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COMMERCIAL SPEECH, FIRST AMENDMENT INTUITIONISM AND THE TWILIGHT ZONE OF VIEWPOINT DISCRIMINATION

*Martin H. Redish**

I. INTRODUCTION

Commercial speech is no longer the stepchild of the First Amendment. Long all but ignored and summarily excluded from the prestigious reach of one of our most foundational constitutional guarantees,¹ commercial speech took its first major step toward validation in the Supreme Court's decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*² But as significant as *Virginia Board* was as a historical and doctrinal matter, it left much to be desired as a coherent statement of First Amendment theory. It was likely this failure that led to the stark second class status and treatment the concept received for the better part of two decades.³ Today, the situation in the trenches appears to be dramatically different. In every recent commercial speech case decided by the Supreme Court, the First Amendment argument

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1. See, e.g., *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (summarily rejecting First Amendment protection for commercial speech). For a description of the early history of the commercial speech doctrine, see Ronald D. Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U. ILL. L.F. 1080.

2. 425 U.S. 748, 770–73 (1976) (holding that truthful commercial speech is protected by the First Amendment).

3. See, e.g., *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989) (keeping the protection afforded to commercial speech subordinate to that afforded to non-commercial speech by refusing to impose a “least restrictive means” standard); *Ohralik v. Ohio State Bar Ass’n.*, 436 U.S. 447, 456 (1978) (“[C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values . . .”).

prevailed.⁴ These results are in sharp contrast to the much more hit-or-miss record of the pro-commercial speech cause in earlier years. While it would be incorrect to suggest that commercial speech is today deemed fungible with fully protected speech in all contexts,⁵ it is at least true that the gap between the two is far narrower than it was in 1976.

Despite this significant alteration in judicial outcomes, certain aspects of the modern commercial speech debate are, sadly, much the same as before. For one thing, the Court at least purports to be applying the “First Amendment Lite” type of protection that it first adopted in its famed four-part *Central Hudson* test in 1980. It does so, despite the fact that the end results of what is supposedly the same commercial speech-specific test are now far more protective than they once were. Moreover, respected scholars have long conducted a form of guerilla warfare on commercial speech protection. Some object to the extension of any First Amendment protection at all.⁶ Others have made clear their objection, not to the extension of *any* level of First Amendment protection, but rather to the extension of *full* First Amendment protection, a standard that—preposterously, they believe—would treat commercial advertising, for constitutional purposes, interchangeably with the works of Shakespeare, Martin Luther King, Jr.’s “I have a dream” sermon, or William Jennings Bryan’s famed “cross of gold” speech.⁷

The nature of these scholarly attacks on commercial speech protection can be placed within three broad categories: (1) rationalist, (2) intuitionist, and (3) ideological. Arguments included in the first category put forward specific reasons that, as a matter of First Amendment theory and principle, commercial speech is to be

4. See, e.g., *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 377 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 566 (2001).

5. For example, false commercial speech is automatically excluded from the scope of the First Amendment. Compare *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980) (stating that for commercial speech to come within the First Amendment’s protection, it “must concern lawful activity and not be misleading”), with *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (explaining that certain categories of false non-commercial speech receive the protection of the “actual malice” test).

6. E.g., C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish’s The Value of Free Speech*, 130 U. PA. L. REV. 646, 652–57 (1982); see discussion *infra* Part II.C.1.d.

7. See, e.g., Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 27 (2000) (discussing the difference between public discourse and commercial speech).

deemed undeserving of First Amendment protection, or at least as much protection as given to more traditionally protected forms of expression. Those arguments falling within the second category appeal, rather, to some intuitive notion as to what free expression is all about, concluding, on the basis of a synthesis of those intuitions, that commercial speech is undeserving of full protection. Those that fall into the third category differ from those in the first two categories in that they are openly grounded on the perceived evils of the economic system of which commercial speech is a part.

In this Article, I will demonstrate that, to all too great an extent, all three forms of criticism of commercial speech suffer from the same fundamental flaw: each either constitutes, facilitates, or, at the very least, comes dangerously close to a constitutionally destructive form of viewpoint-based regulation. As such, each gives rise, ironically in the name of the First Amendment, to the most universally condemned threat to the foundations of free expression—suppression based on the regulators’ subjective disagreement with or disdain for the views being expressed.⁸

To be sure, the three forms of attack on commercial speech protection differ significantly in how they ultimately reach their end result of viewpoint regulation. Criticisms that fall within the third category, for example, are refreshingly candid in their ideological cast, and it is therefore mercifully easy to expose their true nature. They are avowedly premised on acceptance of a particular political or ideological perspective that is hostile to capitalism and its logical outgrowths or implications. There is, of course, no reason in the world that scholars cannot vigorously attack all of the evils of capitalism and commercialism, and argue that the logical result is that speech that fosters or furthers such an economic system should be disdained. The problem is that these arguments are made not merely on a normative political level as part of a broader substantive debate, but rather as a basis on which to determine the reach of the First Amendment. Such a practice is a risky endeavor for those on both sides of any normative political issue. Any student of free

8. The one possible exception to my critique are those free speech theorists who exclude protection of commercial speech because they believe that the First Amendment protects only purely political expression and who, therefore, exclude all forms of non-political speech, including literature, art and science, as well as commercial speech. While I believe that such an approach is grossly underprotective as a matter of First Amendment theory, it would be incorrect to view it as a form of viewpoint regulation. *See infra* Part V.

expression should be able to explain that the level of constitutional protection extended to expression cannot be determined by the extent to which the regulator agrees or disagrees with the views expressed. Adoption of such an approach would automatically transform First Amendment interpretation into a political state of nature. Whoever controls the official channels of constitutional interpretation would then be permitted to exclude from the First Amendment's scope any expression which *they* happen to deem deeply immoral or offensive. As is so often the case in constitutional law, then, we should warn those who want to exclude commercial speech from the First Amendment's scope because they condemn the commercialism of which it is an outgrowth: "Be careful what you wish for."

The other two categories are somewhat more complex and therefore more difficult to characterize as a form of invidious viewpoint regulation. Indeed, attacks in the first category appear, at least superficially, to represent the very opposite of an unprincipled, politically motivated approach to First Amendment interpretation. To the contrary, they appear to be grounded in a form of objective and principled constitutional analysis. It is my position, however, that all such claimed principled justifications are fatally and illogically underinclusive. In each case the justification asserted to support reduced protection for commercial speech applies with equal force to one or more categories of non-commercial expression that are still assumed to receive full First Amendment protection. Thus, what superficially appears to constitute a plausible and principled rationale for reducing protection for commercial speech in reality applies its basis for reduced protection, irrationally and unjustifiably, to commercial speech but not to various forms of fully protected non-commercial speech. Careful analysis demonstrates that if the asserted criteria are employed properly as principled, legitimate, and consistently applied grounds on which to reduce constitutional protection, then logically they should also lead to the exclusion or reduction of protection for the parallel non-commercial speech category saddled with the identical flaw. On the other hand, if the asserted rationale is assumed not to justify reduced protection for various forms of non-commercial speech, then logically it should be equally insufficient to justify reduced protection for commercial speech. It is this very point that lies at the core of Herbert Wechsler's famed "neutral principles" analysis: Once a court that is

interpreting and applying a constitutional provision has chosen a principled basis for decision, it may not selectively ignore that principle in subsequent cases when its use would lead to politically distasteful conclusions.⁹ Rather, for judicial legitimacy to be maintained, the constitutional principle must be applied neutrally in all situations to which that principle applies.¹⁰

It does not automatically follow, of course, that the inconsistent and selective application of what are, in the abstract, rational criteria constitutes viewpoint-based regulation. Indeed, on occasion some of the strongest opponents of commercial speech protection have come from the political right—hardly the place from which one would normally fear anti-capitalist viewpoint-based regulation.¹¹ However, these commentators' or jurists' views can largely be explained on the basis of their largely misguided underprotectiveness of free expression. My concern over indirect or furtive viewpoint-based discrimination, rather, focuses on scholars and jurists who are normally associated with a generally more protective approach toward free expression. It is their logically indefensible refusal to extend full protection to commercial speech that, I believe, is appropriately seen as viewpoint driven.

Strategically selective application of abstract principles is often associated with furtive or indirect forms of viewpoint-based regulation. For example, imagine a Chicago city ordinance that makes it a crime to distribute anti-war literature on Michigan Avenue during rush hour. The asserted justification for the regulation is the viewpoint-neutral contention that distribution of literature at this particular time and place would be disruptive to important governmental interests, such as safety and traffic flow. Such a viewpoint-neutral rationale may or may not justify speech regulation. The answer to that question turns on a complex assessment of numerous criteria and is well beyond the scope of this Article. In the hypothetical ordinance, however, the validity of this asserted rationale is beside the point, because the identical harm would result from distribution of pro-war literature or, for that matter, *any* type of literature. The fatally underinclusive nature of the ordinance's limi-

9. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15–16 (1959).

10. *Id.*

11. See *infra* note 140.

tation inexorably leads to the conclusion that the ordinance is effectively viewpoint based. A similar analysis, I believe, is equally applicable to the fatally underinclusive justifications for reduced protection for commercial speech.

The remaining category of commercial speech opposition, which I have labeled "intuitionist," amounts to neither direct viewpoint-based discrimination nor furtive, indirect viewpoint discrimination. However, because of its inherently non-rational nature, intuitionist analysis may easily serve as either a catalyst or a cover for the implementation of such invidious discrimination. It is thus appropriately seen as an "enabler" of viewpoint discrimination. One can easily assert that one's own First Amendment intuition leads to the exclusion or reduction of constitutional protection for commercial speech. But because by definition an intuitionist justification need not be grounded in rational argument, such intuition may derive (consciously or subconsciously) from a background political or ideological prejudice against either commercial speech itself or the capitalist economic system in which it functions. Equally troubling is the threat which such anti-intellectual "grunting" causes to every aspect of First Amendment thought, right down to its core, for intuitionist justifications are inherently immune to any form of rational critique.

Even if one were to accept everything I have written to this point, there would nevertheless exist a pervasive analytical obstacle to characterizing any or all of these rationales as viewpoint discriminations. Classical viewpoint discrimination selectively regulates (or protects) speech on the basis of regulatory hostility to a specific social, political or moral position sought to be expressed by the speaker. This pathology, for the most part, is not technically true of commercial speech regulation, even when the reduced protection is openly grounded in hostility to commercial expression as a whole. By the Court's own definition, commercial speech promotes sale of a product or service.¹² Such expression, therefore, does not express a political, social or moral viewpoint; if it did, it would no longer be appropriately classified as commercial speech. One may therefore challenge my characterization of hostility to commercial speech as a

12. See *infra* note 21; see, e.g., *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983).

form of viewpoint-based discrimination. At most, the argument could be made that commercial speech regulation constitutes a form of *subject matter* discrimination, a far less invidious—indeed, often readily accepted—type of constitutional classification. While I fully recognize this potential difficulty, I nevertheless conclude that any approach grounded in hostility to commercial speech is appropriately viewed not as subject matter categorization, but rather as viewpoint-based discrimination. I reach this conclusion because I believe such hostility falls within a “twilight zone” category of viewpoint discrimination that, while not conceptually identical to traditional viewpoint-based regulation, gives rise to much the same invidious threat to the foundations of free expression.

This Article contains three main sections. The initial section describes the three categories of arguments usually relied upon to justify a reduced level of protection for commercial speech.¹³ The following section explores the nature of viewpoint discrimination and the reasons why, as a matter of constitutional and political theory, such discrimination must be categorically rejected as a basis for First Amendment analysis.¹⁴ The final section integrates the first two sections by demonstrating that each of the categorical bases for reducing or rejecting First Amendment protection for commercial speech is, in one way or another, appropriately characterized as a form of invidious and constitutionally impermissible viewpoint discrimination.¹⁵

II. THE ARGUMENTS FOR REDUCED COMMERCIAL SPEECH PROTECTION: A CATEGORICAL APPROACH

A. Defining Commercial Speech

Until relatively late in the twentieth century, neither court nor scholar had invested virtually any effort in fashioning a defense of the summary exclusion of commercial speech protection from the scope of First Amendment protection.¹⁶ It was simply assumed, without explanation or support, that commercial speech fell within

13. See *infra* Part II.

14. See *infra* Part III.

15. See *infra* Part IV.

16. See *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (summarily rejecting First Amendment protection for commercial speech).

the area of far less protected property rights, rather than constitutionally protected expression.¹⁷ Since the Supreme Court's decision to extend at least some level of First Amendment protection to commercial speech, a scholarly cottage industry on the subject has mushroomed. Some of it has advocated full, or at least substantial, First Amendment protection.¹⁸ Much of it—likely the overwhelming majority—has rejected full or, on occasion, any First Amendment protection for commercial speech.¹⁹ Before I can attempt to achieve my goal of categorizing and deconstructing the arguments against full First Amendment protection for commercial speech, however, it is necessary to define the concept. The term, it seems, is not self-defining, and how one chooses to define “commercial speech” has a potentially enormous impact on the validity of the attacks on its protection.²⁰

While the Supreme Court has cryptically offered a number of different—and not always consistent—definitions of commercial speech,²¹ for all practical purposes the alternatives come down to two: (1) speech concerning commercial products or services,²² or (2) speech advocating the sale of commercial products or services (the

17. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 414 (1970) (“The rule that communications in the ‘commercial sector’ of our society are outside the system of freedom of expression . . . has been widely observed, [but] has never been fully explained.”).

18. Much of that scholarship has been my own. See MARTIN H. REDISH, *MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY* 14–62 (2001) [hereinafter REDISH, *MONEY TALKS*]; Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 *GEO. WASH. L. REV.* 429, 431–48 (1971); see also Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 *VA. L. REV.* 627, 648–52 (1990) (arguing that commercial speech should be afforded the same protection as non-commercial speech).

19. E.g., C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 *IOWA L. REV.* 1, 3 (1976) (“[A] complete denial of first amendment protection for commercial speech is not only consistent with, but is required by, first amendment theory.”).

20. See *infra* Part II.C.1.b–d.

21. See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983) (holding that an advertisement does not constitute commercial speech merely because of its form, references to a product name, or because it derives from economic motivation, but rather because of a combination of all of these characteristics); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561–62 (1980) (defining commercial speech as “expression related solely to the economic interests of the speaker” and “speech proposing a commercial transaction”); *Compare Valentine*, 316 U.S. at 54 (defining commercial advertising as commercial speech), with *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 384 (1973) (“[S]peech is not rendered commercial by the mere fact that it relates to an advertisement.”).

22. This was the definition I assumed when, prior to the Court's extension of meaningful First Amendment protection to commercial speech, I argued that commercial speech deserved such protection.

definition on which the Court appears to have settled).²³ Under the first alternative, *all* expression concerning the quality, efficiency, or safety of products or services for sale, regardless of the speaker, would receive reduced or no protection. Thus, both a manufacturer's speech advocating a product's sale and a consumer protection advocate's speech criticizing the product would be deemed less protected commercial speech.²⁴ Under the second alternative, in contrast, it is only speech motivated by the seller's goal of direct financial gain through sale that falls within the supposedly "second class" category of commercial expression.²⁵ Both alternatives represent linguistically plausible definitions of the phrase. While the first alternative is, however, at least theoretically conceivable, at no point has the Court ever chosen to employ it. It is probably reasonable to conclude that, at this point, the Court has unambiguously adopted the view that commercial speech is confined to expression advocating purchase.²⁶

In categorizing, analyzing and critiquing the various arguments relied upon to reject full First Amendment protection for commercial speech,²⁷ it is essential that we recognize that those scholars who have advocated this position have done so on the assumption that

23. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553–54 (2001) (stating courts have recognized the "distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech" (quoting *Cent. Hudson*, 447 U.S. at 562)).

24. The issue becomes significantly more problematic, of course, once the debate begins to concern possible government regulation of commercial products or services, because at that point the speech could arguably be deemed political in nature. This fact, however, simply underscores the difficulty of attempting to segregate commercial speech as a self-contained category.

25. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 785 (1976) (Rehnquist, J., dissenting); *Bolger*, 463 U.S. at 66–67 (explaining that since speech is part of the promotion of a sale it is relevant to the determination of commercial speech).

26. See *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 366–68 (2002).

27. It should be noted that unless otherwise specified, when I refer to commercial speech in the course of this Article, I intend to include only truthful, non-misleading expression. There are a number of significant arguments growing out of the question of First Amendment protection for false or misleading commercial expression. See, e.g., Post, *supra* note 7, at 37–41; Martin H. Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech*, 43 VAND. L. REV. 1433, 1443 (1990). In prior writing, I have argued that false commercial speech, much like most false political speech, should be measured by the "actual malice" test of *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). See REDISH, MONEY TALKS, *supra* note 18, at 55–56. Thus, for reasons I have explained elsewhere, I ultimately conclude that even false commercial speech is to be treated fungibly with false non-commercial speech. See *id.* at 53–56. For purposes of intellectual simplicity, however, my critique in this Article is aimed exclusively at arguments made for providing reduced or no First Amendment protection for even wholly truthful commercial speech.

commercial speech is confined to expression promoting sale.²⁸ Indeed, in a number of instances the fact of sale promotion is central to the argument for reduced protection.²⁹ Thus, it should always be kept in mind that the very same scholars who urge reduced protection for commercial speech are at the same time proceeding on the assumption that expression *criticizing* the quality, safety, efficiency, or value of commercial products or services receives full constitutional protection.

*B. Understanding the Nature of Principled Constitutional Analysis:
The Two Levels of Normative Inquiry*

Many years ago, Herbert Wechsler, in his famed article on “neutral principles,” provided the modern basis for the argument that constitutional interpretation must, at its foundation, rest on principle.³⁰ Though the article clearly suffers from a number of flaws and has been the victim of often vigorous, and sometimes misguided, attack,³¹ it properly remains the starting point for any argument that constitutional interpretation must ultimately be grounded in principled analysis.

Anyone who seeks to defend the need for principled analysis in constitutional interpretation, of course, bears an obligation to explain the difference between principled and unprincipled interpretation, which is not an easy task. Indeed, Professor Wechsler was largely agnostic on the question of how to choose a “principled” interpretation of a constitutional provision in the first place.³² However, Wechsler’s greatest—albeit today largely ignored—contribution was to point out what perhaps should have been (but often has not been) obvious in any event: To satisfy the requirements of principle, a constitutional interpretation must be applied *neutrally*.³³ In other

28. See, e.g., Baker, *supra* note 19, at 3.

29. See discussion *infra* Part II.C.1.b–d.

30. Wechsler, *supra* note 9, at 16.

31. E.g., Arthur S. Miller & Ronald F. Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 *passim* (1960); Jon O. Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CAL. L. REV. 200, 202–08 (1984); Benjamin F. Wright, *The Supreme Court Cannot Be Neutral*, 40 TEX. L. REV. 599 *passim* (1962).

32. See generally Wechsler, *supra* note 9, at 11–19 (arguing that courts should rely on principled analysis that transcends the immediate case, but providing no criteria for courts to follow).

33. *Id.* at 15.

words, whatever rationale a court selects to justify its chosen interpretive doctrine must be applied consistently in all cases; it cannot be selectively altered in subsequent cases solely because the court finds the outcome dictated by use of that principle to be politically distasteful or offensive. Wechsler's insight, then, can play a valuable role in constitutional analysis, even if one remains uncertain of how to choose the applicable interpretive principle in the first place. His primary concern was not with the shaping of the principle, but in maintaining the principle's consistent application once it has been adopted in the initial case.

In important ways, portions of the First Amendment prohibition on viewpoint discrimination grow out of a Wechslerian concern for principle. When a regulation of expression is justified on the ground that the regulated expression possesses quality *X*, the fact that the regulation fails to include within its prohibitory reach other expression that also possesses quality *X* automatically renders the regulation, if not unconstitutional, then at least constitutionally suspect. This is so even if one were to assume that a regulation of *all* the expression characterized by *X* would satisfy the First Amendment. The constitutional flaw is that the regulation is irrationally underinclusive, and therefore discriminatory.

It is important to understand that parallel underinclusiveness analysis applies to selective expressive *protection*, as well as to selective expressive *suppression*. Phrased in Wechslerian terms, when the principle of First Amendment interpretation chosen by a reviewing court as a basis for excluding the regulated expression from the protective scope of the First Amendment simultaneously affects other types of speech that the court in subsequent cases chooses to protect, the court has failed to apply its interpretive principle in a neutral manner. Of course, nothing in Wechslerian jurisprudence would logically prevent a reviewing court from deciding to alter its underlying interpretive principle (putting issues of constitutional *stare decisis* to the side).³⁴ Thus, the court could now decide that it had been incorrect in its prior decision in believing that expression is disqualified from the First Amendment's scope because it is characterized by *X*. Such an alteration in principle,

34. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 979–84 (1992) (Scalia, J., concurring in part and dissenting in part).

however, would logically dictate a reversal of the decision not to extend protection to the regulated expression in the initial case; a failure to do so would lead to swimming halfway across a river, intellectually speaking. The court could, on the other hand, now decide that while *X* is not an appropriate basis on which to determine First Amendment protection, *Y* does provide such a basis, and the speech not protected in the initial case is characterized by *Y* while the speech the court chose to protect in the second case is not. If so, however, the court would obviously have to be explicit in its change in underlying decisional principle. Absent such an explicit change in governing principle, exclusion of the expression in case one from the First Amendment's scope, combined with the protective inclusion of similarly characterized expression in case two, is inescapably unprincipled.

When a reviewing court is guilty of such inconsistency in application of its chosen interpretive principle, two conceivable explanations exist: (1) the court simply fails to recognize or grasp the inconsistency, or (2) the court is making a conscious (albeit concealed) choice to apply its principle selectively because it dislikes the regulated speech in the initial case but is favorably disposed to the regulated speech in the second case. There appears to be no third alternative. The reviewing court could, perhaps, candidly acknowledge that it is refusing to protect the expression in case one, not because of any neutrally applied precept of First Amendment analysis but simply because it finds the substance of the speech politically or morally offensive. For example, the court could conceivably assert, quite openly, that its "principle" of First Amendment interpretation is that the speech of Socialists, or Fascists, or Communists or (fill in name of hated group here) is so offensive as to exclude itself from constitutional protection.³⁵ Applying this form of principled analysis, the court would be quite consistent in deciding not to protect the speech in case one but to protect the speech in case two. Such an approach to First Amendment interpretation, however, is impermissible. It represents not a good faith attempt to reconcile and apply the competing historical, textual and normative factors required by principled First Amendment analysis, but rather a thinly veiled attempt by those in power to use the First Amendment as a

35. See *Barenblatt v. United States*, 360 U.S. 109, 127-28 (1959).

weapon to undermine the freedom of thought and expression underlying that very constitutional protection.

One may better understand this interpretive dichotomy by dissecting the reasoning that enters into the shaping of both levels of constitutional analysis. On the first level, the interpreter is seeking to glean an appropriate normative guide from the value or synthesis of values underlying the First Amendment. To be sure, reasonable people may differ over what the correct underlying value or values actually are, or the correct translation from value to doctrine, but in each situation the interpreter is seeking to decipher the deep constitutional structure underlying the words of the First Amendment. On the second level, the interpreter cares not at all about the deep structural value or values underlying the protection of free expression, but instead reflexively draws a superficial, unsupported and manipulative equation between those values and the exclusion of what she deems politically offensive speech. But in the end, interpreters operating on this narrower political level are concerned not at all with what the First Amendment is all about. They are focused, rather, on how to suppress the speech they find politically offensive, and manipulatively interpret the First Amendment toward that end.

C. The Three Categories of Commercial Speech Opposition

With this structural background established, it is now appropriate to turn to explication of the three categories of justifications for the extension of reduced or no protection to commercial speech. Those three categories, it should be recalled, are (1) rationalist, (2) intuitionist, and (3) ideological. It should be emphasized that this categorization is solely my own. No one, to my knowledge, has ever even attempted to categorize the anti-commercial speech arguments, much less chosen the specific categories that I have selected. Since none of the scholars who oppose full First Amendment protection for commercial speech has ever expressly categorized his own arguments in the manner I suggest, it is conceivable that particular scholars will object to my classification of their work. In each case, however, I believe that all of those opposing full commercial speech protection fit with surprising ease into one of my three categories.

1. Rationalist Grounds

What I describe as rationalist grounds for opposition to First Amendment protection for commercial speech include those reasons that purport to be based on principled interpretation of the Amendment—in other words, efforts to construe and implement the values underlying the constitutional provision. To the extent these reasons justify exclusion of commercial speech, then, at least superficially, they do so not because of political opposition to commercial speech, but rather simply because commercial speech does not adequately further First Amendment values. I have discerned six conceivable rationalist grounds: (1) absence of relevance to the political process, (2) motivational heartiness, (3) the speech-action dichotomy, (4) the corporate nature of the speaker, (5) speaker self-interest, and (6) regulatory motivation.³⁶ Closer analysis of each of these asserted rationalist grounds, however, readily exposes the grossly underinclusive nature of all of them.

a. Absence of relevance to the political process

Although Professor Farber is undoubtedly incorrect when he asserts that “[e]veryone seems to agree that political speech lies at the core of the First Amendment’s protection,”³⁷ it is certainly true that a number of leading First Amendment scholars have advocated this view.³⁸ If one were to define “commercial speech” as speech concerning commercial products or services, I suppose one starting

36. Note that in shaping these rationales, I draw on the analysis first developed in my book, *Money Talks*. See REDISH, *MONEY TALKS*, *supra* note 18, at 31–53.

37. Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 562 (1991). At the very least, he is incorrect to the extent I am included among the description of “[e]veryone.” See generally Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) [hereinafter Redish, *The Value of Free Speech*] (arguing that non-political speech, like political speech, fosters self-realization value). Other commentators who reject the view described by Farber also seem not to fall within Professor Farber’s description of “[e]veryone.” See generally C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978) (“Speech is protected not as a means to a collective good but because of the value of speech conduct to the individual.”); Kozinski & Banner, *supra* note 18 (arguing that the commercial/non-commercial distinction “makes no sense”).

38. See generally ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT* 93–94 (Lawbook Exchange Ltd 2001) (1948) (arguing that the First Amendment only protects “speech which bears, directly or indirectly, upon issues with which voters have to deal—only, therefore, to the consideration of matters of public interest”); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 27–28 (1971) (advocating constitutional protection only to expressly political speech).

from the premise that the First Amendment is primarily or exclusively designed to protect speech relevant to the political process would logically conclude that commercial speech is deserving of little or no First Amendment protection. I have attacked this view as flawed because it fails to determine the normative reasons our system would choose democracy in the first place.³⁹ Examination of that question, I have asserted, establishes that speech concerning commercial products and services can facilitate private self-government in much the same way that political speech fosters collective self-government.⁴⁰ Both private and collective self-government are grounded in identical normative concerns about self-development and self-determination.⁴¹ Therefore, I have concluded that it makes absolutely no sense to protect speech relevant to a situation where the individual has a minuscule fraction of a say in the outcome while simultaneously refusing to protect speech that will facilitate choices by the private individual that are solely her own.⁴²

All of this is rendered completely moot, however, once one chooses to define commercial speech not in terms of its subject, but rather exclusively in terms of the motivation of the speaker. If, as the Supreme Court currently maintains,⁴³ commercial speech refers only to speech that advocates purchase, there exists a great deal of expression concerning commercial goods and services that is not relegated to the second class status given to commercial advertising. The magazine *Consumer Reports*, as well as consumer advocate groups, talk predominantly, if not exclusively, about the relative merits of countless commercial goods and services.

It might be argued that, unlike the expression of the commercial advertisers, speech of *Consumer Reports* and consumer advocate groups is presumably objective. But that fact, even if assumed to be

39. See REDISH, MONEY TALKS, *supra* note 18, at 22–29.

40. *Id.*

41. See MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 19–29 (1984).

42. See *id.* At the live symposium, Professor Shiffrin asserted that the key to the democratic process is participation, rather than self-government. Steven Shiffrin, Remarks at the Loyola of Los Angeles Law Review Symposium: Commercial Speech: Past, Present & Future (Feb. 24, 2007) [hereinafter Shiffrin, Symposium Remarks]. However, it is difficult for me to comprehend what possible value participation could have completely divorced from the interest in self-determination. Participation is a rather hollow activity, absent some say in the final choice.

43. See, e.g., *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983); see *supra* note 12 and accompanying text.

accurate, surely has nothing to do with the characterization of the expression as political or non-political. Thus, it is at least arguable that a preference for political speech protection could logically lead to reduced protection, or even an absence of protection, for speech about the merits of commercial products and services.⁴⁴ It would,

44. Even this assertion is questionable, since it assumes that somehow we are able to separate expression into neat, severable units in which we can easily distinguish between political and commercial speech. This ignores the fact that expression about commercial products and services often simultaneously implicates traditionally protected expressive categories such as political or scientific speech.

In his response to this Article, Professor Weinstein suggests that while the First Amendment is appropriately deemed to be about speech concerning the political process, even non-political information may be thought of as having a distinct (if secondary) informational value. James Weinstein, *Fools, Knaves & the Production of Commercial Speech: A Response to Professor Redish*, 41 LOY. L.A. L. REV. 133, 144–52 (2007). For that reason, *Consumer Reports* may deserve constitutional protection because of the benefit of the information it supplies about commercial products and services. This reasoning is curious, since the very premise of his First Amendment theory is that it is only speech that contributes to public discourse that furthers the First Amendment's core constitutional value. But if this is true, how can he conclusively assert that in some instances, even purely non-political expression is deserving of protection? He has failed to explain why information unrelated to public discourse should receive First Amendment protection, when his rationale for First Amendment protection focuses primarily on the value of public discourse. Moreover, if we are to assume that such expression untied to public discourse is, in fact, deserving of protection, how do we know that the level of protection it deserves is less than that deserved by public discourse? Why is only public discourse relevant to the core value of free expression? Professor Weinstein seems merely to assume both points, without the slightest explanatory rationale for either. In addition, if we are to grant Weinstein both of his wholly unsupported postulates—i.e., that non-public discourse informational speech is worthy of constitutional protection, but that level of protection is for some reason less than that given to public discourse—how can he possibly make the wholly unsupported *ex ante* empirical assumption that *Consumer Reports* has informational value beyond that of commercial advertising? At the very least, wouldn't he logically need to permit a showing of regulated advertising's informational value in the individual case?

