant “improperly uses a trademark to create initial customer interest in a product, even if the customer realizes, prior to purchase, that the product was not actually manufactured by the trademark-holder.”<sup>229</sup> For example, in a dispute between Mobil

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<sup>227</sup> Following *McIntyre*, true ascriptive autonomy may not even require a statement as to authorization. See discussion *supra* Part II.B.1. To the extent that the consumer believes the assertion that a T-shirt bearing a Red Sox logo is somehow “better” than a plain T-shirt, it should not matter who is making that assertion. Cf. Goodman, *supra* note 226, at 87–88 (arguing that regulation of undisclosed sponsor marketing is necessary because consumers are not equipped to sort out competing claims on their own). However, as in *Pinette*, courts may deem the autonomous consumer to be someone who “would certainly be able to read and understand an adequate disclaimer.” *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 782 (1995) (O'Connor, J., concurring). In addition, consumers may want to ensure that their money goes to the trademark holder and not to another entity, in which case a statement or disclaimer as to authorization may be important.

<sup>228</sup> See, e.g., *Int'l Order of Job's Daughters v. Lindeburg & Co.*, 633 F.2d 912, 918 (9th Cir. 1980) (“We commonly identify ourselves by displaying emblems expressing allegiances. Our jewelry, clothing, and cars are emblazoned with inscriptions showing the organizations we belong to, the schools we attend, the landmarks we have visited, the sports teams we support, the beverages we imbibe. Although these inscriptions frequently include names and emblems that are also used as collective marks or trademarks, it would be naive to conclude that the name or emblem is desired because consumers believe that the product somehow originated with or was sponsored by the organization the name or emblem signifies.”). But see, e.g., *Univ. of Pittsburgh v. Champion Prods., Inc.*, 686 F.2d 1040, 1049 (3d Cir. 1982) (“[W]hatever the ultimate scope of protection afforded, the crucial element is consumer desire to associate with the entity whose imprint is reproduced. This desire is based on success or notoriety which, in turn, is a result of the efforts of that entity.”).

<sup>229</sup> *Gibson Guitar Corp. v. Paul Reed Smith Guitars, LP*, 423 F.3d 539, 549 (6th Cir. 2005).



Oil—which uses a flying horse as its logo—and a company called Pegasus Petroleum, the Second Circuit found it relevant to the confusion determination that even though third parties would ultimately know which party they were dealing with by the time a sale was concluded, “Pegasus Petroleum would gain crucial credibility during the initial phases of a deal . . . because of the possibility that Pegasus Petroleum is related to Mobil.”<sup>230</sup>

As with the comparative trade dress example discussed earlier,<sup>231</sup> autonomy considerations help distinguish uses that are properly the province of trademark law from those that are for the consumer to negotiate. To the extent the defendant is using the mark for its source-identifying function (e.g., to tell the customer that the plaintiff's product is available when it is not), this use interferes with consumer autonomy much as do false or misleading facts and is thus properly regulated by trademark law.<sup>232</sup> But to the extent that the defendant is using the plaintiff's mark for its persuasive value—either as a lure to attract consumers, with the hope that the consumers will, once attracted, choose the defendant's product instead, or to provide relevant information about the plaintiff (e.g., a trademark used as a keyword in a search engine)—that use seems consistent with the consumer's autonomy interest. When the mark is used for persuasion, the consumer is not being misled by the defendant's activity since the plaintiff's product is available. She is therefore merely deciding whether the goodwill bound up in the plaintiff's mark is persuasive enough to lure her in and keep her attention. For example, a supermarket that advertises “Icy Cold Coca-Cola Inside!” when all that is offered is the store-brand cola

<sup>230</sup> Mobil Oil Corp. v. Pegasus Petroleum Corp., 818 F.2d 254, 259 (2d Cir. 1987).

<sup>231</sup> See *supra* notes 219–21 and accompanying text.

<sup>232</sup> The FTC also characterizes this activity (the classic bait-and-switch) as an unfair trade practice. See 16 C.F.R. § 424.1 (2008) (deeming it unfair trade practice for retail food store “to offer any [grocery] products for sale at a stated price, by means of an advertisement disseminated in an area served by any stores which are covered by the advertisement, if those stores do not have the advertised products in stock and readily available to customers during the effective period of the advertisement, unless the advertisement clearly and adequately discloses that supplies of the advertised products are limited or the advertised products are available only at some outlets”); *id.* § 424.2 (finding no violation if “[t]he advertised products were ordered in adequate time for delivery in quantities sufficient to meet reasonably anticipated demand,” or retailer offers raincheck, similar product at comparable price reduction, or other compensation).

