

February 2003

You Can't Ask (or Say) That: The First Amendment and Civil Rights Restrictions on Decisionmaker Speech

Helen Norton

Follow this and additional works at: <https://scholarship.law.wm.edu/wmborj>



Part of the [Civil Rights and Discrimination Commons](#)

Repository Citation

Helen Norton, *You Can't Ask (or Say) That: The First Amendment and Civil Rights Restrictions on Decisionmaker Speech*, 11 Wm. & Mary Bill Rts. J. 727 (2003), <https://scholarship.law.wm.edu/wmborj/vol11/iss2/9>

YOU CAN'T ASK (OR SAY) THAT: THE FIRST AMENDMENT AND CIVIL RIGHTS RESTRICTIONS ON DECISIONMAKER SPEECH

Helen Norton*

Federal, state, and local civil rights laws regulate private decisionmaking about whom an employer may hire or fire, to whom a landlord may rent an apartment, or to whom a creditor may extend credit. In prohibiting discriminatory conduct, however, these laws also limit the speech of those making these decisions. In this Article, Professor Norton explores how we might think about these civil rights laws in the context of the First Amendment, and their place within the Supreme Court's commercial speech jurisprudence. She concludes that the speech restricted by these laws may be characterized as falling outside the protection of the First Amendment, and that such laws, when crafted properly, may accommodate both free speech and antidiscrimination values.

* * *

Federal, state, and local civil rights laws focus primarily on prohibiting discriminatory conduct — that is, discriminatory decisions or other actions by employers, landlords, lenders, and others with the power to control access to important opportunities. Regulated actions include decisions about hiring, promoting, compensating, or firing employees, as well as determinations about to whom to sell or rent a home or apartment, or whether to extend credit.

Many of these antidiscrimination statutes, however, also limit decisionmaker¹ speech in one or both of two ways: (1) by prohibiting queries soliciting information about applicants' disability status, sexual orientation, marital status, or other protected characteristics; and (2) by proscribing discriminatory advertisements or other expressions of discriminatory preference for applicants based on race, sex, age, sexual orientation, or other protected characteristics.

Depending on the jurisdiction, forbidden communications might include the

* Visiting Assistant Professor of Law, University of Maryland School of Law; B.A. Stanford University; J.D., Boalt Hall School of Law, University of California at Berkeley. Special thanks to the University of Maryland School of Law for its generous financial support for this research. I am also deeply grateful to Joanne Husted, John Malloy, Julie Gantz, Michael Maurer, Aaron Schuham, Chris Anders, and the participants in a University of Maryland faculty workshop for their insight, and to Lauren Epke for her research assistance.

¹ I use "decisionmakers" as shorthand for employers, landlords, lenders, and others with the authority to decide among applicants for employment, housing, credit, and other opportunities.

following questions and statements:

- "Do you have AIDS?"²
- "I believe that cohabiting outside of marriage is immoral and I prefer not to rent to unmarried couples."³
- "What current or past medical conditions might limit your ability to do a job?"⁴
- "I believe that homosexuality is sinful and I will not hire gay men or lesbians."⁵
- "Are you single or married?"⁶
- "Do you take any prescription drugs and, if so, what are they?"⁷

In enacting these restrictions on decisionmaker speech, legislatures seek to facilitate antidiscrimination enforcement, giving life to the promise of equal opportunity for all. At the same time, these laws ban certain questions and statements based on their content, thus limiting some exchange of factual information and sincerely held religious and political opinions.

Except for a few cases involving discriminatory advertisements,⁸ these provisions' free speech implications have received relatively little attention to date.⁹

² See *Doe v. Kohn Nast & Graf, P.C.*, 866 F. Supp. 190, 197 (E.D. Pa. 1994) (discussing Americans with Disabilities Act prohibitions on disability-related inquiries).

³ See *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 710–11 (9th Cir. 1999) (discussing Alaska's prohibitions on landlord statements of discriminatory preference based on marital status), *vacated*, 220 F.3d 1134 (9th Cir. 2000), *cert. denied*, 531 U.S. 1143 (2001).

⁴ See *EEOC v. Wal-Mart Stores, Inc.*, 11 F. Supp. 2d 1313, 1317 (D.N.M. 1998) (discussing ADA prohibitions on disability-related inquiries).

⁵ See *Hyman v. City of Louisville*, 132 F. Supp. 2d 528, 532 (W.D. Ky. 2001) (discussing a Louisville ordinance prohibiting employer statements of discriminatory preference on basis of sexual orientation), *vacated*, 53 Fed. App. 740 (6th Cir. 2002).

⁶ See Regulation B (Equal Credit Opportunity), 12 C.F.R. § 202.5(d)(1) (2002) (prohibiting inquiries into loan applicants' marital status).

⁷ See *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1229 (10th Cir. 1997) (discussing ADA prohibition on disability-related inquiries).

⁸ E.g., *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (addressing complaint that newspaper advertising system discriminated on the basis of gender).

⁹ See Robert G. Schwemm, *Discriminatory Housing Statements and Section 3604c: A New Look at the Fair Housing Act's Most Intriguing Provision*, 29 *FORDHAM URB. L.J.* 187, 191 (2001) (noting that the Fair Housing Act's "ban on discriminatory statements has not been the subject of much litigation or debate"); Tung Yin, *How the Americans with Disabilities Act's Prohibition on Pre-Employment-Offer Disability-Related Questions Violates the First Amendment*, 17 *LAB. LAW.* 107, 108 (2001) ("Curiously, while scholars have endlessly debated whether Title VII's prohibition on sexually harassing speech violates the First Amendment, remarkably little has been said about the ADA's prohibition on the asking of disability-related questions.").

Recent litigation and commentary, however, indicate some new interest in this issue.¹⁰

This Article explores how we might think about these laws for First Amendment purposes. Part I outlines the range of civil rights restrictions on decisionmaker speech, while Part II identifies the antidiscrimination and privacy concerns that drive their enactment. Part III explores in some detail whether — and, if so, how — these civil rights laws fit within the Court's current commercial speech jurisprudence, focusing on that doctrine's mandate that commercial speech is constitutionally valuable only when it accurately informs its recipients' choices among lawful activities. I conclude that the restricted speech is most appropriately characterized as unprotected commercial expression because it skews, rather than educates, such choices by facilitating illegal discrimination and deterring applicants from pursuing important opportunities.

Because commercial speech doctrine is currently the subject of controversy and thus may be subject to change, Part IV goes on to assess other potential First Amendment approaches to this problem. In this exercise, I pose a series of queries assessing the fit of decisionmaker speech at various points along the continuum of First Amendment protections: Is decisionmaker speech unprotected because it is more like discriminatory conduct than expression? If it is speech, is its value nevertheless sufficiently low to warrant something less than full protection? If it is fully protected expression, does the government's regulation of it nonetheless survive strict scrutiny?

These questions illustrate various approaches to describing the relationship between speech and harms that the government has an interest in addressing. The answers, both descriptive and normative, are far from clear (and indeed, the discussion illustrates the uncertainty and complexity of First Amendment doctrine). Nonetheless, the Article concludes that civil rights restrictions on decisionmaker speech, when properly crafted, appropriately accommodate both free speech and antidiscrimination values because they address those limited contexts in which expression is so closely tied to discriminatory conduct to justify its regulation.

¹⁰ See, e.g., *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 702–03 (9th Cir. 1999) (evaluating landlords' challenge to Alaska's housing law prohibiting certain inquiries into and statements about prospective tenants' marital status as a violation, *inter alia*, of free speech rights), *vacated*, 220 F.3d 1134 (9th Cir. 2000), *cert. denied*, 531 U.S. 1143 (2001); *Hyman v. City of Louisville*, 132 F. Supp. 2d 528, 532 (W.D. Ky. 2001) (assessing employer challenge to Louisville's ordinance prohibiting inquiries into and statements about job applicants' sexual orientation as a violation, *inter alia*, of free speech rights), *vacated*, 53 Fed. App. 740 (6th Cir. 2002); Yin, *supra* note 9, at 109 (concluding that "there is a real likelihood" that the ADA prohibition on disability-related inquiries violates the First Amendment).

I. CIVIL RIGHTS RESTRICTIONS ON DECISIONMAKER SPEECH

Antidiscrimination laws frequently bar employers, landlords, lenders, and other decisionmakers from making certain inquiries and statements while interviewing applicants or otherwise communicating about available opportunities. This Article focuses on fairly commonplace civil rights provisions that take one or both of two forms: bans of queries about applicants' protected class status; and prohibitions on discriminatory statements, advertisements, or other expressions of discriminatory preference for applicants of a certain race, sex, sexual orientation, etc.¹¹

A. Prohibiting Certain Decisionmaker Inquiries

Many federal, state, and local antidiscrimination laws limit decisionmaker questions that would elicit information about an applicant's disability, sexual orientation, age, or other protected class characteristics.¹² For example, the Americans with Disabilities Act (ADA) includes a series of prohibitions on disability-related inquiries at various stages in the employment process.¹³ First,

¹¹ While these restrictions most often regulate interviews of, and discussions with, applicants about available opportunities, they sometimes also govern ongoing relationships, such as the ADA's additional limits on employers' disability-related inquiries of incumbent employees. 42 U.S.C. § 12112(d)(4)(A) (2000); *see also* CAL. GOV'T. CODE § 12940(d) (West Supp. 2003) (protecting both applicants and current employees from certain employer inquiries).

¹² The scope of a jurisdiction's antidiscrimination laws determines the subject matter of prohibited inquiries and statements. This scope varies considerably from jurisdiction to jurisdiction. Federal law, for example, does not prohibit sexual orientation discrimination in employment, but some states and localities do. *E.g.*, CAL. GOV'T CODE § 12940(d) (West Supp. 2003); MASS. GEN. LAWS. ANN. ch. 151B, § 4(3) (West Supp. 2003).

¹³ 42 U.S.C. § 12112(d) (2000). A disability-related inquiry "is a question (or series of questions) that is likely to elicit information about a disability." Equal Employment Opportunity Comm'n (EEOC), Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA) (July 27, 2000), at *3, 2000 WL 334077181. According to the EEOC, the agency charged with enforcing ADA prohibitions, disability-related inquiries may include: "asking an employee whether s/he has (or ever had) a disability or how s/he became disabled or inquiring about the nature or severity of an employee's disability"; "asking about an employee's genetic information"; "asking about an employee's prior workers' compensation history"; and "asking an employee whether s/he currently is taking any prescription drugs or medications, whether s/he has taken any such drugs or medications in the past, or monitoring an employee's taking of such drugs or medications." *Id.* The EEOC identifies permissible questions to include "asking generally about an employee's well-being (e.g., How are you?); "asking an employee who looks tired or ill if s/he is feeling okay"; "asking an employee who is sneezing or coughing whether s/he has a cold or allergies"; "asking how an employee is doing following the death of a loved one or the end of a marriage/relationship"; and "asking a pregnant employee how she is feeling or when her

before an offer of employment, the ADA forbids any inquiry "as to whether such applicant is an individual with a disability or as to the nature or severity of such disability."¹⁴ Next, after an applicant receives a conditional job offer but before she begins work, she may be posed disability-related inquiries regardless of their job-relatedness, so long as the employer makes the same inquiries of all new employees in the same job category.¹⁵ Finally, after an employee has started work, an employer may pose only those disability-related inquiries that are "job-related and consistent with business necessity."¹⁶

A wide range of questions are similarly forbidden under the Equal Credit Opportunity Act's regulations implementing the Act's prohibitions on lending discrimination:¹⁷ "A creditor shall not inquire about the race, color, religion, or national origin of an applicant or any other person in connection with a credit transaction."¹⁸ Title VII's prohibitions on sex discrimination in employment have also been interpreted by the Equal Employment Opportunity Commission to bar certain employer inquiries: "Any pre-employment inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification, or discrimination as to sex shall be unlawful unless based upon a bona fide occupational qualification."¹⁹ "You're not pregnant, are you?" — when asked by an employer of a job applicant — exemplifies a question likely prohibited under this regulation.²⁰

baby is due." *Id.* at *3–*4.

¹⁴ 42 U.S.C. § 12112(d)(2) (2000). But "[a] covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions." *Id.* As the regulations explain further, "[a] covered entity may make pre-employment inquiries into the ability of an applicant to perform job-related functions, and/or may ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions." 29 C.F.R. § 1630.14 (2002).

¹⁵ 42 U.S.C. § 12112(d)(3) (2000); 29 C.F.R. § 1630.4(b) (2002). An individual's conditional offer may then be rescinded only when the exclusion is job-related and consistent with business necessity. 42 U.S.C. § 12112(b)(6) (2000); 29 C.F.R. §§ 1630.10, 1630.14(b)(3) (2002).

¹⁶ 42 U.S.C. § 12112(d)(4)(A) (2000). Title IX's regulations include similar prohibitions. *See* 34 C.F.R. § 106.21(c)(4) (2002) (stating that educational institutions that receive federal financial assistance "shall not make pre-admission inquiries as to the marital status of an applicant for admission"); 34 C.F.R. § 106.60(a) (2002) (stating that covered institutions "shall not make pre-employment inquiries as to marital status").

¹⁷ 15 U.S.C. §§ 1691–1691f (2000).

¹⁸ 12 C.F.R. § 202.5(d)(5) (2002); *see also* 12 C.F.R. § 202.5(d)(1) (2002) (prohibiting inquiries into the marital status of applicants for certain types of credit); 12 C.F.R. § 202.5(d)(3) (2002) (prohibiting inquiries into applicants' sex); 12 C.F.R. § 202.5(d)(4) (2002) (prohibiting inquiries into applicants' "birth control practices, intentions concerning the bearing or rearing of children, or capability to bear children").

¹⁹ 29 C.F.R. § 1604.7 (2002).

²⁰ *See King v. Trans World Airlines, Inc.*, 738 F.2d 255, 258 n.2 (8th Cir. 1984)

Many state and local antidiscrimination laws include similar provisions. For example, California's Fair Employment Practices Act, which prohibits job discrimination on a wide range of bases, includes a ban on certain employer questions about applicants' and incumbent employees' sexual orientation, marital status, and other protected characteristics.²¹ In Alaska, landlords and real estate agents may not "make a written or oral inquiry or record of the sex, marital status, changes in marital status, race, religion, physical or mental disability, color, or national origin of a person seeking to buy, lease, or rent real property."²² Colorado, Louisiana, Maine, Massachusetts, and Nebraska are among those states with parallel restrictions.²³

B. Prohibiting Certain Decisionmaker Statements, Advertisements, and Other Expressions of Discriminatory Preference

Many civil rights laws also bar decisionmakers from making discriminatory statements or expressing discriminatory preferences in advertisements or other communications about available opportunities. For example, the Fair Housing Act makes unlawful "any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin"²⁴ Title VII of the Civil Rights Act of 1964²⁵ and the Age Discrimination in

("[Q]uestions about pregnancy and childbearing would be unlawful per se [under Title VII] in the absence of a bona fide occupational qualification.").

²¹ CAL. GOV'T. CODE § 12940(d) (West Supp. 2003).

²² ALASKA STAT. § 18.80.240(3) (Michie 2002).

²³ COLO. REV. STAT. § 24-34-502 (1)(a) (2002); LA. REV. STAT. ANN. § 46:2254(F)(3) (West 1999); ME. REV. STAT. ANN. tit. 5, § 4582 (West 2002); MASS. GEN. LAWS ANN. ch. 151B, § 4(3) (West Supp. 2003); NEB. REV. STAT. § 20-318(5) (1997).

²⁴ 42 U.S.C. § 3604(c) (2000). In a separate provision, the Fair Housing Act outlaws efforts "to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of" his or her fair housing rights. 42 U.S.C. § 3617 (2000). This provision's occasional use to challenge private homeowners' litigation to enforce zoning laws or private restrictive covenants against group homes raises right-to-petition issues that are beyond the scope of this Article. For further discussion, see, e.g., *United States v. Wagner*, 940 F. Supp. 972 (N.D. Tex. 1996); David K. Godschalk, *Protected Petitioning or Unlawful Retaliation? The Limits of First Amendment Immunity for Lawsuits under the Fair Housing Act*, 27 PEPP. L. REV. 477 (2000); Michael P. Seng, *Hate Speech and Enforcement of the Fair Housing Laws*, 29 J. MARSHALL L. REV. 409 (1996).

