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Recommended Citation
85 Minn. L. Rev. 451 (2000-2001)

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Selling the Market-Driven Message: Commercial Television, Consumer Sovereignty, and the First Amendment

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INTRODUCTION

> There can be no disagreement on an initial premise: [Television] programmers and [television] operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment. Through "original programming or by exercising editorial discretion over which . . . programs to include in its repertoire," [television] programmers and operators "see[k] to communicate messages on a wide variety of topics and in a wide variety of formats."
>
> —*Turner Broadcasting Systems, Inc. v. FCC*[1]

> It is urged that motion pictures do not fall within the First Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit. We cannot agree. That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures.
>
> —*Joseph Burstyn, Inc. v. Wilson*[2]

> We can surely agree that no one can raise a cry of deprivation of free speech if he is compelled to prove that there is something more than naked commercial selfishness in his purpose.
>
> —Then-Secretary of Commerce Herbert Hoover[3]

Commercial television broadcasters have been subject to a range of regulations restricting their freedom to present programming to the viewing public. Those restrictions have included the Prime Time Access Rule,[4] the Children's Television Act of 1990,[5] and the Fairness Doctrine.[6] Indeed, the funda-

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1. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 636 (1994) (citations omitted) (*Turner I*).

2. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952) (footnote omitted).

3. Speech by then-Secretary of Commerce Herbert Hoover at the National Radio Conference (Nov. 9, 1925), *quoted in* Harry Kalven, Jr., *Broadcasting, Public Policy, and the First Amendment*, 10 J.L. & ECON. 15, 16 (1967).

4. In the Matter of Amendment of Part 73 of the Commission's Rules and Regulations With Respect to Competition and Responsibility in Network Television Broadcasting, 23 F.C.C.2d 382, 384 (1970). The rule prohibited the broadcast of more than three hours of programming produced by or for television networks in any of the top fifty markets during the four "prime-time" hours of the day—i.e., 7 p.m. to 11 p.m. *Id.* The FCC intended to protect the viability of non-network produced syndicated programming. *Id.* at 385-87.

5. Pub. L. No. 104-437, 104 Stat. 996 (1990). Congress directed the FCC

mental requirement that broadcasters serve the "public interest" in order to retain their licenses from the FCC itself impinges programming discretion.[7] Cable television outlets have been subjected to the Must Carry Rule.[8] Today, some proponents of campaign finance reform seek to compel television broadcasters to provide free time to candidates for political advertising.[9]

Every effort to regulate television programming decisions has been opposed on both constitutional grounds and policy grounds. Dominant among policy objections are the notions of market efficiency that underlie a broader opposition to government regulation of economic relationships. Social welfare is maximized, the argument goes, when freely-bargaining actors can agree upon transactions that enhance the self-defined welfare of each participant. Some have argued, for example, that regulations of broadcast television programming should be evaluated according to whether "they interfere with the free market's ability to maximize consumer satisfaction or to promote most effectively consumer sovereignty."[10] They suggest that "telecommunications goods and markets" should be treated as are "most other goods and markets."[11]

Accompanying these policy objections to the regulation of television programming decisions are arguments that invoke the First Amendment's prohibition of laws that "abridge the freedom of speech." If the government tells CBS that it may not present more than three hours of network-created programming during primetime hours or that it must present at least a minimum amount of children's programming, the network's freedom to choose its preferred programming is restricted. If the government were to tell the networks to provide

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to consider whether stations had provided programming "specifically designed to serve the educational and informational needs of children." *Id.* § 103(b)(2), 104 Stat. at 997.

6. *See infra* Part I.A.

7. The Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (1934), requires that broadcast licensees operate "in the public interest" and empowers the FCC to grant and renew licenses according to the needs of "the public convenience, interest, or necessity." *Id.* § 307(a), 48 Stat. at 1083.

8. Such rules require cable television providers to carry local broadcast network affiliate stations. *See infra* Part I.B.

9. *See infra* Part IV.A.

10. THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 45 (1994).

11. *See id.* at 49, 277-96.

free air time to political candidates, the freedom to choose their preferred programming would be restricted. Broadcasters argue that this freedom to choose programming is "editorial discretion" or "journalistic discretion" protected by the First Amendment. It amounts to the freedom to say what one wants to say and not to say what one wishes to refrain from saying.[12]

The free-market policy argument against regulation has not persuaded everyone—whether as a general matter or in its particular application to television—though it today has a stronghold in political debate.[13] It is nearly universally accepted, however, among judges, politicians, bureaucrats, and scholars,[14] that the programming decisions of television broadcasters and cable providers are exercises of "editorial discretion" protected by the First Amendment.[15] This presumption of constitutional privilege has inhibited political experimentation. The FCC repealed the Fairness Doctrine in part because of these constitutional concerns. Proposals to mandate free television time for political candidates have foundered in part because of concerns about intruding on the constitutionally protected "editorial discretion" of television broadcasters. And, of course, the presumption of constitutional privilege threatens judicial invalidation of those experiments that the political process manages to enact into law.

Should television programming decisions continue to be viewed as a core part of "the freedom of speech" protected by the First Amendment? Should the First Amendment be deemed to supplement, and sometimes to supersede, the range

12. "[W]e reaffirm unequivocally the protection afforded to editorial judgment.... [A] compulsion to publish that which reason tells [newspapers] should not be published is unconstitutional." Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 255-56 (1974) (quotations omitted).

13. "It [is] time to move away from thinking about broadcasters as trustees. It [is] time to treat them the way almost everyone else in society does—that is, as businesses. [T]elevision is just another appliance. It's a toaster with pictures." Then-FCC Chairman Mark Fowler, justifying the repeal of the fairness doctrine regulations, *quoted in* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 49 (1993) (footnote omitted).

14. *See, e.g.*, LILLIAN R. BEVIER, IS FREE TV FOR FEDERAL CANDIDATES CONSTITUTIONAL? 33-34 (1998); *id.* at 46 (arguing that requiring broadcasters to "provide free TV time would restrict *their* speech—or at least their editorial discretion"); KRATTENMAKER & POWE, *supra* note 10, at 235; RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 672-74 (1992); SUNSTEIN, *supra* note 13, at 103-05; Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1101, 1105 n.8 (1993).

15. *See infra* Part I.B.

of policy arguments for, and against, regulation of television programming decisions? Conventional wisdom, from the right to the left, barely acknowledges these questions.[16] The task of this Article is to explore them.

Policy arguments against the regulation of television programming decisions have relied on an economic model that views television broadcasters as producers and sellers acting in a normative context of "consumer sovereignty." Constitutional arguments have relied largely on a political model that views television broadcasters as speakers exercising editorial discretion in a normative context of citizen sovereignty and "the freedom of speech." Those who have critiqued the regulation of programming decisions by invoking both the constitutional and policy perspectives see a consistency—even a synergy—between them.

Forty years ago, for example, Ronald Coase argued that the FCC's power to grant and renew broadcast licenses conditioned on whether a licensee serves the "public interest, convenience, or necessity" involves oversight of the applicant's programming decisions and, therefore, clashes with the First Amendment.[17] From this perspective, he argued that the FCC's power to license broadcasters was as much an intrusion on the First Amendment as licensing newspapers would be. At the same time, Coase viewed broadcasters as commercial actors, motivated by the same forces that shape the decisions of other producers and merchants. From this perspective, he suggested that the allocation of broadcast licenses, like the allocation of other resources, "should be determined by the forces of the market rather than as a result of government decisions."[18] Thus, he argued that broadcasters should be treated under the First Amendment as are other speakers (that is, free to exercise editorial discretion)[19] and should be treated under market theory as are "other businessmen"[20] (that is, largely free to make whatever production and distribution decisions they wish).[21]

16. *See supra* text accompanying notes 1-3.

17. *See* R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 7-12 (1959).

18. *Id.* at 18.

19. *See id.* at 7.

20. *Id.* at 30.

21. Indeed, more recently, Coase has made a stronger and more radical claim: government should be restricted in its power to regulate the market for goods and services as it has been restricted in its power to regulate the market for ideas, because no persuasive justification exists to distinguish the impor-

Following Coase, Thomas Krattenmaker and Lucas Powe have argued that a free-market economic analysis of programming discretion supports a finding of protection by the First Amendment: "[A] *focus on [economic] markets reveals* that direct regulation of programming is virtually always an unnecessary intrusion into *broadcasters' rights of free speech,* and that the [Federal Communications] Commission can attain truly sensible goals without overseeing stations' editorial decisions."[22]

This Article suggests that there is no synergy between viewing programming decisions as properly governed by market forces in a regime of consumer sovereignty and viewing them as protected by the First Amendment's freedom of speech. Indeed, the two models of television broadcasting on which opponents of regulation have simultaneously relied are incompatible. Rather, to the extent that, and because, commercial television programming decisions are economically driven by a desire to satisfy market demand, they should not be viewed as protected by the First Amendment's freedom of speech.

Part I describes the prevailing presumption, both in politics and law, from the right[23] and from the left,[24] that the programming decisions of television broadcasters and cable providers are exercises of "editorial discretion" protected as part of the First Amendment's "freedom of speech."

Part II examines decisionmaking by television network executives. It distinguishes among decisions made by the series of actors involved in the creation, production, and dissemination of such programming, and considers the extent to which such programming decisions flow from the pursuit of profit. It concludes that Coase, Posner, and other market theorists are quite right in suggesting that much—indeed, most, if not all—of such programming decisions involve creating programming that will generate profits by satisfying consumer demand.

Part III analyzes the constitutional significance of the proposition that commercial television programmers behave as

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tance of free speech from that of free trade in goods and services. R.H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1, 3-8, 13-15 (1977).

22. KRATTENMAKER & POWE, *supra* note 10, at 283 (emphasis added).

23. *Id.* at 235.

24. Weinberg, *supra* note 14, at 1114 ("Broadcasting is speech."). Weinberg develops his critiques of First Amendment doctrine and broadcasting by "[r]elying on insights developed by authors associated with critical legal studies." *Id.* at 1109.

do other entrepreneurs in responding to market incentives. Part III begins by distinguishing two categories of message that people might choose to disseminate. The actor who chooses to construct the *content* of a message by referring to the beliefs and values of an anticipated audience, and who does so because he believes that the message will be popular, or that the consumer will buy it, or that it will produce profits, has created the *market-driven message.* The actor who constructs the content of a message by considering what she, herself, believes has created the *speaker-driven message.*

Part III also describes three categories of motive for *disseminating* messages. A person might disseminate messages with no concern about persuading people about the worth of the idea, but simply as a product to be sold for profit; or might disseminate an idea to persuade people of the merits of the idea. This section posits that an actor might choose to profit by selling a market-driven message—in other words, *to sell*; or might endeavor to persuade others with a market-driven message—in other words, *to pander*; or might endeavor to persuade others with speaker-driven self-expression—in other words, *to enlighten.*

Part III then considers whether an actor's choice to sell the market-driven message, as contrasted with an actor's choice to enlighten with speaker-driven self-expression, should be deemed protected by the First Amendment. Having raised this agenda, Part III recognizes that the flow of discussion may be interrupted by the reader's objections. Few people speak in a way that reflects *pure* self-expression or in a way that reflects a *pure* pursuit of economic profit. Given the complexities of reality, what is the point of exploring the implications of two categories of purpose—a purpose to enlighten through self-expression and a purpose to profit through the sale of a market-driven message—that, in their *pure* forms, must be so rare?

