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# MARKET FAILURE IN THE MARKETPLACE OF IDEAS: COMMERCIAL SPEECH AND THE PROBLEM THAT WON'T GO AWAY

Tamara R. Piety\*

*“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .”*<sup>1</sup>

*“Doubt is our product since it is the best means of competing with the ‘body of fact’ that exists in the mind of the general public. It is also the means of establishing a controversy.”*<sup>2</sup>

In Steven Shiffrin’s seminal work, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*,<sup>3</sup> Shiffrin calls attention to the “romantic generalizations”<sup>4</sup> in First Amendment jurisprudence and theory that obscure the reality that “the commercial speech problem is in fact

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\* Associate Professor, University of Tulsa College of Law. I want to thank Ron Collins and Jim Weinstein, the organizers of this conference, Loyola of Los Angeles Law Review Symposium: Commercial Speech: Past, Present & Future (Feb. 23–24, 2007), for inviting me to participate as well as all of the other participants. Additional thanks to the participants at the Seattle University and University of South Carolina symposiums on commercial speech, to Rebecca Tushnet, Peter Oh, M.G. Piety and Reza Dibadj, to the students in my seminar on commercial speech at Florida State University, and to my colleagues at Florida State University, in particular Curtis Bridgeman, B.J. Priester, Brian Galle, Fernando Tesón, J.B. Ruhl, Mark Seidenfeld, and Robin Craig.

1. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

2. Memorandum, Brown & Williamson Tobacco Corp., Smoking and Health Proposal, at 4, <http://ltdlimages.library.ucsf.edu/images/r/g/y/rgy93f00/Srgy93f00.pdf>, quoted in *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 191–92 n.726 (D.D.C. 2006); see also ALLAN M. BRANDT, *THE CIGARETTE CENTURY: THE RISE, FALL, AND DEADLY PERSISTENCE OF THE PRODUCT THAT DEFINED AMERICA* 159–207 (2007) (detailing the history of the tobacco industry’s efforts to create an appearance of uncertainty about the health consequences of smoking where no real uncertainty existed).

3. Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1983) [hereinafter Shiffrin, *Economic Regulation*]; see also STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* (1990) [hereinafter SHIFFRIN, *ROMANCE*].

4. Shiffrin, *Economic Regulation*, *supra* note 3, at 1212.

many problems,”<sup>5</sup> problems that raise “questions that will not go away.”<sup>6</sup> Perhaps chief among these questions is how to discourage fraud without suppressing freedom.

As it currently stands, the commercial speech doctrine creates a category of speech subject to intermediate scrutiny under the First Amendment.<sup>7</sup> This doctrine, first announced in 1976 in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,<sup>8</sup> suffers from serious definitional problems. In order to qualify for commercial speech protection, speech must concern a legal activity or product and cannot be misleading.<sup>9</sup> Defining “commercial speech” so that the first element is a requirement that (roughly speaking) the speech be truthful is *not* to say that all false speech is *non-commercial*. Rather, it establishes that only *truthful* commercial speech is protected by the First Amendment. Presumably, some speech is both commercial and false and therefore is not protected by the doctrine. Indeed, it is probably fair to say it is precisely this category, false commercial speech, which generates most concern. Truth or untruth is (presumably) most often a factual issue to be decided on a case-by-case basis. But “commercial” is a category. Therefore, defining “commercial” is a fairly critical task. Unfortunately, as has been discussed elsewhere, the Supreme Court has not come up with a stable definition of “commercial” for purposes of the doctrine.<sup>10</sup> However, it is beyond the scope of this essay to define “commercial.” Here I will deal with the regulation of *false* commercial speech and in the interests of simplicity, I proceed from the assumption that there is some speech that is reliably “commercial,” which if false, has potential for substantial negative consequences for the public health and welfare. Even though much of the controversy in this area is about whether something is in or out

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5. *Id.* at 1216.

6. *Id.*

7. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n.*, 447 U.S. 557, 563–66 (1980). However, as Professor David Vladeck has noted, although the test is nominally one of intermediate scrutiny, in practice it has become a strict scrutiny test. David C. Vladeck, *Lessons From a Story Untold: Nike v. Kasky Reconsidered*, 54 CASE W. RES. L. REV. 1049, 1059 (2004).

8. 425 U.S. 748 (1976).

9. *Cent. Hudson*, 447 U.S. at 566.

10. See, e.g., Ronald K.L. Collins & David M. Skover, Foreword, *The Landmark Free-Speech Case That Wasn’t: The Nike v. Kasky Story*, 54 CASE W. RES. L. REV. 965, 1024–27 (2004).

of the category “commercial, it is important to consider why the Court might have thought it desirable to regulate false commercial speech in the first place and to place these concerns against the argument so often raised in support of greater protection for commercial speech: that the best way to ensure truth in commerce is to preclude government regulation of it. I believe this argument is misplaced and I seek to illustrate why protection for commercial speech is unlikely to result in better commercial information. To the contrary, more protection is likely to result in more of what we already have in abundance, false and misleading speech in aid of commerce, which seems likely to exacerbate many existing social ills.

In leaving false commercial speech unprotected, the commercial speech doctrine seems intended to maintain the government’s power to regulate *false* commercial speech. With respect to core protected speech, such as political or artistic expression, the First Amendment forbids government regulation of truth. This is a key distinction of commercial speech. Many observers believe it is an illegitimate distinction.<sup>11</sup> Others claim that regulation of commercial speech is necessary and an appropriate function pursuant to the government’s regulation of commerce.<sup>12</sup> The government may regulate commerce fairly freely pursuant to the commerce clause.<sup>13</sup> It does not have the same powers to regulate speech protected by the First Amendment. But of course, “[c]ommerce is linked to communication.”<sup>14</sup> Indeed it

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11. See, e.g., Bruce E.H. Johnson & Ambika K. Doran, *Amendment XXVIII? Defending Corporate Speech Rights*, 58 S.C. L. REV. 855 (2007); Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990).

12. STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANING OF AMERICA* 32–48 (1999) [hereinafter SHIFFRIN, *DISSENT*]; see also C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 25 (1976); Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 5–6 (1979). For an argument that the purpose of the First Amendment is to enrich political debate and that the focus on autonomy interests in the commercial and corporate speech cases fail to advance this interest, see Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986). For a similar argument with respect to the corporate speech cases, see Robert L. Kerr, *Subordinating the Economic to the Political: The Evolution of the Corporate Speech Doctrine*, 10 COMM. L. & POL’Y 63 (2005). Shiffrin argues that the political argument, as advanced first by Meiklejohn and later Sunstein, is flawed because it would exclude too much in art, literature and science and is unrealistic if it depends on a very high degree of participation in the electorate. SHIFFRIN, *DISSENT*, *supra*, at 41–48.

13. SHIFFRIN, *DISSENT*, *supra* note 12, at 39 (“Government’s right to regulate in the economic sphere is settled.”).

may have been the perceived parallels between the market and “the marketplace of ideas” that gave rise to the commercial speech doctrine.

In 1974, two years before the commercial speech doctrine was announced, economist Ronald Coase argued that the policy, reflected in the First Amendment, of minimal governmental interference in “the marketplace of ideas” must represent the conviction that this policy would be the one most likely to lead to the best results.<sup>15</sup> If so, Coase argued, why should we not have a similar faith in a policy of non-interference in the marketplace for goods?<sup>16</sup> At the very least, he claimed, it was a “paradox” that called out for examination and resolution.<sup>17</sup> Although in creating the commercial speech doctrine

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14. Collins & Skover, *supra* note 10, at 1027. Collins and Skover’s observation makes stark the problem of distinguishing between speech and commerce, an effort that reprises the now largely discredited speech/act distinction. *See infra* note 45. It is beyond the scope of this article to explore the definitional margins that make these distinctions so difficult or to dictate how these difficulties should be resolved in every case.

15. R.H. Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384, 384 (1974). Coase may have been inspired by an earlier article by Professor Martin Redish. That article appears to have served as the Supreme Court’s blueprint for *Virginia Pharmacy* in that the Court adopted the same reasoning (protection for the listeners’ interests), the same limitations (only truthful speech protected), and many of the same rationales (incentives) for why government might both protect some commercial speech while retaining some regulatory power over it. *See* Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971). According to Professor Reza Dibadj, both articles were preceded by an article by economist Aaron Director, who noted “a remarkable similarity between the underlying basis for complete laissez faire in the market for ideas and the market for economic goods and services.” Reza R. Dibadj, *The Political Economy of Commercial Speech*, 58 S.C. L. REV. 913, 916 (2007) (quoting Aaron Director, *The Parity of the Economic Market Place*, 7 J.L. & ECON. 1, 3 (1964)).

16. Coase, *supra* note 15, at 389. It is important to note that Coase’s article was basically a thought experiment, not a rigorously supported empirical argument or even a fully developed theoretical position. At the outset, Coase clearly stated he was merely raising the issue of the alleged paradox between assumptions regarding governmental competency to interfere with the “marketplace of ideas” versus the marketplace for goods. He argued that speech and commerce ought to be treated consistently. He did *not* purport to say whether that paradox should be resolved in favor of more regulation for speech or less for commerce, although his other work makes clear that he was in favor of less regulation for commerce. So it is a reasonable inference that this argument was meant to harness intuitions and norms about the appropriate level of regulation for speech to support his argument for less regulation of commerce. It is a testament to the power of the metaphor of “the marketplace of ideas,” as well as to the normative appeal of words like “freedom,” that his article ended up being used to support less regulation for both. However, Coase’s argument presupposes that there is no reasonable basis on which to distinguish between speech and commerce. Many have disagreed with this premise and argued there is indeed a distinction between speech and commerce that justifies inconsistent approaches, at least as a constitutional matter. *See, e.g.,* Lillian R. BeVier, *A Comment on Professor Wolfson’s “The First Amendment and the SEC”*, 20 CONN. L. REV. 325, 325–31 (1988).

17. Coase, *supra* note 15, at 386.

the Court appeared to resolve the paradox in favor of more regulation of speech rather than less regulation of commerce, in fact the doctrine set the stage for the current dilemma commercial speech presents to defenders of freedom of speech because it sweep within the ambit of the First Amendment an enormous amount of speech that had not previously been thought to be covered by the First Amendment, thereby setting the stage for the relaxation of governmental efforts to control commerce through the regulation of speech related to it.

In the wake of Coase's question many scholars, public policy analysts, and politicians heeded his call by proposing both that commerce should be deregulated in many respects and that commercial speech should be accorded the same status as political and expressive speech rather than languishing as a second-class citizen of speech. Moreover, in the years since the commercial speech doctrine was created, the Supreme Court has applied an increasingly rigorous test to governmental attempts to regulate commercial speech. Its current interpretation of the *Central Hudson* test<sup>18</sup> (the test for analyzing the constitutionality of laws regulating commercial speech) is "so rigorous that it results in the virtually automatic invalidation of laws restraining truthful commercial speech."<sup>19</sup> Many academic observers, organizations, and other friends of the Court have urged the Supreme Court to either clarify the commercial speech doctrine's application so that "commercial" is defined narrowly or get rid of the doctrine altogether and extend to commercial speech the same level of protection political and other protected speech receives.<sup>20</sup> These calls raise one of those "persistent problems" Shiffrin identified—what to do about fraud?

Consider the following statements, all arguably commercial speech, and all false. Should any of them be protected by the First Amendment?

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18. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n.*, 447 U.S. 557, 563–66 (1980).

19. Vladeck, *supra* note 7, at 1059.

20. See, e.g., Collins & Skover, *supra* note 10, at 995–98 (describing the amicus briefs filed in *Nike v. Kasky*, 539 U.S. 654 (2003), in favor of Nike's position that its speech was protected by the First Amendment). For law review articles supporting expansive protection of commercial speech, see sources cited *supra* note 11. Note that it does not follow that eliminating the commercial speech doctrine means *more* protection for commercial speech. It could mean *less* protection by returning commercial speech to the unprotected status it had prior to 1976.

“Oxycontin poses a lower ‘threat of abuse and addiction than traditional, faster-acting pain killers.’”<sup>21</sup>

“Chemical tests have not found any substance in tobacco smoke known to cause human cancer or in concentrations sufficient to account for reported skin cancer in animals.”<sup>22</sup>

“[T]he fibers of asbestos . . . are not injurious to the respiratory organs.”<sup>23</sup>

Benefin (a supplement of shark cartilage) is a treatment for cancer and HIV.<sup>24</sup>

If commercial speech were offered more than the intermediate scrutiny protection it is presently afforded,<sup>25</sup> all of these statements might be defended as opinion or speech on matters of public concern and thus subject to the demanding standards of heightened scrutiny found in cases such as *New York Times Co. v. Sullivan*.<sup>26</sup> Although one of the consequences of a heightened scrutiny test may be more shelter from liability for false statements, the Court in *Sullivan* thought it necessary to run the risk that some false speech would be protected in order to ensure the appropriate level of protection for valued expression. After all, “erroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’”<sup>27</sup> The Court further noted that “[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it

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21. Barry Meier, *Narcotic Maker Guilty of Deceit over Marketing*, N.Y. TIMES, May 11, 2007, at A1; see also *United States v. Purdue Frederick Co.*, 495 F. Supp. 2d 569 (2007).

22. Press Release, Tobacco Industry Research Committee, New Evidence Shows Complexities of Lung Cancer, Scientists Say (Sept. 27, 1960), available at <http://legacy.library.ucsf.edu/tid/nqh79d00>, quoted in BRANDT, *supra* note 2, at 202. Brandt notes that “industry researchers . . . were detailing carcinogenic substances in cigarettes and potential strategies for their removal” when this press release was issued by the tobacco companies’ non-profit front group, the Tobacco Industry Research Center (later renamed the Center for Tobacco Research (“CTR”)). BRANDT, *supra* note 2, at 202.