²⁵ 42 U.S.C. § 2000e-3(b) (2000) (making it unlawful "to print or publish or cause to be printed or published any notice or advertisement . . . indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin"). Title IX's regulations include similar prohibitions. See 34 C.F.R. § 106.59 (2002) (stating that educational institutions receiving federal financial assistance "shall not in any advertising related to employment indicate preference, limitation, specification, or discrimination based

Employment Act²⁶ ban job advertisements and other employer statements that indicate a preference against candidates based on protected class membership. The Equal Credit Opportunity Act's regulations forbid creditors from making similar statements with respect to loan applicants.²⁷

A number of states and localities have followed suit. For example, the City of New York bars real estate brokers and dealers from "refer[ring] to race, color, religion, or ethnic background in any advertisement offering or seeking real property for purchase, sale, or rental."²⁸ Louisville, Kentucky prohibits employers from, among other things, publishing any employment "notice or advertisement" indicating "a preference, limitation, specification, or discrimination" for applicants or employees based on gender identity or sexual orientation.²⁹ Alaska, Idaho, Maryland, Michigan, Virginia, and the District of Columbia are among the jurisdictions with similar provisions.³⁰

on sex unless sex is a bona-fide occupational qualification for the particular job in question"). So do the regulations implementing Executive Order No. 11,246, which prohibits job discrimination by federal contractors. *See* 41 C.F.R. 60-20.2(b) (2002) (stating that federal contractors' job advertisements "must not express a sex preference unless sex is a bona fide occupational qualification for the job").

²⁶ 29 U.S.C. § 623(e) (2000):

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

²⁷ 12 C.F.R. § 202.5(a) (2002) ("A creditor shall not make any oral or written statement, in advertising or otherwise, to applicants or prospective applicants that would discourage on a prohibited basis a reasonable person from making or pursuing an application.").

²⁸ NEW YORK CITY, N.Y., ADMIN. CODE § 8-203(2)(b) (West, WESTLAW through 2002 ordinances).

²⁹ LOUISVILLE, KY., CODE OF ORDINANCES § 98.06(E) (2002).

³⁰ ALASKA STAT. § 18.80.240(7) (Michie 2002) (prohibiting any notices, statements, or advertisements indicating a preference for housing applicants based on a range of protected characteristics); D.C. CODE ANN. § 2-1402.21 (2001) (prohibiting any notices, statements, or advertisements indicating a preference for housing applicants based on a range of protected characteristics); IDAHO CODE § 67-5909(4) (Michie 2001) (forbidding any notices or advertisements indicating a preference for job applicants based on handicap); MD. ANN. CODE art. 49B, § 22(a)(3) (Supp. 2002) (prohibiting notices, advertisements, or statements indicating a preference for housing applicants based on a range of characteristics); MICH. COMP. LAWS ANN. § 37.2402(d) (West 2001) (prohibiting educational institutions from "print[ing] or publish[ing] or caus[ing] to be printed or published a catalog, notice, or advertisement indicating a preference, limitation, specification, or discrimination based on religion, race, color, national origin, or sex of an applicant for admission"); VA. CODE ANN. § 36-96.3(A)(3) (Michie 1996) (prohibiting notices, statements, or advertisements indicating

II. THE GOVERNMENT'S INTEREST IN RESTRICTING DECISIONMAKER SPEECH

At least three concerns drive the enactment of these laws.³¹ First, information elicited by certain questions may facilitate discriminatory decisionmaking. Second, these decisionmaker questions and statements may deter individual applicants from continuing to pursue important opportunities. Third, some decisionmaker queries threaten to invade individual privacy.

A. Prohibiting Speech That Facilitates Discriminatory Decisionmaking

When limiting inquiries into individuals' protected characteristics, legislatures and enforcement agencies have concluded that this information might otherwise fuel discriminatory — and thus illegal — decisions about job, housing, or credit opportunities. For example, Congress observed the following in explaining the ADA's prohibitions on employers' disability-related queries:

Historically, employment application forms and employment interviews

a preference for housing applicants based on a range of characteristics).

³¹ Robert Schwemm identifies "preventing psychic pain" as an additional purpose of prohibitions on discriminatory statements. Schwemm, *supra* note 9, at 251–52. I agree that such speech often causes real pain to its listeners. That certain speech may be distressing or offensive to its listeners, however, is generally an insufficient justification for regulating expression under the First Amendment. *See, e.g., Texas v. Johnson*, 491 U.S. 397 (1989) (holding that the First Amendment does not permit a state to prohibit flag-burning even though it is offensive to many); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977) (noting that offensiveness is "classically not [a justification] validating the suppression of expression protected by the First Amendment"); *Cohen v. California*, 403 U.S. 15 (1971) (holding that profanity is protected under the First Amendment despite its offensiveness to many); *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 29 n.2 (questioning "whether Congress intended [Fair Housing Act section 3604c] to confer a legal right on all individuals to be free from indignation and distress"). This Article does not explore alleviating this pain as a primary purpose underlying these restrictions.

Charles Lawrence, however, offers a particularly powerful example of this concern when recalling a Southern restaurant in the 1960s that continued to maintain entrances marked "white" and "colored" even after Title II of the Civil Rights Act of 1964 made separate entrances to such public accommodations illegal. When challenged, the owner "responded, 'People can come in this place through any door they want to.' What this story makes apparent is that the signs themselves constitute an injury that violates the anti-discrimination principle even when the conduct of denial of access is not present." Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 442 n.50. To the extent that such signs deter African-Americans from patronizing the restaurant, their prohibition serves the purposes discussed *infra* at notes 41–49 and accompanying text. But Lawrence suggests that the signs trigger an additional harm regardless of their deterrent effect: sending a painful and damaging message of racial exclusion to its readers.

requested information concerning an applicant's physical or mental condition. This information was often used to exclude applicants with disabilities — particularly those with so-called hidden disabilities, such as epilepsy, diabetes, emotional illness, heart disease, and cancer — before their ability to perform the job was ever evaluated.³²

Congress thus intended that the ADA's framework for barring disability-related inquiries help "assure that misconceptions do not bias the employment selection process."³³

Courts, too, have noted the connection between the information elicited by an employer's disability-related queries and its discriminatory actions. As one district court observed: "[I]t is reasonable to infer from the testimony presented at trial that the asking of the question ["What current or past medical conditions might limit your ability to do a job?"] set off a chain of events that ultimately led to Wal-Mart's discriminatory conduct of refusing to hire [the plaintiff]."³⁴ In another case, the plaintiff's job application was rejected in violation of the ADA after a former employer shared information about her history of back injuries.³⁵

By depriving decisionmakers of the ability to elicit facts that could inform discriminatory actions, restrictions on these front-end communications help prevent discrimination *before* it happens. These provisions may thus be more effective in ensuring truly equal opportunity than after-the-fact litigation.³⁶ Not only is litigation too often slow and costly, it also often has limited value in uncovering and redressing discriminatory selection practices — for example, hiring in employment cases or deciding among competing applicants for a house or apartment.

These limitations are largely due to plaintiffs' lack of access to comparative

³² H.R. REP. NO. 101-485, pt. 2, at 72 (1990).

³³ *Id.* The EEOC further explained that the ADA's prohibition on pre-employment inquiries "helps ensure that an applicant's possible hidden disability (including a prior history of a disability) is not considered before the employer evaluates an applicant's non-medical qualifications." EEOC, ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (Oct. 10, 1995) [hereinafter EEOC, Preemployment Guidance], at *1, 1995 WL 1789073.

³⁴ EEOC v. Wal-Mart Stores, Inc., 11 F. Supp. 2d 1313, 1328 (D.N.M. 1998), *aff'd*, 202 F.3d 281 (10th Cir. 1999).

³⁵ *Cossette v. Minn. Power & Light*, 188 F. 3d 964, 967 (8th Cir. 1999).

³⁶ ADA plaintiffs are particularly unlikely to achieve success through after-the-fact litigation. For example, the American Bar Association's annual survey of ADA employment cases found that in 2001, employers prevailed in 95.7 percent of the federal court cases that reached the merits of claims by workers or job applicants. Amy L. Albright, 2001 *Employment Decisions Under the ADA Title I — Survey Update*, 26 *Mental & Physical Disability L. Rep.* 394, 394 (2002); see also Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 *OHIO ST. L.J.* 239 (2001); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 *HARV. C.R.-C.L. REV.* 99, 100 (1999).

evidence and other key information necessary when challenging selection practices. Applicants who are denied a new job or an apartment rarely receive a reason for their rejection and are unlikely ever to learn the successful candidate's identity. Thus they are in no position to acquire comparative information that may indicate discrimination. As the EEOC observed, "If an applicant [after having been asked disability-related inquiries prior to the ADA's enactment] was then rejected, s/he did not necessarily know whether s/he was rejected because of disability, or because of insufficient skills or experience or a bad report from a reference."³⁷ In contrast, an incumbent employee who is discharged or denied a promotion is more often in a position to identify who received disparately favorable treatment.

Indeed, a great deal of discrimination evades redress due to the challenges faced by plaintiffs alleging discriminatory selection practices. As Michael Selmi concludes, "Most housing discrimination results from individual cases of disparate treatment in which it is often difficult for the individual to fully assess whether the treatment was discriminatory because that person lacks the necessary comparative information" and, for the same reasons, "the vast majority of [employment discrimination] claims involve allegations relating to terminations rather than claims invoking discrimination in hiring."³⁸ He goes on to note that this phenomenon "illustrates the ironies of a complaint-based [approach to civil rights enforcement], namely, that many, perhaps even a majority, of discrimination claims are missed because the discrimination occurs in the contract formation when claims are significantly less likely to be filed."³⁹

By depriving decisionmakers of the ability to elicit information that could inform discriminatory actions, restrictions on decisionmaker speech help stop discrimination before it occurs. In this manner, these laws address the practical difficulties in proving discrimination at the selection stage, thus offering a key tool in the struggle for equal opportunity.⁴⁰

³⁷ EEOC, Preemployment Guidance, *supra* note 33, at *2.

³⁸ Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1409-10 (1998).

³⁹ *Id.*; see also Ian Ayres & Peter Siegelman, *The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 TEX. L. REV. 1487, 1492 (1996) ("In the absence of an obvious motive or a relevant comparison group, potential plaintiffs have a difficult time recognizing that disparate treatment in hiring has occurred, let alone convincing a court of that fact.").

⁴⁰ Note that some statutory schemes make a different policy choice by permitting, if not requiring, decisionmakers to collect data about applicants' race, sex, and other characteristics to assess the diversity of their applicant pool and whether selection practices have an illegally disparate impact. Rather than allowing decisionmakers to note individual applicants' characteristics in a way that might inform discriminatory choices, however, these provisions are designed to facilitate the collection of aggregate information about an entire applicant pool to assess entities' equal opportunity efforts.

Different statutes take different approaches. While Equal Credit Opportunity Act

B. Prohibiting Decisionmaker Speech That Deters Opportunity Pursuit

Closely related to the concern that certain speech will facilitate discriminatory decisionmaking is the fear that such speech has the intent and/or the effect of discouraging applicants who conclude that further pursuit of an opportunity will be pointless or unwise. Because of the power imbalance between decisionmaker and applicant, generally leaving the latter unwilling to challenge the former, decisionmaker speech can be especially effective, intentionally or otherwise, in deterring opportunity pursuit.⁴¹

These antidiscrimination provisions thus remove barriers that might deflect individuals from seeking important life opportunities.⁴² As the Ninth Circuit recognized in one specific — but key — context, the ADA's restriction on

(ECOA) regulations, for example, prohibit any inquiry into applicants' race, sex, etc., in many credit transactions, they require such data collection for those loans secured by residential real estate. 12 C.F.R. § 202.13(a) (2002) (requiring creditors to request information about the applicant's race, national origin, sex, marital status, and age as part of the application). As a safeguard, however, the applicant is not *required* to supply the requested information, and must be informed that the request for information is made for the purpose of monitoring compliance with federal antidiscrimination requirements. *Id.* § 202.13(b)–(c). A number of observers have applauded this requirement, noting that ECOA's failure to provide an exception for data collection purposes for other loans may prevent the accumulation of information that is useful, and sometimes necessary, in challenging discriminatory practices. *E.g.*, Cherry v. Amoco Oil Co., 490 F. Supp. 1026, 1030 (N.D. Ga. 1980) (noting plaintiffs' great difficulty in making statistical showing of disparate impact given ECOA limitations); Scott Ilgenfritz, *The Failure of Private Actions as an ECOA Enforcement Tool: A Call for Active Governmental Enforcement and Statutory Reform*, 36 U. FLA. L. REV. 447, 459 (1984) (because of ECOA prohibitions, "virtually all ECOA plaintiffs attempting to rely on statistics to prove an effects test case will be unable to do so"). From a policy standpoint, these related antidiscrimination interests may be accommodated by allowing decisionmakers to request such information, so long as its provision by applicants is voluntary and the information is kept separate from that used for decisionmaking purposes (for example, by use of a "tear-off" sheet or follow-up letter managed by an entity's equal opportunity office that does not play a role in selection decisions).

One might also argue that decisionmakers should track individual applicants' race, gender, etc., so that protected class membership might be considered positively for diversity or other purposes. For example, the EEOC has interpreted the ADA to permit employers to invite applicants voluntarily to identify themselves as persons with disabilities if such information is used to benefit applicants through required or voluntary affirmative action programs. EEOC, Preemployment Guidance, *supra* note 33, at *2. The constitutional and policy implications of such programs are beyond the scope of this Article.

⁴¹ See *infra* notes 120–23 and accompanying text.

⁴² In the fair housing context, Robert Schwemm helpfully characterizes this statutory purpose as avoiding "market-limiting" — i.e., removing barriers that might deter individuals from seeking homes that are legally available to them. Schwemm, *supra* note 9, at 249–50.

preemployment medical inquiries and examinations "prevents employers from using HIV tests to deter HIV-positive applicants from applying."⁴³ The Sixth Circuit acknowledged a similar purpose underlying the Fair Housing Act's (FHA) prohibitions on discriminatory statements:

Without the regulation of advertisements, realtors could deter certain classes of potential tenants from seeking housing at a particular location, effectively discriminating against these classes without running afoul of the FHA's prohibition against discriminatory housing practices. Congress obviously recognized the key role housing advertisements play in potential real estate transactions and concluded that the regulations of real estate advertisements is warranted.⁴⁴

To this end, courts and enforcement agencies have interpreted these provisions to prevent individuals from being discouraged from pursuing opportunities for which they are legally entitled to compete. For example, the Second Circuit has interpreted the Fair Housing Act to prohibit "any ad that would discourage an ordinary reader of a particular race from answering it."⁴⁵

The Equal Credit Opportunity Act's regulations take a similar approach, forbidding creditors from making oral or written statements "that would discourage on a prohibited basis a reasonable person from making or pursuing [a credit] application."⁴⁶ The EEOC has followed suit with respect to restrictions on employers' speech, advising that both the language and context of challenged advertisements should be examined "to determine whether persons in the protected age group would be discouraged from applying."⁴⁷

⁴³ *Fredenburg v. Contra Costa County Dep't of Health*, 172 F.3d 1176, 1182 (9th Cir. 1999).

⁴⁴ *Hous. Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc.*, 943 F.2d 644, 652 (6th Cir. 1991); *see also United States v. Hunter*, 459 F.2d 205, 215 (4th Cir. 1972):

In combating racial discrimination in housing, Congress is not limited to prohibiting only discriminatory refusals to sell or rent. . . . [S]eeing large numbers of "white only" advertisements in one part of a city may deter non-whites from venturing to seek homes there, even if other dwellings in the same area must be sold or rented on a nondiscriminatory basis.

⁴⁵ *Ragin v. New York Times Co.*, 923 F.2d 995, 999-1000 (2d Cir. 1991).

⁴⁶ 12 C.F.R. § 202.4(b) (2002).