In response, Part III suggests that by exploring the implications of categories that are theoretically pure, but perhaps rare in reality, one has a basis for distinguishing the constitutional significance of more complex human choices that are, in fact, common. A television programming executive like Rupert Murdoch, for example, may seek primarily to create a television program lineup that will attract large audiences but secondarily—reluctantly—may choose to forgo potentially popular (and profitable) programming that excessively offends his own sensibilities. An artist like Michelangelo, for example, may pri-

marily seek to create his vision of truth but secondarily—grudgingly—placate his patron's conflicting preferences. Both act with a mixture of purposes—to communicate in a way that expresses his own values and to profit from market demand. But a Murdoch might strike quite a different balance than would a Michelangelo. Should the difference be deemed constitutionally significant? Should the entrepreneur and the artist be understood as warranting equal entitlement as a participant in the freedom of speech? Without exploring the normative significance of opposing poles that might be pure and rare, one cannot explore the normative significance of the far more common varieties of mixed motives lying in the continuum between them.[25]

Thus, Part III explores the constitutional significance of choices to enlighten with speaker-driven self-expression and choices to profit from the sale of a market-driven message from the perspective of four normative frameworks relevant to the freedom of speech. The first two normative contexts rest on the proposition that the freedom of speech is constitutionally protected because it is necessary for democratic self-government.[26]

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25. Motive and purpose are legally relevant in many contexts. Where the law has made motive and purpose relevant, those who make and interpret the law must confront the problem of mixed motives and purposes and, indeed, have done so. In the area of Equal Protection, for example, the Supreme Court has determined that laws enacted because of purposes reflecting racial prejudice are unconstitutional. In giving doctrinal shape to this principle, the Court has decided that "[r]arely can it be said that a legislature . . . made a decision motivated solely by a single concern, or even that a single purpose was the 'dominant' or 'primary' one." Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977). Thus, one who challenges a facially neutral law on grounds of unconstitutional racial discrimination must prove that an impermissible racially discriminatory purpose was "a motivating factor in the decision." *Id.* If a challenger meets that burden, the state must show "that the same decision would have resulted even had the impermissible purpose not been considered." *Id.* at 271 n.21. This is not to suggest that this sort of "but for" principle is appropriate for determining whether one who seeks to sell a market-driven message should be deemed protected by the First Amendment. It is to suggest, however, that the law has made motive and purpose dispositive in many contexts, and the task of defining the extent to which a motive or purpose must have influenced a decision in order to be legally significant is in no way novel.

26. *See, e.g.*, Mills v. Alabama, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26-27 (1948) ("The principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason in the

Democracy is a theme on which there has been a range of normative and practical variations. Thus, Part III considers the constitutional status of decisions to sell the market-driven message and decisions to enlighten with speaker-driven self-expression from the perspective of two conceptions of democracy prominent in our constitutional history: republicanism and pluralism. The analysis from the perspective of pluralism is the more difficult. Because pluralism better reflects American political practice than does republicanism, it also provides the more important analytical framework.

The third normative context rests on the proposition that the freedom of speech is constitutionally protected because it contributes to personal autonomy and fulfillment. The fourth normative context is provided by Congress's copyright power and its implications for the First Amendment's prohibition of laws abridging the freedom of speech.

Consistent with conventional doctrinal notions that certain categories of expression are of high value warranting the fullest constitutional protection (such as a dissident's speech about public policy) and other categories of expression are of low value warranting little or no constitutional protection (such as obscenity, defamation, and fighting words), this section concludes as follows: in each of these normative contexts, efforts to enlighten by disseminating speaker-driven self-expression are fundamentally valuable and warrant full protection under the First Amendment. In contrast, there is serious reason to question whether entrepreneurial choices to sell the market-driven message as a product—in the way that many television broadcasters might treat their programming decisions—warrant special constitutional protection as speech.[27] Indeed, this section suggests that choices to create programming by anticipating audience tastes and to disseminate such programming for eco-

abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage."); SUNSTEIN, *supra* note 13, at xvii ("My goal in this book is to evaluate the current system in light of the relationship between political sovereignty and the free speech principle."); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26 (1971) (arguing that only "explicitly and predominantly political speech" is entitled to constitutional protection).

27. Cass Sunstein has addressed similar questions concerning whether the speech disseminated by profit-seeking broadcasters should be deemed protected by the First Amendment. *See* SUNSTEIN, *supra* note 13, at 17-19. Sunstein limits his analysis to a republican framework. For a discussion of Sunstein's analysis, and its limitations, see *infra* notes 175-83 and accompanying text.

nomic profit—like any other entrepreneurial production decision in a regime of "consumer sovereignty"—should be deemed beyond "the freedom of speech" and, therefore, unprotected by the First Amendment.

Along the way, Part III confronts the most extreme argument made by proponents of laissez faire. Aaron Director and Ronald Coase, for example, have argued that no adequate conceptual distinction can be made between the marketplace of ideas and the marketplace for products to justify the very different constitutional status accorded to individual liberty in each context.[28] There is, they argue, a "parity" of markets—in speech and property.[29] Richard Epstein has built on this notion and has suggested that courts should just as vigorously protect property under the Fifth Amendment from regulation as they protect speech under the First Amendment.[30] These are not arguments that transactions in the economic marketplace should be protected by the First Amendment *as speech* but that the liberty to engage in property transactions should be deemed to have the same foundational status as has the freedom of speech.

These views depart radically from conventional wisdom about constitutional law. Conventional wisdom holds, in large part, that speech has been constitutionally protected because it is necessary for democratic self-government, that Madisonian majoritarianism is foundational, and that rules governing property are largely derivative of those democratic processes. Thus, transactions in property are not speech under the First Amendment, nor is the Fifth Amendment's protection of property rights as rigorous as is the First Amendment's protection of speech rights. In short, the conventional wisdom holds that *Lochner v. New York* was fundamentally wrong, while *New York Times v. Sullivan* is essentially correct. These propositions of constitutional law span the views of scholars who otherwise have very different perspectives, from Frank Michelman[31] and Cass Sunstein[32] to Raoul Berger[33] and Robert

28. *See* Coase, *supra* note 21, at 2-8, 13-15; Aaron Director, *The Parity of the Economic Marketplace*, 7 J.L. & ECON. 1, 6-10 (1964).

29. *See* Director, *supra* note 28, at 6.

30. *See* Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. CHI. L. REV. 41, 42 (1992).

31. *See* Frank I. Michelman, *Liberties, Fair Values, and Constitutional Method*, 59 U. CHI. L. REV. 91, 114 (1992). Michelman sees arguments about the parity of speech and property arguments as "failing to take account of relevant differences among the ways in which various classes of liberties func-

Bork.[34] Yet, an inseparable element of this conventional wisdom has been the largely unexamined notion that the programming choices of commercial television corporations should be protected as "editorial discretion" under the First Amendment.[35]

In directly confronting this notion of broadcaster privilege, Part III concludes that the market theorists such as Director, Coase, and Epstein are correct in viewing the behavior of commercial television programmers as rational profit maximizers in a regime of consumer sovereignty. They are wrong, however, about the constitutional significance of this fact. Not only is it true, as they acknowledge, that economic production is not speech under the First Amendment, but beyond this, there is no constitutional parity of markets. On the other hand, while the constitutional theorists such as Michelman and Sunstein—as well as nearly a century of Supreme Court decisions—are

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tion in American society and what they signify." *Id.*

32. Arguing that concentrations of private power in speech have changed the context in which the traditional dangers of government regulation of speech were conceived, Sunstein has suggested that government should be deemed free to regulate television programming, "so long as [such regulations] do not intrude on anything that is properly characterized as a right." SUNSTEIN, *supra* note 13, at 73. He has failed, however, to address the broadcaster claim that their "editorial discretion" to construct and select programming *does* amount to a right. For more on Sunstein's views about the relationship between consumer sovereignty and the First Amendment, see *infra* note 136; text accompanying notes 175-83.

33. *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 266 (1977). Berger has called the Court's decision in *Lochner* and similar cases "usurped power in the economic sphere." *Id.* at 287.

34. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 44-49, 168-69 (1990). On *Lochner*, Bork noted,

> In his 1905 *Lochner* opinion, Justice Peckham, defending liberty from what he conceived to be a "mere meddlesome interference," asked rhetorically, "[A]re we all . . . at the mercy of legislative majorities?" The correct answer, where the Constitution is silent, must be "yes." Being "at the mercy of legislative majorities" is merely another way of describing the basic American plan: representative democracy.

Id. at 49 (footnote omitted). On *Sullivan*, Bork suggested that while the particular rules developed by the Court might be questioned, the general "enterprise" making it more difficult for public figures to maintain defamation actions was legitimate. *Id.* at 168-69; *see* Ollman v. Evans, 750 F.2d 970, 993, 995-96 (D.C. Cir. 1984) (en banc) (Bork, J., concurring).

35. Bork, however, might argue that commercial television programs are not protected, since most do not convey "expressly political" speech. *See* Bork, *supra* note 26, at 20. For an argument that Bork too narrowly conceives the definition of speech that is relevant to self-government, see *infra* text accompanying note 168.

correct in viewing the freedom of speech as constitutionally foundational, and property rights as politically derivative, they have failed to explore the implications of this dichotomy for the question of whether the programming decisions of profit-seeking media corporations should be deemed part of "the freedom of speech" protected by the First Amendment. They have erroneously assumed that the programming decisions of commercial television executives qualify as "editorial discretion" protected by the First Amendment.

Precisely because product design, manufacture, and sales decisions in the commercial marketplace do not constitute "editorial discretion" protected by the First Amendment, the programming decisions of commercial television corporations should be deemed to be something quite other than "editorial discretion" protected by the First Amendment.[36] Thus, proponents of the parity of markets should press for constitutional protection of commercial television programming decisions in the same way they press for constitutionally protecting the production and sales decisions of other entrepreneurs—that is, as a property interest under the Fifth Amendment, rather than as speech protected by the First Amendment.