23. SHELDON RAMPTON & JOHN STAUBER, TRUST US, WE’RE EXPERTS: HOW INDUSTRY MANIPULATES SCIENCE AND GAMBLES WITH YOUR FUTURE 86 (2001) (quoting material distributed in 1962 from Gulf Oil Company to its workers, quoted in Jim Morris, *Worked to Death*, HOUSTON CHRON., Oct. 9, 1994, at A1).

24. *United States v. Lane Labs-USA Inc.*, 427 F. 3d 219, 221 (3d Cir. 2005) (paraphrasing claims made for shark fin supplement).

25. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n.*, 447 U.S. 557, 562–66 (1980).

26. 376 U.S. 254 (1964).

27. *Id.* at 271–72 (citing *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963)).

brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'"<sup>28</sup> The application of this standard to commercial speech would offer not only shelter for fraud, but it would represent a perhaps irresistible incentive to commit fraud when making false statements is in a company's economic interest.

Protecting freedom of expression is often justified on the grounds that preserving freedom in the marketplace of ideas is the method most likely to produce the most truth.<sup>29</sup> Justice Holmes's famous remark that "the best test of truth is the power of the thought to get itself accepted in the competition of the market"<sup>30</sup> is often thought to support this claim. However, if many false statements are currently made despite the possibility of negative sanctions, is there

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28. *Id.* at 279 n.19 (quoting JOHN STUART MILL, ON LIBERTY 15 (Blackwell 1947) (1859)).

29. Professors Goldman and Cox call this the Market Maximizes Truth Possession ("MMTP") theory. Alvin I. Goldman & James C. Cox, *Speech, Truth, and the Free Market for Ideas*, 2 LEGAL THEORY 1 (1996). Professors Goldman and Cox offer a more comprehensive (and more distinctively economic) discussion of the same issues I raise here and their article is an important refutation of the notion that the operation of the market will produce more truth. A few caveats though are in order. The First Amendment protects many interests besides truth. *See, e.g.*, THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–8 (1970). Moreover, simply because a particular expression is truthful does not make it particularly informative or a valuable expression in every context. For example, standing on a street corner reciting the names in a telephone book would involve truthful speech. But it is difficult to imagine any context in which it would constitute political, expressive, or even useful speech for informational purposes. Robert Post has also argued that the particular truth-seeking function that the First Amendment is intended to protect is actually a fairly narrow one and that the restriction on governmental intervention in the First Amendment is not applicable outside of that narrow area. Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2365–66 (2000). Finally, "truth" is a highly charged word with many complexities, and distinguishing between fact and opinion is often difficult. Nevertheless, making this distinction is a common legal task. *See, e.g.*, FED. R. EVID. 102 ("These rules shall be construed . . . to the end that the truth may be ascertained and proceedings justly determined.") (emphasis added). For purposes of this article, which claims that First Amendment protection for commercial speech should not be expanded, the word "truth" is used in the same way that it is used generally in the law; as a fact capable of proof or falsification. Used in this way it seems that, as professors Goldman and Cox have noted, a "global denial of objective truth is unwarranted." Goldman and Cox, *supra* at 8. .

30. *Abrams v. United States*, 250 U.S. 616, 630 (1919). Robert Post argues that the use of this metaphor is an "expression of American pragmatic epistemology" rather than an invitation to actually apply economic theory. Post, *supra* note 29, at 2360 (citing Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 788 (1989)). For more on Holmes' connection to the American pragmatists, see LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA (2001). For more on pragmatism in America, see CORNEL WEST, THE AMERICAN EVASION OF PHILOSOPHY: A GENEALOGY OF PRAGMATISM (1989). This pragmatism may have been more directed to the perceived evils of government suppression than a prediction that freedom of speech would necessarily result in the production of truth.



any reason to suppose that more laissez-faire in the marketplace of ideas will produce more truth?

Even supposing there is a market for truth, (and in many cases there demonstrably is—as the existence of the magazine *Consumer Reports* suggests), it is questionable whether the marketplace alone will necessarily produce truth. In fact, the claim that the market produces more truth is demonstrably false in many respects.<sup>31</sup> There is perhaps an even more troubling question of whether the public has much of an appetite for truth.<sup>32</sup> With commercial speech,<sup>33</sup> there are many structural incentives for speakers to engage in fraud, few effective checks on false speech, and some indication that because of personal preferences, social norms, or cognitive limitations, we “can’t handle the truth”<sup>34</sup>—or at least we are not demonstrating a pronounced preference for it.<sup>35</sup> Proponents of more protection for

31. See generally Goldman & Cox, *supra* note 29 (arguing that the MMTP theory is not supported by the application of economic theory or by a comparison of the market operation theory to the adversary system, an example of a non-market mechanism for the production of truth). For a survey of other articles with this theme, see Michael Ruston, *Economic Analysis of Freedom of Expression*, 21 GA. ST. L. REV. 693 (2005). See also Darren Bush, *The “Marketplace of Ideas:” Is Judge Posner Chasing Don Quixote’s Windmills?*, 32 ARIZ. ST. L.J. 1107 (2000) (arguing the inappropriateness of using the market metaphor for interpretation of the First Amendment). For a defense of the market treatment see Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK L. REV. 1 (1986).

32. Whether a good is private or public may make a difference. If truth is a public good, it will likely be under-produced. Goldman & Cox, *supra* note 29, at 25 (“[P]rivate markets will tend to underallocate resources to public goods.”). In many circumstances, truth might be a private good, that is, principally of interest only to the consumer of the information. However, in terms of economic analysis, the First Amendment suggests that truth is also a public good. For example, information about drug risks has been called a “public good.” Bruce M. Psaty & Sheila Burke, *Protecting the Health of the Public—Institute of Medicine Recommendations on Drug Safety*, 355 NEW ENG. J. MED. 1753, 1755 (2006) (proposing reforms for the FDA to improve drug safety).

33. James Weinstein, *Speech Categorization and the Limits of First Amendment Formalism: Lessons from Nike v. Kasky*, 54 CASE W. RES. L. REV. 1091 (2004) (arguing that consumers not only fail to sort out truth from falsehood in commercial speech, but that they may also lack the necessary rationality to do so optimally).

34. A FEW GOOD MEN (Castle Rock Entertainment et al. 1992). Tom Cruise plays a JAG lawyer defending two marines against charges of murder in the death of one of their comrades. His defense consists of showing that the death was an accident arising from an unofficial hazing practice at Guantanamo Naval Base called a “Code Red.” When cross-examining the base commander, played by Jack Nicholson, about the circumstances surrounding the incident and the practice of Code Red, Cruise presses him for the truth. Nicholson’s character responds with disdain, “The truth?! You can’t handle the truth!” *Id.*

35. See BRYAN CAPLAN, THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES (2007). Similarly, Cass Sunstein’s argument that citizens’ increased ability to choose the information they want to hear, from sources that reinforce their existing beliefs, is bad for a free republic, is an argument that does not seem to reflect a great deal of confidence that truth will regularly triumph in competition with error. CASS R. SUNSTEIN,

commercial speech often argue that protection is required to promote the truth, expand the relevant body of information on a topic, and provide balance to both “sides” in a debate.<sup>36</sup> (These proponents apparently assume that providing balance means providing more truthful information.)<sup>37</sup> If more protection for commercial speech does not lead to more truth, which seems demonstrably correct, we confront Coase’s paradox: why should the government and the courts prefer a laissez-faire approach with respect to the marketplace of ideas and not the market?

The explanation is that the marketplace of ideas is a metaphor,<sup>38</sup> and perhaps an inappropriate one. Although some speech is undoubtedly commerce and valuable for that reason, not all speech is valuable simply because it has a market value. We often value speech for reasons that have little to do with its cash value or its economic utility. Applying the metaphor too literally runs the risk of commercializing all speech or suggesting that speech’s *principal* value is its market value.<sup>39</sup> Nevertheless, since some have taken the metaphor seriously, it is worth exploring the question: How good is the market for truth, even with some regulation and only limited protection? And how should we deal with “market failures” in that marketplace?<sup>40</sup> Such failures presumably include; (1) the

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REPUBLIC.COM 112–13 (2001). For a very recent discussion of evidence that much of the public embraces beliefs such as that the U.S. government had a role in the destructive events of 9-11 or in flying saucers and the level of public ignorance more generally see, Nicholas D. Kristoff, ‘*With a Few More Brains...*’ N.Y. TIMES, WK14 (March 30, 2008).

36. See, e.g., *Kasky v. Nike, Inc.*, 45 P.3d 243, 263–67 (Cal. 2002) (Chin, J., dissenting) (arguing that the First Amendment ought to provide a “commitment and guarantee that both sides in a public debate may compete vigorously—and equally—in the marketplace of ideas”).

37. *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

38. Linda L. Berger, *What is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 J. ASS’N LEGAL WRITING DIRECTORS 169 (2004).

39. The trend to commercialize everything is beyond the scope of this article. However, several writers have noted this trend as applied to many areas of social life previously thought to be not appropriately assessed in purely market or economic terms. See, e.g., GARY CROSS, *AN ALL-CONSUMING CENTURY* (2000) (history of consumer culture and society); VINCENT J. MILLER, *CONSUMING RELIGION: CHRISTIAN FAITH AND PRACTICE IN A CONSUMER CULTURE* (2005) (religion); JENNIFER WASHBURN, *UNIVERSITY INC.: THE CORPORATE CORRUPTION OF HIGHER EDUCATION* (2005) (higher education and research); Katherine Mangan, *A J-School Adapts to the Market*, CHRON. OF HIGHER EDUC., Aug. 10, 2007, at A8 (describing the remaking of the Medill School of Journalism at Northwestern University into a more consumer oriented model).

40. Although this article terms failures to produce truth and associated failures as “market failures,” this may not conform precisely to that term as it is used by economists. Nevertheless,

proliferation and acceptance of false ideas, (2) the suppression of truthful information, (3) the failure to produce truthful information, and (perhaps) (4) limitations on choice, and the channeling of the exercise of preferences within those limitations (assuming that choice is a positive good). Finally, is there a role for the government to play in ameliorating the effects of those market failures? This article uses evidence of these market failures under the existing conditions to suggest that extending a broad First Amendment shield to commercial speech is unlikely to produce more truth.<sup>41</sup>

As is so often the case, the use of the metaphor tends to naturalize background distribution of entitlements protected by law as if they represented a state of nature—a move that for some confers instant legitimacy.<sup>42</sup> Although this article argues that the government should continue to have the power to regulate commercial speech, regulation is obviously neither a panacea nor necessarily a helpful place to look in all cases for the amelioration of all these problems.<sup>43</sup> Similarly, a First Amendment shield for a broader range of expressive activities connected with commerce is also not a cure for

Coase himself used the term this way when he observed that, “the results actually achieved by this particular political system [minimal regulation of political speech] suggest that there is a good deal of ‘market failure.’” Coase, *supra* note 15, at 385. So I use the word market failure here in the same way that Coase did in his initial article—to describe a suboptimal result.

41. There is some question of whether the truth is a “good” at all—if by “good” we mean commodity. See Goldman & Cox, *supra* note 29, at 18. Moreover, if a truth is unpleasant, it may not even be considered “good” as in normatively desirable.

42. Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U. L. REV. 939, 956–58 (1985); see also Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 810–11 (1935) (arguing that metaphors are undesirable naturalizations of legal concepts and result in nonsensical questions such as, “where is a corporation?” for purposes of jurisdiction, given that the question cannot be answered by empirical observation). But see Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1114, 1162–71 (1989) (asserting that metaphors are inescapable in legal reasoning, and illustrating that Cohen himself used metaphor). For a discussion of the role of metaphor in law generally, see Mark L. Johnson, *Mind, Metaphor, Law*, 58 MERCER L. REV. 845 (2007) (proposing that metaphor is one of the key devices by which we overcome cognitive limitations and the mind/body problem, helping us to translate abstract ideas into legal principles that may have some rough integrity over time); Robert L. Tsai, *Fire, Metaphor, and Constitutional Myth-Making*, 93 GEO. L.J. 181 (2004) (illustrating the important role of metaphor in creation of law); see also Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (discussing how a framework for approaching issues in one area of law can prove useful in approaching problems in other areas of law).

43. Arthur Best, *Controlling False Advertising: A Comparative Study of Public Regulation, Industry Self-Policing, and Private Litigation*, 20 GA. L. REV. 1, 71 (1985) (arguing a legal regime authorizing private enforcement actions for false advertising may be more efficient than regulatory agency oversight).

these “market failures,” and in many cases may exacerbate them. In other words, incentive structures, experience, and available evidence suggest that extending more protection to commercial speech than it already enjoys is unlikely to generate more truth.<sup>44</sup>

### I. MARKETS AND MOTIVES

Many things provide people with a motivation to speak, or, in some cases, not to speak.<sup>45</sup> Clearly, one of the most powerful motivators is an economic gain. In many cases, the law presumes money is a motive that *automatically* calls into question the ability to make objective judgments.<sup>46</sup> Indeed, arguments for deregulation and

44. For further development of this thesis, see Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. (forthcoming 2008).