⁴⁷ EEOC Policy Guidance N-915.043, [1989-1991 Transfer Binder] Empl. Prac. Guide (CCH) ¶ 5212 (July 3, 1989). Note that certain decisionmaker questions can also be considered as statements of discriminatory preference. *See, e.g., Jancik v. Dep't of Hous. & Urban Dev.*, 44 F.3d 553, 554, 557 (7th Cir. 1995) (asking applicant whether he was a "white Norwegian or black Norwegian" indicated an unlawful preference based on race); *Soules v. Dep't of Hous. & Urban Dev.*, 967 F.2d 817, 824 (2d Cir. 1992) (considering whether an "ordinary listener" would interpret landlord's questions about applicant's child as suggestive

The ordinary listener's perception of a deterrent message, rather than the decisionmaker's intent when making the statement, is generally dispositive when determining whether a statement is illegal under these provisions.⁴⁸ The key to this assessment is whether the ad or other statement "suggests to an ordinary reader that a particular race is preferred or dispreferred for the [opportunity] in question," keeping in mind that the "ordinary reader" is "neither the most suspicious nor the most insensitive of our citizenry."⁴⁹

C. Prohibiting Decisionmaker Inquiries That Invade Individual Privacy

Legislatures also forbid certain decisionmaker queries in order to protect individual privacy. Congress specifically articulated this concern when discussing the ADA's ban on employers' disability-related questions:

An inquiry or medical examination that is not job-related serves no legitimate employer purpose, but simply serves to stigmatize the person with a disability. . . . While the employer might argue that it does not intend to penalize [a worker or applicant identified as having cancer], the individual with cancer may object merely to being identified, independent of the consequences. As was made abundantly clear before the Committee, being identified as disabled often carries both blatant and subtle stigma.⁵⁰

In other words, disability-related inquiries are harmful not only because

of an impermissible preference based on familial status).

⁴⁸ *Ragin*, 923 F.2d at 999 (holding that the Fair Housing Act's prohibition on discriminatory statements may be violated if either actual intent to discriminate can be shown or if the natural interpretation of advertisements by the "ordinary reader" is that they "indicate a racial preference").

⁴⁹ *Id.* at 999–1000, 1002.

⁵⁰ H.R. REP. NO. 101-485, pt. 2, at 75 (1990). John T. Nockleby explained the dangers of such stigma in a related context:

Stigmatization results from the imposition of a label that defines the marked person as deviant, flawed and undesirable. . . . The discredited characteristics become more significant when the deviant dispositions are seen as enduring and primary and thus part of the stigmatized person's identity. If the target is sufficiently stigmatized, the stigmatizer becomes incapable of dealing with the target apart from the assumption that the deviant mark is an essential part of the target's identity. . . . Labeling someone as a member of a stigmatized group ultimately serves as the basis for devaluing that person and contributes to that person's negative perception by the entire community.

John T. Nockleby, *Hate Speech in Context: The Case of Verbal Threats*, 42 BUFF. L. REV. 653, 665 (1994) (citation omitted).

decisionmakers may use the information in a discriminatory way, but also because the information extracted may be deeply private even if never used against the applicant. The individual is injured in part simply because someone else (moreover, someone in a position of power) now possesses what would otherwise be closely held personal information. These concerns are especially substantial with respect to information about a protected class characteristic that is not readily observable and may be considered particularly private — such as sexual orientation or psychiatric disability.⁵¹

The Tenth Circuit echoed these privacy concerns in holding that the ADA's prohibition on disability-related inquiries covers all job applicants regardless of their disability status:

The legislative history of the ADA indicates that Congress wished to curtail all questioning that would serve to identify and exclude persons with disabilities from consideration for employment Furthermore, Congress was also concerned with the potential stigmatizing effect of medical inquiries. . . . If we were to require individuals to make a showing of disability as part of a prima facie § 12112(d)(2) case, we would in effect be making individuals with disabilities identify themselves as disabled to prevent potential employers from inquiring whether they have a disability. Such a course makes little sense.⁵²

⁵¹ Kirke Weaver described this harm when discussing the stigmatizing effects of disclosing genetic information even when the information is not used to facilitate disability-based discrimination:

An additional psychological burden results from the societal discrimination and labelling [sic] of the individual with the genetic defect. The effects of such treatment on the psychological well-being of the individual could be devastating. Discrimination is not only a physical deprivation of equality, but also has a psychological component as well. Individuals may feel stigmatized or depressed because of their newly discovered status of being genetically abnormal.

Kirke D. Weaver, *Genetic Screening and the Right Not to Know*, 13 ISSUES L. & MED. 243, 256 (1997).

⁵² *Griffin v. Steel-tek, Inc.*, 160 F.3d 591, 594 (10th Cir. 1998). The Tenth Circuit has applied this principle to incumbent employees as well, holding that the ADA protects all workers — regardless of their disability status — from an employer's requirement that they report prescription drug use for approval by supervisors. *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1229 (10th Cir. 1997) ("It makes little sense to require an employee to demonstrate that he has a disability to prevent his employer from inquiring as to whether or not he has a disability."). However, not all lower courts agree that the ADA protects non-disabled applicants and employees from disability-related inquiries. *E.g., Armstrong v. Turner Indus., Inc.*, 141 F.3d 554 (5th Cir. 1998) (holding that an employee who was not disabled within the ADA definition was not entitled to damages for improper inquiries absent cognizable injury).

Forbidding certain decisionmaker inquiries thus accommodates the interest of individuals in avoiding coerced disclosure of deeply personal matters.⁵³

III. EVALUATING DECISIONMAKER SPEECH RESTRICTIONS UNDER COMMERCIAL SPEECH DOCTRINE

To the extent that litigators, courts, and commentators have addressed the First Amendment implications of decisionmaker speech restrictions at all, they have most often invoked commercial speech as the proper approach. Their analyses, however, have generally remained cursory. This Part explores in some detail whether — and, if so, how — these civil rights laws fit within the Supreme Court's current commercial speech doctrine.

The “modern” approach to commercial speech emerged in the mid-1970s, when the Court broke from its decades-old practice of treating such speech as completely beyond the scope of the First Amendment.⁵⁴ In *Virginia State Bd. of Pharmacy v. Virginia Citizens' Consumer Council*,⁵⁵ the Court held for the first time that commercial speech was entitled to some constitutional protection.⁵⁶ Emphasizing that the “consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate,” the Court struck down Virginia's law prohibiting pharmacists from advertising prescription drug prices.⁵⁷

The Court described the contours of the constitutional protection owed commercial speech in greater detail four years later in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.⁵⁸ The Court identified two categories of commercial speech, each receiving significantly different treatment under the First Amendment.

First, commercial speech that is false, misleading, or related to an illegal activity receives no constitutional protection and can be banned completely:

⁵³ The ADA includes separate confidentiality provisions that also address significant privacy concerns. See 42 U.S.C. § 12112(d)(1), (d)(2), (d)(3)(B), (d)(4)(C) (2000) (requiring that employers keep confidential any medical information that they lawfully acquire — e.g., information obtained by working with an employee to identify a reasonable accommodation for her disability). Although these and other confidentiality provisions are content-based speech restrictions that deserve (but may well satisfy) First Amendment scrutiny, they are beyond the scope of this Article.

⁵⁴ E.g., *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (upholding governmental ban on advertising handbills and stating that “the Constitution imposes no [free speech] restraint on government as respects purely commercial advertising”).

⁵⁵ 425 U.S. 748 (1976).

⁵⁶ *Id.*; see also *Bigelow v. Virginia*, 421 U.S. 809, 825 (1975) (finding error in lower court's assumption that advertising is entitled to no First Amendment protection).

⁵⁷ *Va. State Bd.*, 425 U.S. at 763.

⁵⁸ 447 U.S. 557 (1980).

The First Amendment's concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity.⁵⁹

Second, restrictions on all other commercial speech (that is, accurate expression unrelated to illegal activity) receive a form of intermediate scrutiny that is skeptical of their constitutionality, yet not as rigorous as the strict scrutiny applied to other content-based speech restrictions:⁶⁰

If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest . . . First, the restriction must directly advance the State interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.⁶¹

As the Court has repeatedly explained, this two-tiered approach makes clear that

⁵⁹ *Id.* at 563–64 (citations omitted); *see also* *Edenfield v. Fane*, 507 U.S. 761, 768 (1993) (“[T]he State may ban commercial expression that is fraudulent or deceptive without further justification.”); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985) (“The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading, or that proposes an illegal transaction.”) (citation omitted); Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297, 319 (1995) (“Furthermore, since the First Amendment's concern for commercial speech is based on the informational aspect of advertising, false or misleading advertising and advertising about unlawful activities are entitled to no constitutional protection.”).

⁶⁰ *See infra* notes 112, 187–214 and accompanying text; *see also* *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 388 (2002) (Breyer, J., dissenting):

[The Court] has concluded that . . . commercial speech does not warrant application of the Court's strictest speech-protective tests . . . in part because restrictions on commercial speech do not often repress individual self-expression; they rarely interfere with the functioning of democratic political processes; and they often reflect a democratically determined governmental decision to regulate a commercial venture in order to protect, for example, the consumer, the public health, individual safety, or the environment.

⁶¹ *Cent. Hudson*, 447 U.S. at 564.

the constitutional salience of commercial speech turns on its ability to facilitate its recipients' informed decisionmaking.⁶² According to the Court, commercial speech that furthers this objective is quite valuable indeed:

The listener's interest [in commercial speech] is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. . . . Commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking.⁶³

The Court's objection to government efforts "to keep people in the dark for what the government believes to be their own good"⁶⁴ thus underlies much of its commercial speech jurisprudence. As it observed when reviewing Virginia consumers' demand for accurate information about prescription drug prices, "the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance."⁶⁵ It continued:

There is, of course, an alternative to [Virginia's] 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.⁶⁶

Thus, when commercial speech serves its constitutional purpose of accurately

⁶² See, e.g., *Zauderer*, 471 U.S. at 651 ("[T]he extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides . . ."); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 14 (2000) ("The Court has been quite explicit that commercial speech should be constitutionally protected so as to safeguard the circulation of information. It has therefore focused its analysis on the need to receive information, rather than on the rights of speakers.").

⁶³ *Bates v. State Bar*, 433 U.S. 350, 364 (1977) (citations omitted).

⁶⁴ *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 497 (1995) (Stevens, J., concurring).

⁶⁵ *Va. State Bd. of Pharmacy v. Va. Citizens' Consumer Council*, 425 U.S. 748, 769 (1976).

⁶⁶ *Id.* at 770; see also *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571 (2001) ("[S]o long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating information about its products and adult customers have an interest in receiving that information.").

educating its recipients' choices among lawful activities, it is entitled to a significant degree of First Amendment protection. In contrast, commercial speech that undermines informed decisionmaking — because it is false, misleading, or concerns illegal conduct — receives no First Amendment protection.⁶⁷

A. Is Decisionmaker Speech "Commercial Speech" for First Amendment Purposes?

The discussion begins, of course, with the question of whether the decisionmaker speech limited by various civil rights laws is commercial speech at all. Speech that does "no more than propose a commercial transaction"⁶⁸ clearly constitutes core commercial expression, but the Court has also emphasized "commonsense differences" between commercial and other forms of speech.⁶⁹

The Supreme Court specifically considered whether commercial speech includes job advertisements in *Pittsburgh Press Co. v. Pittsburgh Commission on Human*

⁶⁷ As discussed *infra* at notes 134–36 and accompanying text, the Court's dichotomy has received its share of criticism. Despite its controversial nature, however, *Central Hudson* remains good law. See *Lorillard*, 533 U.S. at 554–55 (responding to petitioner's argument that the Court should abandon *Central Hudson* and instead apply strict scrutiny to commercial speech regulations: "[W]e see 'no need to break new ground. *Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for [our] decision.'") (quoting *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 184 (1999)); see also *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 366–68 (2002) (finding *Central Hudson* to be the most appropriate First Amendment test for commercial speech).

⁶⁸ *Va. State Bd.*, 425 U.S. at 762 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)).

⁶⁹ *Id.* at 771 n.24; see also *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985) ("[C]ommercial speech doctrine rests heavily on 'the common-sense distinction between speech proposing a commercial transaction . . . and other varieties of speech . . .'" (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455–56 (1978)). This can be a tricky distinction to make. The Court has repeatedly acknowledged "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993); see also *In re Primus*, 436 U.S. 412, 438 n.32 (1978) (conceding that the line between commercial and noncommercial speech "will not always be easy to draw"). As one observer has summarized:

Over the course of more than two dozen decisions since [*Virginia State Board*], the Court has not spelled out exactly what constitutes commercial speech and thus receives the "limited measure of protection" to which that expression is entitled. Rather, the Court has recited various descriptions, indicia, and disclaimers without settling upon a precise and comprehensive definition.

Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 56 (1999) (arguing that the lack of a comprehensive definition of commercial speech "represents a healthy pragmatism, not jurisprudential failure"); see also Post, *supra* note 62, at 8 ("[T]he impossibility of specifying the parameters that define the category of commercial speech has haunted its jurisprudence and scholarship.").

Relations,⁷⁰ where it held that the First Amendment did not preclude enforcement of a city antidiscrimination ordinance that prohibited a newspaper from publishing employers' sex-segregated want ads.⁷¹ After proffering a definition of commercial speech as that which does "no more than propose a commercial transaction,"⁷² the Court concluded:

None [of the ads] expresses a position on whether, as a matter of social policy, certain positions ought to be filled by members of one or the other sex, nor does any of them criticize the Ordinance or the Commission's enforcement practices. Each is no more than a proposal of possible employment. The advertisements are thus classic examples of commercial speech.⁷³

In other words, as proposals of potential employment — or, alternatively, proposals to accept applications or to open negotiations — the advertisements constituted core commercial expression.

Only a handful of lower courts have considered First Amendment challenges to restrictions on decisionmaker speech since the emergence of modern commercial speech doctrine in *Virginia State Board*. They have generally extended *Pittsburgh Press* to conclude, without much analysis, that communications involving recruitment efforts, advertising, interviews, and other negotiations constitute commercial speech because of their close relationship to job, housing, or other transactions.⁷⁴ More difficult questions arise, however, when a decisionmaker's

⁷⁰ 413 U.S. 376 (1973).

⁷¹ *Id.* at 391.

⁷² *Id.* at 385.

⁷³ *Id.* at 385. In this decision predating the emergence of modern commercial speech doctrine in *Virginia State Board*, the Court declined to decide whether commercial speech concerning lawful activity should be afforded full First Amendment value. As discussed *infra* notes 95–96 and accompanying text, the Court determined that this particular commercial speech was entitled to no constitutional protection as an advertisement of illegal activity.

⁷⁴ *E.g.*, *Nomi v. Regents for the Univ. of Minn.*, 796 F. Supp. 412, 417 (D. Minn. 1992) ("[Military job] recruiting proposes a commercial transaction; the purpose of recruiting is to reach an agreement under which services will be exchanged for compensation."), *vacated as moot*, 5 F.3d 332 (8th Cir. 1993)); *Cent. Am. Refugee Ctr.-Carecen v. City of Glen Cove*, 753 F. Supp. 437, 440 (E.D.N.Y. 1990) (holding that a city ordinance prohibiting solicitation of employment from a vehicle or by a pedestrian on a public street was a permissible regulation of commercial speech, as "conversations relating to employment constitute commercial speech"); *see also* Yin, *supra* note 9, at 115 ("[A] disability-related question during an employment interview is . . . part of the commercial transaction of employment, which consists of the employee's offer of labor in exchange for the employer's offer of compensation. . . . [A] disability-related question can be an attempt to gauge the quality of labor being offered by the applicant.").

commercial speech is combined with political or religious expression. In two relatively recent cases, courts have reached entirely different conclusions.

On one hand, in *Hyman v. City of Louisville*,⁷⁵ a district court emphasized the primarily transactional nature of job advertisements in holding that they constituted commercial speech, noting that the political or religious nature of some of the speech did not strip it of its commercial character.⁷⁶ In that case, the plaintiff employer sought to distinguish *Pittsburgh Press* in challenging Louisville's antidiscrimination ordinance, arguing that his proposed job advertisement involved not only a commercial transaction, but also that it made known his religious and moral views on sexual orientation by describing his religious beliefs regarding homosexuality and his intent to hire only heterosexual applicants.⁷⁷ The district court remained unpersuaded, concluding that "commercial speech is not worthy of broader First Amendment protection simply because it coexists with speech addressing important public issues"⁷⁸

Nothing requires [the doctor] to express his opinions in his advertisements for employment. Including Dr. Hyman's political and moral views in his "Help Wanted" advertisements does no more to turn them into political speech than "opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech." Because at their essence, Dr. Hyman's advertisements are proposals of possible employment, we hold that they constitute commercial speech.⁷⁹

For another perspective, consider *Thomas v. Anchorage Equal Rights Commission*,⁸⁰ wherein the plaintiff landlords included a free speech claim among their various challenges to an Alaskan law prohibiting housing discrimination on the basis of marital status. By a two to one margin, the Ninth Circuit panel ruled that

⁷⁵ 132 F. Supp. 2d 528, 540–41 (W.D. Ky. 2001), *vacated*, 53 Fed. App. 740 (6th Cir. 2002). Although the district court's decision was later vacated when the Sixth Circuit determined that the plaintiff employer lacked standing, I explore the opinion in some detail because it exposes one court's analysis of a topic that has generally escaped attention.