Furthermore, those who embrace the conventional wisdom that denies a constitutional parity between the marketplace of ideas and the marketplace for products should recognize the inconsistency in treating decisions to sell the market-driven message as protected by the First Amendment. Indeed, from all four normative frameworks relevant to the First Amendment—republican self-government, pluralist self-government, personal fulfillment, and Congress's copyright power—the reasons that Coase and Director are wrong about the constitutional "parity" of the marketplace of ideas and the marketplace for products underlie the reasons that commercial television programming

36. This argument is unlikely to persuade the market theorists that there is no parity of markets. It should, however, persuade them that they are wrong to employ the conventional notion that television programming decisions should be protected as "editorial discretion" under the First Amendment. Rather, these market theorists should follow through with their recognition that liberties in speech and in property—though of equal value—are not the same. *See, e.g.*, Epstein, *supra* note 30, at 46-47 (noting that while there are many issues common to both speech and property, important differences exist in the areas of compensation and economic concerns). Though there may be a "parity" of markets, the marketplace of ideas and the marketplace for products surely are distinguishable. Thus, their arguments for protecting the programming discretion of commercial television corporations should be rooted in Fifth Amendment property, rather than in First Amendment speech.

decisions should be understood as ordinary property rights, not part of "the freedom of speech."

Part IV explores how a denial—or dilution—of protection for the entrepreneurially motivated dissemination of the market-driven message might, despite real difficulties, be implemented. For example, how could a court adjudicate a challenge to a measure requiring broadcasters to provide free television time to political candidates? Should an actor who disseminates material for mixed purposes—partially entrepreneurial and partially pedagogical—be deemed protected by the First Amendment? How could a court determine whether an actor disseminated material primarily as a market-driven message for sale or a speaker-driven message for enlightenment? This section cautions that a court should not lightly conclude that one who claims the protection of the First Amendment was, in fact, engaged in market-driven entrepreneurial activity and, therefore, is not entitled to constitutional protection of his "editorial discretion." Rather, the government should bear a heavy burden of proving that a First Amendment claimant was acting predominantly as an entrepreneur in selling a market-driven message. The section suggests five indicia for proving this fact in the television programming context.

Part V explores the implications of the "market-driven message principle" for regulations of violence and "indecency" in commercial television. If decisions to sell the market-driven message are deemed not part of "the freedom of speech," should the government be deemed free to engage in content-motivated regulation of such entrepreneurial activity?[37] This is an important question, and the answer here is a contingent no.[38]

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37. Part V also addresses broader cultural critiques of commercial television and the First Amendment. *See, e.g.*, RONALD K.L. COLLINS & DAVID M. SKOVER, THE DEATH OF DISCOURSE 205-16 (1996) (discussing a "cultural approach" to the First Amendment that discards "deliberate lies" and "Madisonian principles" for the unrestrained conventions of popular culture); Ronald Collins & David Skover, *The First Amendment in an Age of Paratroopers*, 68 TEX. L. REV. 1087, 1088 (1990) (noting that "[p]ublic discourse is increasingly taking a distinctive and aestheticized form consistent with the look and feel of commercial television"). For further discussion of the Collins and Skover cultural critique, see *infra* Part V.B.

38. Indeed, the import of my analysis concerns the propriety of asserting *personal* rights under the First Amendment's freedom of speech—the right to exercise "editorial discretion." If the government requires a commercial television station to provide air time for a politician to express her views, or for a concerned member of the community to express his, should one view the station's rights to engage in the freedom of speech as having been infringed?

Unlike current doctrine, the analysis presented in this Article does not depend on physical characteristics (such as bandwidth scarcity) of the technologies for transacting commerce in entertainment—whether broadcast television, cable television, the internet, or technologies yet to be developed.[39] Rather, the analysis focuses on the nature of human choices.[40]

Should such a regulation be deemed to violate the Supreme Court's prohibition, laid out in *Buckley v. Valeo*, against laws that "restrict the speech of some elements of our society in order to enhance the relative voice of others"? 424 U.S. 1, 48 (1976) (per curiam). A regulation displacing one actor's *commercial* activity with another actor's *speech*—for a content-neutral purpose of promoting the freedom of speech—would be permissible. In contrast, a regulation displacing one actor's market-driven message motivated by governmental disapproval of the ideas contained in that message would be impermissible—not because the regulation intrudes on the *personal* First Amendment rights of the regulated entrepreneur but because of prophylactic concerns about governmental domination as a participant in the marketplace of ideas. *See* discussion *infra* Part V.A.

39. *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 396-400 (1969) (upholding the bandwidth scarcity rationale for distinguishing electronic and print media in First Amendment analysis); *see also* COLLINS & SKOVER, *supra* note 37, at 73-81 (focusing on differences in communication by picture versus communication by written word).

Furthermore, unlike other critiques of doctrines that accord First Amendment protection to the broadcast media, this Article's analysis does not depend on making value judgments about the *quality* of ideas disseminated on television or through other media. *Cf.* Collins & Skover, *supra* note 37, at 1097-104; Martin H. Redish, *Killing the First Amendment with Kindness: A Troubled Reaction to Collins and Skover*, 68 TEX. L. REV. 1147, 1149-50 (1990) ("[M]uch of television's programming is not designed to appeal to the viewer's higher intellectual interests. But for almost every *My Mother the Car* there has been a *Masterpiece Theater*.... [I]f a governmental body were to undertake such a screening process of the content of the electronic media, no logical grounds would exist for failing to give identical treatment to the print media."). Rather, this Article's analysis is concerned with whether an actor has intended to *persuade* others with his *own* ideas or simply to sell to others that which they desire.

40. In this regard, technologies for dissemination might be legally relevant not as categorical determinants of regulatory discretion, but as contextual indicia that a First Amendment claimant was, or was not, predominantly engaged in entrepreneurial choices to sell market-driven messages. Furthermore, the technologies used by the disseminators, and the consumption habits of the public, may serve as contextual indicia of whether particular governmental attempts to regulate "editorial discretion" are undertaken for permissible purposes or simply to censor ideas that regulators find offensive.

Commercial television, whether broadcast or cable, may be unique, both in the extent to which programming decisions can be proved to be rooted in entrepreneurial motives to sell market-driven messages, and in the extent to which it represents a context in which government may well have legitimate reasons for intruding upon "editorial discretion." The viewing habits of the public render television (at least for now) the best means of effective commu-

Indeed, although this Article focuses on the constitutional status of commercial television programming decisions, its enterprise rests on more fundamental concerns. It reflects concerns that the freedom of speech not be obscured and overwhelmed by an increasingly pervasive commerce in entertainment—that our constitutional law identify and maintain clear principles to distinguish choices and activities that warrant special constitutional protection as "speech" from those which, superficially, might look like "speech," but have a fundamentally different nature. This is important not only for law itself but also for maintaining a clearer cultural sense of the hierarchy of values in the American constitutional tradition.

Legal categories require definition. This is no less true for the First Amendment's category of "speech" than for any other. The unexamined assumption that anything spoken, anything written, anything painted, photographed, recorded, or filmed, whether or not distributed, and no matter why distributed, is entitled to special constitutional solicitude *as speech* obscures essential distinctions that ought to be made. This is a time in which Americans are so much more engaged in the consumption of products than they were when the First Amendment was framed. It is also a time in which Americans, having unprecedented leisure time, are more than ever engaged in the consumption of products *for entertainment*. Because we are thinking beings, much of our entertainment involves words, pictures, and other vehicles for triggering thoughts that the consumer wishes to experience. With this demand for entertainment comes entrepreneurial choices to respond—to provide the products that people want.

In suggesting that like other entrepreneurial choices, decisions to sell market-driven messages do not warrant vigorous protection as part of "the freedom of speech," this Article does not argue that commercial television programs are necessarily unworthy, or dangerous, or that they should be subject to any particular sort of regulation. From the perspective of the healthy respect accorded to free and vigorous commerce throughout our political history, the profit-motivated choices that producers make to satisfy market demand are generally to

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nication. Regulations displacing commercial programming with speech by candidates or other concerned members of the public can well be understood as pursuing the legitimate purpose of enhancing the freedom of speech by increasing the amount of speech available to the public. *See infra* text accompanying notes 267-70.

be celebrated. Those who argue that media corporations should remain free to make whatever programming decisions they wish, to maximize viewer utility in a regime of consumer sovereignty, would remain fully free to make this policy argument, and to win the day in political competition.

But from the more demanding perspective that must identify choices warranting special constitutional protection, the Article suggests that decisions to sell the market-driven message—like other entrepreneurial choices in the regime of consumer sovereignty—do not warrant protection *as speech*. Indeed, the worth of commerce in entertainment comprised of pictures or words—like the worth of commerce in other products—should be more freely debated, and determined politically, by people engaging in speech that *is* of special constitutional significance—the expression and exchange of their *personal* views for the purposes of forging agreement, identifying disagreement, and providing mutual understanding.

I. TELEVISION PROGRAMMING DECISIONS AS PART OF THE FIRST AMENDMENT'S "FREEDOM OF SPEECH": THE CONVENTIONAL VIEW

A. IN CONGRESS AND THE FCC: "EDITORIAL DISCRETION" AND THE "FAIRNESS DOCTRINE"

The fairness doctrine consisted of two components. First, broadcasters were required to *present* discussion of public issues. Second, the discussion of public issues presented was to be *balanced*.[41] Television broadcasters opposed the requirements by arguing that their programming decisionmaking involves the exercise of "editorial discretion" protected by the First Amendment.[42] During the mid-1980s, when the FCC was considering whether the fairness doctrine should be repealed, broadcasters repeated arguments they made twenty years ear-

41. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 378 (1969).

42. In *Red Lion*, broadcasters challenged the fairness doctrine on the grounds that

> the First Amendment protects their desire to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency. No man may be prevented from saying or publishing what he thinks, or from refusing in his speech or other utterances to give equal weight to the views of his opponents.

Id. at 386.

lier in *Red Lion*. The FCC noted that "broadcasters perceive that the fairness doctrine involves significant burdens"[43]—in particular, intrusions on the broadcasters' programming discretion.[44]

Minority voices within the FCC had long decried the doctrine's intrusion on the editorial discretion of broadcasters and the resulting abridgement of First Amendment values. In 1964, for example, the FCC scrutinized a local television station in Oregon for failing to provide for "balanced programming." Two Commissioners objected to the inquiry:

> The Commission is clearly making a choice between competing interests and values. Presumed quality and "balance" of television programming is one choice and preservation of a wider area of freedom of expression for the broadcaster is the other. . . . [I]f the principle is established that the Commission has the right and power to prescribe, either directly or indirectly, the kind and quality of programs that must be carried by broadcast licensees, then the vital interests of society, the nation, and perhaps the world, in the fullest freedom of communications and the expression of ideas, in whatever form, may be compromised. . . . A lack of satisfying programs on television would be a small price to pay for the maintenance of the fullest freedom of communications and the unimpaired vigor of those private rights which thinkers from Milton, Jefferson, and Mill to the present Supreme Court have declared to be fundamental to the existence and preservation of a free and democratic society.[45]

These dissenting views prevailed in the 1980s as the FCC justified repeal of the fairness doctrine in significant part because of concerns for the "editorial discretion" of broadcasters. Although the FCC expressed concern about both prongs of the doctrine, it was more concerned with the requirement that broadcasters provide *balanced* coverage of public issues than the obligation to *present* discussion of public issues. The requirement of balanced coverage could inhibit the choice to present discussion of controversial public issues, on the supposition that some broadcasters would prefer to say nothing about

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43. Report, In the Matter of Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 145, 159 (1985) (emphasis omitted, citations omitted, capitalization altered) [hereinafter Report].