45. For purposes of this article it is not possible to probe the definitional difficulties in distinguishing between speech, action, and “speech acts.” See, e.g., *United States v. O’Brien*, 391 U.S. 367, 376–84 (1968) (finding a distinction between the noncommunicative elements of the act of burning a draft card from the symbolic elements in upholding petitioner’s conviction for burning his draft card). However, it is a very problematic distinction. One of the most prominent proponents of the speech/act distinction was Yale law professor Thomas Emerson. EMERSON, *supra* note 29, at 17. For an illustration of the difficulties in drawing speech/act distinctions, see Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 272–276 (1981) [hereinafter Schauer, *Categories*]. More vivid examples can be found in CATHARINE A. MACKINNON, *ONLY WORDS* 28 (1993) (“Is a rape a representation of a rape if someone is watching it?”). Although I argue elsewhere that Emerson offered the most comprehensive collection of justifications for protecting freedom of expression, see Piety, *supra* note 44, I part company with his proposal on the speech/act distinction and I am inclined to agree with Schauer and MacKinnon that this distinction is ultimately unpersuasive.

46. See, e.g., 28 U.S.C. § 455 (2000) (entitled “Disqualification of Justice, Judge, or Magistrate Judge”). Subsection (b)(4) provides that a judge should disqualify himself when “[h]e knows that he, individually or as a fiduciary . . . , has a financial interest in the subject matter in controversy or in a party to the proceeding . . . .” *Id.*; see also Richard K. Neumann, Jr., *Conflicts of Interest in Bush v. Gore: Did Some Justices Vote Illegally?*, 16 GEO. J. LEGAL ETHICS 375, 387 (2003) (discussing § 455). Similar requirements for recusal or disqualification where there is a financial interest are ubiquitous in the law. Even where involvement is not explicitly prohibited, cautious counsel might advise a client with a financial interest to avoid involvement as a decision maker because it might undermine the decision’s credibility or legitimacy, regardless of whether it was actually prohibited. Similar presumptions for disqualifications (albeit rebuttable presumptions) govern conflicts of interests for members of a board of directors. See, e.g., DEL. CODE ANN. tit. 8, § 144 (2007) (stating that actions by the board with an interested director are not void or voidable solely on the basis of a director’s financial interest as long as the director’s interest is properly disclosed or there is evidence that the transaction is “fair”). In some circumstances, a financial interest may create a rebuttable presumption of a breach of a director’s fiduciary duty. *Kahn v. Tremont Corp.*, 694 A.2d 422, 428–29 (Del. 1997). However, even where a majority of directors are interested, a transaction may still be upheld. *Zapata Corp. v. Maldonado*, 430 A.2d 779, 786–87 (Del. 1981). For further discussion of these issues, see Julian Velasco, *Structural Bias and the Need for Substantive Review*, 82 WASH. U. L.Q. 821, 854–71 (2004). For the view that the proper balance of deference has been struck in the application of the business judgment rule to takeovers, see Stephen M. Bainbridge, *Unocal at 20: Director Primacy*

privatization often appear to be based on the notion that the motivation to improve one's economic condition is such a singularly powerful motive for acting that it is the most reliable basis, all other things being equal, to efficiently allocate resources.

Of course Coase's question, to the extent it focused on the value of the production and protection of the truth,<sup>47</sup> did not capture all of the interests the First Amendment was meant to protect.<sup>48</sup> Moreover, as Coase noted, the conventional understanding of the First Amendment tended to obscure "that there is, in fact, a good deal of government intervention in the market for ideas."<sup>49</sup> Some of this intervention is undoubtedly because of the variety of contexts and interests implicated by so vaguely worded a protection. Indeed, it was just this multiplicity of interests that led Shiffrin to suggest it was unlikely that a single theory could adequately account for or reconcile all First Amendment precedent or point the way to desirable results in all cases.<sup>50</sup> Coase himself noted that simply because these differing attitudes toward speech and commerce were

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in *Corporate Takeovers*, 31 DEL. J. CORP. L. 769, 787–90 (2006) (arguing for high degree of deference to judgment of directors even in the presence of some (arguably) interested directors).

47. Coase appears to have been agnostic on the issue of exactly what the market was supposed to be better *for*, noting that the public is often "more interested in the struggle between truth and falsehood than it is in the truth itself." Coase, *supra* note 15, at 390. Presumably, he was primarily interested in probing the issue of governmental competence, as opposed to market mechanisms, for concluding what was in the public's best interest. Truth may be *one* of those values, but not necessarily the only one.

48. See, e.g., EMERSON, *supra* note 29, at 6–7 (1980) (arguing that the First Amendment protects notions of autonomy, truth seeking, the political process and social stability). But see Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1424–25 (1986) (arguing that the autonomy interest is not a good fit with respect to for-profit organizations, and that the protection of the political process should take precedence, in particular protection for those with fewer resources to speak, to autonomy interests of such speakers).

49. Coase, *supra* note 15, at 390 (offering examples of broadcast regulation and public education); see also Schauer, *Categories*, *supra* note 45, at 270–71 (listing examples of speech not protected by the First Amendment); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1768 (2005) [hereinafter Schauer, *Boundaries*] (noting areas of routinely regulated speech). For more discussion of this conventional understatement, see Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 12–15 (1984); Michael Rushton, *Economic Analysis of Freedom of Expression*, 21 GA. ST. U. L. REV. 693, 700–02 (2005). Although Coase criticized the soundness of judges' economic views he apparently failed to consider that economists' views on the jurisprudence of the First Amendment might suffer from a similar infirmity. Perhaps he dismissed too easily the fact that lawyers and subsequent judges are not free to disregard "the approach to regulation of markets found congenial by the courts" because, however bad it may be as economics, what the courts say *is* the law. Coase, *supra* note 15, at 384.

50. See Shiffrin, *Economic Regulation*, *supra* note 3.

apparently paradoxical did not mean that “public policy should be the same in all markets.”<sup>51</sup> Moreover, on the efficiency of the non-interference model he wrote, “Suffice it to say that, in practice, the results actually achieved by this particular political system suggest that there is a good deal of ‘market failure.’”<sup>52</sup> Accordingly, this article discusses a few of the ways that there has been a good deal of market failure in the commercial speech marketplace of ideas. Granting more protection to commercial speech than it is currently afforded is unlikely to correct this market failure.<sup>53</sup>

As is now painfully obvious, what people most want to “buy,” both literally and figuratively, may not necessarily be the truth.<sup>54</sup> The popularity of an idea in market terms—how many people think it is true—is not a reliable indicator of its truth.<sup>55</sup> Thus, it is unclear that a completely unregulated marketplace of ideas is likely to lead to more truth, even if it is likely to lead to the production of more of what people want to hear or believe.<sup>56</sup> While it is obvious that we do not have perfect competition in the marketplace of ideas, it is also true, as Burt Neuborne has suggested, that when it comes to commercial speech, “no form of communication is more sensitive to

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51. Coase, *supra* note 15, at 389.

52. *Id.* at 385.

53. For an argument that more protection for commercial speech would imperil the constitutionality of many previously well-settled areas of regulation, see Tamara R. Piety, *Grounding Nike: Exposing Nike's Quest for a Constitutional Right to Lie*, 78 TEMP. L. REV. 151, 188–99 (2005).

54. This is the thesis of a book by George Mason University economist Bryan Caplan in *The Myth of the Rational Voter*, *supra* note 35. Shiffrin rightly questions whether it could possibly be the case that all that is at issue here is, for example, what the majority of citizens think is more important—drug prices or literature. He suggests that the exercise of governmental power inevitably to involve some value judgments such that “supporters of the First Amendment need not be at all embarrassed in suggesting that some speech, such as political speech, is more important than commercial speech.” SHIFFRIN, *DISSENT*, *supra* note 12 at 39–40.

55. Jim Lobe, *Majority Still Believe in Iraq's WMD, Al-Qaeda Ties*, IPS, Apr. 22, 2004, <http://www.ipsnews.net/interna.asp?idnews=23439>. According to a survey published on this site for the Pew Forum on Religion & Public Life, more people believed that scientists had a consensus on the theory of evolution than believed in evolution themselves. PEW FORUM ON RELIGION & PUBLIC LIFE, PUBLIC DIVIDED ON ORIGINS OF LIFE: RELIGION A STRENGTH AND WEAKNESS FOR BOTH PARTIES 7–9 (2005), <http://pewforum.org/publications/surveys/religion-politics-05.pdf>; see also Editorial, *Evolution and Texas*, N.Y. TIMES, Dec. 4, 2007, at A34 (criticizing the dismissal of a state science expert who was apparently fired for passing along an email about a distinguished professor's talk debunking intelligent design). If the democratic majority believes a false idea (e.g., separate but equal, intelligent design), which value comes first—truth or democracy? Similar questions are raised by CAPLAN, *supra* note 54.

56. Goldman & Cox, *supra* note 29, at 18 (“If people valued falsehood, then perfect competition would provide falsehood in a Pareto-optimal way.”).

the wishes and whims of hearers.”<sup>57</sup> And this sensitivity may result in the production of *less* truth rather than more, in direct proportion to the palatability of that truth. At the very least, if truth is only one of many things people value, perfect competition will only deliver truth in the proportion that consumers value it.

One commentator described this problem as follows:

[Although t]he market model avoids [the] danger of officially sanctioned truth . . . it permits . . . the converse danger of the spread of false doctrine by allowing expression of potential falsities. Citizens must be capable of making determinations that are both sophisticated and intricately rational if they are to separate truth from falsehood. On the whole, current and historical trends have not vindicated the market model’s faith in the rationality of the human mind, yet this faith stands as a foundation block for most recent free speech theory.<sup>58</sup>

This observation is echoed in what Ronald Collins and David Skover have called “The Huxleyan Dilemma”<sup>59</sup>—that is, the tension between the fear of repression and the promotion of a governmental orthodoxy and, such as represented in George Orwell’s *1984*<sup>60</sup> and the dystopian vision of a social orthodoxy imposed by powerful, private actors such as the ruling corporations in Aldous Huxley’s *Brave New World*.<sup>61</sup>

57. BURT NEUBORNE, FREE SPEECH—FREE MARKETS—FREE CHOICE: AN ESSAY ON COMMERCIAL SPEECH 13 (Assoc. of Nat’l. Advertisers 1987); see also Burt Neuborne, *A Rationale for Protecting and Regulating Commercial Speech*, 46 BROOK. L. REV. 437, 454–62 (1980) (stating that commercial speakers derive their First Amendment rights from the rights of the listeners).

58. Ingber, *supra* note 49, at 7–8 (footnotes omitted); see also Frederick Schauer, *Free Speech and the Assumption of Rationality*, 36 VAND. L. REV. 199, 204–09 (1983) (critiquing Franklyn Haiman’s reliance on an assumption of rationality to support First Amendment doctrine as empirically wrong (reviewing FRANKLYN HAIMAN, *SPEECH AND LAW IN A FREE SOCIETY* (1981))).

59. See RONALD K.L. COLLINS & DAVID M. SKOVER, *THE DEATH OF DISCOURSE*, at xx–xxv (2005).

60. GEORGE ORWELL, *1984* (1949).

61. ALDOUS HUXLEY, *BRAVE NEW WORLD* (1932). Perhaps it is no accident that the publication of *Brave New World* coincided with the growth of fascism and predated global awareness of the dangers posed by totalitarianism. Not surprisingly, George Orwell, writing more than a decade later, after the conclusion of World War II and at the threshold of the Cold War, felt that the danger of governmental orthodoxy was rather more acute. See ORWELL, *supra* note 60. However, almost another decade after the publication of *1984*, and deep into the Cold War period, Huxley still believed the dangers explored in *Brave New World* had not only *not*

Given recent events—warrantless wire tapping and searches and detaining persons without charges or access to counsel or the courts—it would be premature to conclude that Orwell’s nightmare will never (or has not) come to pass.<sup>62</sup> However, it is equally clear that with the infiltration of marketing techniques into the political sphere, Aldous Huxley’s nightmare may not be that far away either. Consider what Edward Bernays, often called “the Father of Public Relations,”<sup>63</sup> had to say regarding the role of an “elite” in a democracy:

The conscious and intelligent manipulation of the organized habits and opinions of the masses is an important element in democratic society. *Those who manipulate this unseen mechanism of society constitute an invisible government which is the true ruling power of our country.*

We are governed, our minds molded, our tastes formed, our ideas suggested, largely by men we have never heard of. This is a logical result of the way in which our democratic society is organized.<sup>64</sup>

Bernays suggested that this sort of governing elite was inevitable as the only way of “organizing chaos.”<sup>65</sup> He asserted that “the presidents of the chambers of commerce in our hundred largest cities, [and] the chairmen of the boards of directors of our hundred or more largest industrial corporations”<sup>66</sup> would be some of the

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been averted, but were more pressing than ever. ALDOUS HUXLEY, *BRAVE NEW WORLD REVISITED 2* (1958). For an updated version of this vision of a world dominated by corporations, see MAX BARRY, *JENNIFER GOVERNMENT*, at front flap (2003) (“[T]he world is run by giant American corporations (except for a few deluded holdouts like the French); taxes are illegal; employees take the last names of the companies they work for; the Police and the NRA are publicly-traded security firms; and the U.S. government only investigates crimes it can bill for.”). Author Max Barry’s website contains running posts of material critiquing the infiltration of commercial culture and commercial speech into culture generally. See <http://www.maxbarry.com> (last visited Oct. 5, 2007).

62. See “Scooter” Libby and the President: *Justice is not Blind*, *ECONOMIST*, July 5, 2007, at 13–14 (decrying President Bush’s apparent willingness to be perceived as “above the law” in the aforementioned circumstances).

63. LARRY TYE, *THE FATHER OF SPIN: EDWARD L. BERNAYS & THE BIRTH OF PUBLIC RELATIONS*, at ix (1998).

64. EDWARD L. BERNAYS, *PROPAGANDA* 37 (Ig Publ’g 2004) (1928) (emphasis added).

65. *Id.* at 60.