⁷⁶ *Id.* at 540–41.

⁷⁷ *Id.* at 540 & n.15.

⁷⁸ *Id.* at 541.

⁷⁹ *Id.* at 541–42 (quoting *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474–75 (1989)).

⁸⁰ 165 F.3d 692 (9th Cir. 1999), *vacated en banc*, 220 F.3d 1134 (9th Cir. 2000), *cert. denied*, 531 U.S. 1143 (2001). Although the panel's decision was later vacated on ripeness grounds by the *en banc* court because no enforcement action had been taken against the plaintiffs, I discuss this opinion at some length because it illuminates one appellate panel's thinking on this largely unexplored topic.

the plaintiffs' claim was "colorable."⁸¹

In so holding, the *Thomas* majority interpreted the Supreme Court's decisions as suggesting a quite narrow definition of commercial speech: "The Court strongly suggested that the *only* type of expression that is 'commercial' in the constitutional sense is that which does 'no more than propose a commercial transaction.'"⁸² The panel found that the landlords' planned speech (e.g., inquiries into applicants' marital status and advertisements indicating their preference for married tenants) did much more, as it also conveyed moral and religious views.⁸³ The *Thomas* panel was further inclined to view the speech as noncommercial because it ran counter to the speakers' economic interests by limiting the universe of potential renters.⁸⁴ The panel concluded that the plaintiffs had alleged a colorable claim that the ordinance unconstitutionally burdened what was primarily religious expression.⁸⁵

⁸¹ *Id.* at 711. The panel reached this conclusion as part of its determination that the plaintiffs had established a "hybridize[d]" free exercise claim under *Employment Div. v. Smith*, 494 U.S. 872 (1990). In *Smith*, the Court rejected a free exercise challenge to an Oregon law criminalizing peyote as applied to individuals who used the drug as part of a religious ceremony. The Court held that the First Amendment forbids the application of such neutral laws of general applicability to religious exercise only when free exercise rights are infringed upon along with another constitutional right. *Id.* at 880–82. The *Thomas* plaintiffs sought to trigger this so-called "hybrid rights exception," arguing that Alaska's housing statute should be subject to strict scrutiny because it burdened their free exercise as well as, *inter alia*, their free speech rights. *Thomas*, 165 F.3d at 702–12. The free exercise issues are beyond the scope of this Article, but they have been considered extensively by a number of courts and commentators. See, e.g., Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 281–84 (Alaska 1994); Jasniowski v. Rushing, 678 N.E.2d 743, 749–52 (Ill. App. Ct. 1997); Attorney Gen. v. Desilets, 636 N.E.2d 233, 237–42 (Mass. 1994); McCreedy v. Hoffius, 586 N.W.2d 723, 729–30 (Mich. 1998), *vacated in part*, 593 N.W.2d 545 (Mich. 1999) (mem.); James C. Geoly & Kevin R. Gustafson, *Religious Liberty and Fair Housing: Must A Landlord Rent Against His Conscience?*, 29 J. MARSHALL L. REV. 455 (1996) (discussing the availability of the free exercise exception to religious landlords charged with violating antidiscrimination legislation); Maureen E. Markey, *The Price of Landlords' "Free" Exercise of Religion: Tenants' Right to Discrimination-Free Housing and Privacy*, 22 FORDHAM URB. L.J. 699 (1995) (arguing against granting free exercise exceptions to religious landlords charged with violating fair housing laws).

⁸² *Thomas*, 165 F.3d at 710 (quoting *Va. State Bd. of Pharmacy v. Va. Citizens' Consumer Council*, 425 U.S. 748, 762 (1976)).

⁸³ *Id.* at 710.

⁸⁴ *Id.* at 710–11.

⁸⁵ *Id.* The dissenting judge objected to what he saw as the majority's unnecessarily limited definition of commercial speech. *Id.* at 726 (Hawkins, J., dissenting). Judge Hawkins emphasized the statute's expressly limited reach to communications with respect to the sale or rental of real property:

[A] common sense analysis strongly suggests that these anti-discrimination laws do not proscrib[e] speech beyond that directly associated with a commercial transaction — the rental of real property. . . . [T]he statutory language is

In so holding, however, the *Thomas* court failed to recognize that the Supreme Court's willingness to treat "hybrid" speech as commercial for First Amendment purposes has turned on whether the commercial and noncommercial messages are inseparable and whether other avenues remain open for the decisionmaker's noncommercial expression. That speech proposing a commercial transaction may be accompanied by other speech does not necessarily rob it of its commercial character. Instead, according to the Court, the key determination is whether the commercial speech is "inextricably intertwined" with otherwise fully protected speech.⁸⁶

For example, the Court held that contraceptive advertisements constituted commercial speech even though the mailings also included discussion of other important topics like sexually transmitted diseases and family planning.⁸⁷ The *Bolger* Court there made clear its practical concern that "[a]dvertisers shall not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues."⁸⁸ For these reasons, coupling ads for services to evade income tax obligations with political protests against the tax code does not blanket them in First Amendment protection.

A few years after *Bolger*, the Court similarly characterized a public university's ban on Tupperware parties in campus housing as a regulation of commercial speech even though the festivities included discussions of topics like financial and home management along with product sales: "No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares."⁸⁹

explicitly aimed at communications disclosed during the rental of real property. . . . The laws in no way sanction or inhibit [the plaintiffs] from speaking, writing, or publishing their views on cohabitation or their opinion of the anti-discrimination laws.

Id. at 726.

⁸⁶ See *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989) (determining that "pure" speech and commercial speech were not "inextricably intertwined" to justify characterizing the speech as noncommercial); *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988) ("[W]e do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech.").

⁸⁷ *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983).

⁸⁸ *Id.* at 66-67. As discussed by the *Thomas* majority, the *Bolger* Court noted that the combination of three factors — advertising format, product reference, and commercial motivation — provided "strong support" for characterizing the mailings as commercial speech. *Id.*; *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 710-11 (9th Cir. 1999). The *Bolger* Court also stressed, however, that each of those criteria need not be met for speech to be characterized as commercial. *Bolger*, 463 U.S. at 67 n.14. In any event, the *Thomas* plaintiffs' proposed speech satisfied each of those elements: it involved "for rent" advertisements; it made reference to a specific transaction — the landlords' desire to rent the housing units; and it was motivated by the commercial desire to generate rental revenue.

⁸⁹ *Fox*, 492 U.S. at 474 (finding nothing "inextricable" about noncommercial aspects of

Similarly, decisionmakers' transactional speech — for example, advertisements or other proposals of possible housing or employment opportunities; preliminary and/or actual negotiations such as job interviews or discussions while showing an apartment — is fully separable from expression of their moral, political, and religious beliefs. In short, the communications necessary to conclude an employment, housing, or loan transaction are not inextricably intertwined with speech describing the decisionmaker's political or religious views. As *Bolger* and subsequent decisions emphasized: "A company has the full panoply of protections available to its direct comments on public issues, so there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions."⁹⁰

these presentations).

⁹⁰ *Bolger*, 463 U.S. at 68 (citations omitted); see also *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 n.5 (1980) ("There is no reason for providing similar constitutional protection when [utilities' comments on public issues] are made only in the context of commercial transactions."); Stern, *supra* note 69, at 82 (noting that when characterizing "hybrid" speech as commercial or noncommercial for First Amendment purposes, the Court has been especially interested in whether the "noncommercial portion of hybrid expression could be effectively ventilated elsewhere").

In those cases, however, where commercial and noncommercial expression cannot be parsed, commercial speech principles do not adequately safeguard the protected yet inextricable expression. The California Supreme Court, for example, recently considered a situation in which protected noncommercial expression appeared inseparable from accompanying commercial speech. *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002), *cert. granted*, 123 S. Ct. 817 (2003). In what I consider a troubling decision, a narrow majority held that Nike's response to public criticism of its labor practices was not entitled to full First Amendment protection. *Id.* at 247. Instead, the court held that Nike's rebuttals could be regulated as less protected commercial expression under the state's false advertising and unfair competition laws because they involved communications to the public — which inevitably includes consumers — about Nike's practices in producing its commercial offerings. *Id.*

This, however, appears to present a situation in which Nike's noncommercial and commercial speech are truly inextricable. Nike cannot publicly defend its conduct from attack without implicitly addressing some consumers and perhaps shaping their views of Nike products. As dissenting Justice Chin pointed out, Nike defended its business practices — which were at the center of a vigorous public debate — through traditionally protected avenues of political expression (press releases, letters to the editor, letters to university presidents) rather than through its commercial advertising, packaging, or labels. *Id.* at 266; see also *id.* at 270 (Brown, J., dissenting).

I object to the majority's analysis because it fails to provide Nike with any fully protected venue for participating in the public discourse in its own defense, for fear that its audience would inevitably include some consumers and might influence their attitudes toward Nike gear. The strength of the First Amendment's protections should not, in my view, vary from one side of a public debate to the other. An employer, for example, who is the subject of discrimination claims aired in the press or a corporation charged with fraud by an elected official should be allowed to defend itself in the public realm on the same terms as

Determining whether commercial and noncommercial expression are inextricable demands an examination of the expression's purpose and setting. Commercial speech doctrine is particularly helpful in explaining how to sort protected from nonprotected speech by focusing on the context-specific dangers posed by transactional speech. Is, for instance, an employer speaking as a decisionmaker — that is, communicating about possible job opportunities or other transactions to potential participants in the transaction? Or is the employer speaking as a player in a policy debate — that is, to the public at large?

Because civil rights restrictions on decisionmaker speech reflect an understanding of context's significance by regulating only transaction-related communications, they thus fit comfortably within commercial speech jurisprudence. Recall, for example, the Fair Housing Act's ban on discriminatory advertisements and other statements "with respect to the sale or rental of a dwelling,"⁹¹ and the ECOA regulations' prohibition on certain inquiries "in connection with a credit transaction."⁹² In this way, these provisions respond to the reality that transactional speech and discriminatory conduct are closely linked, while preserving other avenues for decisionmaker expression outside the transactional context. An employer's newspaper advertisement that joins a public policy debate by, for example, endorsing David Duke for president or opposing the holiday status of Martin Luther King, Jr.'s birthday, is not commercial speech for First Amendment purposes because it is not related to a specific transaction (nor, for the same reason, would such expression be regulated by the civil rights laws at issue as a statutory matter).

In contrast, an interviewer making such statements when communicating with potential applicants about available opportunities presents a very different context. Because the decisionmaker can easily conduct an employment (or housing or credit) transaction without airing her political views, the noncommercial expression — as in *Hyman* and *Thomas* — is by no means inextricable and thus does not strip the speech of its essentially commercial character.⁹³

its challenger.

⁹¹ 42 U.S.C. § 3604(c) (2000).

⁹² 12 C.F.R. § 202.5(d)(5) (2002).

⁹³ Determining that the communications constitute commercial speech is by no means the end of our inquiry. Whether, as a statutory matter, such statements violate the civil rights laws at issue depends in large part on whether an ordinary listener would understand them to express a discriminatory preference. *See, e.g., supra* notes 45–49 and accompanying text. As a constitutional matter, the level of protection afforded such commercial speech varies, depending on whether it is false, misleading, or related to illegal conduct. *See, e.g., supra* notes 58–67 and accompanying text.

B. Is This Decisionmaker Speech Unprotected Because It "Concerns Unlawful Activity"?

Recall *Central Hudson's* declaration that for "commercial speech to come within [First Amendment protection], it at least must concern lawful activity."⁹⁴ Do decisionmaker inquiries and statements of discriminatory preference fall into this crevasse of unprotected commercial speech? Just how tight must the connection be between decisionmaker speech and illegal discrimination to warrant its characterization as "concerning" or "related to" unlawful activity?

Pittsburgh Press remains a helpful starting point. There the Supreme Court concluded that the newspaper's sex-segregated job advertisements proposed an illegal transaction — discriminatory hiring — and thus slipped entirely from the reach of the First Amendment. In deferring the question whether commercial speech generally deserved greater constitutional protection, the Court noted: "Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity."⁹⁵

Rejecting the defendant's argument that the sex-designated advertisements had no empirical link to actual job discrimination, the Court held that the listings (which consisted of columns headed "Jobs — Male Interest" and "Jobs — Female Interest") constituted unprotected advertisements of illegal activity just like advertisements for illegal drugs or prostitution.⁹⁶ In other words, advertising that "I've got a job for a white male" is just as related to illegal activity for commercial speech purposes as advertising that "I've got cocaine for sale."

More recently, the Second Circuit reached a similar conclusion when considering Fair Housing Act claims involving real estate ads: "Since discriminatory advertisements concern an illegal commercial transaction, the discriminatory sale or rental of housing, they are *not* protected by the First Amendment."⁹⁷ In *Hyman*,⁹⁸ the district court agreed, holding that Louisville's ban

⁹⁴ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

⁹⁵ *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 389 (1973).

⁹⁶ *Id.* at 381 n.7.

⁹⁷ Michael E. Rosman, *Ambiguity and the First Amendment: Some Thoughts on All-White Advertising*, 61 TENN. L. REV. 289, 337 (1993) (citing *Ragin v. New York Times Co.*, 923 F.2d 995, 1002–03 (2d Cir. 1991)). A number of commentators agree. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 891 (2d ed. 1988) (suggesting that sex-segregated ads "threaten[], without any further opportunity for dialogue, to cause an injury that the government has power to prevent"); Rosman, *supra*, at 337 n.216 ("If blacks are discouraged from applying for housing [by a discriminatory ad], then the subsequent sale or

on discriminatory advertisements and other statements of discriminatory preference simply regulated unprotected speech: "[The employer's] proposed speech concerns an activity, discriminating against prospective employees because of their sexual orientation and gender identity, which is made illegal by the ordinances."⁹⁹

Certain decisionmaker inquiries share a similar capacity for facilitating illegal discrimination.¹⁰⁰ Questions that are intended to deter members of a protected class are most clearly related to an illegal activity. Regardless of intent, moreover, most civil rights statutes make unlawful practices that have a disparate impact on members of a protected class.¹⁰¹ For example, disability-related queries are likely to discourage at least some, and probably many, applicants with disabilities: recall the Ninth Circuit's observation that inquiries into HIV-status will likely deter HIV-positive applicants.¹⁰²

Finally, we return to the constitutional values to be promoted by commercial speech generally when assessing whether this expression sufficiently concerns unlawful activity to deny it First Amendment protection. Recall that commercial speech doctrine focuses on the value of such speech in informing choices by its recipients, rather than its speakers.¹⁰³ But job-, credit- and housing-seekers have no interest in receiving inquiries into their protected class status, nor in reading or

rental to a white person is a discriminatory act."); Schwemm, *supra* note 9, at 269.

⁹⁸ See *supra* notes 75–79 and accompanying text.

⁹⁹ Hyman v. City of Louisville, 132 F. Supp. 2d 528, 541 n.16 (W.D. Ky. 2001), *vacated*, 53 Fed. App. 740 (6th Cir. 2002).

¹⁰⁰ See *supra* notes 32–49 and accompanying text.

¹⁰¹ E.g., 42 U.S.C. § 2000e-2(a)(2), (k) (2000) (prohibiting employment practices that have an unjustified disparate impact); Doe v. Pfrommer, 148 F.3d 73, 82 (2d Cir. 1998) (holding that the ADA prohibits disparate impact discrimination); Smith v. City of Des Moines, 99 F.3d 1466, 1469–70 (8th Cir. 1996) (holding that the ADEA prohibits disparate impact discrimination); Edwards v. Johnston County Health Dep't, 885 F.2d 1215, 1223 (4th Cir. 1989) (holding that the Fair Housing Act prohibits disparate impact discrimination); Cherry v. Amoco Oil Co., 490 F. Supp. 1026 (N.D. Ga. 1980) (holding that the ECOA prohibits disparate impact discrimination). *But see* Adams v. Fla. Power Corp., 255 F.3d 1322, 1323 (11th Cir. 2001) (finding disparate impact claims unavailable under ADEA).

¹⁰² See *supra* note 43 and accompanying text.

¹⁰³ As Burt Neuborne points out,

unlike political or aesthetic speakers, commercial speakers possess no cognizable interests of their own, but rather must rely solely on the borrowed interests of their hearers Thus while commercial speech is entitled to substantial first amendment protection, such protection is available only when an articulable hearer interest exists in receiving the message at issue.

Burt Neuborne, *A Rationale for Protecting and Regulating Commercial Speech*, 46 BROOK. L. REV. 437, 462 (1980).