Finally, if Professor Weinstein is so willing to excise non-informational or incomplete non-political speech from the First Amendment's protective scope, one might reasonably ask why even speech that contributes to public discourse is not measured by the same standards. His response, apparently, is that the value of political speech is not its informational benefit but rather some sort of personal benefit to the speaker that comes from the very act of participation. But if this is so, a number of questions arise. First, one may wonder *why* he so quickly provides secondary status to the constitutional value of political information to the voter. Second, one may also wonder why he assumes—once again, without the slightest empirical support—that the *commercial* speaker is more likely than the *political* speaker to be motivated by personal gain, rather than by a desire to obtain the benefits that flow exclusively from the very act of participation. The First Amendment, after all, has hardly been deemed the preserve of those on the level of Mother Theresa. Underscoring the mystery of Weinstein's assumption is the fact that he no doubt extends full First Amendment protection to large corporate enterprises who publish newspapers and political magazines. Presumably *their* motivation is not participation in public discourse as much as it is corporate profit. As a concluding aside, I am really curious what implications Weinstein's political participation theory has for speech that is characterized as literature, art, music and science. If he would, in fact, extend full protection to them, one may reasonably wonder why commercial speech is somehow less deserving of protection, since none of them directly implicates the democratic process. If, on the other hand, he would not extend

however, amount to a total non sequitur to suggest that because we give primacy to political speech, we should reduce protection for commercial advertising but not for non-promotional comments about commercial products and services. Neither has any more to do with the political process than the other. Thus, reliance on a political speech preference as a principled basis for rejecting protection for commercial advertising breaks down. It is easily revealed to be an irrationally underinclusive, and therefore unprincipled, ground for distinguishing commercial from non-commercial expression for purposes of First Amendment protection.

b. Motivational heartiness

In choosing to extend substantial constitutional protection to commercial speech for the first time, the *Virginia Board* Court emphasized that there existed “commonsense differences” between commercial speech and traditionally protected expression.⁴⁵ Chief among these differences is that “[s]ince advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation.”⁴⁶ The existence of the profit motive, in other words, provides a heartiness to commercial speech that makes it more resistant to chilling regulation. Putting the same point in the terms of public choice theory, Professor Farber has suggested that commercial speech is “[a]t the periphery” of the First Amendment,⁴⁷ because “[c]ommercial speech . . . [more] closely resembles a private good [than does political speech]. Most of the benefit of product advertising is captured by the producer itself in the form of increased sales. Consequently, we would not expect severe underproduction of commercial speech.”⁴⁸

It is conceivable that if accepted as a rationale for reduced protection of commercial speech, the argument grounded in motivational heartiness would, in fact, justify the drawing of a distinction between direct commercial promotion of sale, on the one

literature, art, music and science full protection, it is likely that most reasonable observers would deem his approach far too narrow in its reach.

45. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976).

46. *Id.*

47. Farber, *supra* note 37, at 562.

48. *Id.* at 565 (footnote omitted).

hand, and a *Consumer Reports* discussion of products, on the other. As Professor Farber asserts, “Product information distributed by a third party produces benefits that are captured by persons other than the speaker. The speaker, therefore, has an inadequate motivation to produce this information.”⁴⁹ One response to Farber’s point is that *Consumer Reports* does have an economic incentive to produce and distribute its information, for the simple reason that it is able to sell its magazines because of that information. It is arguable, perhaps, that unlike the manufacturer or dealer, *Consumer Reports* does not benefit economically—at least directly—by listener acceptance of, and action upon, its expression, although if listeners or readers do not accept what *Consumer Reports* says, presumably they will not buy its publication and the publishers will lose money. The problems with this “motivational heartiness” rationale, however, are far more significant than this single concern.

In different ways, this rationale for refusing to protect speech manages to be simultaneously overinclusive and underinclusive. It is overinclusive, in that it ignores vitally important differences among different forms of expressive regulation. When the governmental regulation is *partial*, it is at least conceivable that the motivational heartiness rationale is relevant. Thus, it could be argued (albeit incorrectly, I believe) that where government prohibits only false commercial speech—which itself is presumed to fall outside the First Amendment’s protective scope—the spillover chilling effect on protected truthful commercial speech is diluted by the competing motivation of speaker self-interest. The speaker’s desire to communicate truthful information would continue to exist despite the possible fear that what it deems truthful will subsequently be punished as false. But when the governmental regulation of expression is *total*, meaning that it has simply shut down all forms of that type of communication, the motivational heartiness rationale does not make the slightest bit of sense. Where government has suppressed *all* of a particular form of expression, what possible difference does it make that the would-be speaker’s motivation to speak remains strong due to self-interest? Under such circumstances, no matter how motivated the speaker may be, he is denied the right or opportunity to speak. Here, the motivational heartiness rationale

49. *Id.* at 566.

amounts to a complete non sequitur. The essence of that argument in this context would necessarily be that it does not matter that the speaker has been *completely prohibited from conveying truthful information*, because he continues to have the motivation to disseminate truthful information. But the conclusion in no way logically flows from the premise. To the contrary: to state the proposition is to underscore its incoherence. Nor is it the case that the overwhelming number of commercial speech regulations are aimed only at false or misleading commercial information.⁵⁰ Thus, at the very least those reflexively relying on the motivational heartiness rationale as a justification for reducing commercial speech protection need to be far more selective as to the nature of the expressive regulation being justified.

It actually matters little how selective supporters of this rationale are in choosing among types of expressive regulation, however, because the rationale's logic is fatally underinclusive in the scope of speakers penalized by its reach. It is true, as Professor Farber and others have suggested, that commercial advertisers have an enormous motivation, grounded in stark economic self-interest, to communicate with and persuade potential purchasers.⁵¹ But it is surely not difficult to think of numerous other groups of speakers who fit the same description. Candidates for political office have an enormous motivation, grounded in self-interest, both to communicate and to persuade. Perhaps one could respond that while this is possible, it is also conceivable that the candidate could be motivated by more public-oriented goals. Yet, no one can know this *ex ante*, in the particular case. We nevertheless extend full protection to *all* candidate speech. Moreover, one can also hypothesize that there are businesses motivated simultaneously by goals of personal economic gain and public interest. In any event, one can hypothesize numerous categories of speakers who are obviously and unambiguously motivated by personal gain, yet whose speech unquestionably receives full First Amendment protection: welfare mothers

50. Indeed, one can see this simply by a casual examination of the Supreme Court's commercial speech decisions. In virtually none of them was the primary or exclusive subject of regulation false or misleading commercial speech. See, e.g., *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 368 (2002) (prohibition on advertising of compound drugs); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001) (restrictions on tobacco advertising); *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 185 (1999) (restrictions on advertising of gambling).

51. Farber, *supra* note 37, at 565.

picketing for increased benefits, anti-taxation groups, labor unions, and political lobbying groups are illustrative.

c. The speech-action dichotomy

Perhaps the Court's focus on the proposal of a commercial transaction as the defining element of less protected commercial speech can be grounded in the well-established speech-action dichotomy. Both textually and theoretically, the First Amendment protects speech, not actions. To the extent expression promoting commercial transactions is "linked inextricably" to the commercial transactions themselves, arguably the speech collapses into the non-expressive commercial transaction. As a result, its status as protected speech is at least diluted, if not completely revoked.

At most, this reasoning could have relevance to promotion at the point of sale. It is only at the point of sale that commercial advocacy is, even arguably, so temporally linked to the acts of purchase and sale that it can realistically be deemed an element of these acts. Moreover, to suggest that speech that advocates action is automatically rendered the equivalent of action would defy both conceptual reality and at least seventy years of the Supreme Court's First Amendment jurisprudence.⁵² The Court has long held that many forms of advocacy of conduct receive full First Amendment protection, even though the advocated conduct is itself unlawful.⁵³ For that reason, speech that advocates action is no less classifiable as "speech" for purposes of First Amendment protection. Indeed, speech advocating some alteration in listener behavior is in many ways at the core of the constitutional protection, which recognizes the inherent intersection between expression and political choice. Thus, the speech-action dichotomy fails to justify a categorical distinction between commercial and non-commercial expression.

d. The corporate nature of the speaker

One could conceivably reject protection for commercial speech due to the nature of the speaker. The speaker proposing a commercial transaction is invariably a profit-making corporation, an

52. See, e.g., *Schenck v. United States*, 249 U.S. 47, 52 (1919) (explaining that unlawful advocacy can be suppressed only when it gives rise to a clear and present danger of illegal harm).

53. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969) (per curiam).

artificial legal creation of the state whose sole reason for existence is profit maximization. Professor Baker has argued that because free speech necessarily implicates the exercise of free will, the expression of corporations—which is nothing more than the reflexive, robotic attempt to increase profits—cannot qualify for protection.⁵⁴ For this reason, Professor Baker would deny protection not only to commercial speech, but also to purely political speech uttered by corporations.⁵⁵

I have long believed that Professor Baker's reasoning is fatally flawed because he refuses to acknowledge the relevance of the free speech benefits that may flow to the *listener* or *reader* from reading or hearing speech emanating from corporations, either commercial or political.⁵⁶ If one assumes that the values of free speech can be fostered by the receipt, as well as by the communication, of expression,⁵⁷ then it should logically make no difference whether the speaker itself deserves the benefits of the constitutional protection. I have further argued that Baker's approach views the corporation in too truncated a fashion, because it ignores the reason that free willed individuals choose to form a corporation in the first place. The modern corporation developed most completely during the time of Andrew Jackson's administration, as a means by which the common person could compete with the propertied upper classes of the Northeast. Thus, resort to the corporate form can be viewed as a type of "catalytic self-realization" that facilitates individuals' efforts to realize both their goals and their potential.⁵⁸ But even if one were to suspend disbelief and accept Baker's dubious logic, his argument remains grossly underinclusive as a justification for a surgical excision of commercial speech from the First Amendment's protective scope. The institutional media—from *The New York Times* to the *National Enquirer*—are as much profit-making corporations as is any commercial advertiser. Every publishing

54. Baker, *supra* note 6, at 652.

55. *Id.*

56. See Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 235–36 (1997).

57. The theory that free speech values should be viewed from a listener's perspective is associated primarily with the writing of Alexander Meiklejohn. See, e.g., MEIKLEJOHN, *supra* note 38, at 60.

58. Redish & Wasserman, *supra* note 56, at 237.

decision they make is therefore presumably as motivated by profit maximization as are those of non-media corporations.

There appear to exist several possible responses to my underinclusiveness argument. First, Professor Baker has asserted a distinction grounded in the First Amendment's separate constitutional protection for freedom of the press.⁵⁹ Because the corporate media are appropriately classified as "press," he argues, they are to be treated differently, for protective purposes, from non-media speakers.⁶⁰ Thus, the exclusion of robotic profit maximizers from the First Amendment is apparently to be confined to "speakers," rather than to "press."

There is much that is troubling in Baker's reasoning. First, historical support for Baker's grounding of his asserted distinction in framers' intent is weak for two reasons. Initially, one can appropriately question the interpretive legitimacy of any form of inquiry into original intent,⁶¹ and it is only if one accepts the validity of original intent as a form of constitutional interpretation that Baker's argument could even conceivably have relevance. Professor Baker himself appears wholly unconcerned with original intent when it comes to the Speech Clause. More importantly, his argument fails because it amounts to an anachronism: At the time of the framing, there existed no corporate, profit-making institutional press in the sense that it exists today.⁶² It therefore makes no sense to impute to the framers the intent to exclude corporate *speakers*, but not the corporate *press* from the scope of the First Amendment. Secondly, it would have been all but impossible at the time—and, indeed, today—to distinguish the institutional press from the "non-

59. See U.S. CONST. amend. I.

60. See C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 225–49 (1989).

61. Martin H. Redish, *Good Behavior, Judicial Independence, and the Foundations of American Constitutionalism*, 116 YALE L.J. 139, 146–47 (2006); see also Robert W. Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 449 (1984).

62. According to Professor Hovenkamp,

The two greatest classical *legal* institutions in the United States—the modern business corporation and the constitutional doctrine of substantive due process—are both distinctively Jacksonian products. The modern business corporation had its origin in the general corporation acts, one of the most important legal accomplishments of a regime bent on democratizing and deregulating American business.

HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836–1937, at 2 (1991). Thus, the modern business corporation is a product of the Jacksonian period, long after the framing of the Constitution.

institutional” press, if one were even able to persuasively hypothesize such a distinction on a conceptual level in the first place. Third, it is difficult to understand *why*, purely as a normative matter, one would choose to give greater protection to the institutional corporate press than to other more random printed forms of expression. Inferring such a distinction from the First Amendment would effectively transform that provision into one big anti-competitive antitrust violation—hardly a legitimate goal of the constitutional protection of expression.

Perhaps one could respond that it is necessary to provide the institutional press with greater protection, simply to assure the press’ performance of its vital “checking function,” by which it exposes—and thereby limits—governmental excess and abuse.⁶³ But while checking governmental abuse is surely a worthy aim of the First Amendment, it would make no sense to confine performance of that function to some “in group” of established, institutional corporate media. One need point only to *The New York Times’s* pathetic performance as a check on the administration’s now-disproven charges of weapons of mass destruction in Iraq to see that the institutional press is often far more willing to jump into bed with government than it is to check it.⁶⁴ It makes sense, therefore, to view the scope of the press protection broadly, rather than narrowly.

Most devastating to Baker’s effort to rationalize his corporate press/non-press distinction is the simple fact that it is, at its foundation, wholly illogical. If the robotic goal of profit maximization is somehow assumed to justify exclusion from the First Amendment’s scope when non-institutional press is involved—a conclusion that, it should be recalled, I wholly reject—then presumably it is the absence of speaker free will that justifies such exclusion. If the institutional press is made up of profit maximizing corporations, then they, too, must be motivated solely by robotic profit maximization—the very fact relied upon to justify exclusion of corporate speakers in the first place! Baker, then, needs to make up his mind: Does the existence of a goal of robotic profit maximization

63. See Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 480 (1985).

64. See, e.g., Judith Miller, *Defectors Bolster U.S. Case Against Iraq, Officials Say*, N.Y. TIMES, Jan. 24, 2003, at A11; Judith Miller, *Disarming Saddam Hussein: Teams of Experts to Hunt Iraq Arms*, N.Y. TIMES, Mar. 19, 2003, at A1.

logically lead to speaker exclusion from the First Amendment's scope, or does it not? If it does, then he logically must also exclude the corporate press. If it does not, then he cannot automatically exclude expression of the non-press corporation. Reliance on the existence of a separate press clause, then, provides him no outlet. If the existence of a rigid goal of profit maximization is consistent with the notion of constitutional protection for communication in the press context, it logically follows that the values of the First Amendment can co-exist with such profit maximizing motivation. But if that is true, then one cannot rationally exclude constitutional protection for corporate speech solely on the grounds that it is robotically profit-maximizing.

Yet one could possibly point to other asserted distinctions between commercial advertisers and the institutional press besides a specious, straw-grabbing reliance on an anachronistic and illogical press/non-press distinction. It could also be argued, for example, that one does not necessarily know what positions will be taken in the institutional press on issues of public importance. In contrast, one knows for certain, *ex ante*, that a commercial advertiser will promote purchase. One could perhaps reason that it is this certainty that distinguishes commercial speech from the expression of the corporate press. But this argument amounts to nothing more than condemnation—and exclusion—of a speaker because she is an advocate. We know, *ex ante*, that a lawyer arguing on behalf of a client will take a position that, in one way or another, supports that client's interests, not necessarily because the lawyer agrees normatively with that position, but because that is the lawyer's role within the adversary system.⁶⁵ Surely, it does not logically follow that what the lawyer says is inherently unpersuasive or suspect. The same is true for countless non-commercial advocates whose views and positions are quite obviously predetermined by self-interest.⁶⁶ Again, neither Baker nor virtually any other critic of commercial speech protection chooses for that reason to exclude the expression of those speakers from the First Amendment's protection.

65. Martin H. Redish, *The Adversary System, Democratic Theory, and the Constitutional Role of Self-Interest: The Tobacco Wars, 1953–1971*, 51 DEPAUL L. REV. 359, 362–63 (2001) [hereinafter Redish, *Adversary System*].

66. See *supra* note 21.

One might also point to the public interest that exists in the substance of what the institutional media report on, which is to be contrasted to the far narrower concerns of the commercial advertiser. But this argument, too, is fatally underinclusive, as long as one assumes that *Consumer Reports*, which deals with no issue beyond those of the merits of commercial products and services, is to receive full constitutional protection.

It could be argued that the right being asserted is not that of the corporate press, but rather of the reporter or writer who works for the corporation. But what if, as common sense tells us is likely often the case, the reporter writes what the corporation wants her to write?⁶⁷ At the very least, we can be reasonably assured that in most cases, the reporter writes nothing that the corporation does not wish to be printed. In any event, no one has even suggested that the press' First Amendment right in any way turns on the relationship between writer and corporate publisher in an individual case. And it cannot be forgotten that the corporate publisher was able to choose its reporters in the first place. Thus, as long as it is the corporate publisher, rather than the writer himself, who is the subject of the infringement, this factor cannot reasonably distinguish the profit motivation of the corporate institutional press from that of the commercial advertiser.