66. BERNAYS, *supra* note 64, at 59–60. He also included the presidents of labor unions, professional and fraternal organizations, authors, educators, and “interest groups.” *Id.* at 60.



members of that “invisible government.”<sup>67</sup> It surely is the case that these elite shape much of the world as we experience it—news, entertainment, law, opportunities, and choices. So one might say we have arrived at the worst of both worlds. On one hand, the political arena is dominated by a degraded level of discourse.<sup>68</sup> On the other hand, there is a veritable landslide of cultural junk in the form of non-stop advertising and an abundance of entertainment that hardly bothers to disguise its real function as marketing. As James Boyd White put it:

[F]ar too much of our world of public speech consists of forms of expression that are designed simply to promote the sale of commodities or to advance a political position, and do so with very little respect for the audience or regard for the truth. Speech of this character works not by appealing to the thought and experience of the person it addresses . . . but through the manipulation of instincts, *instincts that in fact it does a lot to form*. To put it in plain terms, I think *our public world is dominated by the twin evils of advertising and propaganda; that these constitute in their own way an empire of might*; and that what to think or say about this fact is a serious problem for us both as individual people and as lawyers.<sup>69</sup>

Although White’s lament applies to both commercial and political speech, but only commercial speech has been subject to regulation for its truth. And the protection for truthful commercial speech is itself new. Until very recently, it was taken for granted that the government had the right to control commercial speech. The

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67. Bernays also called the member of this elite “invisible wirepullers.” *Id.* at 60. Master political strategist Dr. Frank Luntz, the man who gave Newt Gingrich the “Contract With America” and turned the estate tax into the “death tax,” is following in Bernays’ footsteps when he observes: “Sophistication is certainly what Americans say they want in their politics, but it is certainly not what they buy.” FRANK LUNTZ, *WORDS THAT WORK: IT’S NOT WHAT YOU SAY, IT’S WHAT PEOPLE HEAR* 5 (2007). Luntz argues that simplicity is necessary for good communication. He is undoubtedly right. Less clear is whether, in this area, the “products” that the public “buys” ought to be the touchstone of truth, and whether there is a duty to convey complicated truths to the public without over-simplifying and running the risk of, as Bernays put it, attempting to get “approval of the masses” by manipulating their emotional reactions and encouraging them to use mental “rubber stamps.” BERNAYS, *supra* note 64, at 48–55.

68. See, e.g., FRANK RICH, *THE GREATEST STORY EVER SOLD: THE DECLINE AND FALL OF TRUTH FROM 9/11 TO KATRINA* (2006).

69. James Boyd White, *Free Speech and Valuable Speech: Silence, Dante, and the “Marketplace of Ideas”*, 51 UCLA L. REV. 799, 809 (2004) (emphasis added).

establishment of the commercial speech doctrine unsettled this expectation somewhat.

The current proposals for complete protection for commercial speech could potentially undo a whole regulatory structure that reflects that the drafters took for granted the power to regulate this sort of speech. If the same free-for-all typical of a political campaign were applicable to speech in the marketplace, and *caveat emptor* applied to all manner of advertising that is currently subject to some truth in advertising restrictions, it would be an unsettling prospect and difficult to imagine we would have more truthful information or be better off. A First Amendment defense, if applied to commercial speech, might well largely cancel out governmental power to regulate commerce at all. As Fred Schauer put it, “[o]nce the First Amendment shows up, much of the game is over.”<sup>70</sup>

Perhaps many observers would not view that as a bad thing. However, the regulatory revolution in the twentieth century seems to have had some role to play in improving the safety of food, drugs, products and the security of the market. And many point to the relaxation of regulation to be the reason for massive financial failures, more poisoned food, toys, and air. So whether or not these views are accurate, it seems at least imprudent to cast vast sections of the U.S. Code relating to consumer protection, securities regulation, environmental regulation, truth in lending, and others into the rubbish bin without a close look at the implications of doing so.

On the other hand, recognizing prudential concerns in eliminating governmental discretion to regulate does *not* equate to arguing that regulation is *invariably* desirable. Regulation can be costly and inefficient. And there is always the problem of agency capture and outright corruption of those entrusted with regulating. Nevertheless, the question remains—is there any reason to believe that insulating false commercial speech by providing commercial speech generally with *more* First Amendment protection will successfully produce *more* truth as supporters of these proposals imply? A look at the incentives and the “market failures” in the current environment suggest that there is not.

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70. Schauer, *Boundaries*, *supra* note 49, at 1767.

*A. Incentive Structures of For-Profit Corporations*

At the outset, there is a problem presented in confining this discussion to commercial speech given that there is presently no clear legal definition of what makes speech “commercial.”<sup>71</sup> For purposes of this discussion, however, commercial speech is defined as speech by for-profit corporate speakers. Although this definition captures much more speech than is obviously covered by the commercial speech doctrine itself, this does not detract from the point. Rather, since it encompasses speech that some might claim is protected speech,<sup>72</sup> it underscores the problem inherent in protecting more of such speech because this article is most concerned with the incentive structures of for-profit corporations.<sup>73</sup> And these incentives affect *all* speech by for-profit corporations, whether it is presently protected or not. At least three features of the for-profit corporation structure directly hinder the production of truthful speech and reduce any expectation that these corporations will refrain from suppressing speech when feasible.

The first feature is the diffuse structure of the corporate organization in which management and ownership are largely disconnected. Management acts on behalf of shareholders and the corporation itself is organized for their benefit. Shareholders, however, are nominal owners and have very little say in the day-to-day operations of the corporation and enjoy a very limited right of intervention.<sup>74</sup> Even if shareholders were inclined to trade off some profit for a process that they found more consistent with their moral commitments, corporate law makes it difficult for them to do so by making it an all or nothing proposition. When shareholders disapprove of management decisions, such as using animals for testing products, their usual remedy is exit—divesting themselves of

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71. See Erwin Chemerinsky & Catherine Fisk, *What Is Commercial Speech? The Issue Not Decided in Nike v. Kasky*, 54 CASE W. RES. L. REV. 1143 (2004); see also Weinstein, *supra* note 33, at 1141–42.

72. Remember that simply because speech falls outside of the commercial speech doctrine does not mean it is protected speech. It could theoretically be protected non-commercial speech or false (and hence unprotected) commercial speech.

73. This is, as I argue elsewhere, a more comprehensive definition of commercial speech as it exists in the world. It is not precluded by the commercial speech doctrine, although some decisions in the corporate speech area would have to be overturned in order for all the Court’s precedent to be harmonized. See Piety, *supra* note 44.

74. See, e.g., WILLIAM A. KLEIN & JOHN C. COFFEE, JR., BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES 109–10 (10th ed. 2007).

their holding.<sup>75</sup> For a variety of reasons, including status quo inertia, total divestment may seem too costly when it means giving up the whole of the investment plus incurring transaction costs.<sup>76</sup> Moreover, exit as a response to management practices with which the shareholder disagrees is not easily disaggregated from any other reason for exit and shareholders cannot expect that managers will reliably understand the signal sent by exit as a response to business practices with which they disagree. This further decreases the incentive to use exit as a strategy to express disapproval of management and encourages shareholders to consider only their economic well being.

The primacy of the financial interest, typically referred to as the “bottom line,”<sup>77</sup> is the second structural problem with respect to speech. For-profit corporations, unlike the human beings who run them, have only one interest<sup>78</sup>—the maximization of shareholder value.<sup>79</sup> The precise meaning of that interest in any given context, and whether it should be measured in the short or the long run, makes this an interest that is not as clear-cut as it might appear at first blush.<sup>80</sup> A corporation’s managers and directors have the discretion to resolve this definitional ambiguity pursuant to the business judgment rule, a legal doctrine that affords them wide

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75. For a discussion of how this makes a “shareholder democracy” different than a political democracy, see ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970). For a discussion of why corporations should not be considered democracies of any kind, see Daniel J.H. Greenwood, *Markets and Democracy: The Illegitimacy of Corporate Law*, 74 UMKC L. REV. 41 (2005).

76. The difficulties of exit as a way to signal disapproval of a decision was one of the factors the Supreme Court found significant in distinguishing between for-profit and not-for-profit organizations in the context of campaign finance issues. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 664 (1990). The Court’s recent decision in *FEC v. Wisconsin Right to Life, Inc.*, 27 S. Ct. 2652 (2007), may have called into question the viability of this distinction.

77. For a book arguing that this incentive structure makes “good people do bad things,” see RALPH ESTES, *TYRANNY OF THE BOTTOM LINE: WHY CORPORATIONS MAKE GOOD PEOPLE DO BAD THINGS* (1996).

78. Professor Daniel Greenwood has argued this comparison actually involves assessing the interests of a fictional shareholder who, like the economists’ “rational man,” is more uni-dimensional in his interests than a real human being. Daniel J.H. Greenwood, *Fictional Shareholders: For Whom Are Corporate Managers Trustees, Revisited*, 69 S. CAL. L. REV. 1021 (1996).

79. “There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.” Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001).

80. See, e.g., *The Ones That Get Away: Accounts Are Increasingly More Art Than Science*, *ECONOMIST*, July 30, 2005, at 65–66.

latitude in assessing which decisions will be most profitable for the corporation and, ultimately, for its shareholders.<sup>81</sup> This discretion is wide enough to encompass expenditures for speech that are not obviously related to furthering the corporation's business interests, such as expenditures for an ad supporting a local referendum or a donation to the opera.<sup>82</sup> Nevertheless, all speech by for-profit organizations can be traced back to those business interests.<sup>83</sup>

While economic and political interests are undoubtedly intertwined,<sup>84</sup> differences do exist between them. Economic interests, expressed in terms of growth or profit, are undoubtedly narrower than political interests, which are typically informed by a range of moral and social concerns. For instance, in the debate over the use of the death penalty, some might assess the question of whether a death penalty is appropriate through the lens of the financial costs associated with having a death penalty, while most people probably believe that the costs of executions, or any potential profits, are irrelevant in answering this question because the retention or abolition of the death penalty is a moral question unsuited to an assessment on a cost/benefit basis.<sup>85</sup>

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81. KLEIN & COFFEE, *supra* note 74, at 156–62.

82. For a paradigmatic case, see *Shlensky v. Wrigley*, 237 N.E.2d 776, 780–81 (Ill. App. Ct. 1968) (upholding the Chicago Cubs' board of directors' decision not to hold night games at Wrigley Field on the grounds that baseball was a "daytime sport" and night games might encourage audiences that would eventually cause a decline in property values in the surrounding area). In retrospect, the board's reasoning seems like a flimsy justification for refusing to avail the organization of the gate revenues expected from night games. Nevertheless, the court indicated it would not second-guess the board's reasoning in favor of the shareholders' arguments as long as there was a reasonable basis for the board's decision. *Id.* at 779–83.

83. Some commentators have argued that the form of the speech, rather than the for-profit identity of the speaker or content, is dispositive for the question of protection. See, e.g., Bruce E.H. Johnson & Jeffrey L. Fisher, *Why Format, Not Content, Is the Key to Identifying Commercial Speech*, 54 CASE W. RES. L. REV. 1243 (2004).

84. Elsewhere I argue there is an identity between the economic and the political interests and of an entity, created by operation of law, for conducting business where the purpose of the law which constitutes it is to create rules for the organization and protection of the conduct of legal business. See Piety, *supra* note 44. Representatives of business entities, such as The Arthur W. Page Society, have themselves suggested as much. "[B]ecause corporations are entities whose decision makers owe fiduciary duties to shareholders and owners, no responsible corporate spokesman speaks on a company's behalf without being concerned about the effects the statements may have on corporate sales and profits." Brief for Arthur W. Page Soc'y et al. as Amici Curiae Supporting Petitioners at 11, *Nike v. Kasky*, 539 U.S. 654 (2003) (No. 02-575) (emphasis added).

85. Daniel J.H. Greenwood, *Enronitis: Why Good Corporations Go Bad*, 2004 COLUM. BUS. L. REV. 773, 805–06 ("Few real people are as disconnected from social relationships as the fiction that drives the share value maximization model.").

In contrast, the management of for-profit corporations does not have any *other* legitimate lens through which to assess these types of question *except* as to how they stand to add or detract from economic benefits to the firm.<sup>86</sup> Other considerations, such as social responsibility may be taken into account to the extent that doing so does not rise to the level of a breach of duty to shareholders, but that does not mean such concerns are central to the firm's reason for existence or are mandatory subjects of directors' duties. Concerns for "stakeholders" are permissive, not mandatory, and case law which approved spending corporate funds on charitable and political concerns developed around a practice of deferring to the board's judgment about what was in the company's long term interest. Donation to social welfare in the form of charitable contributions or other expenditures with no obvious business purpose are actually justified as an exercise of business judgment, and thus authorized by the business judgment rule, because such expenditures are thought to promote the business but generating goodwill and burnishing the company's image. While concern for economic benefits is by no means an illegitimate concern, indeed care for the maximization of economic welfare is often a positive good, it hardly seems that some of the world's largest economic institutions can seriously claim they require a constitutional shield for statements made in furtherance of those interests. This is particularly so given that the corporate structure often offers access to greater resources for expression, greater access to the largest communication networks, and the opportunity to use corporate monies to fund this expression, than is available to the public at large. Moreover, all of these factors (and perhaps others) mean the cultural environment is already heavily skewed in favor of the speech of commercial interests. This results in a situation where "matters of public concern" are increasingly focused on the problems and views of commercial interests rather than a wider range of matters of human concern.<sup>87</sup>

This raises the third structural problem—that the corporation is a legal fiction, not a human being. A corporation has no individual corporeal existence. It is not a human being who dies, suffers, or

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86. Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1033 (1998).