(with the hope that consumers, once inside, will take a second-best offering to avoid having to renew their search) is autonomy-interfering; a supermarket that places the same sign outside when both Coca-Cola and the store-brand cola are offered (with the hope that consumers, once inside, will decide they prefer the cheaper soft drink) is autonomy-enhancing.<sup>233</sup> Transferring this example to the online search engine context yields the same result: The use of a trademark to trigger a list of search results that includes not only the trademark owner's site but also other sites that may be of interest to the consumer is consistent with autonomous choice and thus should be outside the reach of trademark law.<sup>234</sup>

Thus, in each of these areas of trademark law, a consideration of the consumer's First Amendment-based autonomy interests can help determine the appropriate role of trademark law. Where the defendant's use of the plaintiff's mark is the equivalent of a false statement of fact—relying on the source-identifying aspects of the mark—trademark law's role is properly robust. But where the defendant is exploiting the persuasive aspects of the plaintiff's mark (the aspect of the mark that attempts to tell the consumer why the product is desirable), vigorously applied trademark law will deprive the consumer of the ability to engage with the mark on her own terms, to make her own associations with the mark, and to decide for herself whether she believes the message of quality, status, or prestige that the mark is conveying.

It is true that autonomy is not without its costs. As David Strauss notes, a theory that gives us a general principle of permissible government interference may not be helpful in resolving

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<sup>233</sup> It is, of course, a common practice for merchants to advertise a name-brand good for sale (often at a highly reduced price), hoping that consumers will fill their carts with additional merchandise once inside. See, e.g., Rajiv Lai & Carmen Matutes, *Retail Pricing and Advertising Strategies*, 67 J. BUS. 345, 346 (1994) (noting role of advertising as a "commitment device" and that "loss leaders do attract consumers into the store even if they are rational and expect to pay very high prices for unadvertised goods").

<sup>234</sup> Judge Berzon's concurrence in *Playboy Enterprises International, Inc. v. Netscape Communications Corp.*, a keyed Internet advertisement case, speaks to this point. See 354 F.3d 1020, 1035 (9th Cir. 2004) (Berzon, J., concurring) ("There is a big difference between hijacking a customer to another website by making the customer think he or she is visiting the trademark holder's website (even if only briefly) . . . and just distracting a potential customer with another choice, when it is clear that it is a choice.").

any particular case because it takes too “thin” a view of how individuals reason in any particular situation.<sup>235</sup> Consumers are not always capable of making rational judgments about how to engage with trademarks in the marketplace, and so, by definition, an ascriptive view of the consumer holds some consumers to a higher standard than they can meet in practice. As a result, some consumers will experience higher psychic and economic costs of participation in the marketplace. This is particularly incongruous for an area of the law that relies heavily on surveys to determine consumer reaction to trademarks, and so purports to care at least somewhat about what individuals actually think.<sup>236</sup> But the law is no stranger to this phenomenon, as the First Amendment cases and tort law’s “reasonable person” standard demonstrate.<sup>237</sup> And trademark law is no exception, given that not all confusion can be remedied. Today’s consumers have an increasing number of ways to research products before they buy them, along with multiple avenues for expressing their opinions about their experiences with the products.<sup>238</sup> There is therefore nothing inherently wrong with the law reflecting an expectation that consumers will avail themselves of these opportunities; indeed, there can be a benefit to the law’s setting norms rather than merely reflecting them, so long as we believe those norms rest on appropriate foundations.<sup>239</sup> As

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<sup>235</sup> Strauss, *supra* note 55, at 370.

<sup>236</sup> See Sandra Edelman, *Failure to Conduct a Survey in Trademark Infringement Cases: A Critique of the Adverse Inference*, 90 TRADEMARK REP. 746, 747 (2000) (“[S]urvey evidence has become de rigueur in trademark infringement cases.”).

<sup>237</sup> See *supra* Part II.B.

<sup>238</sup> See, e.g., Rob Walker, *The Brand Underground*, N.Y. TIMES, July 30, 2006, § 6 (Magazine), at 29, 31 (“It is often said that this generation of teenagers and 20-somethings is the most savvy one ever in its ability to critique and understand commercial persuasion, and it is probably true — just as it was true when the same thing was said of Generation X and of the baby boomers before that.”). See generally Eric Goldman, *Online Word of Mouth and Its Implications for Trademark Law*, in TRADEMARK LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH, *supra* note 144, at 404 (discussing effect of online reviews and “online word of mouth” on consumer perceptions).