44. *See id.* at 163-64 ("[U]pon a finding that a licensee has violated the fairness doctrine, we order the broadcaster to provide additional programming. . . . Since broadcast time is a valuable resource, such a requirement imposes costs upon the licensee. In order to avoid these costs, a broadcaster may be inhibited from presenting more than a minimal amount of controversial issue programming.").

45. *In re* Lee Roy McCourry, 2 R.R.2d 895, 907 (1964) (Loevinger, J., dissenting).

a public issue than to provide a balanced presentation of that issue. "A licensee may be inhibited from presenting controversial issues of public importance by operation of the fairness doctrine even though the first prong of that doctrine affirmatively requires the licensee to broadcast such issues."[46]

The FCC was less concerned about the requirement to discuss public issues, but only because this obligation had never been vigorously enforced. "[W]ith respect to the affirmative obligation to cover controversial issues of public importance, '[a] presumption of compliance exists.' . . . Indeed, a United States Court of Appeals has characterized this requirement as one which is 'not extensive and [can be] met by presenting a minimum of controversial subject matter.'"[47] The FCC explicitly rejected more vigorous enforcement of the affirmative coverage requirement as a solution to the "chill" caused by the balanced coverage requirement, because the resulting intrusion on the "editorial discretion" of broadcasters would be exacerbated:

> We do not believe that more stringent enforcement of the first prong would be an appropriate remedial response to the existence of a "chilling effect[.]" Indeed, such an approach increases the severity of major detriments associated with the fairness doctrine. For example, contrary to the principles of the First Amendment, a stricter regulatory approach would increase the government's intrusion into the editorial decision making process of [broadcasters].[48]

It is important to note the type of "editorial discretion" affected by each prong of the fairness doctrine. The obligation of balanced coverage intrudes on broadcasters' discretion when they do choose to present discussion of public issues. It affects *how* a broadcaster chooses to cover a public issue. The obligation of affirmative coverage intrudes on the programming discretion of broadcasters only if they otherwise would not present discussion of public issues.[49] It affects *whether* a broadcaster chooses to present discussion of a controversial public issue or to present another type of programming. Thus, in rejecting a more stringent application of the affirmative requirement to cover public issues, which could have been imposed without the requirement of balanced coverage, the FCC elevated as constitutionally protected "editorial discretion" a decision whether to

46. Report, *supra* note 43, at 159.

47. *Id.* at 160 (citations omitted).

48. Inquiry into §73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 58 R.R.2d 1137, 1152 n.66 (1985).

49. *Id.* at 1151.

present a program discussing the state of inner city schools or to present a soap opera or a situation comedy.

Although both houses of Congress voted to codify the fairness doctrine in The Fairness in Broadcasting Act of 1987,[50] concerns about the "editorial discretion" of broadcasters ultimately prevailed. President Reagan vetoed the bill. In his veto message, the President said that the fairness doctrine amounts to the "content-based regulation by the Federal Government" of speech and is, therefore, "antagonistic to the freedom of expression guaranteed by the First Amendment."[51] He viewed the doctrine as an effort to "polic[e] the editorial judgment of journalists" that would be "unthinkable" if applied "[i]n any other medium besides broadcasting":[52]

> [W]e must not ignore the obvious intent of the First Amendment, which is to promote vigorous public debate and a diversity of viewpoints in the public forum .... History has shown that the dangers of an overly timid or biased press cannot be averted through bureaucratic regulation, but only through the freedom and competition that the First Amendment sought to guarantee. S. 742 ... is, in my judgment, unconstitutional. Well-intentioned as S. 742 may be, it would be inconsistent with the First Amendment and with the American tradition of independent journalism.[53]

This point presupposes that a decision to produce and broadcast an episode of *Bosom Buddies* rather than an exposé on malpractice in breast cancer detection involves the exercise of journalistic discretion in a context of public debate.

B. IN THE SUPREME COURT: "EDITORIAL DISCRETION" AND "MUST-CARRY" REQUIREMENTS

In *Turner Broadcasting v. FCC*, the Supreme Court considered a challenge to portions of the Cable Television Consumer Protection and Competition Act of 1992[54] requiring cable broadcasters to carry certain local broadcast stations. Cable system operators claimed that these "must-carry rules" infringed their freedom of speech by intruding on their protected "editorial discretion" and "journalistic discretion" to decide

50. S. 742, 100th Cong. (1987).

51. President's Message to the Senate Returning Without Approval the Fairness in Broadcasting Bill, 1 RONALD REAGAN, PUB. PAPERS 690, 690-91 (June 19, 1987) (1989).

52. *Id.*

53. *Id.* at 690-91.

54. Pub. L. No. 102-385, 106 Stat. 1460 (1992).

what speech is carried through their lines and what speech is not.

The controversy first reached the Supreme Court when the Turner Broadcasting System appealed the District Court's decision granting the government's motion for summary judgment. The Court vacated the District Court's judgment in *Turner I*[55] on the ground that issues of material fact remained unresolved in the record and remanded the case for further proceedings.

The controversy next reached the Supreme Court after the District Court again granted the government's motion for summary judgment based on additional fact finding. In *Turner II*[56], the Court found that summary judgment for the government was appropriate and affirmed the district court's decision.

In both cases, members of the Court disagreed about whether the challenged provisions of the Act were content-neutral or content-based and, therefore, about the appropriate burden of proof under the First Amendment. Although the government ultimately prevailed, all members of the Court did agree that the regulations in question intruded on the cable broadcasters' "editorial discretion" protected by the First Amendment and, therefore, imposed on the government a special burden of justification.

In *Turner I*, Justice Kennedy, joined by Chief Justice Rehnquist and Justices Blackmun, O'Connor, Scalia, Souter, Thomas, and Ginsburg, stated the following:

> There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.... Through "original programming or by exercising editorial discretion over which stations or programs to include in its repertoire," cable programmers and operators "see[k] to communicate messages on a wide variety of topics and in a wide variety of formats." By requiring cable systems to set-aside a portion of their channels for local broadcasters, the must-carry rules regulate cable speech in two respects: The rules reduce the number of channels over which cable operators exercise unfettered control, and they render it more difficult for cable programmers to compete for carriage on the limited channels remaining.[57]

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55. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994).

56. Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997).

57. *Turner I*, 512 U.S. 622, 636-37 (1994) (citations omitted); *see also* Leathers v. Medlock, 499 U.S. 439, 444 (1991) ("Cable television provides to its subscribers news, information, and entertainment. It is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the

These Justices rooted their view of First Amendment rights largely in the notion that speech is protected because it is essential for democratic self-government.[58]

Justice Stevens did not join this part of the Court's opinion in *Turner I*, but not because he disagreed with the premise that a broadcaster's decisions about what programs to carry are constitutionally protected as part of the freedom of speech. He noted,

> [t]he must-carry obligations may be broader than necessary to protect vulnerable broadcasters, but that alone would not be enough to demonstrate that they violate the First Amendment. Thus, for instance, to the extent that §§ 4 and 5 obligate cable operators to carry broadcasters they would have carried even in the absence of a statutory obligation, any impairment of operators' *freedom of choice*, or on cable programmers' ability to secure carriage, would be negligible.[59]

Stevens thus implicitly acknowledges that when the regulation does require a cable operator to carry programming it otherwise would not carry, the government would be intruding on the operator's "freedom of choice" protected by the First Amendment.

Justice Breyer was not involved in *Turner I*. In *Turner II*, however, he stated,

> I do not deny that the compulsory carriage that creates the "guarantee" extracts a serious First Amendment price. It interferes with the protected interests of the cable operators to choose their own programming; it prevents displaced cable program providers from obtaining an audience; and it will sometimes prevent some cable viewers from watching what, in its absence, would have been their preferred set of programs. This "price" amounts to a "suppression of speech."[60]

Breyer viewed these interests of the cable providers, and the interests of the local broadcasters that Congress was seeking to protect, as rooted in a policy that "seeks to facilitate the public discussion and informed deliberation, which . . . democratic

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'press.'"). Although the Court was talking about cable programmers and broadcasters in particular, it is clear that it views the programming and transmission activities of television broadcasters as "speech" protected by the First Amendment.

58. *See Turner I*, 512 U.S. at 641 ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal.").

59. *Id.* at 673 n.6 (Stevens, J., concurring in part and concurring in the judgment) (emphasis added).

60. *Turner II*, 520 U.S. 180, 226 (1997).

government presupposes and the First Amendment seeks to achieve."[61]

As the Court found the "editorial discretion" of cable operators protected by the First Amendment, it has found the programming decisions of broadcast television stations and networks to be part of "the freedom of speech" as well. In *CBS v. FCC*,[62] for example, the Court considered whether the Federal Communications Commission (FCC) violated congressional intent or the First Amendment by ordering television broadcast networks to carry, against their will, a paid political advertisement for President Carter's reelection. All three major television networks argued that the FCC had "violate[d] the First Amendment rights of broadcasters by unduly circumscribing their editorial discretion."[63] In particular, the networks were concerned about the "disruption of regular programming" caused by the Carter-Mondale campaign request and "the potential equal time requests from rival candidates."[64]

Chief Justice Burger's opinion for the Court accepted that the broadcasters had a constitutionally protected interest in exercising "editorial discretion" over programming decisions, but reasoned that such rights had to be weighed against competing public interests which themselves had constitutional magnitude. He noted that "[a]lthough the broadcasting industry is entitled . . . to exercise the widest journalistic freedom consistent with its public [duties], . . . it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[65] Because broadcast media are characterized by a

61. *Id.* at 227. Justice O'Connor, joined by Justices Scalia, Thomas, and Ginsburg, began with the premise that "[t]he must-carry requirements . . . burden an operator's First Amendment freedom to exercise unfettered control over a number of channels in its system, whether or not the operator's present choice is aligned with that of the Government." *Id.* at 250; *see also* Leathers v. Medlock, 499 U.S. at 444 ("Cable television provides to its subscribers news, information, and entertainment. It is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press.'"); City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986) ("Through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, respondent seeks to communicate messages on a wide variety of topics and in a wide variety of formats."); FCC v. Midwest Video Corp., 440 U.S. 689, 707 (1979) (stating that cable operators have "a significant amount of editorial discretion regarding what their programming will include").

62. 453 U.S. 367 (1981).