Applying this principle to decisionmaker speech, Neuborne goes on to explain that, "[T]he regulation at issue in *Pittsburgh Press* did not impinge on a legitimate interest of speakers or hearers, since sex-typed hiring is banned by Title VII." *Id.* at 461.

hearing discriminatory ads or other statements of decisionmakers' discriminatory preferences.¹⁰⁴ Instead, these decisionmaker communications merely facilitate their speakers' discriminatory actions and/or deter their listeners from pursuing opportunities for which they are legally entitled to compete. In short, this expression thwarts, rather than furthers, the informative functions that normally justify First Amendment protection of commercial speech.¹⁰⁵

Linmark Associates, Inc. v. Township of Willingboro,¹⁰⁶ the only case other than *Pittsburgh Press* where the Supreme Court has considered the intersection of commercial speech and civil rights, sheds some additional light on the requisite link between the government's speech regulation and its interest in antidiscrimination enforcement. *Linmark* involved a challenge to a local ordinance prohibiting "For Sale" and "Sold" signs on real estate in an effort to prevent perceived "panic" selling by white homeowners.¹⁰⁷ Ruling after *Virginia State Board*'s move towards greater protection of commercial speech — but before the emergence of the more detailed *Central Hudson* test — the Court struck down the ordinance.¹⁰⁸

Linmark is fundamentally distinguishable from the decisionmaker speech at issue here. First, the forbidden signs concerned clearly legal transactions: homeowners' decisions to sell their homes and leave a community. Even when those decisions are unwise or harmful to the community, they are not illegal (assuming that the homeowners do not racially discriminate among those seeking to buy their property).¹⁰⁹ In contrast, the decisionmaker speech at issue here is related to an illegal transaction — discriminatory decisionmaking.

Second, the *Linmark* Court was troubled by what it saw as the town's paternalistic fear that the signs' readers would respond by selling their homes and moving away: "The Council has sought to restrict the free flow of these data because it fears that otherwise homeowners will make decisions inimical to what the Council views as the homeowners' self-interest and the corporate interest of the

¹⁰⁴ See *infra* note 183–84 and accompanying text for a discussion of the possibility that applicants have an interest in learning of their potential employer's or landlord's biases to inform their assessment of a job or housing opportunity.

¹⁰⁵ Daniel Farber argues persuasively that the critical factor in determining whether to treat certain commercial speech as protected is whether government seeks to regulate its "informative" or "contractual function." Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372 (1979). He considers discriminatory job advertisements, for example, as offers or invitations of offers, where the government's regulation "relates to the contractual function of the ads, rather than to the suppression of the free flow of information." *Id.* at 400.

¹⁰⁶ 431 U.S. 85 (1977).

¹⁰⁷ *Id.* at 86–88.

¹⁰⁸ *Id.* at 86.

¹⁰⁹ See 42 U.S.C. § 3604(a) (2000) (prohibiting race and other forms of discrimination in housing sales and rentals).

township: they will choose to leave town.”¹¹⁰ Indeed, throughout its modern commercial speech cases, the Court’s discomfort with governmental regulation of truthful speech for fear that folks would otherwise make poor (but not illegal) decisions is fully consistent with a view of commercial speech as constitutionally valuable when — but only when — it accurately informs individuals’ decisionmaking among lawful alternatives.

In contrast, paternalism does not animate civil rights limitations on decisionmaker communications. Rather than seeking to “save” folks from their own unwise choices among legal products, merchants, or transactions, the government interest in regulating decisionmaker speech remains focused on enforcing antidiscrimination laws.¹¹¹

C. Are These Decisionmaker Communications Unprotected as “Misleading”?

For those who are unpersuaded that the link between decisionmaker speech and illegal discrimination is sufficiently tight to justify stripping the expression of constitutional protection,¹¹² an alternative approach remains. Recall that the Court

¹¹⁰ *Linmark*, 431 U.S. at 96.

¹¹¹ Furthermore, the fit between Willingboro’s means and ends was considerably looser than that here. While the Court agreed that the township’s interest in promoting integrated housing was “important,” the *Linmark* Court objected to the means chosen to advance this goal. *Id.* at 94. First, it was not persuaded that a signage ban was necessary, absent evidence that eliminating signs in fact reduced panic selling. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 565 n.8 (1980) (“[In *Linmark*,] we observed that there was no definite connection between the township’s goal of integrated housing and its ban on the use of ‘For Sale’ signs in front of houses.”). Nor was the Court convinced that Willingboro was actually experiencing a great deal of “white flight” that called for such a response. *Linmark*, 431 U.S. at 95–96. The Court also determined that the ban did not leave available ample alternatives for addressing buyers’ and sellers’ legitimate interest in communicating about available real estate; other options (such as newspaper advertisements and listings with real estate agents) were more costly and less effective in delivering this information. *Id.* at 93.

¹¹² Indeed, not everyone is convinced that decisionmaker speech sufficiently “concerns” illegal activity to warrant stripping it of First Amendment protection. Tung Yin, for example, accepts *Pittsburgh Press*’s analysis with respect to discriminatory advertisements, but would distinguish the ADA’s prohibitions on disability-related inquiries because, in his view, such questions do not “automatically deter” certain applicants in the way that sex-segregated job advertisements do. Yin, *supra* note 9, at 118–19.

In a few situations, decisionmaker expression may be regulated even where the threatened discrimination is not illegal in a particular jurisdiction. Because such commercial speech is not related to unlawful activity, it is entitled to the protection offered by intermediate scrutiny. Consider, for example, *Nomi v. Regents for the Univ. of Minn.*, 796 F. Supp. 412 (D. Minn. 1992), *vacated as moot*, 5 F.3d 332 (1993). That case involved a First Amendment challenge to a public university’s policy forbidding the use of campus facilities for recruitment by employers who refused to sign assurances that they did not engage in

made clear that "there can be no constitutional objection to the suppression" of "communication more likely to deceive the public than to inform it."¹¹³ Because decisionmaker inquiries into protected class status and statements of discriminatory preference may deceive individuals into believing that certain opportunities are not available to them,¹¹⁴ that speech may also be banned as misleading.

Even "innocent" inquiries (that is, where the employer has no intention of using the information elicited in a discriminatory way) may leave an applicant with the inaccurate impression that the opening will not be available to him. In *Pittsburgh Press*, for example, the newspaper argued in part that its advertisements merely reflected the reality that men and women gravitated to certain job categories and thus might find sex-designated ads helpful in their search for employment.¹¹⁵ Even if this were true, however, listing job openings in sex-segregated columns was likely to (mis)lead women to conclude that male-designated jobs were closed to them (and men to believe the same of openings characterized as of "female interest").¹¹⁶

sexual orientation discrimination. Because the ban on sexual orientation discrimination was a matter of school policy rather than federal, state, or local law, the parties stipulated that recruiters' speech in violation of the policy did not concern illegal activity. The district court then upheld the university's restriction under intermediate scrutiny. The decision was later vacated as moot after the student plaintiff graduated.

Under *Central Hudson's* intermediate scrutiny, the government's interest must be "substantial," its regulatory means must directly advance that end, and those means must be narrowly tailored to achieve their objective. *Cent. Hudson*, 447 U.S. at 564; *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989). In *Fox*, the Court explained that this standard requires "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." *Fox*, 492 U.S. at 480 (citations omitted).

Although applying this standard is far from an exact science, decisionmaker speech restrictions appear appropriately crafted to withstand this level of scrutiny. Indeed, these laws may well survive the more rigorous strict scrutiny. See *infra* notes 192–214 and accompanying text for a more detailed discussion of strict scrutiny analysis in this context.

This is by no means a unanimous view. Tung Yin, for example, argues that the ADA's ban on disability-related inquiries would fail *Central Hudson's* means-ends assessment. See Yin, *supra* note 9, at 123–24. In particular, he is unpersuaded that the ban directly advances the government's admittedly substantial interest in eliminating discrimination, nor does he believe that the prohibition is sufficiently narrowly tailored. *Id.* at 128–35.

¹¹³ *Cent. Hudson*, 447 U.S. at 563; see also *Ibanez v. Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 142 (1994).

¹¹⁴ See *supra* note 41–49 and accompanying text.

¹¹⁵ *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 381 n.7 (1973).

¹¹⁶ See, e.g., Kathleen Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 SUP. CT. REV. 123, 150–52 (asserting that even if the *Pittsburgh Press* ads did not explicitly exclude women from applying for male-designated jobs, they made such applications substantially less likely).

Similarly, an applicant with a disability confronted by employer questions about her medical status or use of prescription drugs might well be [mis]led to conclude that the job is unavailable to those with certain medical conditions.¹¹⁷ If the applicant is wrong in reaching this conclusion, then the query may be unprotected because it is misleading. If she is right, then the query is unprotected because it facilitates illegal discrimination.

Moreover, power imbalances between decisionmaker and applicant (or supplicant, given the importance of the opportunity sometimes at stake) exacerbate the danger that decisionmaker speech will mislead its recipients. An applicant confronted with communications of this type is unlikely to question or rebut the speech without risking loss of the opportunity altogether.

On several occasions the Court has considered the power disparity between speaker and listener in assessing the effects of the decisionmaker's speech. For example, the Court appeared to recognize the dangers created by certain decisionmaker speech in *NLRB v Gissel Packing Co.*¹¹⁸ There it held that the National Labor Relations Board had not violated the First Amendment in sanctioning an employer who repeatedly told his employees considering union affiliation that unionization might cause them to lose their jobs.¹¹⁹ Although decided before the emergence of modern commercial speech doctrine, *Gissel* emphasized the "economic dependence of the employees on their employers and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear."¹²⁰ The Court held the employer's speech to be regulable because it was "a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment."¹²¹

In *Ohralik v. Ohio State Bar Ass'n*, the Court again made clear that a speaker's greater power and expertise may distort her listener's ability to assess the information received.¹²² The Court there applied commercial speech principles to uphold a ban on attorneys' in-person solicitations, noting that they threatened a larger danger of coercion and overreaching than other types of advertising by

¹¹⁷ See, e.g., *supra* notes 41–49 and accompanying text.

¹¹⁸ 395 U.S. 575 (1969).

¹¹⁹ *Id.* at 619.

¹²⁰ *Id.* at 617. The Court also relied on the NLRB's experience "that employees, who are particularly sensitive to rumors of plant closings, take such hints as coercive threats rather than honest forecasts." *Id.* at 617–18; see also Kingsley Browne, *Title VII as Censorship: Hostile Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 515 (1991) ("Gissel relied heavily on the inequality of power between employer and employee to justify the restriction on employer expression.").

¹²¹ *Gissel*, 395 U.S. at 618; see also *infra* note 140–53 and accompanying text for additional discussion of threats as unprotected illegal conduct.

¹²² 436 U.S. 447 (1978).

lawyers: "[I]n-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection."¹²³

The D.C. Circuit grappled with the potential for decisionmaker communications to mislead when it identified the purposes of the Fair Housing Act to include dispelling any public misunderstanding about antidiscrimination requirements.¹²⁴ In an opinion written by then-Judge Ginsburg, it held that the Act was violated when ads "created a public impression that segregation in housing is legal, thus facilitating discrimination by defendants or other property owners."¹²⁵ In other words, under the Act, decisionmakers have a duty not to mislead applicants about their legal entitlement to compete for opportunities free from discrimination.¹²⁶

This duty parallels advertisers' duty, under federal and state consumer protection statutes, not to mislead or deceive.¹²⁷ Indeed, these laws acknowledge the disparity between seller and consumer in knowledge, and perhaps sophistication, by prohibiting representations that have a tendency to deceive their listeners regardless of the speaker's intent.¹²⁸ Just as deceptive advertising about a product's cost or

¹²³ *Id.* at 457; *see also* Post, *supra* note 62, at 38 ("The Court has sometimes used the misleading requirement to identify . . . circumstances [where the relationship between speaker and listener is unequal and dependent] and to deprive them of the constitutional protection of commercial speech doctrine.").

¹²⁴ *Spann v. Colonial Village, Inc.* 899 F.2d 24, 30 (D.C. Cir. 1990).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *See, e.g.,* Federal Trade Commission Act, 15 U.S.C. § 45 (2000) (prohibiting unfair and deceptive representations in context of consumer transactions); *Fed. Trade Comm'n v. Colgate-Palmolive*, 380 U.S. 374 (1975) (holding that the FTC Act prohibits representations that have the capacity or tendency to deceive consumers); *Cliffdale Assocs.*, 103 F.T.C. 110 (1984) (holding that the FTC Act prohibits representations that are likely to deceive consumers); MD. CODE ANN., COM. LAW, § 13-301(1) (prohibiting unfair and deceptive trade practices that include any "misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers"); *see also* 15 U.S.C. § 78i(a)(4) (2000) (prohibiting securities dealers and brokers from making false or misleading statements to induce securities transactions); CAL. CORP. CODE § 25400(d) (West 1977) (prohibiting false or misleading statements made for the purpose of inducing the purchase or sale of securities).

¹²⁸ *See, e.g.,* *Orkin Exterminating Co., Inc. v. Fed. Trade Comm'n*, 849 F.2d 1354, 1368 (11th Cir. 1988) (determining that FTC Act violation "does not take into account the mental state of the party accused"); *Fed. Trade Comm'n v. Algoma Lumber Co.*, 291 U.S. 67, 81 (1934) (holding that "innocence of motive" does not relieve seller from duty not to deceive under the FTC Act, as "there is a kind of fraud . . . in clinging to a benefit which is the product of misrepresentation, however innocently made").

safety is constitutionally unprotected,¹²⁹ so too are decisionmaker communications that mislead applicants into abandoning further pursuit of job or housing opportunities.¹³⁰

* * *

According to Robert Post, "A useful doctrine ought to distinguish government interests that are compatible with relevant constitutional values from those that are not," and "[a] useful doctrine ought to distinguish [effects on speech] that are compatible with relevant constitutional values from those that are not."¹³¹ I believe that commercial speech doctrine accomplishes these objectives when applied to decisionmaker speech restrictions.¹³² In short, it explains when (and why) decisionmaker communications in this particular context are rightly characterized as unprotected: when they skew, rather than educate, choices among lawful activities by facilitating illegal discrimination and deterring applicants from important opportunities. By parsing communications that contribute to informed decisionmaking from those that undermine it, modern commercial speech doctrine provides a valuable sorting function.¹³³

To agree, however, requires that the reader accept, first, that some expression is more valuable than others for First Amendment purposes; and, second, that commercial speech accurately describes a category of such lesser expression. Because many thoughtful folks reject one or both of these premises, commercial speech doctrine remains in flux and, from some corners, under attack.¹³⁴

¹²⁹ The Court has made clear that sellers' misleading representations may be banned altogether without running afoul of the First Amendment. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563-64 (1980) (citations omitted).

¹³⁰ See *supra* note 59 and accompanying text.

¹³¹ Post, *supra* note 62, at 43.

¹³² See *supra* notes 103-05 and accompanying text.

¹³³ I am considerably less sanguine that the *Central Hudson* intermediate scrutiny formulation adequately protects accurate speech about lawful activities. But that discussion is beyond the scope of this Article's focus on decisionmaker speech that does not fit that description.

¹³⁴ See, e.g., Post, *supra* note 62, at 2 (asserting that commercial speech doctrine is "a notoriously unstable and contentious domain of First Amendment jurisprudence"). Indeed, many argue that commercial expression does not warrant any constitutional protection because it fails to further any First Amendment values. See, e.g., Lillian R. Bevier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978); Thomas H. Jackson & John Calvin Jeffries, *Commercial Speech, Economic Due Process, and the First Amendment*, 65 VA. L. REV. 1 (1979). Others are equally adamant that commercial speech should receive the fullest constitutional safeguards. See, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996) (Thomas, J., concurring) ("I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower' value than 'noncommercial' speech."); Alex Kozinski & Stuart Banner,

Most of the controversy has focused (rightly, I believe) on whether *Central Hudson's* intermediate scrutiny standard is sufficiently protective of accurate commercial speech unrelated to illegal activity.¹³⁵ But some of the doctrine's detractors have also decried its treatment of commercial speech that is misleading or concerns unlawful conduct. For example, Justice Thomas, among the most vigorous critics of contemporary commercial speech doctrine, sees no need to afford such speech less protection in the commercial context:

The State's power to punish speech that solicits or incites crime has nothing to do with the commercial character of the speech. . . . The harm that the State seeks to prevent is the harm caused by the unlawful activity that is solicited; it is unrelated to the commercial transaction itself. Thus there is no reason to apply anything other than our usual rule for evaluating solicitation and incitement simply because the speech in question happens to be commercial.¹³⁶

So, while I believe that commercial speech is the best way to think about these issues for First Amendment purposes, it is not necessarily the only possible approach. Accepting, for the moment, critics' suggestion that "general First Amendment principles" should apply with equal force to commercial speech,¹³⁷ the next Part examines how those principles might apply to these civil rights laws.