87. Lawrence E. Mitchell, *The Age of Aquarius or, How I (Almost) Learned to Stop Worrying and Love Free Markets*, 88 MINN. L. REV. 921, 930–32 (2003).

feels pain or joy. This means it has no expressive interests of its own. And it also means that the sanctions of the criminal law, to the extent that they are directed at human concerns like liberty, are less effective.<sup>88</sup> First, the dispersal of authority often makes assigning fault to it difficult. Second, where there is no human being to punish with the singular sanction that the criminal law has to offer, loss of liberty, we can expect that, at least as a theoretical matter, the effectiveness of the criminal law as a deterrent will be diminished.<sup>89</sup> A corporation cannot be thrown in jail.<sup>90</sup> Third, even when the law exacts criminal penalties against a corporation, it is unclear that the punishment falls on the appropriate party.<sup>91</sup> If the corporation goes out of business a disproportionate amount of the resulting suffering falls on employees, creditors, and shareholders who were *not* directly responsible for any wrongdoing. There is no thing to suffer the punishment. Punishment is always displaced. (Of course the same observation might be made of civil fines—who is punished if the cost of the fine is simply passed through the corporation?) Thus, the *corporate* person is a person somewhat<sup>92</sup> insensitive to sanctions of any kind, whether criminal or civil.<sup>93</sup> For all of these reasons, with respect to truth, not only can we predict that market failures would

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88. LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT 103 (2001).

89. See, e.g., Stacey Neumann Vu, *Corporate Criminal Liability: Patchwork Verdicts and the Problem of Locating a Guilty Agent*, 104 COLUM. L. REV. 459, 459, 487 (2004) (describing the difficulties of assigning mens rea where responsibility is diffused); see also HARRY GLASBEEK, WEALTH BY STEALTH: CORPORATE CRIME, CORPORATE LAW, AND THE PERVERSION OF DEMOCRACY 118–43 (2002).

90. TED NACE, GANGS OF AMERICA: THE RISE OF CORPORATE POWER AND THE DISABILITY OF DEMOCRACY 5 (2003) (“As Baron Thurlow said some three centuries ago, ‘Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?’”); see also Lawrence E. Mitchell & Theresa A. Gabaldon, *If Only I Had a Heart: Or, How Can We Identify a Corporate Morality*, 76 TUL. L. REV. 1645, 1655 (2002).

91. For instance, when a corporation goes out of business its employees lose their jobs and sometimes their pensions as well, regardless of their personal involvement in the criminal behavior. To those affected by such losses the punishment may be a far more dire than that of even a very large fine.

92. The key word here is “somewhat.” I am not suggesting that fines and other criminal sanctions have *no* effect. And presumably the officers and directors of a corporation have the same disinclination to suffer the social stigma of the perception of wrong doing, not to mention the possibility of being charged personally and going to jail, in their professional context and anyone does with respect to their status as citizens.

93. One observer has suggested that, pursuant to the criteria of the *Diagnostic and Statistical Manual IV* for the diagnosis of mental illness, the corporate “person” is a psychopath. JOEL BAKAN, THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER 56–59 (2004).

persist under a framework of broader protection for commercial speech, they might positively flourish.

### *B. Market Failures*

Economists generally use the term “market failure” to describe conditions where the operation of the market fails to produce optimal (i.e., “efficient”) distributions of goods, services, or outcomes.<sup>94</sup> Although economists differ on the definition of market failures and how to determine when one has occurred, for purposes of this article I define market failures as those occasions when the current market fails to produce what may be fairly described as truth (or choice in contexts where truth seem inapplicable) where the public welfare would seem to require truth. These market failures occur in four instances: (1) falsehoods perpetuated and disseminated to the detriment of public welfare; (2) suppression of truthful information that may benefit the public; (3) failures in the production of truthful information; and (4) private (non-governmental) suppression of freedom of expression or choice.<sup>95</sup>

Additional problems may result from the dominance of the market metaphor itself because treating expression as a sellable product refracts all social aims through the lens of the market, something many find independently objectionable to the extent that they feel some values transcend assessment in material terms.<sup>96</sup>

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94. Market failures are typically caused by departures from the assumption of perfect competition. For example, transaction costs, barriers to entry, distortions due to monopoly power, free rider problems, and externalities can all result in market failures. See, e.g., Bush, *supra* note 32, at 1114–20.

95. These are tentative categories and perhaps a more detailed inquiry will suggest they should be collapsed. However, they are at least a sketch of the principal problems. I include suppression of freedom of choice because sometimes one encounters the argument that the existence of a thing is itself a truth. Suppression of its existence would be suppression of a truth of a sort, even if the truth of the thing is relatively trivial, for instance, the existence or non-existence of a perfume associated with Britney Spears. Whether its production or existence is a good or bad thing is beyond the scope of this article. But it typically seems to be an article of faith that more choice, without regard to its substance, is *prima facie* a normative good on the grounds that any other conclusion is the paternalistic substitution of one person’s (or group of persons’) idiosyncratic preferences for another’s. For an argument to the contrary see BARRY SCHWARTZ, *THE PARADOX OF CHOICE: WHY MORE IS LESS* (2004).

96. There is a wealth of writing on this topic with fairly polarized views between those who celebrate the consumer culture and those who view it as a negative development of the twentieth century. Compare TYLER COWEN, *IN PRAISE OF COMMERCIAL CULTURE* 1 (1998) (“The capitalist market economy is a vital but underappreciated institutional framework . . .”), and JAMES B. TWITCHELL, *ADULT USA: THE TRIUMPH OF ADVERTISING IN AMERICAN CULTURE* 4 (1996) (“In giving value to objects, advertising gives value to our lives.”), with JEAN KILBOURNE,



Others object to efforts they deem manipulative as interference with autonomy. For example, there is an enormous amount of time and money spent on psycho-social-neurological research with the aim of learning how to better manipulate consumers. Much of this research lacks meaningful oversight.<sup>97</sup> The perpetual bombardment of consumerist messages also intersects in complex ways with issues of race and gender. Although all these problems merit further attention, they are beyond the scope of this article.<sup>98</sup> This article is limited to a discussion of the above four categories which, perhaps the exception of the limitations on choice category, most would agree represent some species of market failure as to the production of truth in the marketplace of ideas. Virtually everyone wants fewer falsehoods, more reliable information, more production of reliable information, and (usually) more choice. The following is a brief overview of some evidence that suggests the market is yielding less of the last three categories and more of the first than is optimal.

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CAN'T BUY MY LOVE: HOW ADVERTISING CHANGES THE WAY WE THINK AND FEEL 45 (1999) ("[C]ommercial persuasion . . . promotes beliefs and behavior that have significant and sometimes harmful effects on the individual, the family, the society, and the environment."), NAOMI KLEIN, NO LOGO (1999), KALLE LASN, CULTURE JAM: THE UNCOOLING OF AMERICA™ 201 (2000) ("Never-ending material growth is the cornerstone of our current economic system. . . . And yet, constant growth within finite terrain is the ideology of the cancer cell."), VINCENT J. MILLER, CONSUMING RELIGION: CHRISTIAN FAITH AND PRACTICE IN A CONSUMER CULTURE 225 (2005) ("Consumer culture is a profound problem for contemporary religious belief and practice."), and JULIET B. SCHOR, BORN TO BUY: THE COMMERCIALIZED CHILD AND THE NEW CONSUMER CULTURE 17 (2004) (arguing that commercialization of children, induced by increasing commercial advertising that targets children, puts their emotional and psychological well-being at risk).

97. It is not clear that the vast majority of marketing research, which takes place in focus groups, surveys, questionnaires, and the like, is subject to much regulatory oversight. This is only a problem of course if you feel regulation is beneficial. However, the lack of oversight presents a curious contrast with generally prevailing attitudes towards university and medical research involving human subjects. For a discussion regarding the ethics of research on human subjects, see CARL H. COLEMAN ET AL., THE ETHICS AND REGULATION OF RESEARCH WITH HUMAN SUBJECTS 161–68 (2005) (describing research not regulated by federal law and not concerning an FDA regulated matter, which is conducted at an institution either receiving federal funds or agreeing to comply with the common rule). For a discussion of the way in which a great deal of market research relies on data collected by the government, see Douglas A. Kysar, *Kids & Cul-de-Sacs: Census 2000 and the Reproduction of Consumer Culture*, 87 CORNELL L. REV. 853, 857–58 (2002).

98. See, e.g., Tamara R. Piety, "Merchants of Discontent": An Exploration of the Psychology of Advertising, Addiction, and the Implications for Commercial Speech, 25 SEATTLE U. L. REV. 377 (2001).

## 1. Falsehood

It is axiomatic that the First Amendment is not a license to commit fraud. In addition, at least with respect to the commercial speech doctrine, a key element for both extending protection to speech and justifying its regulation is the degree to which reliable information is crucial to proper market functioning. In the landmark *Virginia Pharmacy*<sup>99</sup> case, the Supreme Court held that the public's interest in the "free flow of commercial information"<sup>100</sup> justified extending some protection to commercial speech.<sup>101</sup> This holding seemed influenced by Professor Martin Redish's assertion that "[i]nformation received in the commercial context . . . is specifically designed to assist the individual in the decision-making process."<sup>102</sup> Information, the Court concluded, was necessary for the proper operation of the economy.<sup>103</sup> This view conformed to the theoretical understanding in economics of optimal market function. Perfect knowledge "is assumed as a *condition* of the optimal operation of the market."<sup>104</sup>

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.<sup>105</sup>

The Court concluded that it was unduly "paternalistic" to assume that people needed to be protected from the truth.<sup>106</sup> The Court did not, however, conclude that this "free flow" of information required quite

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

100. *Id.* at 765.

101. The term "commercial" continues to elude satisfactory definition. See Weinstein, *supra* note 33; and Chemerinsky & Fisk, *supra* note 71.

102. See Martin H. Redish, *supra* note 15, at 445. In fact, he also convincingly folds self-government into self-actualization claiming that Emerson's third value is really just a manifestation of the first value. *Id.* at 439.

103. For a discussion of the arguments that advertising is economically efficient, see Elizabeth Mensch & Alan Freeman, *Efficiency and Image: Advertising as an Antitrust Issue*, 1990 DUKE L.J. 321.

104. Goldman & Cox, *supra* note 29, at 20.

105. *Va. Pharmacy*, 425 U.S. at 765.

106. *Id.* at 770 ("[P]eople will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication rather than to close them.").

the degree of governmental laissez-faire available to political or expressive speech under the traditional First Amendment analysis. To the contrary, the Court observed that “[t]he First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.”<sup>107</sup>

This is easier said than done because regulation is not cost-free. The market model assumes perfect information and no transaction costs. But in the real world there are transaction costs associated with acquiring and producing information as well as with its production. Where the costs to eliminate fraud would be higher than the expected benefits of a fraud-free environment it would be rational for the government to opt not to regulate. Thus, there may be some optimal amount of fraud.<sup>108</sup> But the decision that regulation in a particular context is more costly than attempting to eliminate all market imperfections is not the same thing as concluding that what the market produces is optimal truth.

Given imperfect information and the existence of transaction costs, much of the dilemma with commercial speech and the regulation of commerce has been how to achieve the closest approximation possible to the condition of complete information that would obtain in a perfect market (and seems necessary to it), without incurring the excessive costs arising from over-regulation. It is important to find this balance because, “[f]or markets to operate effectively, buyers must have accurate information about the quality and other characteristics of the products offered for sale. *Otherwise there can be no basis for confidence that the market will enable consumers to make purchases maximizing their welfare within the limitations of their resources.*”<sup>109</sup>

Two general assumptions guide these efforts: fraud is bad and ought to be discouraged and information is good and ought to be

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107. *Id.* at 771–72 (emphasis added). For a discussion of the reasons why the Court thought commercial speech could be more safely regulated for its truth than other types of protected speech, see *id.* at 772 n.24 (noting that the “hardiness” of commercial speech, the speaker’s ability to verify the facts, and the need to prevent deception justify imposing the burden of truthfulness on the speaker).

108. See generally Michael R. Darby and Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. 67 (1973).

109. RICHARD A. POSNER, REGULATION OF ADVERTISING BY THE FTC 3 (1973) (emphasis added).

cultivated.<sup>110</sup> The question is: who is to cultivate it? Although the market model assumes perfect knowledge as a condition, it does *not* suggest that perfect knowledge is a *consequence* of the operation of the market.<sup>111</sup> In reality, there are transaction costs associated with acquiring knowledge. All other things being equal, listeners need a way to distinguish false speech from true speech in order for the market to produce maximum truth. “If hearers cannot distinguish truths from falsehoods, speakers of truth will not be able to command higher prices for them, and, hence, the market for speech will not have the optimal properties it would have under perfect information.”<sup>112</sup> In the absence of perfect information, governmental attempts to improve the quality of information in the market can hardly be deemed paternalistic when it comes to *false* speech. What is a little more troublesome is the protection offered to *true* commercial speech. If “commercial speech” equals “advertising” it is not clear that what it is protecting is truth, even if, strictly speaking, it isn’t falsity either.

The *Virginia Pharmacy* Court did not attempt to define what made speech commercial, but it seemed to use the term “advertising” interchangeably with the term “commercial speech.” Even though the Court offered commercial speech protection for its informational value, one would be hard-pressed to identify much “information” in the vast majority of commercial advertising.<sup>113</sup> As Professor Martin Redish noted in 1971, even “[a] cursory examination of current television and periodical advertising reveals that in practice, comparatively little commercial promotion performs . . . a purely informational function.”<sup>114</sup> It might be fair to say that this is even truer today than it was in 1971. Currently, there is not much information and a lot of false advertising out there. This is true even when you do not count as false advertising which is deceptive insofar as it creates (or attempts to create) irrational associations such as the belief that using a certain brand of toothpaste will make you popular,

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110. *Id.*

111. Goldman & Cox, *supra* note 29, at 20.

112. Goldman & Cox, *supra* note 29, at 21.

113. Similar to the distinction between commercial and non-commercial speech, the attempt to define “information” is a difficult proposition because marketing is information in the form of brand identities and images that will resonate with the potential consumer, and the lines between advertising and entertainment are blurred.