63. *Id.* at 394.

64. *Id.* at 393.

65. *Id.* at 395 (quotations and citations omitted).

physical scarcity that precludes many who wish to speak from doing so, and because some regulation of the use of broadcast frequencies is necessary to prevent chaotic cacophony, the Court has held that Congress has greater discretion to impinge upon the protected rights of broadcasters than it does with respect to other speakers[66]—including, for example, cable television operators.[67] Whatever the merits of the analysis based on the physical characteristics of broadcast media,[68] the important point for present purposes is the Court's point of departure: when television broadcasters make programming decisions, they are exercising "editorial discretion" or "journalistic discretion" protected by the First Amendment.[69]

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66. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 389-90 (1969).

67. *See Turner I*, 512 U.S. 622 (1994).

68. The free-market theorists have lodged a devastating attack on the proposition that broadcast television should be subject to different First Amendment rules than are other media based on physical characteristics of the broadcast spectrum. *See, e.g.*, BEVIER, *supra* note 14, at 21-28 (arguing that scarcity "does not support the broad proposition for which it is most commonly advanced"); KRATTENMAKER & POWE, *supra* note 10, at 203 (noting that the Court's distinctions between broadcasting and print media are criticized extensively by modern commentators); POSNER, *supra* note 14, at 672-74 (describing the Court's scarcity justification for distinguishing between broadcast and print media as "economic nonsense"); Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990, 1007-28 (1989) (examining and criticizing the various rationales that have been posited for providing less First Amendment protection to broadcasters than to print media). The Court might well find that the circumstances of broadcast technology today are so different from those prevailing when *Red Lion* was decided that it would no longer invoke the notice of spectrum scarcity for evaluating the constitutionality of new intrusions on the programming discretion of broadcasters. *See infra* note 87 and accompanying text.

69. In *Miami Herald Publishing Co. v. Tornillo*, the Court invalidated a Florida statute that imposed criminal penalties on newspaper editors who failed to provide a right of reply to candidates for public office after attacking the "personal character" of those candidates. 418 U.S. 241 (1974). The Court said that "we reaffirm unequivocally the protection afforded to editorial judgment. . . . Any such a compulsion to publish that which reason tells [newspapers] should not be published is unconstitutional." *Id.* at 255-56 (quotations omitted). Furthermore,

> [t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Id. at 258.

Justice White, joined by Justices Rehnquist and Stevens, dissented from the Court's decision upholding the FCC's intrusion on the programming preferences of the three major broadcast networks. Justice White was convinced that Congress had not intended to authorize the FCC to impose on broadcasters' discretion in this way. In his view, Congress wished "'to leave broad journalistic discretion with the licensee.'"[70] "'[T]he policy of the Act [was] to preserve editorial control of programming in the licensee.'"[71] White found these congressional policies rooted in the First Amendment itself:

> These policies have been so clear and are so obviously grounded in constitutional considerations that in the absence of unequivocal legislative intent to the contrary, it should not be assumed that § 312(a)(7) was designed to make the kind of substantial inroads in these basic considerations that the Commission has now mandated.[72]

Thus, expressing concern with the potential for a "substantial disruption of regular programming,"[73] Justice White found that the FCC's regulation of the programming discretion of television broadcasters intruded upon their constitutionally protected "journalistic discretion" and that Congress had not intended to authorize the FCC to tread around or beyond these boundaries of constitutional permissibility.[74]

C. DOCTRINAL CONSEQUENCES OF VIEWING TELEVISION PROGRAMMING DECISIONS AS NOT PART OF "THE FREEDOM OF SPEECH": A PRELIMINARY DISCUSSION

Turner and *CBS* indicate that even if programming decisions are viewed as "editorial discretion" protected as part of the "freedom of speech," the government is not entirely precluded from requiring television networks to carry materials they otherwise would not present. This does not mean, however, that the matter is without doctrinal significance. *CBS* was decided within the *Red Lion* framework. Broadcasters' protected editorial discretion was subordinated to the rights of the audience, which the Court deemed to be amplified by the scarcity of available broadcast frequencies. Yet, the scarcity ra-

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70. CBS, Inc. v. FCC, 453 U.S. 367, 400 (1981) (quoting CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 105 (1973)).

71. *Id.* at 401 (quoting FCC v. Midwest Video Corp., 440 U.S. 689, 705 (1979)).

72. *Id.* at 402.

73. *Id.* at 415.

74. *See id.* at 418.

tionale for according a different constitutional status to the regulation of broadcasters has itself come under withering attack.[75] *Turner* was decided by a Court that had not yet determined—as it still has not—whether the speech interests of cable television providers are more like those of television broadcasters or newspaper publishers or, for that matter, whether broadcasters will continue to be accorded a different constitutional status than are newspaper editors.

Indeed, the Court has invalidated regulations requiring newspapers to carry content contrary to their own editorial preferences. In *Miami Herald Publishing Co. v. Tornillo*, a newspaper challenged a Florida statute requiring it to publish a response from a political candidate whose "personal character" the newspaper had attacked. Florida endeavored to justify the statute based on arguments similar to those underlying the fairness doctrine.[76]

The Court determined that this statute intruded into the "editorial judgment" of the newspaper,[77] which is at the core of the First Amendment's protections. Chief Justice Burger's opinion for the Court declared that any "compulsion exerted by government on a newspaper to print that which it would not otherwise print"—any compulsion "to publish that which reason tells them should not be published"—is unconstitutional.[78] Burger found this principle determinative regardless of whether the regulation had the effect of displacing material the newspaper otherwise would have published or of requiring the newspaper simply to print more material than it otherwise would have published.

Assuming the first scenario, not only is the newspaper required to carry what it does not want to carry, it is prevented from presenting material that it does want to present. Assuming the second scenario, "[e]ven if a newspaper would face no additional costs to comply with a compulsory access law,"[79] it is simply the right of a speaker not to speak that is infringed. Chief Justice Burger and the Court determined that this aspect

75. *See supra* note 68.

76. Florida argued that newspapers broadly influence public opinion, that they have become big business controlled by relatively few wealthy corporations, and that access to these vehicles for effective communication is severely restricted. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 247-255 (1974).

77. *Id.* at 256.

78. *Id.* (quotations omitted).

79. *Id.* at 258.

of constitutionally protected "editorial discretion" was sufficiently significant to warrant invalidation of the Florida statute:

> A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.[80]

In contrast with such solicitous concern for a newspaper's right not to publish "that which reason tells them should not be published," the Court has been virtually dismissive of the claim that property owners who were engaged not in speech, but in commerce, have a right protected by the First Amendment to exclude speakers from their property. In *Pruneyard Shopping Center v. Robins*,[81] shopping mall owners challenged an interpretation of the California Constitution requiring them to permit access for those who wish to engage in "speech and petitioning." The property owners argued that their freedom of speech under the First Amendment had been abridged because they had been "forced by the State to use [their] property as a forum for the speech of others."[82] They based their argument, in part, on *Tornillo*. The Court rejected this argument out of hand, noting that *Tornillo* "rests on the principle that the State cannot tell a newspaper what it must print. . . . The statute was found to be an 'intrusion into the function of editors.' These concerns obviously are not present here."[83]

The Court has been struggling to determine whether cable television providers should be treated more like television broadcasters (that is, pursuant to *Red Lion*, subject to more regulation of editorial discretion under a broadcast spectrum scarcity rationale) or like newspaper publishers (that is, pursuant to *Tornillo*, subject, at most, to de minimus regulation of editorial discretion under a traditional speaker's discretion rationale). Indeed, three members of the Court have declared that cable television should be accorded the First Amendment rights of newspapers.[84] Justice Thomas, Chief Justice Rehnquist, and Justice Scalia finally resolved for themselves

80. *Id.*

81. 447 U.S. 74 (1980).

82. *Id.* at 85.

83. *Id.* at 88 (quoting *Tornillo*, 418 U.S. at 258).

84. Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 814 (1996) (Thomas, J., concurring in part and dissenting in part).

the status of cable television providers and aligned their First Amendment rights with those of newspapers:

> The *Red Lion* standard does not apply to cable television.... In *Turner*, by adopting much of the print paradigm, and by rejecting *Red Lion*, we adopted with it a considerable body of precedent that governs the respective First Amendment rights of competing speakers. In *Red Lion*, we had legitimized consideration of the public interest and emphasized the rights of viewers, at least in the abstract. Under that view, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." After *Turner*, however, that view can no longer be given any credence in the cable context. It is the operator's right that is preeminent.[85]

In determining that *Pruneyard* was inapplicable to regulatory intrusions on the programming discretion of cable operators, Thomas noted that "we permitted California's compelled access rule only because it did not burden or conflict with the mall owner's own speech."[86] Thus, for Thomas, Rehnquist, and Scalia, the cable operator's constitutionally protected editorial discretion to choose programming was to be determined by reference to the rights of newspaper editors as conceived in *Tornillo*.

At the same time, the FCC has determined that the physical scarcity rationale may no longer be applicable to broadcasting, or persuasive even if applicable, and that perhaps even television broadcasters should be understood as possessing constitutionally protected editorial discretion akin to that enjoyed by newspaper publishers.[87] Members of the Court have at least intimated as much, recognizing how quickly telecommunications technologies are changing and the potential need for doctrinal adjustments in response to technological evolution.[88]

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85. *Id.* at 815-16 (quoting *Red Lion*, 395 U.S. at 390).

86. *Id.* at 820 n.5.

87. In determining that the fairness doctrine should be repealed, the FCC rejected the notion that scarcity of broadcast frequencies justifies intruding on a broadcaster's "editorial discretion." The FCC determined that the availability of cable television, satellite television, newspapers, and other information sources together "provid[e] the public with suitable access to the marketplace of ideas so as to render the fairness doctrine unnecessary." In the Matter of Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 142, 197 (1985). Even without viewing broadcast television in context with other forms of television and print information sources, the development of digital broadcast television could itself destroy the scarcity rationale for diluted protection for the "editorial discretion" of broadcasters.

88. Justice Breyer, joined by Justices Stevens, O'Connor, and Souter, declined to identify a standard of review in a challenge to provisions of the Cable Television Consumer Protection and Competition Act of 1992. These provi-

Given the attack on the rationales for treating broadcast television differently from other technologies for communication, the day may soon come when the Court determines that not only cable television, but broadcast television as well, should be given the same protection under the First Amendment as newspaper publishers.[89]

The analysis to be presented in this Article develops a perspective with doctrinal consequences for the protection of television programmers that move in the opposite direction. The analysis will not depend on the technological characteristics of the medium at issue. Rather, it will depend on the nature of human choices as they relate to constitutional norms.