IV. OTHER FIRST AMENDMENT APPROACHES TO LIMITATIONS ON DECISIONMAKER SPEECH

Does the constitutionality of these laws depend entirely on the continuing vitality of commercial speech doctrine, or might they be justified under other First Amendment approaches as well? This Part considers three possibilities.

Who's Afraid of Commercial Speech?, 76 VA. L. REV. 627 (1990); Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777 (1993).

¹³⁵ See, e.g., *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 431 (1993) (Blackmun, J., concurring) ("I continue to believe that the analysis set forth in *Central Hudson* and refined in *Fox* affords insufficient protection for truthful, non-coercive commercial speech concerning lawful activities."); Aleta Estreicher, *Securities Regulation and the First Amendment*, 24 GA. L. REV. 223, 260 (1990) (urging greater protection of truthful commercial speech, while accepting ban on advertising when the underlying activity is unlawful).

¹³⁶ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 578-79 (2001) (Thomas, J., concurring).

¹³⁷ See, e.g., Sullivan, *supra* 116, at 126 ("[I]t is unclear why 'commercial speech' should continue to be treated as a separate category of speech isolated from general First Amendment principles.") (citation omitted).

A. Is Decisionmaker Speech Completely Unprotected as Discriminatory "Conduct" Rather Than Speech?

As discussed above,¹³⁸ these decisionmaker communications appear to fall most easily into the category of commercial speech that is unprotected because it concerns discriminatory, and thus illegal, activity. But even outside the commercial context, certain expression related to illegal behavior has long been treated as completely beyond the First Amendment's protection. Is this decisionmaker speech another example of the sort of "speech"¹³⁹ that is really unprotected illegal "conduct"?

A great deal of speech is treated as unprotected conduct for constitutional purposes. For example, the Court has long drawn a content-based distinction between speech advocating unlawful behavior and speech threatening or soliciting illegal action.¹⁴⁰ While the former receives a relatively high level of First Amendment protection,¹⁴¹ the latter is considered "conduct" and is completely

¹³⁸ See *supra* notes 94–111 and accompanying text.

¹³⁹ Speech that takes the form of a question is still speech for First Amendment purposes. Questions, of course, seek to elicit information, and the First Amendment protects information gathering. See, e.g., A. Michael Froomkin, *The Death of Privacy*, 52 STAN. L. REV. 1461, 1508 (2000) ("[B]oth the Supreme Court and appellate courts have interpreted the First Amendment to encompass a right to gather information."); Yin, *supra* note 9, at 114–15:

The fact that the interviewer is asking a question, as opposed to making a statement, does not strip the speech of First Amendment protection. . . . [J]ust as the question "Will you buy X for \$Y?" is functionally equivalent to the statement "I will sell X for \$Y," a disability-related question can be an attempt to gauge the quality of labor being offered by the applicant.

Moreover, the questions themselves deliver information by sending a message about what interests are valued by the questioner.

¹⁴⁰ See, e.g., Post, *supra* note 62, at 35.

¹⁴¹ In *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the Court held that government may not punish speech urging illegal behavior except where that advocacy is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447. Some commentators have suggested that *Brandenburg*'s principles should apply with equal force to commercial speech related to illegal activity — i.e., that government may regulate such speech only when it is intended and is likely to produce imminent illegal behavior. See, e.g., Sullivan, *supra* note 116, at 126. It seems to me, however, that the *Brandenburg* test might also be characterized as taking various First Amendment approaches to the problem of incitement, just as a range of First Amendment principles might apply to decisionmaker speech. For example, incitement might be so close to illegal activity (like solicitation or conspiracy) as to constitute conduct. Or *Brandenburg* might be viewed as the outcome of a balancing analysis — i.e., while political dissent is generally of great First Amendment value, the value of speech directed to producing imminent lawless activity is outweighed by its harms. Or it might be seen as a specific application of strict scrutiny — i.e., it defines proscribable "incitement" to ensure that the government's response is sufficiently narrowly tailored to address only the most dangerous speech. I discuss the application of these

unprotected.¹⁴² Similarly, the use of speech to commit illegal acts like price-fixing, blackmail or conspiracy does not trigger a First Amendment defense to prosecution.¹⁴³ Indeed, in *Ohralik v. Ohio State Bar Ass'n*,¹⁴⁴ the Court listed “[n]umerous examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers’ threats of retaliation for the labor activities of employees.”¹⁴⁵

In a related context, even free speech absolutists have consistently acknowledged that at least some decisionmaker speech — for example, employers’ quid pro quo requests or demands for sexual favors in exchange for a job benefit — is completely unprotected as discriminatory, and thus illegal, conduct.¹⁴⁶ By

principles to decisionmaker speech restrictions *infra* at notes 163–214 and accompanying text.

¹⁴² *E.g.*, *Watts v. United States*, 394 U.S. 705, 707 (1969) (holding that a federal statute criminalizing threats against the President does not violate First Amendment).

¹⁴³ *E.g.*, *Nat’l Soc’y of Prof’l Engineers v. United States*, 435 U.S. 679 (1978) (upholding the constitutionality of a court order prohibiting a professional society from adopting an official position stating or implying that competitive bidding is unethical where such position would be in violation of the Sherman Act); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (declaring that “placards used as an essential and inseparable part of a grave offense against an important public law cannot immunize that unlawful conduct from state control,” and finding no First Amendment problem with an injunction restraining picketing that violated Missouri’s anti-trade restraint law); *United States v. Barnett*, 667 F.2d 835, 842 (9th Cir. 1982) (“The first amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose.”); *see also* EUGENE VOLOKH, *THE FIRST AMENDMENT: PROBLEMS, CASES AND POLICY ARGUMENTS* 205 (2001) (“Some kinds of speech seem so closely tied to illegal conduct that they are often perceived as being closer to conduct than [speech]”); Post, *supra* note 62, at 49 n.224 (listing examples of content-based restrictions on apparently unprotected expression, such as insubordinate speech by soldiers and speech persuading others to break their contracts).

¹⁴⁴ 436 U.S. 447 (1978).

¹⁴⁵ *Id.* at 456 (citations omitted). Especially relevant to decisionmaker speech, Daniel Farber notes “the intuitive belief that commercial speech is somehow more akin to conduct than are other forms of speech.” Farber, *supra* note 105, at 389. He argues that speech that serves a contractual function warrants less protection because it “involves talking about a transaction — and completing the transaction. The transaction itself can be regulated, just as the language in a contract can give rise to regulation.” *Id.* at 386–87. Rodney Smolla similarly explains that “the laws governing the language that must appear on a negotiable instrument never have been thought to implicate freedom of speech. To regulate the language is to regulate the transaction” Rodney A. Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171, 187 (1990).

¹⁴⁶ *E.g.*, Browne, *supra* note 120, at 513 n.193 (asserting that quid pro quo harassment, even when communicated by speech, is transactional and thus unprotected); Nadine Strossen, *The Tensions Between Regulating Workplace Harassment and the First Amendment: No*

definition, quid pro quo harassment can be performed only by a decisionmaker who has the power to control the terms and conditions of an individual's employment and threatens to use this authority in a sexually discriminatory way.¹⁴⁷ Because this

Trump, 71 CHI.-KENT L. REV. 701, 704 ("Even the most diehard free speech absolutist recognizes that the speech involved in quid pro quo harassment is tantamount to threats or extortion, expression that has long been punishable without raising substantial free speech concerns in any context."); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1800 (1992) (stating that quid pro quo harassment, even if it involves speech, "would seemingly be as unprotected by the First Amendment as any other form of threat or extortion").

Many of these advocates distinguish verbal hostile work environment harassment as constitutionally protected expression. Compare Browne, *supra* note 120, and Volokh, *supra* (both arguing that Title VII prohibitions on hostile work environment harassment run afoul of First Amendment), with Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461, 465 (1995), and Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1 (1990) (both arguing that Title VII's prohibition of unwelcome verbal conduct that creates a sexually hostile workplace does not violate First Amendment).

That quid pro quo harassment always involves decisionmaker (supervisor, rather than co-worker) speech makes it considerably easier to characterize as primarily transactional — and thus more like conduct than speech — than hostile work environment harassment by co-workers. At least a few courts, however, have found that once unwelcome sexual harassment by co-workers becomes sufficiently severe or pervasive to create a hostile work environment, it constitutes illegal conduct, rather than expression, for First Amendment purposes. See *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991) ("[P]ictures and verbal harassment are not protected speech because they act as discriminatory conduct in the form of a hostile work environment. In this respect the speech at issue is indistinguishable from the speech that comprises a crime, such as threats of violence or blackmail, of which there can be no doubt of the authority of a state to punish.") (citations omitted); see also *Burns v. City of Detroit*, No. 213029, 2002 WL 31475274, at *7 (Mich. Ct. App. Nov. 1, 2002) (finding the Michigan Civil Rights Act prohibition on hostile work environment "essentially directed toward discriminatory conduct").

Charles Lawrence emphasizes the conflation of speech and conduct in similar circumstances:

The words "Women Need Not Apply" in a job announcement, the racially exclusionary clause in a restrictive covenant, and the racial epithet scrawled on the locker of the new black employee at a previously all-white job site all convey a political message. But we treat these messages as "discriminatory practices" and outlaw them under federal and state civil rights legislation because they are more than speech. In the context of social inequality, these verbal and symbolic acts form integral links in historically ingrained systems of social discrimination. They work to keep traditionally victimized groups in socially isolated, stigmatized and disadvantaged positions through the promotion of fear, intolerance, degradation and violence.

Charles R. Lawrence III, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 VILL. L. REV. 787, 795 (1992).

¹⁴⁷ See, e.g., *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) (discussing

harassment takes the form of speech that forces its recipients to choose between submission and adverse job consequences, the speech cannot be separated from the illegal conduct. Similarly, the decisionmaker communications at issue here are so closely tied to unlawful discrimination that they may be characterized as more conduct than speech.

The Supreme Court's dictum in *R.A.V. v. City of St. Paul*¹⁴⁸ may lend further support to a characterization of decisionmaker speech as unprotected discriminatory "conduct."

[S]ince words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation's defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. Thus, for example, sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices.¹⁴⁹

Like treason or sexually derogatory fighting words, certain decisionmaker speech is thus unprotected because it essentially constitutes illegal conduct.¹⁵⁰

supervisor's threats as quid pro quo harassment).

¹⁴⁸ 505 U.S. 377 (1992).

¹⁴⁹ *Id.* at 389 (citations omitted).

¹⁵⁰ This understanding is supported by the Court's later characterization of this reference to Title VII as "an example of a permissible content-neutral regulation of conduct." See *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1992).

In *R.A.V.* the Court struck down a city ordinance prohibiting the display of symbols that may cause "anger, resentment or alarm" on the basis of race, religion, or gender. In holding the law to be an impermissible viewpoint-based restriction on expression, the Court explained that

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

Id. at 388-89 (citations omitted).

The decisionmaker speech restrictions at issue here are distinguishable from the law invalidated by the Court in *R.A.V.* for several reasons. First, and most important, the speech at issue in *R.A.V.* was not commercial expression, so it did not fall within that category of less protected speech. Second, prohibitions on disability-related and other inquiries into protected class status are not viewpoint-based regulations (because they bar *all* inquiries regardless of whether innocently or invidiously motivated), and thus do not raise the concerns presented by the St. Paul ordinance. Third, as described above, *R.A.V.*'s dictum lends support to the argument that discriminatory advertisements and other statements of

As Frederick Schauer observes, the line between protected "speech" and unprotected "conduct" is hard to mark clearly: there are no "moderately workable and well-known doctrinal or theoretical standards to determine the scope of the First Amendment's coverage."¹⁵¹ Instead, the line seems to be drawn on a largely intuitive (and, some might argue, maddeningly unprincipled) basis.¹⁵² I do not propose a solution in this Article, but simply note that this decisionmaker speech can plausibly be characterized as more akin to discriminatory conduct than expression, and thus entitled to no First Amendment protection.¹⁵³

B. Is Decisionmaker Speech Less Protected as "Low Value" Speech?

If these decisionmaker inquiries and statements are not entirely unprotected as essentially discriminatory conduct, are they nonetheless regulable as "low value" speech entitled to less than full First Amendment protection? The Court has identified a series of "less protected" categories of speech that include fighting words,¹⁵⁴ obscenity,¹⁵⁵ defamation,¹⁵⁶ and, as discussed above, commercial speech.¹⁵⁷

discriminatory decisionmaker preference are unprotected discriminatory conduct. Finally, as discussed *infra* at notes 192–214 and accompanying text, even if none of these doctrines apply, these civil rights laws may survive strict scrutiny.

¹⁵¹ Frederick Schauer, *The Speech-ing of Sexual Harassment*, in *NEW DIRECTIONS IN SEXUAL HARASSMENT LAW* (Catherine MacKinnon & Reva Siegel eds., forthcoming 2000) (manuscript at 2, available at <http://www.ksg.harvard.edu/wapp/research/schauer.pdf>).

¹⁵² See, e.g., *TRIBE*, *supra* note 97, at 827:

The trouble with the distinction between speech and conduct is that it has less determinate content than is sometimes supposed. . . . It is thus not surprising that the Supreme Court has never articulated a basis for its distinction; it could not do so, with the result that any particular course of conduct may be hung almost randomly on the "speech" peg or the "conduct" peg as one sees fit.

¹⁵³ While decisions about *where* to advertise available opportunities may have some expressive component, they seem even more like conduct as illegally discriminatory recruitment practices. Consider, for example, an employer's decision to advertise solely in the Klan's political newsletter. Courts have generally treated such choices as "practices" that may be evaluated as possibly discriminatory. See, e.g., *EEOC v. O & G Spring & Wire Forms Specialty Co.*, 38 F.3d 872 (7th Cir. 1994) (recognizing the possibility of pattern and practice discrimination based on employers' reliance on word of mouth advertising); *EEOC v. Chicago Miniature Lamp Works*, 947 F.2d 292, 298 (7th Cir. 1991) ("We cannot conclude that as a matter of law it is impossible for an employer to discriminate intentionally against blacks by relying on word-of-mouth [recruiting] . . ."); *Barnett v. W.T. Grant Co.*, 518 F.2d 543 (4th Cir. 1975) (finding word-of-mouth recruiting may create illegally disparate impact if it unjustifiably results in predominantly white workforce).

¹⁵⁴ E.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

¹⁵⁵ E.g., *Miller v. California*, 413 U.S. 15, 70 (1973).

¹⁵⁶ E.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

¹⁵⁷ See *supra* notes 54–67 and accompanying text. For purposes of this discussion, in this subpart I ignore the fact that commercial speech generally forms a specific category of less

As explained in *R.A.V. v. City of St. Paul*,¹⁵⁸ the Court created each category after a balancing analysis determined that the expression's harm outweighed its relatively limited ability to further First Amendment purposes:

[O]ur society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."¹⁵⁹

This categorical approach, of course, has both fans and critics. Supporters suggest that balancing is inescapable given the practical challenges faced by governments confronted with very real problems.¹⁶⁰ Skeptics, on the other hand, argue that the very exercise of identifying "low value" expression is incompatible

protected speech, and instead apply the Court's balancing analysis to decisionmaker speech as a separate category.

¹⁵⁸ 505 U.S. 377 (1992).

¹⁵⁹ *Id.* at 382–83 (quoting *Chaplinsky*, 315 U.S. at 572). Justice White's concurring opinion further described this process:

[T]he Court has held that the First Amendment does not apply to [certain content-based categories] because their expressive content is worthless or of *de minimis* value to society. We have not departed from this principle, emphasizing repeatedly that "within the confines of [these] classification[s], the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required."

Id. at 400 (citations omitted); see also Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1251–52 (1983):

[The Court] has balanced the impact of challenged regulations on first amendment values against the seriousness of the evil that the state seeks to mitigate or prevent, the extent to which the regulation advances the state's interest, and the extent to which the interest might have been furthered by less intrusive means.