114. Redish, *supra* note 15, at 433.

or that smoking a particular brand of cigarettes will make you liberated. While this sort of deception, as well as “puffing,”<sup>115</sup> has been the subject of much discussion,<sup>116</sup> it is beyond the scope of this article.<sup>117</sup> This article offers only a quick impressionistic sketch of the sort of falsehoods that are rather straightforwardly capable of being identified as such. And even so limited, our culture appears awash with such claims. The four statements mentioned in the beginning of this article are merely a sample of what appears to be the ubiquitous practice of making false or misleading claims in a commercial context. Any general circulation magazine is bound to contain numerous claims which seem false on their face, claims such as those found in ads touting diet pills (Eat all you want and Lose Weight!), sexual aids (Recover Potency!), marital aids (Have the Best Sex Ever!), exercise equipment (Six Pack Abs in Six Weeks!), and any number of dietary supplements (Have More Energy! Get a Good Night’s Sleep!).

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115. See, e.g., *In re Gen. Motors Corp. Anti-Lock Brakes Prod. Liab. Litig.*, 966 F. Supp. 1525, 1531 (E.D. Mo. 1997), *aff’d* 172 F.3d 623 (8th Cir. 1999) (holding that General Motors’ claim that its ABS was 99% more effective than other protective systems such as airbags was not actionable, but rather mere puffing that “a consumer [would not] reasonably believe” was supported by test data).

116. Ads may be subtly deceptive or emotionally manipulative because they do not rely on direct appeals to rationality, Sarah C. Haan, *The “Persuasion Route” of the Law: Advertising and Legal Persuasion*, 100 COLUM. L. REV. 1281 (2000) (arguing that persuasion is not solely a matter of rational appeal), and claims may be exaggerated pursuant to the puffing doctrine. There is some evidence that many in the marketing field believe that the facts are only loosely tethered, if at all, to appeals in advertising and marketing. See, e.g., Seth Godin, *The Storytellers*, CMO MAG., June 2005, at 1 (“The facts are irrelevant. In the short run, it doesn’t matter one bit whether something is actually better or faster or more efficient. What matters is what the consumer believes.”); see also Lew McCreary, *Lies, Damn Lies and Puffery*, CMO MAG., July 2005.

117. This article does not address the more inchoate value to consumers of the information contained in the form of trademarks, patents, and brands. In fact, the value of such information is more tangible to the seller than to the consumer, where, for instance a generic brand is indistinguishable in composition or effect from a name brand selling for a higher price. Early in the 20<sup>th</sup> century, sellers treated the investment in creating such distinctions in the consumers’ minds as potential economic waste because the distinction could not be tied back to a substantive difference. See JULES BACKMAN, *ADVERTISING AND COMPETITION* 28–34 (1967) (describing previous assessment that advertising expenditures constituted “waste” and were anticompetitive and arguing that, to the contrary, advertising performs an important role in the economy and delivers information to consumers). Later, courts accepted businesses’ judgment that brand identification and loyalty were valuable insofar as they helped reduce search costs for consumers and so were not wasteful, even though the only discernable difference between the house brand and the national brand was the companies’ respective advertising budgets. See, e.g., *FTC v. Borden Co.*, 383 U.S. 637 (1966); Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165 (1948) (arguing that brands lower transaction costs like search costs).

Print ads in magazines represent only one small slice of the range of marketing efforts where false claims may be made. It does not capture false or misleading statements made in any other media—for example, television or radio. And false or misleading statements are made in other many contexts other than overt advertising pitches. Take the example of what later became known as Enron's Potemkin village. Enron managers, in an attempt to sell analysts on the company's stock, took them on a tour of a new division called Enron Energy Services ("EES") that was supposed to serve as a retail energy provider. They were shown to a room purporting to be the headquarters for EES.

There, they beheld the very picture of a sophisticated, booming business: a big open room, bustling with people, all busily working the telephones and hunched over computer terminals, seemingly cutting deals and trading energy. Giant plasma screen displayed electronic maps, which could show the sites of EES's many contracts and prospects. Commodity prices danced across an electronic ticker.<sup>118</sup>

One observer called it "impressive. . . a veritable beehive of activity."<sup>119</sup> However, the whole thing was a sham. The entire room was set up to make analysts think that EES was farther along than it was.<sup>120</sup> What is particularly striking about this is that Enron's management seemed to feel that this exercise was nothing more than the sort of permissible spin or puffery that is an inextricable part of the current business environment and that it was permissible because they *intended* to establish such a center in the future. If it *would* be true that EES would have such a command center at some future point, it would not be lying to pretend it was already established. It would simply be a preview. As we now know, the market eventually corrected for the Enron misstatements, although at great cost to investors, employees, and the economy as a whole. But does it seem likely that a First Amendment defense for promotional speech would enhance the chances of the occurrence of this market correction? To the contrary, it seems far more likely to insulate such incidents from

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118. BETHANY MCLEAN & PETER ELKIND, *THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND THE SCANDALOUS FALL OF ENRON*, 179–80 (Penguin Books 2004).

119. *Id.* at 180.

120. *Id.*

providing a basis for criminal or civil liability if defendants may assert a First Amendment defense to their promotional activities.

## 2. Suppression of Truth

The market may indeed sometimes expose misstatements without any help from governmental intervention because, according to Judge Richard Posner, there is a market for truth. "Being profit-driven, the media respond to the actual demands of their audience rather than to the idealized 'thirst for knowledge' demand posited by public intellectuals and deans of journalism schools."<sup>121</sup> Fortunately, for those who are interested in the truth (even if not quite a "thirst for knowledge"), there is "a market demand for correcting the errors and ferreting out the misdeeds of one's enemies . . . ."<sup>122</sup> In other words, we can expect the market to eventually correct for falsehoods because someone, somewhere is interested in exposing the falsehoods of others.<sup>123</sup> However, as previously noted, this proposition is demonstrably false in many those cases where there is no other "side" that has the same resources and/or motivations to offer counter speech.<sup>124</sup> Even where there is another side it may have difficulty getting the mainstream media to carry its message since private media have no obligation to carry any particular communication. Yet, the argument that an open market is self-correcting is the basis for claiming that a failure to apply the same broadly protective First Amendment standards to Nike's speech as is applied to the speech of its critics represents suppression of one "side."<sup>125</sup>

It does not seem obvious that society should put so much faith in the media, or an entity's competitor, for the exposure of untruths. As previously discussed, media are often subject to enormous pressures

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121. Richard A. Posner, *Bad News*, N.Y. TIMES BOOK REV., July 31, 2005, at 9. Notice how Posner fudges the question of whether what the market demands is the truth. How is that ordinary truth that the market will presumably produce different from the impliedly elite "thirst for knowledge"? To be fair, he was speaking specifically about journalism which is only one source of information, and so perhaps that accounts for the distinction.

122. *Id.* at 9–10.

123. *Id.* For a contrary view on the reliability of the market to provide adequate information, see Charles Lewis, *The Nonprofit Road*, COLUM. JOURNALISM REV., Sept.–Oct. 2007, at 33–34 (arguing that market forces are inadequate to provide sufficient coverage of news and issues and that a nonprofit organizational structure may be necessary to sustain journalistic quality).

124. See, e.g., Goldman & Cox, note 29, at 27.

125. See, e.g., Johnson & Fisher, *supra* note 83, at 1254.

from advertisers with respect to content, pressures that make them unreliable watchdogs.<sup>126</sup> And if every firm in the market is engaging in similar behavior, the incentives for exposing that behavior in others is perhaps reduced. Moreover, whether or not these motivations are adequate for exposing untruths, the same mechanisms, such as dependence by media on advertising, can lead to suppression of truth where truthful information might hurt a firm's economic interests. The health risks associated with smoking cigarettes is the most notorious example of this problem. Presumably the same problem arises with products like pesticides, drugs, food, and other products that might cause rather direct harms. If no entity has an economic interest in producing information about the harms associated with a particular product or process, it is not clear why we should be confident that it will invariably be produced.

It is difficult to draw a clear line between the dissemination of a false statement and the suppression of truthful information because the dissemination of a false statement often represents the suppression of the opposite truthful information.<sup>127</sup> To say, for example, "cigarettes do not contain carcinogenic materials" when they in fact do is to simultaneously promote a falsehood and to repress its opposite, the information that cigarettes *do* contain carcinogens. Suppression of truthful information like this is most troubling when the speaker possesses all or most of the information on a subject. For example, in the case of a new drug, presumably the company which developed it may be the only entity to have negative information about the product prior to its release or approval by the

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126. When the media take public relations press releases from commercial entities and presents them as news without attribution to the source, they are not only not acting as watchdogs, they are part of the problem. See, e.g., Trudy Lieberman, *The Epidemic*, COLUM. JOURNALISM REV. Mar.-Apr. 2007, at 38-43, ("Phony medical news is on the rise, thanks to dozens of unhealthy deals between TV newsrooms and hospitals."); see also C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* (1994). For a discussion of the role played by mergers and the diminishing number of firms in the communication and media business, see C. EDWIN BAKER, *MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS* (2007); ROBERT W. MCCHESENEY, *RICH MEDIA, POOR DEMOCRACY* (1999).

127. In some cases it is not clear whether speech constitutes truth, falsehood, or an obfuscation of the truth, such as where a drug is marketed for an off-label, unapproved use. One drug, Neurontin, was approved for use in the treatment of epilepsy, but not approved for uses such as treating migraine headaches, social phobias, diabetic neuralgia, spinal cord injury, and a host of other ailments. When Warner-Lambert executed a marketing plan specifically setting goals for increasing prescriptions for off-label uses it ran afoul of the FDA and the company pled guilty to criminal charges. See *Southern v. Pfizer, Inc.*, 471 F. Supp. 2d 1207, 1213 (N.D. Ala. 2006).



FDA.<sup>128</sup> Nevertheless, there may be a difference of degree, if not in kind, between the following: a knowing falsehood, the failure to disclose negative information where it is known, and the active engagement in strategies to suppress, obfuscate, or make information more difficult to obtain, even if all three strategies may be employed with respect to a particular product. This section focuses on the last two strategies.

The civil and criminal penalties for fraud are part of a legal strategy to impose costs on fraud that will make engaging in it less profitable and thus discourage its production. Judging from what appears to be the ubiquitous nature of fraud, it is unclear whether the various existing penalties have achieved anything close to an optimal correction for the market failure of fraud. At least there are some penalties for fraud. In contrast to affirmative misstatements, the law has not always required a seller to disclose flaws or shortcomings in the product. Rather, caveat emptor was, and in many cases remains, the default rule. The establishment of affirmative legal duties to disclose negative information in areas like consumer protection and securities<sup>129</sup> seems to be the only corrective to market incentives not to disclose.<sup>130</sup> Broad First Amendment protection for commercial speech might imperil some of these disclosure rules.

There is no basis for concluding that a for-profit corporation will ever disseminate unfavorable information except under compulsion or in the most enlightened assessments of its long-term interests where the corporation can expect the information will eventually come to light.<sup>131</sup> Even though the members of boards of directors

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128. See WASHBURN, *supra* note 39, at 113–16 (describing suppression of adverse events in clinical studies on the use of SSRI anti-depressants for adolescent depression).

129. See, e.g., Leigh Johnson, Jane Jeffries Jones & Diane J. Fuchs, *Preparing Proxy Statements Under the SEC's New Rules Regarding Executive and Director Compensation Disclosures*, 7 U.C. DAVIS BUS. L.J. 373 (2007) (covering disclosure requirements in securities laws); Ronald J. Mann & Jim Hawkins, *Just Until Payday*, 54 UCLA L. REV. 855, 903 (2007) (discussing the Truth in Lending law and observing that disclosures are a common feature of consumer protection law).

130. There is a separate issue about whether disclosures are always effective and thus may be a fairly weak corrective device. See, e.g., Richard Craswell, *Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere*, 92 VA. L. REV. 565, 583–84 (2006) (discussing the evidence that some disclosures actually reduce consumer understanding of truthful information).

131. There is some evidence that even under compulsion corporations will not disclose negative information. For example, Judge Kessler in the District Court for the District of Columbia assessed a \$2.75 million fine on Philip Morris for failure to comply with a court order with respect to discovery. See *United States v. Philip Morris USA Inc.*, 327 F. Supp. 2d 21, 26

have probably just as much interest as anyone in not seeing negative information circulated about themselves or their company, they have an additional incentive to withhold disclosure of negative information. Given that officers and directors have a fiduciary duty to shareholders, arguably they may have a duty to suppress negative information *as long as* it is legal to do so (i.e., there is no legal requirement of disclosure) where that information will predictably have negative consequences on the bottom line. Disclosure rules are intended to create an incentive to disclose information where one otherwise does not exist. For example, with respect to prescription drugs, some argue that researchers need to disclose funding from pharmaceutical companies because without these disclosures the outcomes of such research might be overvalued.<sup>132</sup> Obvious cases in this category are adverse incidents related to drugs such as Vioxx<sup>133</sup> or defective products in general.<sup>134</sup>

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(D.D.C. 2004). Destruction of documents which might arguably contain negative information about Enron was a key aspect of the criminal charges against Enron's accounting firm, Arthur Andersen, although the verdict was later reversed on the grounds that the jury instructions were misleading. See *Arthur Andersen L.L.P. v. United States*, 544 U.S. 696, 705–06 (2005) (overturning the conviction because the jury instruction failed to adequately convey the requirement of intent to the jury). Of course one could say that this failure to disclose was no more a feature of its corporate status than a similar failure by any individual. So it didn't fail to disclose *because* it was a corporation. However, for the reasons I outlined in the previous section on incentives, I believe corporate law actually constructs positive moral incentives for behavior that in other contexts an actor might think was improper, but reframed as a duty to shareholders seems acceptable, particularly where it is not specifically forbidden. Moreover, as discussed above, the dispersal of tasks amongst many persons, each of whom may only have a part, a part that seems less clearly problematic, similarly makes antisocial behavior harder to identify and thus harder to punish, with, presumably for those retributivists out there, a corresponding decrease in incentives to either investigate or refrain since chances of being caught are low. Add into this mix the hierarchy which offers some people the opportunity to claim they are merely following the orders of their superiors and it seems there is a robust structure of incentives in addition to whatever cupidity might encourage in individual circumstances.