Finally, the ultimate refuge of one who has no other argument to make is to fall back on mindless adherence to tradition. The institutional press receives full protection, despite its inexorable drive to maximize profits, for no reason other than in American tradition it has been deemed to receive it, while commercial speech has not. But this form of "proof by adverse possession" makes little sense. Also part of our nation's "tradition," tragically, were slavery, Jim Crow laws, the near genocide of the Native American population, and the (shockingly recent) confine-ment of American citizens for no reason other than their national origin during World War II. Surely, not every part of our tradition is to be deemed preserved by constitutional value. If one can defend the unprincipled

67. See Ronnie Dugger, *The Corporate Domination of Journalism*, in *THE BUSINESS OF JOURNALISM* 27, 27, 34–35 (William Serrin ed., 2000) ("Corporate censorship now shapes the whole mainstream media process The reporter, for the dissemination of whose honest work the press is supposed to be free, is subordinated now to the nature of the corporation itself and to the mass-audience requirements, ideological restraints, profit-making imperatives . . . of those same advertising and entertainment corporations.").

distinction between First Amendment protection for the corporate press on the one hand and the commercial advertiser on the other solely on grounds of tradition, one has effectively conceded the argument.

e. Speaker self-interest

In some ways, the argument grounded in speaker self-interest has already been alluded to as part of the discussion of the possible distinctions between commercial advertising and the corporate media.⁶⁸ In a broader sense, however, the argument potentially stands on a separate footing as an independent basis for excluding commercial speech from the First Amendment's protective reach. No commercial advertiser, it may be safely presumed, is likely to highlight the flaws or deficiencies in its product or the comparative advantages of a competitor's product. In this way, it might be argued that commercial speech is inherently misleading because of its strategic and selective incompleteness.⁶⁹

This argument is transparently underinclusive in its reach. Surely, strategic and selective advocacy is by no means confined to commercial advertising. To the contrary, casual experience and common sense tell us that there is precious little fully protected expression that could properly be labeled "objective." Countless speakers, whether in the political, academic, or social worlds, have an underlying agenda when they speak. This invariably leads them to selectively omit damaging information from the content of their argument. This is as true of political interest groups as it is of political candidates. For example, the National Rifle Association is no more likely to promote in its literature the number of people killed annually in gun accidents than gun control advocates are likely to highlight the number of crimes prevented due to gun ownership. Yet, somehow, this fact never leads the very same scholars who criticize protection of commercial speech to argue for reduced protection for the speech of interest groups or political candidates. Instead, we accept as a given that individuals and associations have a

68. See discussion *supra* Part II.C.1.d.

69. This argument, it should be noted, is distinct from an argument that posits that while commercial speech is deserving of First Amendment protection in the abstract, false and misleading commercial speech is not deserving of such protection. This argument, in contrast, assumes the *inherently* misleading nature of commercial speech because of its inherent advocacy.

full constitutional right to promote their goals—often involving personal economic gain⁷⁰—through the use of expression as a means of persuading listeners, readers and viewers to accept their positions. Yet, this is, of course, exactly what commercial advertisers are doing.⁷¹

f. Regulatory motivation

The final conceivably principled rationale for the reduction in or exclusion of commercial speech from the First Amendment is what I label “regulatory motivation.” Simply put, the argument is that when political speech is regulated, there exists an appropriate degree of mistrust of and skepticism about the motivation of the regulator. Such skepticism flows from the inherent incentive of those in power to suppress the expression of their out-of-power rivals. This fact gives rise to the need for a reviewing court to intervene more aggressively to counter the incentive to over-regulate and to protect free speech interests.⁷²

This reasoning resonates with the inherent skepticism that led the framers to adopt systems of separation of powers, federalism, and checks and balances when they promulgated the Constitution.⁷³ Perhaps “if angels were to govern,” the authors of the *Federalist Papers* reasoned, there would be no need for such protections.⁷⁴ Sadly, the eminent drafters of those documents were forced to recognize that those who do govern are likely to be far from angelic.⁷⁵

70. See discussion *supra* Part II.C.1.b.

71. As previously noted, acceptance of the appropriateness of strategic incompleteness in expression provides the foundation for our commitment to the adversary system. See discussion *supra* Parts II.C.1.d–e. See generally Redish, *Adversary System*, *supra* note 65 (discussing the concept of adversary theory in the context of free speech and due process).

72. Puzzlingly, this inherent incentive to suppress the competition appears to have been largely ignored by certain members of the Supreme Court in the area of campaign finance regulation. Justice Breyer, for example, has urged greater-than-normal deference to legislative choices in campaign finance regulation, due to the supposed “expertise” of a governing legislative body. See *Randall v. Sorrell*, 126 S. Ct. 2479, 2492 (2006); *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 137 (2003). He does so, despite the obvious fact that sitting legislators have an inherent interest in confining the ability of opponents to equalize the advantages traditionally associated with incumbency.

73. See U.S. CONST. art. II, § 2; *id.* art. III, § 2; *id.* art. V.

74. See THE FEDERALIST NO. 51, at 118 (James Madison) (J. & A. McLean ed., 1788).

75. See *id.* See generally Martin H. Redish & Elizabeth Cisar, “If Angels Were to Govern”: *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449 (1991)

Whether this reasoning justifies reduced or excluded protection for commercial speech, however, is a very different matter, for at least two reasons. First, the insights of public choice literature tell us that the legislative regulatory process is fraught with dangers of rent-seeking or improper influence by special interests and private parties.⁷⁶ There is no reason to believe that these dangers are any less when the subject of regulation is commercial, rather than political, behavior. Indeed, those with financial resources sufficient to influence political decision making are often commercial operators who are likely to be disposed toward suppression of their competition. Suppression of the speech of their competitors is often likely to be as effective, and far more subtle, than direct regulation of competitors' commercial behavior. To point to one of many conceivable examples, the drug industry could conceivably seek to influence the legislative process for the purpose of suppressing advertising of generic, compound, or homeopathic competitors. There is, then, no *ex ante* basis on which to assume the good faith or neutrality of legislative regulators in the regulation of commercial activity.

The same skepticism might also affect administrative regulation. Scholars have often pointed to the danger of "captured agencies," in which regulators travel back and forth between governmental agencies and the industries they regulate.⁷⁷ This danger, under certain circumstances, could negatively affect competitors of those regulated. The problem for a reviewing court, of course, is that it is both difficult and unseemly to attempt to ferret out such pathological motivation in a particular case. It is, therefore, appropriate to generically presume the danger of regulatory abuse when commercial speech is the subject of regulation, much as we do when political speech is the subject of regulation.

(discussing the doctrine of separation of powers and the various models used to resolve separation of powers disputes).

76. See generally Steven Kelman, "Public Choice" and Public Spirit, 87 PUB. INT. 80 (1987) (arguing that the practice of public choice itself is essentially immoral); Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988) (advocating that a republican approach to the First Amendment offers reasons to reform many areas of modern law); Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) (suggesting that courts should use principles of republicanism to assess political processes).

77. See, e.g., THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 77-78 (2d ed. 1979).

Moreover, exclusive focus on the danger of pathological regulatory motive unduly truncates both First Amendment interests and the threat posed to them by regulation, particularly of the administrative variety. As I have argued in another context, regulatory bodies exist for the very purpose of regulating.⁷⁸ It is all but inconceivable, then, that they can be presumed to provide protection for free speech interests which stand as potential obstacles to regulation with the appropriate level of intensity. It is not uncommon for regulators to focus their concern on a paternalistic desire to protect individuals by selectively suppressing promotion of sale of legal products.⁷⁹ This is so, even if we assume no ulterior or pathological regulatory motivation. It is simply a matter of the cognitive dissonance that inheres in holding the position in the first place. This danger exists just as much when the subject of regulation is commercial speech as when it is non-commercial speech.

Finally, reliance on a focus on potential pathological regulatory motivation as a justification for drawing a protective distinction between commercial and non-commercial expression is fatally underinclusive for yet another reason. Even were one to assume, for purposes of argument, that the danger of regulatory pathology exists for political speech regulation but not for commercial speech regulation, it would remain unclear why *Consumer Reports* would receive full First Amendment protection. Presumably, there is at least as small a danger of regulatory pathology when objective comments on commercial products and services are made as when commercial advocacy is regulated. Thus, as is the case for all of the conceivable “rationalist” defenses of reduced protection for commercial speech, the regulatory motivation argument is fatally underinclusive.⁸⁰

78. See Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 76 (1984) (“Nonjudicial administrative regulators of expression exist for the sole purpose of regulating; that is their *raison d’être*.”); see also Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 659 (1955) (“The function of the censor is to censor. He has a professional interest in finding things to suppress.”).

79. See, e.g., *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995) (finding a law that prohibits beer labels from displaying alcohol content violates the First Amendment).

80. It was suggested at the live symposium of the *Loyola of Los Angeles Law Review* that even if I were correct in my assertion that none of these six posited justifications provides rational support for reduced protection for commercial speech, the six of them combined may do so. Remarks at the *Loyola of Los Angeles Law Review Symposium: Commercial Speech: Past, Present & Future* (Feb. 24, 2007). I have a great deal of trouble understanding this argument;

2. "Intuitionist" Grounds

First Amendment scholarship is often characterized by what could best be described as an "anti-rationalist" school of thought.⁸¹ Though some scholars somehow manage to fit themselves into both rationalist and anti-rationalist camps,⁸² for the most part, acceptance of this anti-rationalism allows its advocate to reach decisions about the scope of First Amendment protection without risking a headache due to over-thinking. Instead of worrying about how to deal with annoying logical inconsistencies in their conclusions, they choose to defend their decisions on grounds that are fundamentally right-brained and, therefore, presumably immune to rationalist attack. These intuitionist scholars are, in other words, focused exclusively on the intuitive appeal of the result of the extension or non-extension of First Amendment protection to a particular hypothetical situation.

Thus, Professors Farber and Frickey imply the preposterousness of suggesting a constitutional equivalence between political speech and an advertisement for soap, without enlightening us as to why, exactly, no equivalence can be drawn.⁸³ Professors Jackson and Jeffries assert—without so much as the slightest grounding in rational thought—that whatever the First Amendment protects, it surely fails to protect "a seller hawking his wares."⁸⁴ Phrased in such a way, I suppose it does—superficially, at least—seem intuitively nonsensical to provide full constitutional protection to such fluff as that. But when one attempts to deconstruct their reasoning, one finds little more than hyperbolic pejorative in support of their sweeping

adding six losing lottery tickets together does not equal one winning lottery ticket. I have demonstrated that each, on its own terms, is false, illogical, inconsistent, or otherwise invalid. It is therefore difficult to see how each could be transformed into a necessary-but-insufficient condition for the proposition that commercial speech is undeserving of protection.

81. See, e.g., Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1639–56 (1987).

82. Professor Farber's scholarship, for example, has included both rationalist and anti-rationalist arguments for reduced protection of commercial speech. As for rationalist arguments, see Farber, *supra* note 37, at 562–68, wherein he asserts a public choice version of what I have labeled a motivational heartiness argument. See discussion *supra* Part II.C.1.b. On the other hand, Professor Farber's work on commercial speech (co-authored with Professor Frickey) is characterized by reliance on a quasi-intuitionist form of "practical reason" and a rejection of heavily rationalist arguments in support of commercial speech protection. See Farber & Frickey, *supra* note 81, at 1639–56.

83. See Farber & Frickey, *supra* note 81, at 1622.

84. Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 2–6 (1979).

and summary exclusion of commercial speech from the First Amendment's scope.

Professor Emerson asserted many years ago that commercial speech concerns the field of property rights, rather than those centered on expression.⁸⁵ But like Farber and Frickey and Jackson and Jeffries, Emerson fails to make even the slightest effort to explain *why* this is so, or, for that matter, why the two are somehow assumed to be mutually exclusive in the first place, even if he is correct in his assertion that commercial speech implicates the system of property rights. But all of these free speech commentators are freed from so burdensome a task as engaging in careful, reasoned, and logically consistent explication of their conclusions. Each of them, in one way or another, is (if only implicitly) employing a form of First Amendment intuitionism,⁸⁶ which, it appears, is simply another word for "conclusory."

I truly envy those scholars who feel sufficiently comfortable with their total abandonment of the obligations of reason and logical consistency so as to develop official labels for their refusal to recognize and assume the task of reasoned analysis, traditionally deemed inherent in the scholarly endeavor. The strategy, I fully concede, is brilliant. How, after all, can one respond to a reliance on "intuitionism"? How can one possibly prove it wrong? Measured by an intuitionist perspective, a conclusion's truth is established automatically by its assertion. This is so, because the assertion unquestionably represents the speaker's intuition as a definitional matter. A decision based on constitutional intuition, then, can never be "wrong."

Whether practical reason demands more intellectual rigor than intuitionism provides appears to be the subject of debate. Farber and Frickey, for example, have suggested that it does. Yet, their own suggested definition of practical reason certainly fails to instill confidence in their ability to translate the phrase's seemingly vague terms into something capable of providing meaningful guidance as to what is and is not appropriate. Farber and Frickey suggest "an

85. EMERSON, *supra* note 17, at 414–17, 447.

86. Professor Shiffrin has explicitly employed the term "intuitionism" to describe his approach to First Amendment interpretation. See Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1254 (1984).

alternative view of the [F]irst [A]mendment's normative status. Rather than thinking of free speech as one level in a hierarchy of values, it may be better to think of it as part of a web of mutually reinforcing values."⁸⁷ The problem they see with more conceptually foundational, logically applied theories is that these approaches often lead inexorably to "highly dubious applications, which the theorist presents as logically inescapable inferences from his premise."⁸⁸ They conclude that "[w]hen a concrete application of grand theory cannot be squared with our complex, situationally sensitive web of beliefs, it is the former that is likely to give way."⁸⁹

If all Farber and Frickey are saying is that pragmatic considerations must at some point be taken into account in shaping First Amendment jurisprudence, I certainly do not disagree. But pragmatic considerations, too, can and should be developed first on a generalized basis as part and parcel of, or at least a gloss on, the general theory, and then applied to specific fact situations as a transparent potential qualifier or limitation on the remaining part of the theory. Thus, my self-realization theory is expressly restrained by recognition of the need to take into account cases in which there exists a compelling need to prevent harm (narrowly defined), usually physical harm. But surely inclusion of this limited pragmatic gloss—itsself appropriately disciplined by its own sets of internally principled restrictions⁹⁰—is a far cry from the vague and malleable reference to a "complex, situationally sensitive web of beliefs" to which Farber and Frickey cryptically refer.⁹¹

Farber and Frickey assert that all forms of modern practical reason

share some fundamental characteristics. Among them are a concern for history and context; a desire to avoid abstracting away the human component in judicial decisionmaking; an appreciation of the complexity of life; some faith in dialogue and deliberation; a tolerance for

87. Farber & Frickey, *supra* note 81, at 1640.

88. *Id.* at 1641.

89. *Id.*

90. See generally Martin H. Redish, *Unlawful Advocacy and Free Speech Theory: Rethinking the Lessons of the McCarthy Era*, 73 U. CIN. L. REV. 9 (2004) (exploring contexts in which danger of harm should be found to restrict speech rights).

91. Farber & Frickey, *supra* note 81, at 1641.

ambiguity, accommodation, and tentativeness, but a skepticism of rigid dichotomies; and an overall humility.⁹²

Practical reason, they readily concede,

is unruly. It specifies no certain starting point, follows no predestined path, may frolic as well as detour, and cannot rise above the abilities of its users. Indeed, the indeterminacy of practical reasoning might suggest that it cannot achieve the status of a theory at all. Like ‘prudence’ and ‘wisdom’ in everyday affairs, legal practical reasoning is explained better by example than by abstract methodological prescriptions The absence of a formula for practical reasoning is inherent in the enterprise⁹³

What seems to be missing from this discussion is any effort to explain how one actually goes about attempting to resolve a specific case on the basis of practical reason. In contrast to principled decision making, practical reason appears to rely on a far cruder resort to a pre-existing set of widely shared prejudices and normative social instincts, untied to any effort to resolve individual cases by reliance on broader and deeper forms of constitutional value development, determined *before* examination of the specific situational context. Strongest evidence of this ominous absence of grounding in some consistently applied set of non-contextual values is Farber and Frickey’s total failure to explain *why* “selling soap” is less deserving of First Amendment protection than other, more traditionally protected types of expression.⁹⁴ Yet they are more than willing to criticize my concededly counterintuitive suggestion (to many, at least) that no principled basis, grounded in accepted and transparent principles of First Amendment theory, can justify a gradation of protection between the two subjects of expression.⁹⁵ Instead of resorting to so burdensome and unpleasant a theoretical and logical inquiry, Farber and Frickey appear to rely on a kind of intuitive situational judgment, largely inexplicable beyond the conclusory expression of a deep-seated feeling that somehow the two situations must be treated differently. This intuitive judgment,

92. *Id.* at 1646.