<sup>239</sup> See Beebe, *supra* note 5, at 2068 (“As currently understood, trademark law is a primarily descriptive enterprise, one which seeks simply to insure that market information is accurately conveyed and comprehended. . . . The law commands that courts assess whether or not consumers are actually confused, not whether or not they *should* be confused.”); Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or Fait Accompli?*, 54 EMORY L.J. 461, 487 (2005) (“The real underlying issue is whether the trademark law should act . . . as a *creator* or as a *reflector* of societal norms.”).

Julie Cohen theorized, albeit in a different context: “Autonomous individuals do not spring full-blown from the womb. We must learn to process information and to draw our own conclusions about the world around us. We must learn to choose, and must learn something before we can choose anything.”<sup>240</sup> Allowing the consumer to engage with trademarks’ various associations without interference from trademark law is a necessary part of this learning process.

As with the discussion of the First Amendment cases above,<sup>241</sup> my goal here is modest. It is not to suggest that consideration of the consumer as an autonomous being answers every trademark question, that the autonomy interest is as robust as in the First Amendment cases,<sup>242</sup> or even that the autonomy interest might not be outweighed by other, more important interests. Rather, my goal is to demonstrate that consumer autonomy has been an underappreciated interest to date and that trademark doctrine would do well to recognize it.

#### IV. CONCLUSION

In many areas of intellectual property law, commentators have identified the importance of focusing on the recipients of information—readers, viewers, and listeners—as equal to speakers in their role as participants in the making of meaning.<sup>243</sup> The

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<sup>240</sup> Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1424 (2000) (advocating “zone of relative insulation from outside scrutiny and interference” (i.e., data privacy) to allow development of autonomy).

<sup>241</sup> See *supra* Part II.B.

<sup>242</sup> Cf. Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1526 (1997) (reviewing FISS, *supra* note 51, and distinguishing “democratic citizens” from consumers on ground that democratic citizens actively participate in agenda-setting and framing issues for decision).

<sup>243</sup> See, e.g., Beebe, *supra* note 5, at 2059 (describing cultural populist commentary in trademark law as “committed to the view that the consumer is active and critical, both in search and preference formation”); Litman, *supra* note 178, at 1910 (noting that interaction with copyrighted works is important right of readers); Madow, *supra* note 177, at 139 (describing “cultural populist” conception of popular culture as view that consumers “neither uniformly receive nor uncritically accept the ‘preferred meanings’ that are generated and circulated by the culture industry” (footnote omitted)); cf. *Pleasant Grove City, Utah v. Summum*, No. 07-665, slip op. at 12 (U.S. Feb. 25, 2009) (“Even when a monument features the written word, the monument may be intended to be interpreted, and may in fact be

consumer is not simply someone with the ability to repurpose speech but is also someone who contributes to determining first purposes. The attention commentators have paid in recent years to the importance of the public domain in copyright law is borne of a recognition of the value of allowing consumers of creative expression to develop meaning and construct their identities. This engagement, in trademark law as in the other fields, is a critical part of personal development. Our choices as to what we read, listen to, and purchase help to create our identities, define ourselves to the world, and develop our critical faculties.<sup>244</sup> In this respect, trademark law is no less worthy a candidate for a First Amendment theory of the consumer than is copyright law, religious observance, or political speech.

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interpreted by observers, in a variety of ways.”).

<sup>244</sup> Cf. Brown, *supra* note 5, at 1198 (“In trade symbol cases, the unwary purchaser is scarcely a worthy object for judicial solicitude. . . . The figure of the unwary, casual, incautious, unsuspecting purchaser suggests conclusions which those who favor him could scarcely confess: that people are not very bright, and that a good deal of persuasion cancels out, leaving consumers (bright or not) indifferent as to either origin or advertising of many goods.” (footnote omitted)); Dreyfuss, *supra* note 144, at 292 (“[D]esigning [trademark] law to protect the reasonable consumer would encourage individuals to develop their facilities.”); Redish, *supra* note 59, at 439 (“[I]f the individual’s intellectual growth is dependent upon an opportunity to participate actively in decisions that significantly affect him, what decisions affect him more directly than those which he must make concerning matters within the private sector of his life?”); Smolla, *supra* note 146, at 786 (“In an open society there is always pressure to believe that money and material will give life meaning. . . . The very openness, however, that . . . encourages advertisers to try to make us all materialists[ ] will also give free wheel to the intellectual and entrepreneurial imaginations that hold the best promise for genuinely uplifting our quality of life.”).