132. See, e.g., Amy Rainey, *Study Says 'DSM' Lacks Transparency*, CHRON. OF HIGHER EDUC., May 5, 2006, at A22 (reporting on a study claiming many of the contributors to the latest edition of the *Diagnostic and Statistical Manual of Mental Disorders-V* have "undisclosed financial ties to the pharmaceutical industry").

133. Vioxx is one of the most well known but is by no means the only one. Henry A. Waxman, *The Lessons of Vioxx—Drug Safety and Sales*, 352 NEW ENG. J. MED. 25, 2576–78 (2005).

134. Products liability is an entire area of law devoted to securing redress for consumers for injuries caused by defective products. Most disturbingly, a company may predicate its decision to market a product on the economic comparison between expected liabilities and expected sales. Under this approach, if sales exceed potential liability, the company may decide to go forward with manufacturing and production despite known risks. Cigarettes are the most notorious example, and similar examples are the Ford Pinto and Firestone tires. In many of these cases, internal documents uncovered that a company knew the risks of a product, but suppressed the

The most difficult case in truth suppression may be the last category, that is, where a for-profit company engages in speech not to add to available information, but to create confusion and doubt about the truth of a particular claim. This sort of effort typically takes place through public relations efforts and may be characterized as “spin” that is not demonstrably false, but which is disseminated with the intention of promoting false impressions or actively obscuring the truth.<sup>135</sup> The tobacco industry’s efforts to create doubt about the negative health consequences of smoking present a paradigmatic case of this sort of market failure. The tobacco industry funded front groups, such as the Center for Tobacco Research, to publish “research” and issued reports on this research intended to create uncertainty over the negative health effects of smoking where, increasingly, there was no uncertainty existed in the scientific community.<sup>136</sup>

As industry critics Sheldon Rampton and John Stauber have observed, this tactic is a familiar one in public relations and has been applied to a number of industrial hazards: (1) the Air Hygiene Foundation and Silica Safety Associations formed to dispute that exposure to silica caused silicosis;<sup>137</sup> (2) the American Petroleum Institute’s Medical Advisory Committee mobilized to dispute that exposure to benzene caused cancer;<sup>138</sup> and (3) API’s Medical Advisory Committee and Industrial Hygiene Foundation formed to dispute asbestos’ link to asbestosis.<sup>139</sup> Today, it is generally undisputed that all these substances represent health hazards. The list of toxic chemicals with negative effects on workers and consumers health that were not fully appreciated at the time the chemicals were first produced is distressingly long. In addition to the above mentioned hazards, the list includes DDT, PCBs, vinyl

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information. Of course it is probably true that no product is risk-free and so the decision to make anything is taken on this basis.

135. For a more detailed discussion of this issue, see Tamara R. Piety, *Free Advertising: The Case for Public Relations as Commercial Speech*, 10 LEWIS & CLARK L. REV. 367 (2006).

136. See First Amended Complaint, *United States v. Phillip Morris USA, Inc.*, 327 F. Supp. 2d 21 (D.D.C. 2004) (No. 99-02496); see also Press Release, Campaign for Tobacco-Free Kids, Tobacco Companies Found Guilty of Massive Wrongdoing but Remedies Fail to Protect American People and Must Be Appealed (Aug. 17, 2006), <http://www.tobaccofreekids.org/script/DisplayPressRelease.php3?Display=937>.

137. RAMPTON & STAUBER, *supra* note 23, at 75–98 (2001).

138. *Id.*

139. *Id.*

chloride, lead, and numerous others. In many cases, the industry in question may have been aware of the dangers associated with these substances long before the dangers became widely known. If so, efforts to convince the public that these substances did not represent a risk to public health seem to represent a market failure in the market for truth.

The sorts of efforts at obfuscation through the use of front groups have not been limited to misdirection about the effects of toxic chemicals. Similar efforts have contributed to the public perception of value in the shares of companies such as Enron where public relations spin helped to create the impression of value where (arguably) none existed.<sup>140</sup> Similarly, many have charged the oil companies have pursued a strategy of sowing doubt about the evidence of global climate change which was modeled on the tobacco industry's efforts to deny the health risks of smoking, although with perhaps more devastating consequences since global climate change affect everyone on the planet.<sup>141</sup>

### 3. Failure in the Production of Information

Money and access to money are often linked to the production of speech. It takes money to finance a movie, to test a drug and publish the results, to publish a book, and to produce and air a

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140. An enormous amount has been written about the collapse of Enron and similar failures. A good collection of articles can be found in *ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS* (Nancy B. Rapoport & Bala G. Dharan eds., 2004). Enron was one of the most well-publicized spectacular business failures in recent years arising from fraudulent accounting. The Saturday, June 11, 2005 issue of *The New York Times* carried at least five stories related to corporate misconduct. See *A Second Guilty Plea in A.I.G.-Related Case*, N.Y. TIMES, June 11, 2005, at C13; Ken Belson, *Ebbers Pleads for Leniency in Sentencing*, N.Y. TIMES, June 11, 2005, at C13; Julie Creswell, *Citigroup Agrees to Pay \$2 Billion in Enron Scandal*, N.Y. TIMES, June 11, 2005, at A1; *Jurors in Trial of Two Tyco Executives End the Week Without Completing a Verdict*, N.Y. TIMES, June 11, 2005, at C2.

141. In September of 2006 *The Economist* devoted a special section of its magazine to climate change. A subtitle for one article was, "Global warming, it now seems, is for real." Emma Duncan, *The Heat Is On*, *ECONOMIST*, Sept. 9, 2006, at 3–6 (emphasis added). A reasonable question could be, why use the phrase "it now seems"? What took so long? Perhaps it was the years of industry-sponsored research purporting to dispute the scientific consensus? See Press Release, Ayn Rand Inst., *Senators' Letter is a Violation of Exxon Mobil's Freedom of Speech* (Dec. 8, 2006), <http://www.aynrand.org/site/News2?page=NewsArticle&id=13691> (discussing a letter from Senators Rockefeller and Snowe comparing the techniques of dispute creation on the issue of climate change to the tobacco industry's creation of a false "debate" over the issue of smoking); see also Steven F. Hayward & Kenneth P. Green, *Scenes From the Climate Inquisition: The Chilling Effect of the Global Warming Consensus*, *WKLY. STANDARD*, Feb. 19, 2007, at 26, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/013/275tmktsp.asp>. The cost of delay in recognizing the reality of climate change is still unclear.

commercial, documentary, or television show. So at the outset we can assume that some truth may fail to be produced if it lacks funding. And while we might deplore the low quality of some entertainment produced through this system, particularly with respect to goods like children's educational television programming,<sup>142</sup> this is a concern with perhaps more direct negative consequences when it comes to issues like drug research.<sup>143</sup> Daniel Carlat, a professor at Tufts Medical School, has argued that there is a lack of "high quality research data" on the efficacy of generic drugs in some areas because most research into the efficacy of drugs is conducted by pharmaceutical companies, and with the financial incentive of patents these companies will not perform this research, even if it is socially useful.<sup>144</sup>

For example, according to Dr. Carlat, the drug Trazodone is much cheaper than either Ambien or Lunesta, two prescription sleep aids.<sup>145</sup> Although it might be useful to follow up on preliminary studies that suggest Trazodone is valuable as a sleep aid in order to offer the public a cheaper alternative to Ambien and Lunesta, such research is unlikely to be conducted without funding. And funding may not be forthcoming where there is little or no prospect of generating the exclusive, intellectual property rights deemed necessary to recoup the costs of investing in the research. Intellectual property regimes may thus drive failures to produce information as well as offering incentives for its production in other

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142. Ronald J. Krotoszynski, Jr., *Into the Woods: Broadcasters, Bureaucrats, and Children's Television Programming*, 45 DUKE L.J. 1193, 1246–47 (1996) (arguing that "the market has plainly failed to provide [children's educational programming] on a consistent basis" and the First Amendment claims of broadcasters in opposition to proposals to mandate more of it have been "vastly overstated").

143. See, e.g., JERRY AVORN, *POWERFUL MEDICINES: THE BENEFITS, RISKS, AND COSTS OF PRESCRIPTION DRUGS* (2004) (identifying some of those costs as inadequate information about risks because of incentives structures that favor expenditures in marketing rather than the collection of post-marketing data and which may reward suppression of negative information); Susan Haack, *Scientific Secrecy and "Spin": The Sad Sleazy Saga of the Trials of Remune*, 69 LAW & CONTEMP. PROBS. 47, 63 (2006) ("Entanglement with business interests undoubtedly poses a threat to the scientific ethos, and, in consequence, to the advancement of science.").

144. Daniel Carlat, *Generic Smear Campaign*, N.Y. TIMES, May 9, 2006, at A27. Dr. Carlat also charges that the manufacturers of these drugs have sponsored research that "can only be described as trazodone-bashing" and is unwarranted by trazodone's safety record. Assuming the shortcomings of trazodone supposedly revealed by the research Carlat alludes to are fabricated or misleading, this example may fall into the first market failure category—falsehoods perpetuated and disseminated to the detriment of public welfare.

145. *Id.*

cases.<sup>146</sup> Presumably, these are losses of truth which we are prepared to suffer without regard to free competition in the marketplace of ideas.<sup>147</sup>

#### 4. Other Market Failures—Suppression of Choice

In addition to the market failures with respect to truth, its expression, suppression, and production, another sort of failure occurs when the market fails to provide an adequate array of choices, (assuming that maximizing choice is a generally agreed upon good).<sup>148</sup> One of the supposed advantages of a free market is the greater array of choices in a market system that caters to the variety of consumer desires. This is often set in contrast to a planned economy which only offers government-approved goods. Wendy's famous "Soviet fashion show" ad, to note only one example, promoted this notion of a wide variety of choices as a positive thing.<sup>149</sup> The ad is a fashion show in which all of the categories—daywear, evening wear, and swimwear—feature the same woman in the same grey dress. The tag line is that at Wendy's, not all burgers were "dressed the same." In other words, Wendy's offered consumers a choice. The implication is that this is good thing. And although it is true that a market system often rushes to provide consumers with the goods that they want, it is also sometimes the case that it rushes to convince the consumer to want what it has to offer. And that is not always the widest choice as theoretically possible. In many cases the market suppresses choice, including expression.

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146. See, e.g., William A. Wines & Terence J. Lau, *Can You Hear Me Now? Corporate Censorship and Its Troubling Implications for the First Amendment*, 55 DEPAUL L. REV. 119, 120–21, 167 (2005).

147. This is a far broader topic that can be covered here. However, there is a wealth of commentary and criticism with respect to the ways in which intellectual property rules may decrease the amount of speech, art, and other creative work produced. For somewhat polemic arguments about the effects of intellectual property regimes, see DAVID BOLLIER, *BRAND NAME BULLIES* (2005); BRIAN MARTIN, *AGAINST INTELLECTUAL PROPERTY*, (1998).

148. Although our culture generally celebrates choice as an unquestioned good, philosophers and psychologists have noted that sometimes choice can create distress. See, e.g., GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* 62–81 (1988); BARRY SCHWARTZ, *THE PARADOX OF CHOICE* (2004).

149. See *Wendy's Soviet Fashion Show Ad*, <http://www.youtube.com/watch?v=DWAKtYGJZSM> (last visited Oct 5, 2007). Burger King advertised its own customization options with the similar injunction "have it your way."

The notion that the government is the sole source of the suppression of freedom, including limitation on choice, obscures the ways private actors may also operate to limit consumer choice. When the limitations are imposed by private, rather than governmental entities, this may represent a different political issue, and it may not be a First Amendment issue, but it is nevertheless a real limitation with implications for the proposition that a free market will maximize choices. Of course, the distinction between the private and the public may not be easy to maintain given that it is the public law that authorizes private property. The legal concept of private property may operate to confer privilege and power in a way that limits others' choices.<sup>150</sup> For example, owners of trademarks and other intellectual property may suppress infringing uses pursuant to the legal protection of commercial activities.<sup>151</sup> As Professor Rebecca Tushnet has observed, "[t]here is no free speech right to use another's property."<sup>152</sup>

Of course, the First Amendment is directed at limiting governmental restrictions of speech. Private suppression of speech is not, therefore, a First Amendment issue. However, if we recall, as Hohfeld<sup>153</sup> suggested, private suppression is only made possible through a legal regime created and enforced by government<sup>154</sup> we should perhaps not dismiss too readily even private suppression as not implicating the First Amendment. A number of legal concepts in private law chill the expression of self, choice, and options.<sup>155</sup>

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150. Goldman & Cox, *supra* note 29, at 10–11 (citing CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 34 (1993)).

151. In many cases it may also arise from market power arising from few players, disparate resources, and the ability to affect laws in their favor—these factors as well as others are typically viewed as failures in perfect competition necessary for a fully free market.