93. *Id.* at 1647–48.

94. *See id.* at 1622.

95. *See id.* at 1622–24.

apparently, is to be derived from the observer's preexisting personal "web of values" and perceptions.⁹⁶

How much so-called practical reason extends beyond inherently anti-rationalist and logically inexplicable First Amendment intuitionism, like almost everything else about these frustratingly cryptic modes of First Amendment analysis, remains unclear. Although Professor Farber suggests that intuitionism, like practical reason, is part of "a movement away from grand theory,"⁹⁷ he ultimately rejects the notion that practical reason is identical to intuitionism.⁹⁸ But while Professor Farber extends a great deal of effort to tell us what practical reason is *not*,⁹⁹ he spends precious little time telling us what it *is*. Indeed, he attempts to define the concept primarily in terms of what it *rejects*. Practical reason means, he asserts, "a rejection of the view that rules and precedents in and of themselves dictate outcomes."¹⁰⁰ He adds that

[a]t the level of legal theory, practical reason means a rejection of foundationalism, the view that normative conclusions can be deduced from a single unifying value or principle. At the level of judicial practice, practical reason rejects legal formalism, the view that the proper decision in a case can be deduced from a pre-existing set of rules.¹⁰¹

The rejected techniques, Professor Farber explains, "rely heavily on deductive logic (i.e., the syllogism) as the primary method of analysis."¹⁰²

While Professor Farber candidly concedes that practical reason "is easier to invoke than to define,"¹⁰³ perhaps his description of what the concept is *not* helps us to see that if practical reason is not

96. *Id.* at 1641. Note that in a subsequent article, Farber does resort to a more rationalist form of argument to justify reduced protection for commercial speech. See generally Farber, *supra* note 37. However, I have already demonstrated the flaws in his argument. See discussion *supra* Part II.C.1.b.

97. Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 538 (1992).

98. See *id.* at 542 ("Whatever practical reason may be, it is neither deduction nor intuition.").

99. Professor Farber tells us, for example, that "practical reason does not mean—as is sometimes mistakenly thought—an embrace of ad hoc decisionmaking." *Id.* at 538–39.

100. *Id.* at 539.

101. *Id.*

102. *Id.*

103. *Id.*; see also *id.* at 541 ("[A]dherents to practical reason have not fully explained what cognitive processes in addition to deductive logic they view as legitimate.").

identical to intuitionism, it is close enough to be considered a kissing cousin. Both seem to share a heavily anti-rationalist view, chafing at the restraints that syllogistic reasoning imposes on implementation of desired decision making. In this sense, the two can be treated fungibly for present purposes. Both modes of decision making free a reviewing court from the bonds of reason, consistency, and predictability that inherently characterize principled decision making.

With what, exactly, do advocates of either approach fill the intellectual vacuum created by their rejection of the demands of principle and reason? One point seems clear: the anti-rationalism that they share suggests that under both approaches, decisions are made on the basis of some sort of unexplained—and, quite probably, inexplicable—value choices, external to the constitutional provision being interpreted. For if decisions did, in fact, derive from an analysis of the value or values gleaned from the provision's text or structure, they presumably could be explained transparently and supported rationally. From where are these value choices, external to the interpreted constitutional provision, to be derived? One possibility is from the wholly subjective normative value structure of the particular judicial decision maker.¹⁰⁴ At the very least, it would be difficult to prevent such a result, even if it were not desired, were these non-rationalist decision-making models to be employed. The intellectual fog that flows from rejection of all demand of logic or principle would inevitably provide easy cover for implementation of the judge's personal moral or political value structure through the case-by-case process of constitutional interpretation. A second alternative, at least in theory, would be to fill the decision-making vacuum with a judicial implementation of what the court determines to be public sensibilities on the specific issue before the court.¹⁰⁵

Neither of these alternatives provides a satisfactory solution. Indeed, both should frighten the stuffing out of any thoughtful observer of the constitutional decision-making process. An approach that condones as a guidepost for judicial application of the First Amendment right of free expression a judge's implementation of her own personal political, social, or moral value structure, disguised

104. See, e.g., Post, *supra* note 7, at 34–41.

105. See, e.g., *id.* at 20.

under some vapid heading such as “intuitionism” or “practical reason,” should be viewed as the worst form of judicial irresponsibility. Indeed, scholars of the political left who advocate use of practical reason or intuitionism in First Amendment interpretation should be very careful what they wish for. It is unlikely that the “intuition” of many federal and state judges who sit today would match those of left leaning academics. Yet if the judge steadfastly maintains that her “intuition” is that pro-choice demonstrators must be denied a First Amendment right to express their views because they advocate baby killing, the most an academic critic can respond is that his intuition differs from that of the judge—something of an intuitionist stand-off. Reliance on intuitionism or practical reason, then, will let constitutional protection turn on the vagaries of subjective judicial preferences, and it will usually be impossible to determine what those preferences are, *ex ante*.

Even less appealing is the use of practical reason as a means of implementing some judicially perceived notion of widespread public sensibilities. Initially, it is difficult to imagine a branch of government less well suited to determine public sensibilities on a particular issue than the unaccountable, unrepresentative federal judiciary.¹⁰⁶ If one were to proceed on the assumption that assessment of public sensibilities should be deemed constitutionally significant, it would make far more sense to leave those choices to the representative and accountable branches of government. Moreover, the federal judiciary has no access to expensive and carefully performed empirical studies that can provide it with accurate information about public preferences. Finally, and most importantly, to let First Amendment protection turn on some notion of public sensibilities on a subject effectively turns that countermajoritarian constitutional protection on its head. The idea of the First Amendment, at the very least, is to protect the right to express unpopular ideas, which are protected by the insulated judiciary from suppression by the majority.¹⁰⁷ If the reach of the First Amendment is somehow to be coordinated with widespread

106. See U.S. CONST. art. III, § 2 (providing federal judges with life tenure and protections of their salary during good behavior); see also U.S. CONST. art. II, § 2 (providing the President with authority to nominate federal judges, subject to confirmation by the Senate).

107. See *Abrams v. United States*, 250 U.S. 616, 630 (Holmes, J., dissenting) (criticizing the majority’s imposition of its views by means of censoring expression of minority views).

public sensibilities on the subject of or views expressed in the challenged speech, then the First Amendment will have been effectively rendered a nullity.

It should be emphasized that in rejecting both intuitionism and practical reason as the guidepost for First Amendment interpretation, I do not mean to put in their stead some sort of abstract Langdellian formalism. As I have acknowledged in past writing,¹⁰⁸ cases will inevitably arise in which the outcome cannot be predicted simply on the basis of some formulaic statement of the law. The key, however, is that in such cases the issue will concern the nature of the *harm* to which the regulated speech gives rise and the extent to which, under the circumstances of the particular case, that harm can appropriately be thought to give rise to a compelling governmental interest justifying regulation of expression. But those who reject First Amendment protection for commercial speech cannot reasonably argue that commercial speech—at least truthful commercial speech—necessarily causes more harm than do all forms of fully protected political speech, such as advocacy of violent overthrow.¹⁰⁹ They are, instead, making some form of judgment about the nature or value of the expression itself.

The major distinction between practical reason and the use of a harm standard as a qualifier of the implications of rational analysis is that the latter, unlike the former, requires use of traditional legal reasoning: open, reasoned debate over the choice of a substantive standard of law, and then application of that standard to individual cases. The decision of whether or not to permit a showing of harm that will ever be sufficient to justify suppression of otherwise protected speech, and the nature and degree of the showing of harm to be required, are issues of general substantive law that are the proper subject of debate. They are to be made openly and consistently; when used as a justification for regulation of one type of expression, the harm factor cannot be mysteriously excluded as a measure of another type of expression, unless some other principled basis exists for distinguishing between the two types of expression. Decision makers employing First Amendment intuitionism or

108. See Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 119–20 (1981) (recognizing a limited role in First Amendment analysis for case-by-case balancing process).

109. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 448–49 (1969) (per curiam).

practical reason, in contrast, make contextual judgments that do not demand—indeed, apparently do not permit—attempted application of prior agreed upon general principles of decision to specific fact situations.

It is also important to establish that neither practical reason nor intuitionism is the necessary outgrowth of a rejection of a single overarching value of free expression. One could conceivably conclude that free expression is appropriately deemed to foster not a single value but rather a complex intersection of multiple values,¹¹⁰ yet nevertheless view the creation of free speech doctrine as the application to specific cases of one or more permutations of those multiple intersecting values. This process would presumably be no more or less syllogistic than the shaping of doctrine through the application of an assumed single underlying value of free expression to specific cases. Intuitionism and practical reason, in contrast, eschew use of any such form of logical reasoning in favor of what is described—euphemistically—as a more “contextual” examination.

In the case of commercial speech, decision makers who choose to employ practical reason and intuitionism are making their “rough judgment” that commercial speech is not worthy of protection before the issue of harm caused by the speech is even considered. The argument, so far as I can tell, is not that commercial speech inherently gives rise to more harm than do more traditionally protected types and subjects of expression. The initial question in every First Amendment case is whether government even needs to satisfy the compelling interest standard that is triggered when fully protected expression is sought to be regulated. Because the intuitionists and practical reason advocates conclude that, for whatever reason, commercial speech is not deserving of protection in the first place, they need never even reach the compelling interest question. In light of their initial conclusion, under their approach there is no First Amendment interest triggering the demand for a

110. Note that it is my view that free expression does, in fact, serve ultimately only one value—self-realization—of which all other conceivable values are merely logical sub-values. See Redish, *The Value of Free Speech*, *supra* note 37, at 593. However, reconsideration of that issue is unnecessary for present purposes, because even if one were to accept the notion of a synthesis of multiple free speech values, the application of traditional legal reason could still be employed. Thus, while much of Professor Weinstein’s response to this Article focuses on my explication of the self-realization value, *see* Weinstein, *supra* note 44, at 155–61, that discussion is largely irrelevant to my argument here.

compelling interest analysis. And their initial conclusion is never justified by resort to logic or reason that is applied consistently to all types of expression. No justification is provided to which reasoned response can be made. Instead, there is simply something “intuitive” that tells us that, as Jackson and Jeffries asserted, surely “a seller hawking his wares” deserves no constitutional protection for his speech.¹¹¹

One could conceivably seek to defend resort to intuitionism or practical reason as an alternative to an effort to decide cases on the basis of logic and principle by challenging the feasibility of the rationalist enterprise. It is likely true that principled consistency will not function like clockwork in every case. Occasions will arise, no doubt, where reasonable people could differ as to how generally agreed upon principles apply to specific cases. But to resort to what ultimately amounts to a form of non-rational subjectivism and intellectual chaos as an alternative is most assuredly the wrong move.

It is conceivable that I am being unfair to adherents to practical reason. Perhaps there is more “there, there” than I have recognized, and practical reason in reality involves debate over reasons, albeit from a purely pragmatic perspective. But “pragmatic” is a meaningless concept absent a clear understanding of what ends one is attempting to achieve in the first place. If those ends are determined by anything other than pure subjective value assessment, then they should be testable by the application of the standards of principled consistency: like cases should be decided in a like manner. Where the asserted reason for excluding commercial speech from the scope of the First Amendment applies with equal force to an expressive category to which full protection is nevertheless extended, there necessarily exists some difference other than the asserted principled basis for exclusion of commercial speech in the first place. Once deconstructed, then, all that remains are the subjective differences in the unrestrained value preferences of the decision maker that are most comfortably associated with the instinctive intuitionism that runs counter to any precept of reasoned debate.

In the wonderful world of practical reason and First Amendment intuitionism, none of my critiques of the logical underinclusiveness

111. Jackson & Jeffries, *supra* note 84, at 14; *see* discussion *supra* Part II.C.2.

of the asserted rationalist justifications for providing reduced protection for commercial speech demands response or defense.¹¹² No logical, principled, or reasoned defense of manipulative underinclusiveness is required when the justification for the exclusion of commercial speech from the First Amendment's protection is, simply, that it somehow intuitively just does not seem to fit in. But when one recognizes the pathetic conceptual inadequacies of such an approach to First Amendment interpretation and the serious practical dangers to which it gives rise, the need for meeting the challenge of commercial speech protection on the basis of transparency, consistency, and principle will become inevitable. As I have demonstrated, there exists no basis in logic or principle to treat commercial speech differently from other categories of fully protected expression.¹¹³

3. Ideological Grounds

On relatively rare occasion, scholars have been mercifully open and candid in evincing academic hostility toward commercial speech. These scholars have made fairly clear that their opposition to the protection of commercial speech is grounded in their disdain for the expression's impact on the functioning of society—in short, their *ideological hostility* toward commercial speech.¹¹⁴ This ideological rationale can take one of two forms. First, it may represent a generic ideological rejection of the very economic system out of which commercial advertising grows. Second, it may constitute a narrower form of policy preference that condemns the particular product or service being promoted by the commercial advertising in question. The thinking behind this narrower rationale is presumably that, as a practical matter, the only individuals who possess sufficient incentive to promote the product or activity to the public are those seeking to sell it. Thus, to stop the commercial advertising is tantamount to halting all promotion of the use of the product or service. Under such a regulatory approach, it would make perfect sense to extend full protection to the speech of those attacking the product or service, but either no protection or only

112. See discussion *supra* Part II.C.2.

113. See discussion *supra* Part II.C.1.

114. See, e.g., R. GEORGE WRIGHT, *SELLING WORDS: FREE SPEECH IN A COMMERCIAL CULTURE* 7 (1997).

limited protection to speech promoting its purchase or use, simply because the former category of expression furthers the predetermined policy goal while the latter undermines it.

The problem with either of the conceivable forms of an ideological or policy-based rationale is, as I have argued throughout this Article, that both of them are fundamentally inconsistent with the core premises of a system of meaningful free speech protection and the democratic structure of which free expression is a central element. Surely, the Supreme Court today would not countenance a law restricting pro-socialist expression on the grounds that those in power believe that socialism is unwise or immoral and fear that such expression might lead to society's adoption of socialist precepts. Nor would it uphold a law restricting anti-socialist expression because those in power have deemed socialism to be the preferred social economic theory. Under such a blatantly viewpoint-based form of selective protection, the control of expression would be reduced to nothing more than a struggle for political power. Whichever side attains political power would presumably be able to constitutionally shut off all expression that it found to be ideologically distasteful or in disagreement with the currently predominating ideology.

Nevertheless, critics of commercial speech have on occasion openly acknowledged the relevance to their analysis of either ideologically oriented concerns or subjective social or political values. For example, R. George Wright, a strong and articulate opponent of commercial speech protection, argued: "[C]ommercial getting and spending is, except in the case of the poor, at best weakly correlated with happiness or well-being."¹¹⁵ He further expressed concern over "the ways in which commercialism and commercial values affect how we experience the otherwise non-commercial elements of our lives."¹¹⁶ Wright thus overtly demonstrated his subjective ideological distaste for commercial speech as a predicate for his attack on its constitutional protection.