¹⁶⁰ See, e.g., Archibald Cox, *Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 4 (1980) ("Some balancing is inescapable. The ultimate question is always, where has — and should — the balance be struck?"); Kent Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645, 785 ("Anyone who supposes that the protections of the First Amendment can be reduced to one justification or one all-purpose test of coverage is either deluded or willing to sacrifice a great deal in the interests of theoretical neatness and actual or apparent simplicity of administration."); Cass R. Sunstein, *Can Pornography and the First Amendment*, 1986 DUKE L.J. 589, 605 ("[I]t would be difficult to imagine a sensible system of free expression that did not distinguish among categories of speech in accordance with their importance to the underlying purposes of the free speech guarantee.").

with the First Amendment's plain language,¹⁶¹ and warn of the danger that definitional lines will be drawn to suppress unpopular or dissenting speech.¹⁶² Again, I do not seek to resolve this debate here (and I note that the Court seems reluctant to add to the list of "low-value" categories),¹⁶³ but instead to explore how decisionmaker speech might fare under such an approach.

The harms posed by these decisionmaker communications have already been discussed.¹⁶⁴ We now turn to the other side of the scale, examining the free speech values potentially advanced by the inquiries and statements at issue here — and the First Amendment costs of restricting them.

A great deal of debate, of course, has sought to identify the core value or values protected by the First Amendment.¹⁶⁵ Without revisiting that contest here, decisionmaker speech implicates many of those values most often cited.

For example, prohibiting certain decisionmaker inquiries restrains some exchange of truthful information, which is generally identified as among the core First Amendment values.¹⁶⁶ Whether an applicant has a disabling medical condition,

¹⁶¹ "Congress shall make no law . . . abridging the freedom of speech, or of the press" U.S. CONST. amend. I.

¹⁶² See, e.g., *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 761 (1978) (Powell, J., concurring): I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most "valuable" and hence deserving of the most protection, and which is less "valuable" and hence deserving of less protection.

See also Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 751–52 (1993) (criticizing the Court's distinction between commercial and noncommercial speech, noting that "there seems to be no debate that the First Amendment bars the majority from suppressing the speech of some simply because others find it to have little value"); Michael E. Rosman, Book Review, 13 CONST. COMMENT. 317, 323 (1996) (reviewing KENT GREENAWALT, *FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH* (1995)) ("[U]sing concepts like 'low value' speech is a dangerous thing. We have a grave tendency to identify modes of communication that others use as 'low value,' and the modes that we use as 'high value.'").

¹⁶³ See, e.g., *Pacifica Found.*, 438 U.S. at 746 (declining to characterize "indecent" speech that falls short of obscenity as low-value speech); *Cohen v. California*, 403 U.S. 15, 25–26 (1970) (declining to characterize profanity as low value speech).

¹⁶⁴ See *supra* notes 32–53 and accompanying text.

¹⁶⁵ See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26–31 (1971) (arguing that the First Amendment's primary purpose is to further self-government); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) ("[T]he constitutional guarantee of free speech ultimately serves only one true value, which I have labeled 'individual self-realization.'"); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1256 (1983) ("The first amendment is at least in part designed to further the process of arriving at the truth. When the state tries to prevent the dissemination of truth, it is time to demand justification.").

¹⁶⁶ See, e.g., Ronald A. Cass, *The Perils of Positive Thinking: Constitutional*

is gay or straight, married or single, are generally verifiable facts. Of course, the civil rights laws at issue render them legally irrelevant, but they remain factually true nonetheless.

Moreover, precisely *because* this information is irrelevant for decisionmaking purposes, allowing inquiries may further the development of independent judgment skills, which has been identified by some as an additional First Amendment value.¹⁶⁷ When permitted to acquire this information — while declining to act on it — decisionmakers may learn to use their discretion more wisely and fairly. In addition, eliciting such information might arguably further decisionmakers' tolerance by increasing their knowledge about their applicants' diversity.¹⁶⁸

Decisionmaker advertisements and other statements of discriminatory preference may, moreover, include political opinion and expressions of religious belief, which are almost universally seen as forming the very core of the First Amendment.¹⁶⁹ The plaintiffs in *Thomas v. Anchorage Equal Rights Commission*¹⁷⁰

Interpretation and Negative First Amendment Theory, 34 UCLA L. REV. 1405, 1411 (1987) ("Most theoretical writings have suggested variants of four different values as critical to speech protections: individual development, democratic government, social stability, and truth.") (citations omitted); Thomas I. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CAL. L. REV. 422, 423 (1980) ("Over the years, we have come to view freedom of expression as essential to: (1) individual self-fulfillment; (2) the advance of knowledge and the discovery of truth; (3) participation in decisionmaking by all members of society; and (4) maintenance of the proper balance between stability and change."); Schauer, *supra* note 151 (manuscript at 8) (stating that the "posited" but "contested" purposes of the First Amendment include assisting the search for truth, encouraging dissent, checking abuses of power, facilitating democratic deliberation, and permitting individual self-expression).

¹⁶⁷ See, e.g., Estreicher, *supra* note 135, at 324–26 (arguing that the First Amendment encourages independent judgment by allowing the exercise of "judgment muscles" that "may otherwise atrophy from disuse"); Kent Greenawalt, *supra* note 160, at 673 (identifying "independence of judgment" as an additional First Amendment value).

¹⁶⁸ See, e.g., LEE C. BOLLINGER, *THE TOLERANT SOCIETY* (1986) (arguing that the First Amendment seeks, *inter alia*, to instill tolerance among citizens). See *supra* note 40 for a discussion of the value of collecting aggregate data on applicants' protected class characteristics in enhancing equal opportunity efforts.

¹⁶⁹ See *supra* note 166. But note that the "value" of such expression in contributing to vigorous public discourse may be diminished by the limited opportunities for full and free discussion of differing views in the workplace and similar hierarchical settings. See, e.g., Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 289 (1991) ("[A]n image of dialogue among autonomous self-governing citizens would be patently out of place [in the workplace].").

Because of the power disparities inherent in decisionmaker speech, some might argue that it should be regulable under the Court's "captive audience doctrine." Indeed, this may be another way of describing how these communications are less valuable because they do not contribute to the exchange of ideas most valued by the First Amendment. Under the captive audience doctrine, "[t]he First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable

and *Hyman v. City of Louisville*,¹⁷¹ for example, proposed queries and advertisements that reflected their religiously-based opposition to, respectively, nonmarital cohabitation and same-sex relationships.¹⁷² An employer or landlord might similarly include political viewpoints on the merits of antidiscrimination laws when communicating with applicants: "The ADA was written by stupid politicians who don't understand the cost of accommodating folks with certain disabilities. I sure hope you don't have one." For the same reasons, decisionmaker statements often include self-expression, an interest also recognized as a fundamental First Amendment value:¹⁷³ "This is what I believe. This is who I am."

Some decisionmaker speech may also be self-expressive in a social, as opposed to political or religious, way. Consider queries or comments by an employer seeking to commiserate about shared medical conditions, thus breaking the ice in a job interview ("My back is killing me — do you have a bad back too?") or by a landlord who is genuinely interested in the lives of his tenants ("Do you have a boyfriend [or girlfriend]? Any thoughts about marriage?").

After determining that decisionmaker speech furthers at least some of the First Amendment's primary purposes, we next balance these values against the harms it poses. On balance, these communications appear to inflict damage that outweighs their benefits.

Concerns that forbidding certain decisionmaker queries interrupts the free exchange of information, for example, should be weighed against the information's legal irrelevance. The primary purpose of information flow is to enable individuals

speech." *Frisby v. Schultz*, 487 U.S. 474, 487 (1988) (citations omitted) (holding that a ban on residential picketing did not violate the First Amendment because of the important government interest in protecting residential privacy). While I agree that the coercive effects of decisionmaker speech are critical to the First Amendment analysis, I think this danger is more appropriately addressed when assessing the strength of the government's interest, as well as when gauging the appropriate scope of its regulation. See, e.g., Jamin B. Raskin & Clark L. LeBlanc, *Disfavored Speech About Favored Rights: Hill v. Colorado, the Vanishing Public Forum, and the Need for an Objective Speech Discrimination Test*, 51 AM. U. L. REV. 179, 207 (2001) ("Given the [*Frisby*] Court's strong language in favor of protecting the home and its emphasis on the limited communicative potential of the speech, it is virtually certain that the ordinance would have survived strict scrutiny had it been used."). Like the secondary effects doctrine, see *infra* note 192, the captive audience concept may be a way to avoid acknowledging that legislatures and courts are actually balancing the expression's value against its harms. While this may be inevitable, we should be clear that we are doing it so we can honestly and fairly debate whether the benefits of regulation outweigh the costs to free expression.

¹⁷⁰ 165 F.3d 692 (9th Cir. 1999), *vacated en banc*, 220 F.3d 1134 (9th Cir. 2000), *cert. denied*, 531 U.S. 1143 (2001).

¹⁷¹ 132 F. Supp. 2d 528, 540–41 (W.D. Ky. 2001), *vacated*, 53 Fed. App. 740 (6th Cir. 2002).

¹⁷² See *supra* notes 75–85 and accompanying text.

¹⁷³ See *supra* note 166.

to make choices, to act responsively. Because the antidiscrimination laws bar discriminatory action, the information sought is valueless because it cannot be used to support decisionmaker choices.

Indeed, governmental restrictions on the flow of truthful information are fairly commonplace, resting upon a balancing — explicit or implicit — of the speech's potential for significant harm against its real, but circumscribed, informational value.¹⁷⁴ Examples include various confidentiality requirements,¹⁷⁵ as well as evidentiary prohibitions on the use of privileged communications, hearsay, and other relevant information deemed more prejudicial than probative.¹⁷⁶

In a related context, moreover, the Court held that truthful information can be regulated to prevent its discriminatory misuse when it struck down, on equal protection grounds, Louisiana's law requiring that political candidates be identified by race on all ballots and nominating papers.¹⁷⁷ Its holding supports the principle that the exchange of factually accurate information may be checked in certain limited contexts that invite discriminatory application:

[This case] has nothing whatever to do with the right of a citizen . . . to receive all information concerning a candidate which is necessary to a proper exercise of his franchise. It has to do only with the right of a State to require or encourage its voters to discriminate upon the grounds of race. . . . [B]y placing a racial label on a candidate at the most crucial stage in the electoral process — the instant before the vote is cast — the State furnishes a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another.¹⁷⁸

The *Anderson* Court recognized the danger of labeling individual characteristics in a way that facilitates discriminatory decisionmaking and found that this hazard outweighed any informational value: "Nor can the attacked provision be deemed to be reasonably designed to meet legitimate governmental interests in informing the electorate as to candidates. We see no relevance in the State's pointing up the race of the candidate as bearing upon his qualifications for office."¹⁷⁹ This, of course, is

¹⁷⁴ See A. Michael Froomkin, *The Death of Privacy*, 52 STAN. L. REV. 1461, 1512 (2000) ("It has long been assumed that sufficiently great government interests allow the legislature to criminalize the publication of certain special types of accurate information.").

¹⁷⁵ See, e.g., Post, *supra* note 62, at 52 ("Every confidentiality requirement suppresses the flow of accurate information to citizens because of fear that persons will use or respond to the information in a manner that might cause harm.").

¹⁷⁶ See, e.g., Farber, *supra* note 105, at 401 (discussing evidentiary rules that limit the admission of truthful and often relevant information for fear that jurors will misuse it).

¹⁷⁷ See *Anderson v. Martin*, 375 U.S. 399, 403 (1964).

¹⁷⁸ *Id.* at 402.

¹⁷⁹ *Id.* at 403.

the same danger presented by a decisionmaker's inquiries into an applicant's disability, sexual orientation, and other protected characteristics.

Moreover, the restrictions' focus on *decisionmaker* inquiries means that the exchange of this information is not shut down completely, because opportunity-seekers remain free to volunteer any personal information themselves, thus advancing their own interests in self-expression. The Pennsylvania Supreme Court found this to be a critical distinction in striking down efforts to bar "situation wanted" ads by job-seekers that included information about their personal characteristics.¹⁸⁰ The court distinguished ads placed by individual job-seekers describing themselves to prospective employers (including information about their sex, age, etc.) from the ads placed by *employers* in the original *Pittsburgh Press* case. Because antidiscrimination laws govern only employers' actions, the court reasoned, ads placed by applicants, rather than decisionmakers, proposed no illegal transaction and were thus protected commercial speech.¹⁸¹

Similarly, decisionmaker communications that expose bias may well be of value to applicants in assessing a prospective employer or landlord. Even so, the expression's dangers appear to outweigh this informational value. Most significant, permitting such an exchange invites bigoted decisionmakers to undermine antidiscrimination objectives through "friendly" efforts to "inform" certain applicants. For example, in *United States v. Hunter*,¹⁸² a landlord justified his advertisement identifying a housing opportunity as a "white home" in this manner: "It's really a kindness to colored people. There's no use making them . . . come here when I'm not going to rent to them."¹⁸³ The Fourth Circuit declined to accept this defense.¹⁸⁴

¹⁸⁰ Commonwealth v. Pittsburgh Press Co., 396 A.2d 1187 (Pa. 1979).

¹⁸¹ *Id.* at 1190. In other words, the laws leave applicants free to volunteer personal information — including protected class membership — but prohibit decisionmakers from acting upon such information in a discriminatory way. The Pennsylvania court found that it was "too speculative" to conclude that job-seekers' ads would cause employers to make illegal employment decisions. *Id.* But one can imagine a "situation wanted" ad that might well encourage at least some employers to discriminate on certain grounds — e.g., "I'm a young male, completely healthy, unmarried, with no plans for kids, and can thus devote myself entirely to my job." Such ads are not addressed by the civil rights laws at issue here, which limit only employer, as opposed to applicant, speech. Whether, as a matter of policy, such applicant speech should be regulated as inviting or even soliciting discrimination is an interesting question. As a constitutional matter, applicants' self-expressive interests in describing themselves are of significant First Amendment value and thus offer one point of distinction. In any event, the employer's legal obligation not to discriminate in its selection practices remains unabated; a decisionmaker has the duty not to use this information (however received) to make discriminatory decisions.

¹⁸² 459 F.2d 205 (4th Cir. 1972).

¹⁸³ *Id.* at 215 (omissions in original).

¹⁸⁴ *Id.*

Concerns about chilling political and other “high-value” speech may also be mitigated by the restrictions’ limited reach. They prohibit certain transaction-related communications by decisionmakers to persons who may be interested in available opportunities. Decisionmaker expression that is not “in connection with” or “with respect to” a covered transaction¹⁸⁵ does not implicate the government’s interest in equal opportunity enforcement, and the limitations do not apply. Decisionmakers thus remain free to express any political, moral, religious, or other opinion outside the transactional context (e.g., through letters to the editor, testimony, sermons, etc.). Because these views may be fully ventilated elsewhere, there appears to be no First Amendment gain in allowing their expression in this specific context — where their effect, and sometimes their purpose, is to facilitate discrimination, deter applicants, and/or invade privacy. Speech in this particular setting is thus of decidedly limited, if any, value if other avenues for expression remain available that do not pose these same dangers.¹⁸⁶

C. Can Decisionmaker Speech Restrictions Survive Strict Scrutiny?

If, however, this decisionmaker speech is not characterized as less protected or unprotected expression, its regulation must survive strict scrutiny.¹⁸⁷ Strict scrutiny analysis differs from balancing in that it does not weigh the government’s interests against the speech’s value.¹⁸⁸ Instead, regardless of the expression’s First Amendment value, strict scrutiny considers only whether the government’s interest is sufficiently strong (“compelling”) and its regulation carefully crafted (“narrowly

¹⁸⁵ See, e.g., *supra* notes 91–93 and accompanying text.

¹⁸⁶ In a related context, some commentators have suggested that prohibitions on harassing speech are justified after weighing the speech’s harm to equal opportunity against its limited First Amendment value. See, e.g., Richard Fallon, *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn’t Bark*, 1994 SUP. CT. REV. 1, 24 (“‘Labor speech’ may define a . . . category in which content-based regulation is permitted under less exacting standards than ‘strict scrutiny.’”); Strossen, *supra* note 146, at 706–07 (noting that constraints on employees in a hierarchical workplace may explain “why expression that might be protected in other contexts should not necessarily be protected at work”). To the extent that these context-specific arguments are persuasive, they are even stronger with respect to the inquiries and statements at issue here, which threaten significantly greater damage precisely because they involve decisionmakers with the power to control access to important opportunities.