152. Rebecca Tushnet, *Trademark Law as Commercial Speech Regulation*, 58 S.C. L. REV. 737, 746 (2007).

153. WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* (David Campbell & Phillip A. Thomas eds., 2002) (discussing private rights as legal entitlements backed up by the power of the state).

154. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 YALE L.J. 16, 32–44 (1913) (noting that a legal “liberty” inevitably gives rise to a “privilege” to exercise that liberty, and therefore, legal liberties and privileges are indistinguishable); *cf.* *Shelley v. Kraemer*, 314 U.S. 1 (1948) (finding state action and violation of the Fourteenth Amendment in the court’s enforcement of a discriminatory restrictive covenant, even though the covenant was solely defined between private parties to a private contract).

155. This section highlights the difficulty with these distinctions. Can it be said that a particular suppression arises from the operation of the market (as distinct from the law) when the

The most obvious suppression of expression, and thus choice of what speech products to consume, arises from intellectual property, copyright, and trademark. When a patent prevents the development and/or sale of a generic form of a drug, this is a limitation on choice, albeit perhaps a justifiable limitation. When copyright laws prevent the use of copyrighted materials in some context in which the material might otherwise be shown or disseminated, it prevents the dissemination and availability of that material, or sometimes of new material that might be made from bits of the original. This may or may not be a good thing. Originality, to the extent that it exists, may be a value worthy of protection as much as choice. However, the protection of intellectual property suppresses some freedom of expression.

Perhaps the second most notable exercise in suppression takes place in the workplace. All over the country most employees are not free to say whatever they like without fear of reprisal because the employment-at-will doctrine extends to employers the right to dismiss employees for any reason, including what might be considered a “bad” reason, like self-expression.<sup>156</sup> One might find this high level of speech suppression problematic if we assume there is much truth being suppressed (quite apart from the independent value of supporting self-expression). Whistleblowing might be one such circumstance. “Multiple recent examples of corporate heads who have failed to listen to dissenters and whistleblowers underscore the costly and disastrous consequences [of suppressing dissent in the workplace].”<sup>157</sup> There is not a lot of evidence, however, that either in the law or in society in general, there is much support for the proposition that free expression in the workplace is a good thing. To the contrary, there appears to be a fair amount of consensus that suppression of self-expression in the workplace is a necessary trade-

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rights and privileges that may support some of this suppression arise in law and could be said to be examples of imperfections in competition?

156. See, e.g., Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 102 (1995); Richard Michael Fischl, *Labor, Management, and the First Amendment: Whose Rights Are These, Anyway?*, 10 CARDOZO L. REV. 729, 734–35 (1989). See generally LAWRENCE SOLEY, *CENSORSHIP, INC.: THE CORPORATE THREAT TO FREE SPEECH IN THE UNITED STATES* (2002) (discussing other ways that businesses censor speech in addition to the employment context).

157. Nasrin Shahinpoor & Bernard F. Matt, *The Power of One: Dissent and Organizational Life*, 74 J. BUS. ETHICS 37, 42 (2007).



off for efficiency, if not desirable for its own sake. Some people might prefer to be free from co-workers' self-expression for example. Apart from the issue of whether this is a false dichotomy, some may support such suppression by employers as socially appropriate, that is, as a natural outgrowth of the enterprise "belonging" to the employer.<sup>158</sup>

There are few areas that encroach upon this discretion. Discrimination is one. Whistleblower protection is another and arguably the most uncontroversial one. since whistleblowers are reporting violations of the law. On its face, this seems uncomplicated. Of course, in a legal environment where the legality of so many actions may be open to dispute, it is perhaps not so strange that concerns about deference to managers and economic efficiency are persuasive counter-arguments to broader enforcement of protections for whistleblowers.<sup>159</sup> So in practice, these limitations of employer freedom to suppress speech with which it disagrees have been fairly narrow.

If suppression of absolute freedom of expression in the workplace chills some expression, the suppression of this speech is the result of a rather straightforward argument from efficiency. It is not so clear that other sorts of information suppression or the limitations of choices are a positive good. Consider the example of alternatives to the internal combustion engine in automobiles. When the manufacturers of electric cars engaged in public relations and advertising campaigns to depress demand for electric cars and then pulled all the models of electric cars in existence from the market save those in museums, arguably this was not in the public's interest.<sup>160</sup> It may not have even been in the long run interest of the

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158. Whether this paradigm of the employer as a person who "owns" the enterprise is an apt one in the case of public companies—where the owners are ostensibly the stockholders, who do not have much proprietary interest in the day-to-day directing of the firm's business—is another question.

159. For example, there is some evidence that the whistleblower protection provisions of Sarbanes-Oxley have not proven particularly effective.

Three years ago, the Sarbanes-Oxley Act was signed into law and hailed as a safety net for employees who stepped forward and revealed wrongdoing at their companies. But of the hundreds of people who lost jobs and filed complaints since the act was passed, only two are actually back at their jobs.

Jayne O'Donnell, *Blowing the Whistle Can Lead to Harsh Aftermath, Despite Law*, USA TODAY, August 1, 2005, at 1B.

160. WHO KILLED THE ELECTRIC CAR? (Sony Pictures Classics 2006).

car manufacturers themselves to the extent that they may have placed bad, long-run bets against the public's interest in electric cars.<sup>161</sup>

It is just as difficult (if not impossible) to speculate on what is *not* being produced in marketplace of ideas as it is to speculate on what products are not being produced in general. But as with the electric car, one has the sense that choices are sometimes limited in a way to suit the demands of manufacturers and producers of products rather than in response to an authentic demand. One example may be the range of colors in which, from year to year, consumer products are produced. Anyone who has ever become attached to a particular color that has fallen out of favor, or who has noticed that particular colors are suddenly popping up everywhere, is experiencing one manifestation of this phenomenon. It is tempting to think that the proliferation of a particular color, say avocado green, is simply a reflection of consumer tastes. But it is not anything so direct. In fact, colors are researched and announced in palettes and introduced in a way that obscures the concept of choice and chooser.<sup>162</sup> If only lime green and sea foam green are available when a consumer wants emerald green, and the colors are a function of a choice made by manufacturers, advertisers, consultants, color specialists, and others some years in advance so that nothing is available in the color the consumer wants, did the consumer really "chose" sea foam green when he would have preferred emerald green? Do the choices of these experts inhibit the autonomy of the individual by dictating the available palette?

Channeling consumer desires with respect to colors may be a relatively trivial thing. Other examples of channeling and shaping consumer choices are arguably less benign. For example, when advertising of food, particularly cheap food, relentlessly promotes

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161. This section does not defend either the decision to pull electric cars or the proposition that pulling them was unwise, but rather suggests that the correct choice is unclear, even as a business decision.

162. There is no "conspiracy" per se around color, but there is a powerful consortium of industry researchers who put together color forecasts for marketing purposes. See Color Marketing Group, <http://www.colormarketing.org> (last visited Oct. 8, 2007). The projections appear to be a self-fulfilling prophecy to the extent that it is unclear whether the color palette suggested would actually represent consumer preferences in the absence of widespread industry adoption of the group's recommendations. The purpose of this effort is discussed in the organization's publication, *The Profit of Color!* (note the play on words of "profit" and "prophet" in which the point of the group is to *predict* color trends). Color Marketing Group, *The Profit of Color!*, <http://www.colormarketing.org> (follow "The Profit of Color" hyperlink).

high fat, high caloric, high salt foods, and healthier substitutes are more expensive, harder to obtain, less convenient, less salient, and less visible in the culture, this influences food choices in a way that may not purely reflect the operation of the market or the autonomy of the consumer. If it were the case that fresh vegetables, fruits, and other unprocessed foods were similarly marketed and similarly available, it might be that ultimately the consumer's choice would be different.<sup>163</sup> The reasons for their unavailability are complicated and may be related to the technology of mass production, preservation, and transportation, rather than to any desire to promote fattening products.

Presumably, all things being equal, the producers of these products would be delighted if their product were non-fattening. Nevertheless, the freedom of choice in an arena of limited options and unequal promotion may be a matter of concern when those choices have negative health consequences such as heart disease or obesity. This is *not* to say we should institute a regime of paternalistic interference in people's food choices by outlawing fast food. However, it seems unrealistic to represent the relentless promotion of these products as the neutral promotion of options for consumers in the face of the health consequences, given uneven economic incentives for the promotion of competing food choices, and in conjunction with the ambiguity of what constitutes choice where the chooser's choices are channeled and limited at the outset.

Similarly, permitting direct-to-consumer advertising of the drugs themselves, instead of simply the price of drugs, as was at issue in *Virginia Pharmacy*, seems to go beyond anti-paternalistic desires to provide consumers with "information." To the contrary, the "sell" message is often not very informational. Rather it is vivid, colorful and laden with emotional appeals to "take control" and "enjoy life." In contrast, the portion of these ads which contain (arguably) the most information, the portion relating to side effects, warnings and contraindications, is conveyed in a manner that seems calculated to have potential consumers skip it. The information is in black and

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163. In response to vocal criticism of marketing practices targeting children as consumers of sugary foods, Kellogg's and other cereal companies are adopting voluntary guidelines on both the manufacturing and the advertising fronts to produce healthier cereals and to stop marketing those brands that don't meet announced nutritional standards to children in an attempt to avoid governmental regulation.

white dense blocks of text which, much like lending disclosures, warranties, and similar information is designed to encourage a consumer to disregard it. Such language is seldom actually read. Using persuasive presentation techniques like pictures and vague ad copy that appeal to emotional motivations, when these same techniques are not used to convey the warnings substantially skews and channels choices in a way that may be counter to the public interest. Consider for a moment that if the warnings contained on labels on cigarettes needed to be conveyed with the same vividness and salience as the sales portion,<sup>164</sup> whether those warnings might not be more effective.

## II. CONCLUSION

Ultimately, the metaphor of the “marketplace of ideas,” while illuminating some issues, is inadequate to the task of articulating appropriate boundaries for the regulation of commercial speech, even on its own terms. It runs the risk of failing to capture, or perhaps even fundamentally transforming, important values that may not survive the translation to a market analogy.

The view that the good life is a life of the gratification of desire, without critical attention to the nature of the desire in question or to the nature of the proposed gratification—a life of consumption—is simply not an adequate conception of human felicity or an adequate image of the meaning of human experience. Our habituation to the forces in our culture that promote this view, in the economic and political arenas alike, makes it difficult for us to defend our most important institutions and values, those that imply and require a richer conception of human action, thought and flourishing.<sup>165</sup>

As authors Goldman and Cox, a philosopher and an economist respectively, put it, perfect knowledge is assumed “as a *condition* of the optimal operation of the market, not as a *consequence* of the market.”<sup>166</sup> And even in conditions of perfect knowledge:

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164. See BRANDT, *supra* note 2, at 392–93.

165. White, *supra* note 69, at 810.

166. Goldman & Cox, *supra* note 29, at 20.

If people valued falsehood, then perfect competition would provide falsehood in a Pareto-optimal way. Or, to make a more realistic assumption, if truth is one thing people value, but they are willing to substitute other commodities (e.g., entertainment) for truth, then economic theory says that they will get the amount of truth such that the marginal rate of substitution between truth and these other commodities equals the marginal rate of transformation in the technology between producing truth and producing other commodities. If consumers do not value truth very much (relatively speaking), perfect competition will efficiently ensure that they don't get very much truth as compared with other goods.<sup>167</sup>

For First Amendment purposes, the question is, does the evidence of existing incentive structures offer a basis for thinking that more truth would be produced by more protection for commercial speech? It would seem not. As Steve Shiffrin so forcefully argued:

Advertisers spend some sixty billion dollars per year to disseminate their messages.<sup>[168]</sup> Those who would oppose the materialist message must combat forces that have a massive economic advantage. Any confidence that we will know what is the truth by seeing what emerges from such combat is ill placed. The inequality of inputs is structurally based.<sup>169</sup>

These inequalities of input cause predictable market failures for truth in the marketplace of ideas.<sup>170</sup> Given those failures, more protection

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167. *Id.* at 18.

168. This figure has increased quite a bit and probably grossly understates total marketing expenditures of all kinds. *Advertising Age* reported that in 2006 advertisers spent \$104.8 billion in spending on advertising in print, TV and some internet forms. Bradley Johnson, *Leading National Advertisers Report: Top 100 Spending Up 3.1% to \$105 Billion*, ADVERTISING AGE, June 25, 2007, at 4. As a measure of the investment in marketing as a proportion of other spending, the following information is instructive and suggestive even if it may not be reliably extrapolated to other products and industries. "The Pharmaceutical industry spends more than \$5.5 billion to promote drugs to doctors each year—more than what all U.S. medical schools spend to educate medical students." Waxman, *supra* note 133, at 2576–78. Additionally, a "recent study by the pharmaceutical trade group found that its members employ some 86,226 individuals in marketing and only 51,588 in research and development." Juliet Fleming Brown, Book Review, 46 JURIMETRICS J. 215, 221 (2006).

169. Shiffrin, *Economic Regulation*, *supra* note 3, at 1281.

170. For more discussion of the limitations of economics applied to law, see Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211 (1991).

for commercial speech seems unlikely to produce more freedom or more truth. Rather we should see the attempt to expand First Amendment protection for commercial speech for what it is—a “sophisticated attempt at putting forth a deregulatory agenda through constitutional rhetoric—a role similar to that which the Due Process and Contract Clauses occupied nearly a century ago.”<sup>171</sup> The struggle over the legitimate boundaries of governmental regulation, whether of speech or anything else, is indeed a persistent problem that will not soon go away.

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171. Dibadj, *supra* note 15, at 915.