Reliance on such ideological motivations effectively reduces free speech doctrine to a Hobbesian state of nature, in which there

115. *Id.*

116. *Id.* at 6.

exists a political war of all against all.¹¹⁷ In such circumstances, whichever ideological camp attains political power may, quite legitimately, suppress the speech of its opposition on no grounds other than naked distaste for the political viewpoints expressed in that speech. However, life in such a constitutional state of nature is, as Hobbes warned, likely to be nasty, brutish, and short. As a theoretical matter, then, preference for a particular ideology should never play any part in justifying governmental restriction of expression.

4. Objections to Commercial Speech Protection and the Parameters of Neutral Principles

Each of the three categories of objections to commercial speech protection—rationalist, intuitionist, and ideological—is seriously flawed in a variety of ways. The primary concern with the three categories, however, is not merely the manner in which each is flawed, but rather the way in which each threatens the core values underlying free speech protection. It is my contention that in attempting to construe the First Amendment, each of the three categories, in its own way, largely represents a form of impermissible viewpoint discrimination undermining of the very core of what the First Amendment is all about. Admittedly, these are rather strong words. But it is, I believe, reasonable to conclude that each of the three categories of objections is ultimately grounded in distaste for what commercial speech facilitates and represents, in a manner wholly unrelated to a properly value-neutral approach to First Amendment interpretation.

The reflexive response to my suggestion, no doubt, is that one cannot demand value neutrality in First Amendment interpretation. To the contrary, the argument proceeds, First Amendment construction necessarily involves a choice among values that free speech protection is designed to foster. This is no doubt true. However, the value neutrality that is necessarily implicated in First Amendment analysis differs fundamentally from the form of value invocation triggered by the three categories of objections to commercial speech protection. As I have already demonstrated,

117. THOMAS HOBBS, *THE LEVIATHAN* 185 (C.B. MacPherson ed., Penguin Books 1968) (1651).

those objections are not premised on a plausible selection of one conceivable free speech value over another. If they were, the objections would be applied consistently to the protection of other types of expression which readily receive full constitutional protection.¹¹⁸ Rather, they are grounded in the decision maker's preference for particular political or ideological value preferences that would, in the decision maker's view, be threatened or undermined by the extension of constitutional protection to commercial speech. Recognition of these two levels of value analysis is essential to an understanding of the judiciary's appropriate role in enforcing First Amendment protections.

The essence of this distinction in levels of value analysis is embodied in and policed by the doctrinally well-established prohibition on viewpoint-based discrimination. Therefore, I now turn to a description and analysis of this core First Amendment doctrine.

III. VIEWPOINT DISCRIMINATION AND THE FOUNDATIONS OF FREE EXPRESSION

A. The Uniquely Invidious Nature of Viewpoint Discrimination

How absolute the First Amendment is has long been the subject of scholarly and judicial debate.¹¹⁹ What should not—and, for the most part, has not—been the subject of serious dispute is that regulation of expression that is grounded in nothing more than governmental hostility to the normative viewpoint to be expressed is unqualifiedly unconstitutional. There can be no exceptions to the constitutional bar of viewpoint-based regulations—at least in the context of coercive regulations and prohibitions¹²⁰—because to

118. See discussion *supra* Part II.C.1.d.

119. Compare *N.Y. Times Co. v. United States*, 403 U.S. 713, 720 (1971) (Douglas, J., concurring) (First Amendment is absolute), and Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 246–48 (First Amendment protection of political speech is absolute), with Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821, 825 (1962) (First Amendment requires use of a balancing approach).

120. At the *Loyola of Los Angeles Law Review's* live symposium, Professor Post pointed out that presumably President Bush could fire Secretary of State Rice for suggesting the Iraq War was a mistake without violating the First Amendment, even though it would have, of course, been due to the expression of her viewpoint. Robert Post, Remarks at the Loyola of Los Angeles Law Review Symposium: Commercial Speech: Past, Present & Future (Feb. 24, 2007) [hereinafter Post, Symposium Remarks]. I fully concede the point. However, losing the position of Secretary

permit one exception is effectively to permit all viewpoint-based regulations.¹²¹

In every conceivable instance, a viewpoint-based regulation of expression is, by definition, grounded not in a principled effort to interpret and apply the structural values underlying the free speech protection, but rather in a subjective assessment of moral and/or socio-political considerations that are external to the First Amendment. These considerations necessarily grow out of normative concerns that exist wholly beyond the boundaries of the First Amendment. This is so, because the First Amendment's immediate focus is on allowing the private individual or entity, not the government, to decide what is normatively dictated. The viewpoint neutrality of the First Amendment's free-expression guarantee is the logical outgrowth of the nation's original commitment to democratically based rule. As a definitional matter, a democratic form of government means that the electorate possesses the fundamental freedom to choose those who will govern day-to-day policy choices.¹²² Moreover, the electorate is even permitted to alter the counter-simple majoritarian limits imposed by the

of State because of expression of one's viewpoint implicates an entirely distinct area of First Amendment analysis concerning government subsidies and benefits—a subject on which both Professor Post and I have written. See REDISH, MONEY TALKS, *supra* note 18, at 196–231; Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 152–53 (1996). I refer here entirely to the more traditional and prevalent First Amendment context of directly coercive government regulation of expression. Surely the fact that a President can fire a cabinet officer for expressing unpopular views does not in any way imply that government can place a private citizen in jail for expressing a similarly unpopular view. I cannot imagine that Professor Post would disagree with this uncontroversial assertion.

121. At the live symposium, Professor Post suggested that numerous regulations of viewpoint are permitted, consistent with the First Amendment. Post, Symposium Remarks, *supra* note 120. In attempting to support his assertion, however, Professor Post evinced substantial confusion over the nature of the viewpoint discrimination concept. *Id.* For example, he pointed to the fact that a doctor may be penalized for incorrectly reporting to a patient that a lesion was not cancerous. *Id.* This example, however, has absolutely nothing to do with the concept of viewpoint discrimination as employed in First Amendment analysis. That concept is confined to governmental penalizations of expression for no reason other than disagreement with or disdain for the normative views expressed.

122. See HENRY MAYO, AN INTRODUCTION TO DEMOCRATIC THEORY 103 (1960) (“[E]verything necessary to [democratic] theory may be put in terms of (a) legislation (or decision-makers) who are (b) legitimated or authorized to enact public policies, and who are (c) subject or responsible to popular control at free election.”); J. ROLAND PENNOCK, DEMOCRATIC POLITICAL THEORY 310 (1979) (“Elections are thought to constitute the great sanction for assuring representative behavior, by showing what the voters consider to be their interests by giving them the incentive to pursue those objectives.”).

Constitution by resort to the super-majoritarian amendment process.¹²³

Free expression, as Alexander Meiklejohn told us, facilitates performance of the self-governing function by providing the electorate with information and opinion concerning policy making choices that will face those chosen to serve.¹²⁴ Since the electorate possesses the ultimate authority to put candidates into office who take any position, it logically follows that those in power cannot be permitted to manipulate the political debate in a manner designed strategically to control the available scope of governmental choices. Any other result would undermine the individual citizen's integrity as a free-thinking human being worthy of respect. It would also effectively gut the operation of the democratic process of which the First Amendment is a logical outgrowth.

The absoluteness of the constitutional prohibition on viewpoint discrimination flows from recognition of the unique harm that such regulations necessarily cause to the foundations of free expression. It is impossible, *ex ante*, to authorize exceptions to this prohibition because the content of those exceptions would have to be determined by those in power; it is those in power who would necessarily determine which viewpoints were to be deemed so offensive as to justify suppression of their expression. Presumably, they would choose to exempt regulations of those particular viewpoints that, as a subjective matter, they found the most offensive. If power were to be subsequently transferred to another group with a different set of ideological preferences, the exemptions to the constitutional prohibition on viewpoint discrimination would be changed to comport with the subjective preferences of that group.

For example, if conservatives were in power, they might well deem sufficiently offensive, as to justify exemption from the bar against viewpoint discrimination, expression of viewpoints such as that a woman should have a right to choose to obtain an abortion, or that the United States is fundamentally an evil nation, or even that

123. See U.S. CONST. art. V.

124. MEIKLEJOHN, *supra* note 38, at 24–25. Note that many commentators, including myself, believe the First Amendment does far more than this. See generally Redish, *The Value of Free Speech*, *supra* note 37 (First Amendment fosters self-realization). However, at the very least, the First Amendment must be deemed to protect the expression that influences and facilitates the voter's democratic choice in the voting booth. For present purposes, we need not take the argument further.

we should retreat from Iraq. If the political left were to replace the conservatives in power, viewpoints exempted from the bar against discrimination might well be changed to include expression of the view that abortion is murder or that affirmative action is evil. Perhaps there are certain moral views that are so widely accepted that expression of a contrary view would universally be deemed offensive. In such an event, the role of the First Amendment as a protection of unpopular views would be gutted. Put bluntly, the decision as to which viewpoints could be exempted from the regulatory bar would inevitably be determined by the political agenda of those in power. The end result, therefore, would be a political jungle in which those in power are able to suppress the expression of those whose views they find deeply offensive. Thus, whatever one believes about the absolutism of free speech protection in other contexts, the bar against viewpoint-based regulations must be deemed absolute, lest it not exist at all.¹²⁵

The most fascinating aspect of the constitutional world of viewpoint discrimination is that it is simultaneously so obvious as a core element of First Amendment theory and so counterintuitive—and often devastating—to those operating in the real world, away from the lofty heights of constitutional theory.¹²⁶ The classic illustration is the *Skokie* case of the late 1970s, where a ragged—but, to most, understandably highly offensive—band of Nazis sought to march in a Chicago suburb with a large Jewish population (including, at the time, many concentration camp survivors).¹²⁷ The courts that dealt with challenges to Skokie ordinances designed to prevent the march were quite clear about their unconstitutionality,

125. For a thoughtful explanation of the constitutional prohibition on viewpoint regulation, see generally Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978). For an explanation of the prohibition on viewpoint discrimination from the perspective of equal protection theory, see generally Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

126. In his response to this Article, Professor Post contends that the concept of viewpoint discrimination, as I describe it, is too vague and convoluted to be of much help in First Amendment analysis. Post, *supra* note 120. I find the assertion puzzling, to say the least. While it is true that Professor Post appears to have difficulty getting his arms around the concept, *see supra* note 121, the sources previously cited make clear that the concept of viewpoint discrimination is both well-established and well-understood in First Amendment theory. *See supra* note 125; *see also* Farber, *supra* note 37, at 577 (“In First Amendment jurisprudence, restrictions based on viewpoint are especially suspect.”).

127. *Vill. of Skokie v. Nat’l Socialist Party of Am.*, 313 N.E.2d 21, 22 (Ill. 1978).

whatever distaste they may have had for the political message of the march.¹²⁸ This conclusion was constitutionally dictated because any other result would have led to normative censorship by those in power—a result wholly inconsistent with the foundations and premises of a democratic society.

That the bar to viewpoint-based discrimination must be deemed absolute, however, is of little help in recognizing when a regulation of expression is viewpoint based and when it is not. It is to this question that I now turn.

B. Defining and Recognizing Viewpoint Discrimination

1. The Essential Characteristic of Viewpoint Discrimination

On a purely conceptual level, viewpoint discrimination is not difficult to distinguish from more principled forms of First Amendment selectivity—even those forms with which one ultimately disagrees as a matter of free speech theory. Disputes over the scope of First Amendment protection grounded in principle concern factors that are “internal” to the First Amendment. The debate over which principled means of construing the First Amendment, in other words, will concern one of two issues: (1) the extent to which the expression in question is deemed to foster the value or values that underlie the guarantee of free expression, or (2) the extent to which the harm that the expression would likely give rise to justifies restriction.

Viewpoint discrimination, on the other hand, is grounded in considerations that are “external” to the First Amendment. By this assertion, I mean that the driving normative force has nothing to do with a good faith effort to determine the process or structural values of free expression. Rather, it flows from normative premises determined by entirely unrelated factors of political, social, economic, moral, or religious beliefs or concerns that are wholly external to the First Amendment itself. They grow not out of the process-based analysis that seeks to create the most viable or appropriate constitutional system, but rather from unrelated personal beliefs of those imposing the restriction. To those seeking to impose viewpoint discrimination, the First Amendment is not something to

128. *Id.* at 26; *Collin v. Smith*, 578 F.2d 1197, 1207 (7th Cir. 1978).

be deciphered and structured, but rather a potential obstacle to attainment of their political or ideological values and goals that needs to be circumvented.

While this dichotomy seems relatively easy to recognize on a purely conceptual level, it is not always a simple task to separate legitimate, principled (if controversial) constitutional analysis, on the one hand, from invidious viewpoint discrimination that grows out of normative premises wholly unrelated to constitutional analysis, on the other. As the following sections demonstrate, however, certain guideposts may be recognized to help draw this vitally important distinction in the First Amendment trenches of real world adjudication.

2. Viewpoint Discrimination and the Avoidance of “Harm”

In its starkest form, viewpoint discrimination is relatively easy to recognize. Classic illustrations are not difficult to hypothesize: a law prohibiting speech that argues against (or in favor of) the government’s Iraq policy; a law prohibiting expression advocating (or opposing) abortion rights; or a law prohibiting anti-capitalist advocacy. When such cases have arisen, the Supreme Court has generally been quick to strike them down.¹²⁹ A problem quickly arises, however, when supporters of the selectively based restriction reflexively invoke the fear of “harm” that might result from allowing the regulated expression. After all, if expression is being suppressed or punished in order to prevent “harm,” then it is not being regulated simply to quiet expression of an offensive viewpoint. Surely, the argument would proceed; a constitutional prohibition on viewpoint regulation would not prevent the government from punishing advocacy of violent criminal behavior. Sloppy or conclusory invocation of the threat of harm as a justification for suppression,

129. *See, e.g.*, *Schacht v. United States*, 398 U.S. 58, 62–63 (1970) (holding unconstitutional a congressional ban on the unauthorized wearing of American military uniforms in a manner calculated to discredit the armed forces); *see also* *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107 (2001) (holding that a school’s exclusion of a Christian children’s club from meeting after hours at school, based on its religious nature, was unconstitutional viewpoint discrimination); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 549 (2001) (finding as unconstitutional a restriction that prohibited funding to organizations that represented clients seeking to challenge existing welfare laws); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835–37 (1995) (holding that a university’s denial of funds to a religious organization amounted to viewpoint discrimination).

then, could easily consume the beneficial impact of the constitutional prohibition on viewpoint regulation.

There exist three ways in which this danger can be averted. First, at the outset it is important to distinguish between “harms” that flow from illegal or extra-legal behavior, on the one hand, and harms that flow from either lawful behavior or from efforts to bring about proper governmental alteration of existing law. Individuals have a First Amendment right to urge a governmental body—judicial, legislative, or executive—to alter existing legal standards, even if those currently in power would find that such legal changes lead to normatively unacceptable results. For example, if the First Amendment means anything at all, it must protect an individual’s right to urge that the Supreme Court’s decision in *Brown v. Board of Education*,¹³⁰ finding unconstitutional so-called “separate-but-equal” laws, should be overruled, even though most of us no doubt would be morally outraged by such a reversal. An individual must also possess a First Amendment right to urge Congress to repeal Title VII of the 1964 Civil Rights Act,¹³¹ prohibiting racial, religious, or gender-based discrimination in private hiring, though, once again, most of us today would (hopefully) find such a change in the law morally repugnant. On a political level, one could easily oppose such proposals on the ground that their acceptance would cause significant “harm” to racial minorities or women. But for the First Amendment to work, “harm” that is considered sufficiently severe to justify suppression cannot be defined to include bringing about a distasteful, albeit lawful, political result.

Second, the courts must be wary of laws that seek to avoid harm by resorting to a suspiciously underinclusive invocation of the danger of harm. Once again, the example of an ordinance prohibiting distribution of anti-war literature on Michigan Avenue in Chicago during rush hour because of the danger of harm cannot be permitted to stand unless *all* forms and subjects of expression at the same time and place are also banned. The same would be true of an attempt to justify a law making criminal the burning of the American flag on grounds that such action would give rise to a serious fire hazard. Finally, we should demand that any claim of even potential

130. 347 U.S. 483 (1954).