The following sections will explore the following proposition: television networks—whether broadcast or cable—*to the extent that they are acting as entrepreneurs responding to the economic market forces of consumer sovereignty* should be viewed as not possessing the First Amendment rights of editorial discretion akin to those of traditional newspaper editors. Rather, such television networks should be viewed as possessing rights akin to those of *Pruneyard*'s shopping center owners—that is, property owners engaged not in speech, but in commerce, who wish to maintain control of their property for commercial rather than for communicative reasons.

II. TELEVISION PROGRAMMING DECISIONS AND CONSUMER SOVEREIGNTY

> We have used [the First Amendment] for the protection of private, possessive interests with which it has no concern. It is misinterpretations such as this which, in our use of the radio, the moving picture,

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sions permitted cable operators to refuse to carry "patently offensive" sexual programs on their public access channels. *Denver Area Educ. Telecomm. Consortium*, 518 U.S. at 738. These four Justices determined that it would be "unwise" and "premature" to choose a "specific set of [doctrinal] words now," because "'[t]he broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may be outmoded ten years hence.'" *Id.* at 738-42 (quoting CBS v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973)). Reluctance, based on technological change, to identify a doctrinal approach to adjudicating the constitutionality of regulations of the cable industry applies as well to maintaining a decades-old doctrinal approach to adjudicating the constitutionality of regulations of the broadcast industry. Indeed, Justice Breyer specifically referred to the dynamic nature of broadcasting, even though the case at hand involved regulation of cable operators.

89. *See, e.g.*, KRATTENMAKER & POWE, *supra* note 10, at 55; POSNER, *supra* note 14, at 672-74; Spitzer, *supra* note 68, at 1007-28.

> the newspaper and other forms of publication, are giving the name "freedoms" to the most flagrant enslavements of our minds and wills.
>
> —Alexander Meiklejohn[90]

> It [is] time to move away from thinking about broadcasters as trustees. It [is] time to treat them the way almost everyone else in society does—that is, as businesses. [T]elevision is just another appliance. It's a toaster with pictures.
>
> —Then-FCC Chairman Mark Fowler[91]

A. A TAXONOMY OF ACTORS IN THE DISSEMINATION OF TELEVISION PROGRAMMING

Many people are involved in the ultimate dissemination of television programming: writers, directors, camera operators, actors, producers, editors, and the corporate executives who decide which programs to order and to put on the air.[92] The writer might conceive her role as artist. She might seek to express her view of truth, or beauty, or an ugly reality. So might the directors, the camera, lighting, and sound technicians, the actors, and the producers. There may be countless creative production teams, all endeavoring to create some version of truth through television programming as an art form.

Many, however, do not. Muriel Cantor has studied the ways in which television producers choose story lines and has considered the extent to which these actors seek to please their own sense of creativity, their sense of what the viewing audience wants, or their sense of what the television networks and advertisers want. She concludes that "[w]hen selecting content, producers have to consider the organizations who finance and control the series, the craft groups who work alongside them, as well as the viewing audience."[93] Cantor notes that while "it is . . . possible that [some] television producers make decisions with only their own aesthetic standards as reference points,"[94] other "creators make decisions based both on what the network

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90. MEIKLEJOHN, *supra* note 26, at 104-05.

91. Then-FCC Chairman Mark Fowler, justifying the repeal of the fairness doctrine regulations, *quoted in* SUNSTEIN, *supra* note 13, at 49 (footnote omitted).

92. MURIEL G. CANTOR, THE HOLLYWOOD TV PRODUCER: HIS WORK AND HIS AUDIENCE 92 (1983).

93. *Id.* at 38.

94. *Id.* at 31-32.

officials want and on their own intuitive judgment of what the audience wants."[95]

Indeed, in the end, the goals and purposes of producers, writers, and other "creative" participants are of practical irrelevance for determining the content of the television programming that is actually presented to the viewing public. These are relatively powerless players—at the mercy of those who *select* which programs to carry—much as is the ordinary citizen who herself might wish to say something to the nation but who cannot gain access to the broadcast signal or cable. The discretion of the television programmer impinges upon the "creative" participants' interests, or serves their interests, depending on what "editorial" choices the programmer makes in service of the media corporation's needs.[96] Indeed, the fairness

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95. *Id.* at 29; *see also* Jaime Wolf, *The Blockbuster Script Factory*, N.Y. TIMES, Aug. 23, 1998 (Magazine), at 32, 35. Wolf describes "the blockbuster way of thinking" in movie production. From this perspective,

> a script is far less a literary or an imaginative undertaking than it is a business plan for a start-up company that requires some . . . $100 million in initial capitalization. In essence, studios are investment banks that specialize in financing this kind of venture; their executives are experts in evaluating such plans in terms of particular elements that are thought to guarantee a good return.

Id. As for other expensive and complex manufacturing enterprises, there is a specialization and division of function in writing these blockbusters. "Screenwriters who labor to get a movie green-lighted merely stand at the head of a conveyor belt designed by producers and studios to precision-tool hits, sending their scripts along for subsequent handling by a small army of additional writers," each one with a different specific skill and function. *Id.* at 32.

96. Gitlin describes the structure and players involved in the television programming process:

> Each network contains an entertainment division, within which there are development departments for drama, comedy, and movies for television. They plant ideas for shows with producers, or with the major suppliers—studios and production companies—who hire the right producers and writers for the project; and they take ideas—"pitches"—directly from writers and producers.

TODD GITLIN, INSIDE PRIME TIME 20 (1983). And he describes the principle by which they determine what shows to produce: "If they think the characters, the relationships, and the premises will resonate with a mass audience, they underwrite a script." *Id.*

The television programmer chooses among countless programming options in a highly selective way. The television programmer, and the higher executives to which the programmer is accountable, evaluate some three thousand program ideas per year. From those three thousand ideas, she will order one hundred scripts. Among those scripts, twenty-five pilots might be produced. Among those pilots, five or ten might be selected for produced and broadcasting. And among those new productions, one or two might be renewed for another season. *Id.* at 20-21; *see also* CANTOR, *supra* note 92, at 32 ("If a producer is successful it may be that his choices are in agreement with a number

doctrine, the cable must-carry rules, the Prime Time Access Rules, or possible mandates of free air time for political candidates impinge upon the discretion of the programmer, not upon the writer, the director, the actor, or others who might claim to be engaging in speaker-driven self-expression.[97] It is, in short, the programmer who is the operative decision maker and *the object of past and potential governmental regulations*. It is the programmer, as agent of the media corporation's interests, who asserts constitutionally privileged "editorial discretion" when such regulations are challenged under the First Amendment.

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of subgroups and publics who make up the audience. If the producer is unable to communicate to a large enough segment of the audience, his series is dropped.")

97. Even writers and producers, to a surprising extent, are purposefully engaged in an entrepreneurial pursuit of a mass audience by creating products shaped by the forces of consumer sovereignty, as they understand the agenda of the networks and advertisers to whom they are accountable. According to Gitlin, "[e]pisode writers are usually modest and often embarrassed by their labors." GITLIN, *supra* note 96, at 71. He quotes one comedy writer: "You don't have to have talent to write for television. . . . I thought it was writing, but it's not. It's a craft. It's like a tailor. You want cuffs? You've got cuffs." *Id.*

Soon after the Supreme Court decided *Brown v. Board of Education*, Rod Serling wrote a story for television inspired by the murder of a black youth in Mississippi by two whites who were angered because their victim had apparently whistled at a white woman.

> By the time Serling took the idea to the Theater Guild for production on the *U.S. Steel Hour*, he was already trimming. . . . [T]he victim was now an old pawnbroker, the killer a neurotic. . . . To avert the slightest hint that Serling's unspecified location might be the South, the executives insisted that the show open with a shot of a white church spire, New England style.

GITLIN, *supra* note 96, at 182. Significantly, Serling, himself, anticipated the need to cater to the perceived desires of the audience, stripping the story of its essence, of the elements that inspired him—racism in the American South of the 1950s.

Even Norman Lear, creator and producer of *All in the Family*, a show that seemed to have so much ideological content in the early 1970s, was more engaged in creating a market-driven message than in self-expression. "When Lear Americanized *All in the Family* from its English prototype, he says, 'I was one hundred percent interested in creaming an audience.'" *Id.* at 212.

Yet there remain protestations of personal creativity and agenda among some writers and producers:

> The medium's leading writers and producers insist that they can cater to the audience's tastes without pandering to them. In the words of [producer] Leonard Goldberg, . . . "I think it is the responsibility of television not only to entertain, but present contemporary problems facing our society and to offer some guidance, some hope, and just to make people think about them."

S. ROBERT LICHTER ET AL., WATCHING AMERICA 10 (1991).

B. TELEVISION PROGRAMMERS AS RATIONAL PROFIT MAXIMIZERS IN THE REGIME OF CONSUMER SOVEREIGNTY

Leading free-market theorists suppose that profit-seeking media corporations respond to market forces as does any other sort of profit-seeking corporation. Krattenmaker and Powe, for example, criticize FCC efforts to improve the "quality" of broadcast programming. "Quality is a function of viewers' desires and broadcasters' resources, elements the FCC cannot control."[98] Thus, "to succeed, a broadcaster, like any entrepreneur, [must] know what customers want."[99]

Richard Posner also supposes that television networks develop and select programming in an entrepreneurial fashion to maximize profit. In considering whether monopoly or competition could produce more "diversity" in television programming, Judge Posner reasoned from the premise that programming decisions are made by reference to anticipated viewer preferences:

> [M]onopoly in broadcasting could actually promote rather than retard programming diversity. If all the television channels in a particular market were owned by a single firm, its optimal programming strategy would be to put on a sufficiently varied menu of programs in each time slot to appeal to every substantial group of potential television viewers in the market, not just the largest group. For that would be the strategy that maximized the size of the station's audience. Suppose, as a simple example, that there were only two television broadcast frequencies (and no cable television), and that 90 percent of the viewers in the market wanted to watch comedy from 7 to 8 p.m. and 10 percent wanted to watch ballet. The monopolist would broadcast comedy over one frequency and ballet over the other, and thus gain 100 percent of the potential audience. If the frequencies were licensed to two competing firms, each firm would broadcast comedy in the 7 to 8 p.m. time slot, because its expected audience share would be 45 percent (one half of 90 percent), which is greater than 10 percent. Each prime-time slot would be filled with "popular" programming targeted on the median viewer, and minority tastes would go unserved. Some critics of television believe that this is a fair description of prime-time network television. Each network vies to put on the most popular programs and as a result minority tastes are ill served.[100]

From the opposite end of the political spectrum, and basing his opinion on observation as much as on theory, Todd Gitlin is also among those who interpret programming decisions as driven by an entrepreneurial desire to identify and to satisfy

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98. KRATTENMAKER & POWE, *supra* note 10, at 73.

99. *Id.* at 79.