¹⁸⁷ The Court applies strict scrutiny to content-based restrictions on fully protected speech. See, e.g., *Republican Party of Minn. v. White*, 536 U.S. 765, 774 (2002); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

¹⁸⁸ See Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2438–39 (1996). For example, the Court has upheld, under strict scrutiny, restrictions on what some would characterize as speech of the highest value: campaign and related political speech. See *infra* notes 205–11 and accompanying text.

tailored").¹⁸⁹

Strict scrutiny is a tough standard.¹⁹⁰ But while demanding, it is not impregnable. Although most content-based limitations on expression fail this test, a few have survived.¹⁹¹ How would — and should — restrictions on decisionmaker speech fare if subject to strict scrutiny?¹⁹²

We begin by considering whether the government's regulatory goals are compelling. The requisite strength of the government's interest in eliminating various types of discrimination is clearly established in some cases, but not in others. While the Supreme Court has made clear that the government's interests in addressing race and sex discrimination are compelling,¹⁹³ it has not specifically assessed the government's interest in ending other kinds of discrimination.¹⁹⁴ The

¹⁸⁹ See, e.g., *White*, 536 U.S. at 774–75; *Simon & Schuster*, 502 U.S. at 118.

¹⁹⁰ But some feel that it is not tough enough. Justice Kennedy, for example, prefers a standard even more suspicious of content-based restrictions. When confronted with a governmental content-based speech regulation that is not limited to a category of less protected speech ("not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm the State has the substantive power to prevent"), he would bypass the application of strict scrutiny and simply hold the action unconstitutional. *Simon & Schuster*, 502 U.S. at 124 (Kennedy, J., concurring).

¹⁹¹ See *infra* notes 205–11 and accompanying text.

¹⁹² Rather than treating these laws as content-based limitations, some might instead characterize them as content-neutral regulations of the speech's "secondary effects" and thus subject to a standard less exacting than strict scrutiny. The Court's "secondary effects" doctrine emerged in *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986), where it upheld a city's zoning ordinance that singled out adult theaters for different, and less favorable, treatment than other types of theaters. *Id.* at 54–55. The majority reasoned that the ordinance was content-neutral because it was motivated not by the adult films' pictures or ideas, but instead by their impact on the surrounding neighborhood in terms of increased crime and declining property values. *Id.* at 48. While I believe that increased illegal activity (e.g., unlawful discrimination) and other harmful effects created or exacerbated by speech may properly be considered under strict scrutiny when evaluating the strength of a government's interest and the calibration of its response, I do not agree that the government's interest in those effects transforms a regulation of speech from content-based to content-neutral.

¹⁹³ *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983).

¹⁹⁴ In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Court identified a compelling interest in protecting the right of "members of groups that have historically been subjected to discrimination . . . to live in peace where they wish." *Id.* at 395. To the extent that the government need only establish that the affected groups "have historically been subjected to discrimination," most, if not all, of these bases will likely meet this standard. This showing may be easier in some instances, such as disability and sexual orientation, than in others, like marital status. See, e.g., *Attorney Gen. v. Desilets*, 636 N.E.2d 233, 239 (Mass. 1994) (remanding assessment of whether state interest is compelling in eliminating marital status discrimination, but noting differences in legal rights conferred to married and unmarried

lower courts that have wrestled with this issue have reached somewhat mixed results, but the trend seems to be towards characterizing as compelling a government interest in addressing any arbitrary discrimination.¹⁹⁵ This conclusion seems unassailable in a nation committed to individual self-determination and equal opportunity.

The government's interest in protecting individual privacy may also be compelling as an additional rationale underlying prohibitions on certain decisionmaker inquiries. Again, the Supreme Court has never directly addressed this question.¹⁹⁶ A number of lower courts have grappled with the issue, generally concluding that an individual's medical information is constitutionally protected from unwanted disclosure to or by the government.¹⁹⁷ If an individual's right to

couples and observing that "marital status discrimination is not as intense a State concern as is discrimination based on certain other classifications"). For a more detailed discussion of the factors to be considered when determining whether a government's antidiscrimination interest is compelling, see Note, *Sexual Orientation Antidiscrimination Law and the Religious Liberty Protection Act: The Pitfalls of the Compelling State Interest Inquiry*, 89 GEO. L.J. 719, 738 (2001).

¹⁹⁵ These cases generally involve free exercise challenges to state antidiscrimination laws' application to religious entities. Compare *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 717 (9th Cir. 1999) (finding no compelling state interest in preventing housing discrimination on the basis of marital status), *vacated en banc*, 220 F.3d 1134 (9th Cir. 2000), *cert. denied*, 531 U.S. 1143 (2001), and *Cooper v. French*, 460 N.W.2d 2, 10-11 (Minn. 1990) (plurality opinion) (finding no compelling interest in preventing marital status discrimination), with *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 279-80 & n.8 (Alaska 1994) (finding a compelling state interest in protecting unmarried cohabitants from housing discrimination), *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1, 39 (D.C. 1987) (finding a compelling governmental interest in eradicating discrimination on the basis of sexual orientation), and *McCready v. Hoffius*, 586 N.W.2d 723, 730 (Mich. 1998) (finding a compelling state interest in preventing housing discrimination based on marital status).

¹⁹⁶ In *Whalen v. Roe*, 429 U.S. 589 (1977), the Court considered a somewhat related issue, when it noted that constitutional privacy rights may include an individual's interest in avoiding disclosure of personal matters, including medical information. *Id.* at 598-600. Although it ultimately found that a state law requiring disclosure of drug prescriptions included adequate privacy safeguards, the Court acknowledged that the statute "creates a genuine concern that the information will become publicly known and that it will adversely affect [plaintiff patients'] reputations. This concern makes some patients reluctant to use, and some doctors reluctant to prescribe, such drugs even when their use is medically indicated." *Id.* at 600.

¹⁹⁷ E.g., *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998) (holding that a government employer's nonconsensual testing of employees for sickle cell trait, syphilis, and pregnancy violated employee privacy rights, as "[t]he constitutionally protected privacy interest in avoiding disclosure of personal matters clearly encompasses medical information and its confidentiality"); *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) (finding a constitutional right to privacy limiting government publication of individual's HIV status: "We agree that the right to confidentiality includes the right to

avoid disclosure of her medical status is constitutionally protected, the government's interest in preserving that privacy seems similarly compelling.¹⁹⁸

Assuming that the government's interests are found compelling, a second — and harder — question remains: Are these limitations on decisionmaker speech sufficiently narrowly tailored to withstand strict scrutiny? Several possible arguments support the conclusion that they are.

First, the reach of these laws is limited to decisionmaker communications about available opportunities: advertisements or other notices or proposals, along with communications during preliminary or actual negotiations, such as job interviews or discussions while showing an apartment or house. Recall, for example, the Fair Housing Act prohibits discriminatory statements "with respect to the sale or rental of a dwelling."¹⁹⁹ ECOA regulations similarly limit only inquiries into protected class status made "in connection with a credit transaction,"²⁰⁰ while Title VII regulations address similar inquiries only "in connection with prospective employment."²⁰¹ These limitations thus do not extend to communications outside of the transactional context.²⁰²

Indeed, these laws fully preserve alternative avenues for decisionmakers to engage in political, religious, or other expression outside their role as decisionmakers — through, for example, letters to the editor, sermons, testimony, or other statements sharing their views on the morality or wisdom of antidiscrimination laws. In *Pittsburgh Press*, the Court took pains to distinguish speech in this particular transactional setting from political speech: "Nothing in our holding allows government at any level to forbid Pittsburgh Press to publish and

protection regarding information about the state of one's health. Extension of the right to confidentiality of personal medical information recognizes that there are few matters that are quite so personal as the status of one's health.").

¹⁹⁸ See Paul Steven Miller, *Is There a Pink Slip in My Genes? Genetic Discrimination in the Workplace*, 3 J. HEALTH CARE L. & POL'Y 225 (2000) (outlining growing concerns about genetic discrimination in the workplace); Mark. A. Rothstein et al., *Protecting Genetic Privacy by Permitting Employer Access Only to Job-Related Employee Medical Information: Analysis of a Unique Minnesota Law*, 24 AM. J. L. & MED. 399 (1998) (discussing growing federal and state movement towards protecting medical privacy). Whether an individual has a constitutionally protected privacy right to avoid disclosure of other personal, yet non-medical, information — such as sexual orientation, age, or marital status — is considerably less clear.

¹⁹⁹ 42 U.S.C. § 3604(c) (2000).

²⁰⁰ 12 C.F.R. § 202.5(d)(5) (2002).

²⁰¹ 29 C.F.R. § 1604.7 (2002).

²⁰² The Sixth Circuit, for example, upheld a finding of a Fair Housing Act violation when a husband and wife "expressed an intention to exercise their control [over a trailer rental] in a discriminatory way." *Stewart v. Furton*, 774 F.2d 706, 709 (6th Cir. 1985). The Court noted the First Amendment problem that would have been created if the discriminatory statements "had not related to a specific discriminatory and illegal transaction." *Id.* at 710 n.2.

distribute advertisements commenting on the Ordinance, the enforcement practices of the Commission, or the propriety of sex preferences in employment.”²⁰³

Second, prohibitions on discriminatory statements are designed to address only those communications that have the purpose or effect of discriminating against or deterring applicants based on their protected class status. Recall that the test generally focuses on whether the statements suggest to an ordinary listener or reader that a particular protected characteristic is “preferred or dispreferred.”²⁰⁴ Advertisements and other statements that do not deliver this deterrent message do not violate these civil rights provisions.

Finally, these restrictions on front-end decisionmaker communications are narrowly tailored because no less restrictive alternative effectively accomplishes the government’s antidiscrimination interests. Indeed, there is some precedent for concluding that prophylactic bans of this type are sometimes necessary to achieve the government’s objectives.

In *Burson v. Freeman*,²⁰⁵ for example, the Supreme Court upheld a content-based ban on campaign speech within 100 feet of polling places.²⁰⁶ Applying strict scrutiny, the plurality first determined that the state’s interests in preventing fraud and voter intimidation were compelling.²⁰⁷ Turning to the more difficult question of whether the ban was sufficiently narrowly tailored, it found that merely prohibiting intimidation and fraud would address only the most blatant attempts to impede elections.²⁰⁸ Additional preventive efforts — by prohibiting campaign speech both inside and immediately outside the polling place — were necessary.

The Court upheld a similarly prophylactic rule under strict scrutiny in *Buckley*

²⁰³ *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 391 (1973). Lower courts have also emphasized this distinction. For example, in *United States v. Northside Realty Assoc., Inc.*, 474 F.2d 1164 (5th Cir. 1973), the Fifth Circuit remanded to ensure that the lower court’s finding of a Fair Housing Act violation for a decisionmaker’s discriminatory statements was not based on the defendant’s protected announcement that he would challenge the Act’s constitutionality. *Id.* at 1171. In contrast, as discussed *supra* note 90, the California Supreme Court’s decision in *Kasky v. Nike, Inc.*, failed to preserve commercial actors’ capacity to participate in public debate outside the transactional context and, in my view, thus runs afoul of fundamental free speech principles.

²⁰⁴ See, e.g., *Ragin v. New York Times Co.*, 923 F.2d 995, 999–1000 (2d Cir. 1991). For example, when determining whether certain age-related references in job advertisements were unlawful, the Fourth Circuit noted that, “[W]e are inclined to think that the discriminatory effect of an advertisement is determined not by ‘trigger words’ but rather by its context.” *Hodgson v. Approved Pers. Serv.*, 529 F.2d 760, 765 (4th Cir. 1975). It went on to conclude, that the term “junior” referred to a position’s responsibility, rather than the preferred youth of the jobholder. *Id.*

²⁰⁵ 504 U.S. 191 (1992).

²⁰⁶ *Id.* at 211.

²⁰⁷ *Id.* at 199.

²⁰⁸ *Id.* at 206–07.

v. *Valeo*.²⁰⁹ It recognized Congress' compelling interest in addressing the appearance, and sometimes the reality, that large campaign contributions compromised their recipients.²¹⁰ Acknowledging that some large contributions exert no improper influence, the Court nonetheless concluded that a ban on contributions over a certain size was necessary to achieve the government's anticorruption goals.²¹¹

Some parallels emerge when we return to proscriptions on certain decisionmaker inquiries, such as the ADA's ban on employers' disability-related questions. Although Congress could have restricted less speech, for example, by forbidding only those questions motivated by discriminatory intent, the ADA's approach responds to the practical difficulty in screening "innocent" inquiries from those that will fuel discriminatory decisions. Certain questions might well be benignly posed by some decisionmakers who would never use the information for decisionmaking purposes, just as they might be used by others, consciously or unconsciously, to screen applicants in a discriminatory way.²¹²

Because separating the two in advance seems virtually impossible (just as the *Buckley* Court acknowledged the difficulty in distinguishing corrupt from benign campaign contributions of a certain size), an across-the-board ban on certain queries may well be the only means to accomplish the government's antidiscrimination interests. Moreover, regardless of the decisionmaker's intentions, these queries might well deter applicants from continuing to seek the opportunity at stake.

Even more important, decisionmaker speech restrictions also help prevent

²⁰⁹ 424 U.S. 1 (1976); see also *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 657–60 (1990) (upholding a Michigan law prohibiting corporations from using their general treasury funds for spending on state election campaigns on ground that government has compelling interest in preventing the reality or appearance of unfair or corrupt corporate influence and the ban was narrowly tailored because it allowed corporate spending through segregated funds). In my view, the Court's decisions allowing certain content-based speech restrictions in the election context shed some light on the application of strict scrutiny in other contexts as well. But I recognize that elections may raise unique First Amendment issues. For a thoughtful discussion of this topic, see Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1804 (1999) (suggesting that elections might be subject to "special election-specific First Amendment principles because of their special role in democracy").

²¹⁰ *Buckley*, 424 U.S. at 28.

²¹¹ *Id.* On the other hand, the *Buckley* Court also held that caps on candidates' expenditures on their own behalf, total campaign spending, and individuals' direct spending violated the First Amendment. *Id.* at 644–54.

²¹² As discussed above, "innocent" queries might include those seeking to break the ice in an interview (e.g., perhaps commiserating about shared medical conditions: "My back is killing me — do you have a bad back too?") or by a decisionmaker who is genuinely interested in the lives of prospective tenants or employees ("Do you have a boyfriend/girlfriend? Any thoughts about marriage?"). See *supra* text accompanying notes 173–74.

discrimination *before* it happens, which is especially important in light of the limitations of after-the-fact enforcement described earlier.²¹³ Recall the *Burson* plurality's recognition of the need to prevent speech-induced fraud and voter intimidation *before* they occur: "These undetected or less than blatant acts may nonetheless drive the voter away before remedial action can be taken."²¹⁴ The communications at issue here raise very similar concerns — that is, certain decisionmaker speech may lead applicants to walk away from pursuing opportunities for which they are legally entitled to complete. Moreover, the difficulties of after-the-fact enforcement indicate that other approaches that restrict less speech (such as simply banning discriminatory decisions while declining to regulate decisionmaker communications) would prevent and redress substantially less discrimination and thus would be significantly less effective in achieving the government's equal opportunity objectives.

CONCLUSION

Exploring the free speech issues raised by these civil rights limitations on decisionmaker expression reminds us yet again of the complexity and uncertainty of First Amendment doctrine. This discussion highlights, for example, continuing debates over the value of distinguishing commercial speech from other speech, the often shadowy line between verbal "conduct" and "speech," the challenges in separating so-called "low-" and "high-" value speech generally, and the occasional tension between equality and free speech values.

Rather than attempting to resolve these longstanding quandaries, this Article seeks to determine whether principled bases exist for defending these laws consistent with the First Amendment. A few key points deserve emphasis. First, decisionmaker speech plays a major role in controlling access to employment, housing, and other important life opportunities. This control may be exercised (intentionally or otherwise) in a manner that undermines our national commitment to equality. Second, decisionmaker communications about available opportunities are of primary value to their recipients, rather than the decisionmakers themselves. Third, these antidiscrimination provisions preserve other vehicles for decisionmakers to air their expressive interests outside the transactional context.

By sorting these communications according to their ability to provide accurate information to inform lawful decisionmaking, the Court's modern commercial speech doctrine most directly explains why civil rights restrictions on certain decisionmaker expression do not run afoul of free speech values. Indeed, these limitations parallel longstanding approaches to consumer fraud and deception.

Commercial speech, however, is not the only means for defending these laws.

²¹³ See *supra* notes 36–40 and accompanying text.

²¹⁴ *Burson v. Freeman*, 504 U.S. 191, 207 (1992).

Perhaps the link between these decisionmaker communications and discrimination is so close that the speech should simply be considered unprotected conduct. Or perhaps the fit is so tight that the expression's regulation may satisfy strict scrutiny. In any event, these various approaches offer different ways to describe the same phenomenon: a specific context where certain speech is so closely tied to discriminatory action that its regulation is justified.