131. 42 U.S.C. §§ 2000e to e-17 (2000).

unlawful harm be established not as some vague, undefined possible injury at some point in the unspecified future, but rather as a more definite and proximate threat.¹³² This is the goal of the “clear and present danger” test, currently embodied, for the most part, in controlling Supreme Court doctrine in its most protective form.¹³³

3. Recognizing the Different Forms of Viewpoint Discrimination

Unconstitutional viewpoint discrimination is not always as direct or obvious as many of the examples described in the prior section. Those are situations in which the government sought to regulate expression of a specific viewpoint, regardless of who was expressing it. The perceived offensiveness of the words themselves, standing alone, were what triggered suppression. Other, less obvious or direct situations of viewpoint regulation, however, will arise, and it is important to see them as equally invidious forms of speech regulation.

One example of such indirect viewpoint regulation could be described as a type of “heckler’s veto.” In these situations, government will prohibit expression of derogatory comments about a particular ethnic, racial or religious group, even where the speech in question is not spoken directly to a member of one of those groups and lacks any immediately coercive quality,¹³⁴ for no reason other than that the speech is thought to be demoralizing or hurtful to the affected group. Here the governmental regulator is effectively operating as the agent of the affected group. Even more clear are classic “heckler’s veto” situations, where government suppresses speech because of fear that others who hear it will be so offended that they threaten harm to the speaker. Here, too, the regulator is operating as a type of agent for those who are likely to find the speaker’s views offensive. A viable system of free expression could not possibly function under such a framework. At most, reliance on these concerns to justify suppression could be accepted only in the

132. For a more detailed discussion of this point, see MARTIN H. REDISH, *THE LOGIC OF PERSECUTION: FREE EXPRESSION AND THE MCCARTHY ERA* 63–131 (2005) [hereinafter REDISH, *THE LOGIC OF PERSECUTION*].

133. See *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969) (per curiam).

134. In this context, it is important to emphasize that I am in no way suggesting that harassing or coercive speech, said to unwilling listeners, is protected by the First Amendment. For a discussion of my position on this issue, see REDISH, *THE LOGIC OF PERSECUTION*, *supra* note 132, at 123–26.

most compelling of immediate, narrowly defined circumstances, where authorities reasonably conclude that they would be unable to prevent serious violence.

A second form of indirect viewpoint discrimination occurs where government suppresses speech not because of the words of the speech, but because of who the speaker is. For example, a law prohibiting Democrats from speaking should still be deemed invidious viewpoint discrimination, even though it does not directly focus on the expression of a particular viewpoint. In this example, the restriction of expression turns not at all on the specific words that the Democrat would utter. But focus on the nature of the speaker here serves as a relatively simple surrogate for viewpoint discrimination. The speaker is prohibited from speaking on the basis of his or her pre-existing ideological association.

Since these regulations go to the speaker and not the speech, it might be suggested that their unconstitutionality is more appropriately grounded in the Equal Protection Clause,¹³⁵ rather than the First Amendment right of free expression.¹³⁶ Nonetheless, I suppose the end result would be the same. I believe, however, that the First Amendment, standing on its own, appropriately invalidates such a law as invidious viewpoint discrimination. The fact that the viewpoint regulation is one step removed from the expression itself should make no difference, because the right of the speaker to speak is being “abridged” as a result of his pre-existing ideological and political expressive associations—the core concern of the ban on viewpoint regulations.

4. Judicially Imposed Viewpoint Regulation

The judiciary, like the other branches of government, is constrained by the First Amendment.¹³⁷ It is therefore conceivable that the actions of the judicial branch, as easily as the executive or

135. U.S. CONST. amend. XIV, § 1, cl. 4. Though the Fourteenth Amendment’s Equal Protection Clause does not apply to the federal government, the Supreme Court has held that the Fifth Amendment’s Due Process Clause is properly construed to contain a prohibition on equal protection violations. *Bolling v. Sharpe*, 347 U.S. 497, 498–99 (1954).

136. U.S. CONST. amend I. For an attempt to intertwine the Equal Protection and Free Speech clauses, see *Karst*, *supra* note 125, at 26–29. See also *Police Dep’t v. Mosley*, 408 U.S. 92, 94–98 (1972).

137. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964) (stating judicial imposition of liability in libel suits may implicate First Amendment protection).

legislative branches of government, may contravene the First Amendment's absolute prohibition on viewpoint discrimination.

Judicial action can potentially interact with viewpoint discrimination in either of two ways: (1) by condoning or facilitating implementation of viewpoint discrimination initially imposed by one or both of the majoritarian branches of government; or (2) by shaping or applying First Amendment doctrine selectively, where no basis for such a disparity in First Amendment treatment—apart from the differences in viewpoint—exists to justify such distinctions. It is important to recognize, then, that the judiciary may well be the culprit, and not merely the enabler. The difference in judicial culpability can be best understood by use of hypothetical examples. First, imagine an action taken by one or both of the political branches selectively discriminating against expression of one viewpoint. If the judiciary upholds this discrimination against First Amendment attack, it will have acted as an enabler. Now imagine a law that indiscriminately restricts expressive activity by all. Were the courts to uphold that law against constitutional attack against speech expressing one viewpoint but invalidate it as to the expression of a different viewpoint, the judiciary itself would be imposing the viewpoint discrimination.

5. Recognizing the “Twilight Zone” of Viewpoint Discrimination

To this point, my descriptions, explanation, and analysis of the concept of viewpoint discrimination, while hopefully illuminating, should hardly be considered controversial to theorists of the First Amendment. Few, if any, knowledgeable observers would dispute the inherently invidious nature of viewpoint-based discrimination in light of the manner in which it inevitably undermines the values served by democracy and the system of free expression of which it is a part. However, there exists a form of viewpoint discrimination that may not be as readily recognized as either the direct, indirect, or judicial forms of the First Amendment pathology described to this point. I refer to this category as “twilight zone” viewpoint discrimination, because the resulting invidious harms to free speech interests are just as great as the more classic forms of the category, even though they are, superficially, one or two steps removed.

What distinguishes twilight zone viewpoint discrimination from the more classic variety is the fact that it focuses on neither the normative positions taken in the substance of the regulated speech (direct viewpoint discrimination) nor the ideological or political affiliations of the speaker (indirect viewpoint discrimination). It is, rather, grounded in hostility toward what might be called, for lack of a better phrase, the “ideological ether” of which both the speech and the speaker are a part. In these situations, the speaker herself may have no *ex ante* offensive socio-political affiliations, and what she says, in and of itself, asserts nothing to which the regulator is normatively hostile. However, both the speaker and the speech are themselves outgrowths of, and participants in, a broader communicative process which the regulator finds offensive on ideological grounds. Of course, if the speaker and the speech are part of a broader non-expressive, conduct-based activity deemed harmful by those in authority, the government may prohibit the relevant conduct, consistent with constitutional protections other than the First Amendment. In so doing, the government may sweep within its reach any communicative activity that forms an essential element of that conduct, subject, I suppose, to whatever limited First Amendment protection is extended to advocacy of unlawful conduct. But where the primary or intended impact is on expression or communication, the fact that regulatory hostility focuses not on the specific speech or speaker, but rather on the ideological foundations of the system of which the speech and speaker are an inherent part, does not alter the invidious viewpoint discriminatory character of the expressive regulation. As in the case of classic viewpoint discrimination, government is regulating expression on the basis of ideological hostility, and for that reason it is seeking to prevent communications among private individuals or entities. As in the case of classic viewpoint discrimination, penalizing expression is premised on grounds wholly external to the First Amendment and government is selectively restricting expression in an attempt to foster one ideology and hinder another.

It is probable that relatively few categories of twilight zone viewpoint regulation exist. But this fact makes them no less problematic when they do actually occur. One example of this category is obscenity. When government suppresses or punishes obscene publications, it is likely that the neither the regulated

expression nor the speaker have directly assumed an ideological position found offensive by the regulators.¹³⁸ For example, regulated obscenity usually does not, on its face, urge creation of a society characterized by free love. Were government to prohibit expression of the view that society should adopt such a free love system, I imagine a court would have to strike the prohibition down as unconstitutional viewpoint discrimination. However, both the speaker and the expression are outgrowths of a system whose essential premise is, if not free love, at the very least a belief in a significant loosening of societal mores about sex. Suppression of obscene expression, then, grows out of regulatory hostility toward the moral and socio-political premises implicitly advocated by the obscene communication. The regulatory hostility is effectively directed at the “ideological ether” surrounding the obscenity. If government may not punish expression that voices a particular ideological position, the same logic should prevent it from punishing such “satellite” expression because of hostility to that ideological position.

The one conceivable distinction between direct regulation of expression of the ideological position itself and regulation of such satellite expression is the possibility that the satellite expression gives rise to harm to which direct ideological advocacy does not. Advocacy of violent overthrow, for example, is surely not the same thing as an actual attempt to overthrow. But as long as we are speaking solely of satellite *expression* rather than conduct, and the harms that allegedly flow from both ideology and satellite expression are basically communicative in nature, this distinction should be deemed irrelevant. In the case of obscenity, for example, government would seek to control obscene narratives for much the same reason that it would seek to prohibit advocacy of free love. In both situations, government regulates because it does not wish to allow private individuals to decide for themselves whether to alter their mores in ways found offensive by those in power.

138. To avoid triggering potentially intractable complications involving the speech-conduct dichotomy, I refer here solely to obscene publications that do not include photographic depictions of real individuals. I thus confine the discussion to pure narrative or artistic renderings.

IV. COMMERCIAL SPEECH AND THE TWILIGHT ZONE OF VIEWPOINT DISCRIMINATION

As in the case of obscenity, exclusion of commercial speech from the protective scope of the First Amendment could conceivably be characterized as a form of twilight zone viewpoint discrimination. If, for purposes of argument, we assume that exclusion of commercial speech from the First Amendment's protective scope is based on something other than either principled constitutional analysis or at least a flawed attempt to employ principled constitutional analysis,¹³⁹ the only alternative is to assume that it grows out of some form of hostility to or disdain for the capitalist system of which commercial speech is a part. While exceptions may exist, political hostility to commercial speech will usually not be grounded in either the ideological affiliations of the speaker or in any ideological viewpoint expressed in the substance of the regulated speech. But if the basis for the exclusion of commercial speech grows not out of a principled "internal" analysis of First Amendment value, but rather from political or socio-economic hostility to the capitalist system of which commercial speech is a part, then the discriminatory treatment given commercial speech is appropriately characterized as an invidious form of viewpoint discrimination.

Am I suggesting that any jurist or scholar who opposes full First Amendment protection for commercial speech is necessarily engaged in the surreptitious and manipulative process of stratifying First Amendment protection in order to furtively undermine capitalism? As a practical matter, it would be difficult to maintain this position, given that several jurists associated with the political right have consistently opposed full First Amendment protection for commercial speech.¹⁴⁰ There are, to be sure, scholars and jurists who have no moral, economic, or political problem with the capitalist system, but who strongly believe in generally limiting counter-majoritarian judicial interference in decisions of the

139. See discussion *supra* Part II.C.1.b-f.

140. See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 781 (1976) (Rehnquist, J., dissenting) (believing that the Court's decision to extend First Amendment protection to commercial endeavors is troublesome); Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 22 n.43, 39-40 (1986) (stating that because commercial speech does not produce significant external benefits it should be afforded less constitutional protection).

democratic process.¹⁴¹ These jurists or scholars—Judge Bork, for example—may consistently seek to confine First Amendment protection narrowly to speech directly affecting the political process.¹⁴² I may well conclude that such skimpy protection of free expression is grossly underprotective,¹⁴³ but it would be difficult to characterize their rejection of commercial speech protection as a form of furtive manipulation.

Scholars or jurists who reject full First Amendment protection for commercial speech, but simultaneously extend such protection to other forms of non-political, economically motivated expression, must fall into one of two categories. First, they may incorrectly fail to recognize the inescapable intellectual inconsistency in their positions. Second, they may be employing a form of indirect, twilight zone viewpoint discrimination. There is no third alternative for scholars or jurists who purport to employ a rationalist approach to First Amendment interpretation. To the extent these jurists reject commercial speech protection, I am forced to conclude that, at least to the extent that they simultaneously would protect other forms of equally non-political or economically motivated expression, they have incorrectly drawn logically indefensible distinctions in their efforts to avoid judicial disruption of democratically ordained choices.

To the extent observers choose to exclude commercial speech from First Amendment protection by resorting to some form of intuitive, non-rationalist process, it is conceivable that they do not themselves even realize that they are actually implementing a form of implicit viewpoint discrimination. Ultimately, my argument comes down to this: unless an observer who chooses to reduce protection for commercial advertising (1) simultaneously reduces protection for *Consumer Reports* and consumer advocate groups; (2) rejects or reduces protection for political speech motivated by goals of personal gain on behalf of the speaker; or (3) puts forth a consistent, coherent, non-viewpoint-based justification for drawing

141. See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971) (“Constitutional protection should be accorded only to speech that is explicitly political.”).

142. See *id.*

143. See generally Redish, *The Value of Free Speech*, *supra* note 37 (arguing that any expression, political or not, that enhances the self-realization value should be permitted full First Amendment protection).

such a First Amendment distinction (a justification I have yet to hear), his or her refusal to protect commercial speech, at the very least, must be considered presumptively either an illustration of viewpoint-based discrimination or simply a failure to understand the inescapable logical implications of his or her analysis.

The viewpoint discrimination that may well plague the arguments for reduced protection of commercial speech constitutes a synthesis of two categories of discrimination: twilight zone discrimination and judicially imposed discrimination.¹⁴⁴ It belongs in the twilight zone category for the reasons just described.¹⁴⁵ It also belongs in the judicially imposed category, however, because those urging the reduction or exclusion are doing so not in the form of legislative or executive discrimination, but rather through the judicial exclusion of commercial speech from the First Amendment's protective scope. While this exclusion will of course facilitate legislative or executive discriminations, even standing alone it represents an unconstitutional, judicially imposed discrimination against a form of expression. Moreover, such judicial discrimination is an ideologically based hostility grounded in something other than an internal, principled analysis and implementation of free speech values. It is as if the Court invalidated a ban on picketing by pro-choice demonstrators but not on an identical ban on picketing by pro-life demonstrators.

The viewpoint-based nature of the segregation of commercial speech is especially underscored in situations in which a commercial enterprise is enmeshed in a dispute about its product or service with consumer advocates or members of the media. Take, for example, Ralph Nader's attack on the safety of the Chevrolet Corvair.¹⁴⁶ No one, it is fair to suppose, would suggest that Nader possessed anything short of full First Amendment protection for his critical comments. However, were General Motors to attempt to defend its product's safety in response to Nader's attacks, automatically its comments are transformed into lesser protected—or unprotected¹⁴⁷—

144. See discussion *supra* Part III.B.4–5.

145. See *supra* text accompanying notes 139–143.

146. See, e.g., RALPH NADER, UNSAFE AT ANY SPEED 3–41 (1965).

147. Earlier in this Article, I suggested that the Supreme Court has in practice, if not in name, extended full First Amendment protection to commercial speech. See *supra* notes 4–5 and accompanying text. But it is only with respect to truthful commercial speech that this is the case. The protections of the “actual malice” test of *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–

commercial speech. The same is true of the more recent dispute between the media and Nike. When *The New York Times* columnist Bob Herbert criticizes Nike for using near slave labor in third world countries to manufacture its sneakers,¹⁴⁸ again no one could question the extension of full First Amendment protection to his statements. But when Nike seeks to respond, because it is effectively promoting sales of its product, its constitutional protection is reduced.¹⁴⁹ In these situations, as Justice Scalia has accurately analogized in a different context, one side has to fight according to the Marquis of Queensbury Rules while the other side can gouge or hit below the belt.¹⁵⁰ And the viewpoint always afforded the lesser level of

80 (1964), are denied to commercial speech, while they are extended to false non-commercial speech. Also, as previously noted, a number of highly respected scholars have argued that, contrary to the view of the Court, commercial speech is entirely undeserving of First Amendment protection. See *supra* note 19.