100. Schurz Communications, Inc. v. FCC, 982 F.2d 1043, 1054-55 (7th Cir. 1992); *see also* POSNER, *supra* note 14, at 672-74.

consumer demand. He acknowledges the undeniable fact that television programming executives are people like all others and have their own tastes and their own politics. Yet when acting as a television executive, rather than as citizen or parent, the programmer ordinarily subordinates her tastes and values to the demands of the job. Gitlin suggests that "executives learn to heed the institutional voice. If they possess any distinct taste, aside from a relish for show-business glitter, they have to dispel it, or subdue it. To keep taste and market judgment separate is 'professional.'"[101] And for the television executive, professionalism on the job demands programming decisions that will maximize revenue—revenue generated by the decisions of advertisers to buy time during the programs in question.[102]

> Network executives often say that their problem is simple. Their tradition, in a sense, is a search for steady profits. They want, above all, to put on the air shows best calculated to accumulate maximum reliable audiences. Maximum audiences attract maximum dollars for advertisers, and advertiser dollars are, after all, the network's objective.[103]

Thus, the programming executive sees "himself as the instrument of the popular will."[104] "The trick is not only to read the restless public mood, but somehow to anticipate it and figure out how to encapsulate it in a show."[105]

In this regard, Gitlin reports the views of a vice-president for research projects at NBC, who likened the production of television shows to the production of automobiles. "Most people do not put on television what they personally like any more

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101. GITLIN, *supra* note 96, at 23-24.

102. "Television executives certainly do not see themselves as opinion leaders. They live in terror of ratings and perceive their basic task as predicting the public's response." Edward Rubin, *Television and the Experience of Citizenship*, 68 TEX. L. REV. 1155, 1158 (1990).

103. GITLIN, *supra* note 96, at 24-25. Muriel Cantor agrees:

> The decisionmaking process in the television industry has to be understood in the general construct of commercial television. The main function of entertainment programs generally is to attract large audiences to sell products; therefore, if a show does not attract a large enough audience, it often will be dropped. The advertiser wants a certain number of viewers for his money; in fact, the "cost per thousand" viewers often determines whether the advertiser will stay with a show.

CANTOR, *supra* note 92, at 64.

104. GITLIN, *supra* note 96, at 24.

105. *Id.* at 203.

than executives in Detroit make cars they personally like."[106] The head of the Entertainment Division for CBS, B. Donald Grant, also compared the production of television shows to the manufacture of automobiles, and expressed a similar professional ethic: "I have my own values. Everybody has their own values. The guy who is making Chevrolet cars, let's say, may have Cadillac tastes, but he's making Chevrolet cars because he knows that that's what's marketable. And that's basic. Business is a business."[107] As Krattenmaker and Powe argue that no distinction exists in fact between the market dynamic shaping the production decisions of automobile or sneaker manufacturers and those of television programmers,[108] so Grant confirms the proposition.[109]

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106. *Id.* at 24.

107. *Id.* at 230.

108. *See* KRATTENMAKER & POWE, *supra* note 10, at 280-282.

109. Gitlin is emphatic about the extent to which the quest for ratings, for the "maximum reliable audiences," provides the governing principle and dynamic by which decisions are made about what shows to create, to air, and to retain. GITLIN, *supra* note 96, at 25. "Short-sighted guesses of future ratings are the alpha and omega shaping the shows that take up the prime time of Americans, the twenty-two hours a week . . . when, at any given moment, one-third of all Americans are staring into the blue light." *Id.* at 11. Network executives admit as much. In response to criticisms about the poor quality of television programming, networks "insist[] that they simply gave people the entertainment they wanted." *Id.* at 12. A vice president for television research at CBS has similarly stated that "I'm not interested in culture. I'm not interested in pro-social values. I have only one interest. That's whether people watch the program. That's my definition of good, that's my definition of bad." *Id.* at 31; *see also* Roger D. Wimmer & Martha L. Popowski, *Program and Audience Research*, *in* BROADCAST/CABLE PROGRAMMING: STRATEGIES AND PRACTICES 44, 45 (Susan Tyler Eastman et al. eds., 3d ed. 1989) ("Broadcast and cable programmers are interested in one goal: *reaching the maximum possible audience.*").

Television networks have constructed elaborate procedures and mechanisms for predicting market demand for potential programs and for measuring market "consumption" of existing programs. CANTOR, *supra* note 92, at 64-65; *see also* Wimmer & Popowski, *supra*, at 45-54. Confirming their abiding objective to create the market-driven message, the networks conduct research on "every marketable attribute of a show: plots, continuations, concepts, stars, titles." GITLIN, *supra* note 96, at 39. According to the executive in charge of testing for ABC in the early 1980s, a television show "is a machine whose parts wear out. Its use lies entirely in its marketability; why not let testing diagnose the faulty elements?" *Id.* Yet, for all the energy expended in predicting audience demand for different television productions, television executives view the task of predicting popularity as part science and part art. *Id.* at 25, 31.

> The quest for the surest possible maximum audience explains why the networks are cautious yet, in their limited way, pluralist at the same time. Executives want to play it safe, but there are two impor-

C. ALTERNATIVE VIEWS OF THE TELEVISION PROGRAMMING DECISION

Some argue that programming executives have not entirely excluded their personal values from their professional decisionmaking. They suggest, first, that even when they are trying to serve the corporate bottom line, the television elite cannot help but allow their personal values to insinuate themselves into productions. These commentators point to the content of television programming, especially its evolution over the past half century, as evidence of a particular political bias. Second, some suggest that the television elite use their power intentionally to shape public opinion.

These hypotheses complicate the question of whether television programming decisions respond to the forces of consumer sovereignty in the way that other entrepreneurial production decisions do. But consider the significance of the first hypothesis mentioned above. Even if it is true that some television programming executives unavoidably allow their personal values to shape their business decisions while endeavoring to maximize corporate profits, they are still *trying* to construct a message that responds to the demands of the market. Their attitude, intent, and strategy are not concerned with promoting their own values and pursuing their own priorities. By this hypothesis, they do not devote their most important persuasive resources to the issues of greatest concern to them.[110] In the programs they choose and the topics they pursue, their goal remains to maximize profits by satisfying outside forces rather than their personal values and priorities. Such television programmers may be imperfect business decision makers, but they remain, at their essence, business decision makers.[111]

> tant qualifications. They are not expert at knowing just how to play it safe. And if they succeed in playing it too safe, they may bore their audience to the point of indifference. From these qualifications flow whatever diversity the networks maintain. The quest for the offbeat or for high demographics and prestige, sends them after new material, satisfying some of the creative drives of some writers and producers; then the quest for the mass market clicks back in, flattening that new material, striving to reduce it to standard proportions.

Id. at 186-87.

110. This is quite unlike decisions to be expected by a participant in pluralist and republican decisionmaking. *See infra* Part III.B.1.

111. Consider an analogous situation so familiar in debates about the nature of law. If a federal judge, while endeavoring to engage in "neutral" interpretation, cannot help but allow her personal values to shape her decisions, she is hardly rendered indistinguishable from a legislator or a voter. She may

Consider, now, the second hypothesis. According to Ben Stein, who studied television during the 1970s, programming has manifested a particular (liberal) political orientation. Stein has suggested that television reflects a consistent perspective on businessmen (that they are evil),[112] crime (that it is portrayed—inaccurately, in Stein's view—as typically perpetrated by whites on whites),[113] police (romanticized),[114] the military (bureaucratic, mindless, and lacking human decency),[115] small towns (peaceful and lovely on the surface, while hiding evil underneath),[116] big cities (that New York is exciting, intense, but dangerous, while Los Angeles is less exciting, more "laid-back," and less dangerous),[117] the rich (superficially lovely, while

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be an imperfect judge, and even a poor one, but she thinks about legal issues that arise during her cases differently from the way she thinks about political issues when standing in a voting booth. As a judge, her values impede her goal of neutral interpretation. As a voter, vindicating her personal values is her goal.

112. BEN STEIN, THE VIEW FROM SUNSET BOULEVARD: AMERICA AS BROUGHT TO YOU BY THE PEOPLE WHO MAKE TELEVISION 15-28 (1979).

113. *See id.* at 29-39. In Stein's view, real-life murderers and rapists "are usually poor, minority-group people, apparently acting on sudden impulses of rage and anger," while "robberies and muggings are also usually perpetrated by young minority-group males" and the victim usually is "another ghetto dweller." *Id.* at 30. He continues, "On television, things could hardly be more different. The typical TV murder involves a well-to-do white person killing another well-to-do white person. . . . The criminal is a comfortable middle-class or upper-middle-class person, even if not a businessman." *Id.* at 30.

One can quarrel with the accuracy of Stein's views about whites, racial minorities, and crime. Indeed, he claims that "[i]n the thousands of hours I have spent watching adventure shows, I have never seen a major crime committed by a poor, teenage, black, Mexican, or Puerto Rican youth, even though they account for a high percentage of all violent crime." *Id.* at 31. But even if television does not accurately convey the demography of crime, the question remains whether the television producer and programmer are portraying personal views of reality, or whether they are reacting to the public's tastes and preferences. Stein's observations about the content of television programming with respect to crime is consistent with Gitlin's analysis of how programmers determine which shows to order and to broadcast.

114. *See id.* at 40-46.

115. *See id.* at 47-56.

116. *See id.* at 63-73.

117. *See id.* at 74-80. Stein himself seems to have no love lost for New York City, characterizing it as tainted by "the filth, the street killings, the junkies, the high prices, the cheating, the dirty air, and the other realities of New York life." *Id.* at 79. He sees television executives as largely transplanted to Los Angeles from New York, as retaining a wistful bias in favor of New York, and as expressing that bias in their programming decisions:

> The affection that TV writers and producers feel for New York comes across clearly in shows set in Los Angeles. A person who has lived in

scheming and unhappy underneath),[118] the poor (without flaw or fault, society's heroes or victims),[119] and the clergy (absent from primetime television).[120]

One might quarrel with the accuracy of Stein's observations about the content of television programming. One might question, if the observations ever were accurate,[121] whether they remain so. More significant for purposes of this Article's analysis, however, is the possibility that the political slant that Ben Stein has detected may reflect not the persuasive agenda of television programmers, producers, and writers, but the escapist and entertainment agenda of the public.[122] Even a television program constructed purely to satisfy consumer desires has content reflecting values. Its content, however, like the content of an automobile, or a pair of trendy sneakers, is a function of the *consumers'* values.

It is possible that media corporate managers would choose to sacrifice profits by endeavoring to affect public values and perceptions through the expression of their personal opinions or the opinions of the corporate entity. After all, Mobil purchases op-ed space in the New York Times; CBS could well devote some of its broadcasting time for similar endeavors. But to posit that such self-expression is the dominant concern of media corporation, or even a substantial concern, strains credulity. Indeed, corporate officers owe a fiduciary duty to shareholders to make business decisions that will maximize corporate profits.[123] As Posner, Krattenmaker, and Powe suggest, not only is it a reasonable hypothesis that media corporations behave like other profit-seeking corporations in creating products they anticipate will fare well in the economic marketplace,[124] the hypothesis is supported by the way in which count-

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both places can easily see that even if a Chicano is shown lounging next to a palm tree, New York is in the writer's mind.