148. Bob Herbert, *In America: Nike's Pyramid Scheme*, N.Y. TIMES, June 10, 1996, at A17; Bob Herbert, *In America: The Wrong Indonesian*, N.Y. TIMES, Nov. 1, 1996, at A35; Bob Herbert, *In America: Nike Blinks*, N.Y. TIMES, May 21, 1998, at A33.

149. *Kasky v. Nike, Inc.*, 45 P.3d 243, 247 (Cal. 2003), *cert. granted*, 537 U.S. 1099 (2003), and *cert. dismissed*, 539 U.S. 654 (2003).

150. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) (plurality opinion). At the live symposium that gave rise to this issue of the *Loyola of Los Angeles Law Review*, it was suggested that a rational basis for distinguishing between Nike and its accusers is that Nike has special access to knowledge on the question, and a significant degree of power and access for the expression of its views. Remarks at the Loyola of Los Angeles Law Review Symposium: Commercial Speech: Past, Present & Future (Feb. 24, 2007). But much the same could be said of one of its primary attackers, Bob Herbert of *The New York Times*. No one can doubt the *Times's* power and access in the media world. And while of course Herbert cannot be assumed to have the same access to information about Nike as Nike itself does, one can reasonably wonder why, if he lacks adequate information about Nike, he is making accusations in the first place. Moreover, under *Sullivan's* actual malice test, Herbert cannot be held liable for product defamation even if he was grossly negligent in making the accusations. It is unclear why a lack of comparative access to information should insulate such grossly negligent behavior—except, of course, for the fact that we place a premium on free expression. It is a mystery why we would not provide equal breathing room, even for an individual or entity with presumably superior access. Moreover, to suggest that Nike's arguable superiority in access to information logically leads to using a standard tougher than actual malice misses the point. The issue, from the perspective of the chilling effect concern evinced in *Sullivan*, is not what Nike does or does not know, but rather what Nike will be chilled from saying because of use of the stricter standard of liability. In any event, under the actual malice test, Nike's superior access to information would simply mean it would be easier to establish its knowledge of falsity.

Most importantly, in no other context of First Amendment analysis do we ever impose comparative gradations of protection on the basis of the relative power of the speaker or the speaker's access to information. Resort to this rationale to justify the outrageous disparity in protection in *Nike*, then, only goes to underscore the discriminatory treatment received by those speakers who advocate purchase of their product or service.

In any event, *Consumer Reports* rarely lacks for either power or information access. Yet *Consumer Reports* is all but universally extended full First Amendment protection by courts and commentators.

protection is the pro-business side of the debate. It would be impossible to hypothesize a starker illustration of intentional and invidious viewpoint discrimination—discrimination that takes place only because of the reduced protection given to commercial speech.

Whether the urged exclusion or reduction of commercial speech protection *necessarily* derives from “external” ideological hostility is another matter. It should be recalled that a number of rationalist arguments have been or could be made to support a principled internally grounded basis for a reduction in commercial speech protection. But as already demonstrated, even if they are assumed to be valid bases for reduced protection in the abstract, these asserted distinctions are inevitably applied in an irrationally underinclusive manner.¹⁵¹ One cannot, for example, rely on the ground that commercial speech involves matters not worthy of First Amendment concern, because it is almost universally accepted that *Consumer Reports*, which focuses on identical issues, receives full protection. Nor can one rely on the ground that commercial speech is motivated by base concerns of personal economic gain, because much fully protected expression is also motivated, largely or exclusively, by personal economic gain. The exclusion cannot be premised on the ground that in commercial speech cases the speaker is a profit-making corporation, because much expression by profit-making corporations is fully protected in other contexts. Finally, an equally insufficient basis for exclusion is that commercial speech, because of its inherently self-interested nature, will always be misleading due to its strategically motivated selectiveness and slant. The exact same thing can be said of any form of advocacy that is fully protected by the First Amendment.

Perhaps both Post and Weinstein (both of whom have prepared responses to this Article) could respond that strategically selective political expression is protected not for its informational value but because it represents a speaker’s participation in “public discourse.” But I find that response no more satisfactory. They have failed to explain *why* speech contributing to “public discourse” is deserving of greater protection, and they have failed to explain exactly *what* the concept of “public discourse” even means. The argument that allowing speech contributing to public discourse increases

151. See discussion *supra* Part II.C.1.

“legitimacy” of the system is conclusory and unhelpful, because they have failed to explain by reference to what normative standard of political theory they are measuring the concept of legitimacy in the first place. A benevolent dictator might argue that his government retains “legitimacy,” because its decisions are grounded in a paternalistic effort to guide those who, left on their own, would be unable to maximize their welfare. Thus, Post’s and Weinstein’s assertions of legitimacy must first be grounded in an initial moral commitment to self-determination—something they have totally failed to do. It is as if one is walking into a movie theater in the middle of the movie. Yet if they were to attempt to explain their implicit commitment to self-determination, two puzzling (and unanswered) questions arise. First, how do they define the scope of “public discourse” in the first place? Second, how do we determine that *Consumer Reports* does contribute to “public discourse,” but commercial advertising does not?

When every conceivably principled (or what I have called internal) basis for discrimination against commercial speech is shown to be irrationally underinclusive, it is possible to draw only one of two conceivable inferences: (1) the asserted bases of distinction do not represent the true grounds for exclusion, or (2) the First Amendment interpreter mistakenly failed to recognize the illogical underinclusiveness of the asserted basis of distinction. It should be kept in mind, however, that discovering irrational underinclusiveness is a classic method of unearthing viewpoint-based discriminations. Otherwise, the prohibition on viewpoint discrimination could be easily circumvented simply by invoking a form of legalized sophistry.

Reliance on First Amendment intuitionism (or practical reason) as a basis for exclusion of commercial speech from the scope of the First Amendment gives rise to a more complex issue. However, careful and critical analysis of the entire nature of intuitionist constitutional thinking leads to one of two conclusions: (1) the intuitionist label disguises what is at its foundation a form of unprincipled constitutional analysis that in reality represents a form of viewpoint discrimination; or (2) the intuitionist approach functions as an enabler, implementing broader pre-existing societal hostility to or disdain for particular types of expression.

Both intuitionism and practical reason, it should be recalled, call for an analysis that turns on a non-syllogistic form of contextual reaction to a given set of circumstances. While it is not entirely clear exactly what either approach actually entails, it is clear what they do not entail: application of pre-existing generalized principles to specific fact situations.¹⁵² Absent this intellectually disciplined form of inquiry, what remains can be nothing beyond some synthesis of personal impressions and instincts, untied to any effort to discern enduring, generalized and consistently applied constitutional principles from the document's text, structure, or history. As a definitional matter, then, use of intuitionism relies on the decision maker's preexisting prejudices, instincts, and predilections. It is only a small step from personal prejudices, instincts, and predilections untied to a careful and reasoned analysis of abstract constitutional principles to a decision grounded in the decision maker's viewpoint.

To the extent that practical reason seeks not to implement the decision maker's personal preferences but rather those of society at large,¹⁵³ it simply transforms the source of the external viewpoint that is to be implemented. In so doing, practical reason effectively turns the entire basis of the First Amendment on its head. It would seem not to be a controversial proposition to assert that the First Amendment is designed to *protect* the assertion of *unpopular* views, positions, perspectives and ideologies from *suppression by the majority*. It is, then, nonsensical to let the scope of First Amendment protection turn on an assessment of the normative instincts of society as a whole. And this is so, even if we ignore the flawed assumption implicit in this approach that somehow the unrepresentative, unaccountable judiciary possesses an empirical pipeline to popular perspectives. It hardly seems consistent with the foundations of the First Amendment, for example, to suggest that during the "pathological" periods of World War I, the post-World War I "red scare" period, or the McCarthy era of the 1950s it was appropriate for the judiciary to implement, through a judicial assessment of public "sensibilities," the strongly held ideological prejudices of the majority.¹⁵⁴

152. See discussion *supra* Part II.C.1-2.

153. See discussion *supra* Part II.C.2.

154. Cf. REDISH, THE LOGIC OF PERSECUTION, *supra* note 132, at 46-62; Blasi, *supra* note 63, at 449-50 (espousing the view that the First Amendment should function at its most

Reliance on intuitionism or practical reason to justify the exclusion of commercial speech from the First Amendment, then, is no more principled a form of constitutional analysis than is reliance on superficially principled but irrationally underinclusive bases of distinction. The fact that the decision maker's reflexive personal instincts, or the decision maker's rump assessment of societal predilections and preferences, suggest that commercial speech is somehow not worthy of First Amendment protection in no way removes such analysis from characterization as invidious viewpoint discrimination.

The most obvious form of viewpoint discrimination used to justify reduced protection for commercial speech is open and candid reliance on ideological disdain for commercialism.¹⁵⁵ When this transparent ideological disdain is employed, we are left with the paradigmatic example of twilight zone viewpoint discrimination. In this situation, it is true that normative preferences untied to any good faith effort to decipher and apply the First Amendment's underlying values do not lead to discrimination premised on either the preexisting ideological associations of the speaker or the ideological positions taken in her speech. The fact remains, however, that the decision to discriminate against commercial speech in the reach of constitutional protection is made on the grounds of the decision maker's personal ideological pre-disposition. It is difficult to imagine a more pathological undermining of fundamental First Amendment values.

V. CONCLUSION

Several years ago, I authored a book entitled *Money Talks: Speech, Economic Power and the Values of Democracy*.¹⁵⁶ In it, I argued that regulation of the use of money as expression and the suppression of the speech of those with money caused significant harm to the First Amendment. I gave a copy to an old friend and colleague whose politics are far, far more conservative than my own.

protective during times when intolerance of unorthodox ideas pervades the social and political climate).

155. See discussion *supra* Part IV.A. Professor Shiffrin's repeated expression of disdain for materialism at the live symposium qualifies quite nicely for this categorization, I believe. Shiffrin, Symposium Remarks.

156. REDISH, MONEY TALKS, *supra* note 18.

After reading the book, he sent me the following brief but pithy e-mail message: “Redish, I always knew you were a closet Republican.” Thinking I could educate him about the differences between adherence to narrow personal political beliefs on the one hand and implementation of the values of constitutional process on the other, I sent back the following reply: “The fact that I believe in the free speech rights of corporations and commercial advertisers no more means I am a Republican than the fact that individuals who supported the free speech rights of Communists in the 1940s necessarily implied that they were Communists.” He sent back a single-sentence response: “*Weren’t they?*”

There are, I believe, two important lessons to be learned from this anecdote. First, it underscores both the importance and the difficulty of separating personal political and ideological preferences from comprehension of the ideological humility central to a commitment to a viable system of free expression. No viable system of free expression can survive where the guardian of the First Amendment determines protection on the basis of the speech’s consistency with her own ideological predilections. Second, it demonstrates the close—and often unrecognized—link between commercial speech and political ideology. Commercial speech, as defined by both the Court and hostile commentators, does not include *all* speech concerning commercial products and services. As previously noted,¹⁵⁷ none of the scholarly opponents of commercial speech protection would suggest that Ralph Nader’s criticisms of the Chevrolet Corvair’s safety or *The New York Times* columnist Bob Herbert’s criticisms of Nike’s foreign production process fall into the category of less protected commercial speech. However, when Chevrolet defends the safety of its product or Nike denies the charges about its use of sweatshop labor, somehow the expression is magically transformed into lesser protected commercial speech. It is, then, only advocacy on the part of commercial enterprises about its products and services that is deemed less deserving of constitutional protection.

The point of this Article has been to connect the constitutional and political dots. It has been wrongly assumed by many that the arguments for excluding commercial speech from the scope of the

157. See discussion *supra* Part IV.A.

First Amendment represent plausible contributions to the debate over the shaping and application of constitutional principles gleaned from analysis of the normative foundations of free expression. It has also been wrongly assumed that commercial speech may appropriately be excluded from the First Amendment's scope without undermining any fundamental constitutional values, because commercial speech is, at best, only peripheral to those values. Ironically, the inaccuracy of both of these assumptions is best underscored by seeing the link between these two flawed assumptions about commercial speech: the very fact that many wish to exclude commercial speech from protection on grounds completely ignored when relevant to other types or subjects of speech actually suggests the invidious political and ideological presumptions often underlying the attacks on commercial speech.

When, in the 1940s and 50s, scholars opposed constitutional protection for the speech of Communists, they often did so on the basis of an ideological world view that found such expression ideologically offensive.¹⁵⁸ Hopefully, if an identical political situation were to arise today, cooler heads in the world of free speech scholarship would prevail and recognize that ideological hostility to the views of Communists cannot properly be used as a basis to exclude their speech from the First Amendment's scope. And this is true, whether we seek to achieve that end by irrationally (or strategically) selective use of more principled grounds, vague notions of intuitionism or practical reason, or open reliance on contrary ideology.

To be sure, hostility to commercial speech is probably one step removed from hostility to Communist expression, because the suppressed speech is not, standing alone, what is deemed offensive by the regulators. However, I have demonstrated here that where the speech is suppressed because of the regulators' hostility to the "ideological ether" that pervades the regulated speech and speaker, the harms to First Amendment values are just as great. It is time to recognize opposition to commercial speech protection for what it all too often is: a form of ideological hostility to the premises of

158. See, e.g., Carl Auerbach, *The Communist Control Act of 1954: A Proposed Legal—Political Theory of Free Speech*, 23 U. CHI. L. REV. 173, 217–20 (1956) (arguing that the passage of the Communist Control Act of 1954 does not constitute an abandonment of democratic principles).

capitalism and commercialism. As was true of those who sought to protect the free speech rights of Communists in the mid-twentieth-century, one surely need not agree with the ideological premises underlying either capitalism in general or the commercial speech sought to be regulated in particular to find such suppression ominous.

In the live symposium that gave rise to this issue of the *Loyola of Los Angeles Law Review*, Professor James Weinstein, commenting on a prior draft of this Article, suggested that in effect I was calling all those jurists and scholars who oppose full protection for commercial speech “either fools or knaves.”¹⁵⁹ Certainly, those terms would not have been my choice as to how to describe my conclusion. But consider once again the hypothetical ordinance making it a crime to burn the American flag. Assume that a scholar or jurist seeks to justify this ordinance on the grounds that the burning of the American flag would give rise to a serious fire hazard, completely ignoring the absurd underinclusiveness that characterizes such an argument. How should one describe those who make such a nonsensical argument: as a fool, because they mistakenly fail to see the obvious point that burning the Iranian or North Korean flags give rise to the exact same danger, or as a knave, because of the thinly disguised viewpoint-based and manipulative nature of the argument?

The only exception, I suppose, would be those scholars or jurists who are consistent in what I consider their underprotection of expression. The line of demarcation, as I have suggested throughout this Article, is whether the scholar or jurist who opposes full protection for commercial speech would simultaneously extend full protection to *Consumer Reports*. Those who believe in a narrowly political version of the First Amendment—for example, Judge Bork, and perhaps Professor Weinstein himself—would logically exclude from full protection *both* commercial advertising *and* *Consumer Reports*. While I would certainly disagree with so narrow a perspective on the First Amendment’s scope, I could not reasonably characterize their positions as either discriminatory or viewpoint based. The same, however, clearly could not be said of those who seek to distinguish between the two. Whether well intentioned or

159. James Weinstein, Remarks at the Loyola of Los Angeles Law Review Symposium: Commercial Speech: Past, Present & Future (Feb. 24, 2007).

not, scholars and jurists who would simultaneously extend full constitutional protection to *Consumer Reports* but fail to do the same for promotional commercial speech are, in fact, guilty of something. They have either failed to grasp the absence of any principled constitutional distinction between the two, or have intentionally sought to impose non-existent distinctions for narrow ideological reasons. For reasons explained in this Article, neither represents an acceptable approach to First Amendment interpretation.