Id. at 80. Whatever bias this might reveal in the television writer, this passage may help to reveal biases under which Mr. Stein's analysis labors.

118. *See id.* at 81-91.

119. *See id.* at 92-99.

120. *See id.* at 100-04.

121. Stein purported to study programming content from the late 1970s. *See id.* at xiv.

122. Even if a market-driven message represented the *political* agenda of the public, its dissemination would not qualify as valuable "speech" from a pluralist or republican perspective. *See infra* notes 163-73 and accompanying text.

123. *See* United States v. Byrun, 408 U.S. 125, 137-38 (1972).

124. *See* RONALD V. BETTIG, COPYRIGHTING CULTURE: THE POLITICAL

less network presidents, programmers, producers, and media observers speak about the television industry.

III. THE MARKET-DRIVEN MESSAGE AND THE FREEDOM OF SPEECH

> We can surely agree that no one can raise a cry of deprivation of free speech if he is compelled to prove that there is something more than naked commercial selfishness in his purpose.
>
> —Then-Secretary of Commerce Herbert Hoover [125]

A. RUPERT MURDOCH, BILL CLINTON, AND MARTIN LUTHER KING: THE VARIETIES OF COMMUNICATIVE INTENT

What common thread runs through Martin Luther King's decision to deliver his "I Have a Dream" speech, Bill Clinton's decision to advocate a middle class tax cut during the early portion of the 1992 presidential campaign, and Rupert Murdoch's Fox television network decision to present *Living Single* and other television shows targeted to the interests of an African-American audience? Surely there are differences in how each man related to the message he chose to convey. Martin Luther King strongly believed in the content of his message. He intended to persuade as many people as possible of its truth. Candidate Bill Clinton may have believed in the virtues of a middle class tax cut. Given his choices as President, however, it is perhaps more reasonable to suppose that he did not view such a tax cut as good public policy. If the latter is true, he chose to advocate the policy to pander to the predicted preferences of voters in the Democratic primaries. Rupert Murdoch may well be unconcerned—and, indeed, might disagree with much—about the lives and perspectives of young black professionals in urban America. Yet he seemed to construct a broadcast schedule during the early existence of his Fox television network for entrepreneurially strategic reasons. He sought to reach an audience whose entertainment interests were not directly addressed by the other television networks.

Under conventional notions about the freedom of speech, however, the communicative decisions of each of these men would be viewed as having indistinguishable constitutional significance. A governmental regulation that, for example, re-

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ECONOMY OF INTELLECTUAL PROPERTY 226 (1996).

125. Speech by then-Secretary of Commerce Herbert Hoover at the National Radio Conference (Nov. 9, 1925), *quoted in* Kalven, *supra* note 3, at 16.

quired Murdoch to broadcast Bill Clinton's advocacy rather than an episode of *Living Single*, or one that required Bill Clinton to reprint passages from King's speech in his campaign literature, or to reprint portions of a *Living Single* script, would be viewed as intruding on the same constitutionally protected speaker interests—the right to choose the content of the messages one disseminates.

One can, however, identify real bases for distinguishing the constitutional value of King's speech, Clinton's speech, and Murdoch's broadcast. The bases for distinction have nothing to do with the content of the message conveyed or judgments about the worthiness of the content conveyed. The distinctions have nothing to do with the technology employed for disseminating the messages. Rather, the distinctions are rooted in the nature of the communicative intent of the actor in question. Indeed, the distinctions depend on two components of the communicator's intent. The first component concerns the intent involved in a communicator's creation of the *content* of his message. The second concerns the intent involved in a communicator's *reasons for disseminating* his message.

Consider, now, two kinds of intent underlying a communicator's creation of the *content* of his message. For one kind of expressive content, the communicator constructs his message by reference to a judgment about what other people want to hear. This communicator seeks to determine how many people would want to consume a message or pay money for it. This communicator is concerned about *predicting, responding to, and profiting from market demand.* He interprets the values and preferences of others and generates the content of his message as a function of this interpretation. This communicator produces a *market-driven message.*

For the other kind of expressive content, the communicator constructs his message by reference to his own conscience, beliefs, and values. This communicator looks within, identifies what he believes, and articulates those beliefs to others. This speaker intends to create a *speaker-driven message*—that is, to engage in self-expression.[126]

126. The speaker-driven message is similar to Habermas's notion of "communicative action." The market-driven message falls within Habermas's category of "strategic action." For Habermas, "[i]n communicative action participants are not primarily oriented to their own individual successes; they pursue their individual goals under the condition that they can harmonize their plans of action on the basis of common situation definitions." 1 JÜRGEN

In addition to these two kinds of intent underlying a communicator's decisions in forming the content of his message, one might distinguish three kinds of motive for *disseminating* a message. Two motives for dissemination seem to have particular significance for the market-driven message. First, one might wish to sell a market-driven message with the motive to earn a profit. Disseminators of a market-driven message evaluate what messages consumers crave, construct their "speech" in the way that an automobile manufacturer might plan a car design or a cereal manufacturer might plan a product concept, and seek to sell that message-as-product. Their objective is to earn a profit from the success of their product in the consumer market. They are, in this sense, indistinguishable from what one ordinarily would regard as producers of consumer goods.[127] They are entrepreneurs responding to economic forces in the

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HABERMAS, THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY 286 (Thomas McCarthy trans., Beacon Press 1984) (1981). A person engages in "communicative action" when he has "an attitude oriented to reaching understanding" in a "process of reaching understanding." *Id.* In contrast, when engaged in "strategic interaction," "a speaker acts with an orientation to success and thereby instrumentalizes speech acts for purposes that are only contingently related to the meaning of what is said." *Id.* at 289. Habermas suggested that "strategic action" would include lying, manipulating, and any intentionally persuasive use of words that does not honestly articulate the beliefs of the speaker. *See id.* at 306-07, 333-37. Although he does not address the phenomenon of selling the market-driven message, as opposed to pandering, the former would seem to fall a fortiori into the category of strategic action. Although selling the market-driven message does not involve the intent to persuade at all, it does instrumentalize speech "for purposes that are only contingently related to the meaning of what is said." *Id.* at 289.

The analysis presented in this Article's analysis does not depend on Habermas's theory of communicative action and is not derived from it. Rather, it is tied to traditional strands of American political and constitutional theory. It so happens, however, that these strands of political theory are concerned with communication as a vehicle for reaching agreement, in the context of individuals recognized as having certain participatory rights, and that Habermas's theory of communicative action parses the meaning and implications of communication from a similar perspective. He says that

> [i]f we assume that the human species maintains itself through the socially coordinated activities of its members and that this coordination has to be established through communication—*and in certain central spheres through communication aimed at reaching agreement*—then the reproduction of the species . . . requires satisfying the conditions of a rationality that is inherent in communicative action.

Id. at 397 (emphasis added).

127. Ronald Bettig has noted a "commodification of human intellectual and artistic creativity" on an international scale. BETTIG, *supra* note 124, at 226. This Article draws a connection between product development and sales by

economic forces in the regime of consumer sovereignty. Posner, Krattenmaker, Powe, Gitlin, and Cantor describe the behavior of commercial television programmers in a way that would fall within this model of selling the market-driven message.

Second, an actor might wish to pander with a market-driven message—that is, to curry favor with listeners who already embrace the message and to induce others to embrace it as well. One might suspect that certain politicians' decisions about what positions to take, and how to express them, are examples of pandering with a market-driven message. Indeed, Senator Paul Tsongas accused Governor Bill Clinton of pandering to voters in 1992 with his proposal of a middle-class tax cut.

The third motive for disseminating a message seems to have particular significance for speaker-driven self-expression. An actor might be concerned with disseminating his honestly held views toward the enlightenment of others or of self. In this pursuit of truth, *the actor tries to test his views against those of others or to persuade others that his views are correct.*[128]

One might suspect that certain political activists decide what to say by reference to their own beliefs and that they choose to express accurately and sincerely what those beliefs are. Martin Luther King would seem to fit this model of communicative intent. Similarly, one might suspect that certain reporters, artists, law professors, and screen writers form their

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manufacturers and the development and sale of the market-driven message by (for example) broadcasters, and it distinguishes these activities from product advertising by manufacturers.

128. This kind of speaker is even willing to *expend* his resources in order to persuade others. Political contributions and campaign expenditures are familiar examples, and the inequalities in speaking power flowing from inequalities in wealth have been a focus among those concerned with electoral reform. The Supreme Court has recognized that "virtually every means of communicating ideas in today's mass society requires the expenditure of money. . . . The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech." Buckley v. Valeo, 424 U.S. 1, 19 (1976) (per curiam). It further stated that "the dependence of a communication on the expenditure of money" does not vitiate its protection under the First Amendment. *Id.* at 16. Indeed, the willingness of an actor to spend money to disseminate an idea, rather than to make money on the sale of an idea, provides evidence that the actor intends to disseminate a speaker-driven message rather than a market-driven message. Although a speaker might promote a speaker-driven message concerned with his own material well-being, such as a message that taxes should be reduced or student loans should be increased, the content of the message reflects his own views and preferences, and the material benefit he seeks is not from the sale of the message but the policy consequences of the message.

message by referring within themselves toward persuading others to embrace their perspective. Such a speaker expresses a message intended to shape the marketplace of ideas, to change or reinforce people's views or values, by expressing his own notion of what is right.[129]

* * *

As earlier acknowledged, one might be concerned about the practical significance of legal categories which focus on an actor's motives and intent. How could the legal system determine an actor's intent in fact, in order to give real world significance to categories that distinguish between an actor's decision to formulate and sell the market-driven message and an actor's decision to enlighten through self-expression?

Consider four responses. First, the fear that one could never hope to ascertain reliably an actor's complex purposes should not abort an essential inquiry into constitutional norms. Almost any method one might employ in interpreting constitutional text requires identifying values deemed to underlie that text and exploring their implications. If an actor's purpose is really what should matter given the constitutionally significant normative framework, recognizing that normative proposition is foundational—the basis on which formal and technical doctrine must be constructed. Law, after all, is about the vindication of public values. This is no less true—perhaps it is especially true—for constitutional law.

Second, as suggested in the introduction, exploring the normative significance of categories of purpose that are pure, yet rare—such as a purpose to enlighten through speaker-driven self-expression or a purpose to profit entrepreneurially by selling a market-driven message—enables one to explore the normative significance of more complex varieties of purpose that may be far more common.

Third, by identifying an actor's purposes as a linchpin on which constitutional protection should depend, one can endeavor to construct proof rules by which the legal system could make determinations about an actor's purposes, specifically designed to account for imperfections in adjudicative fact finding.

Finally, in confirmation of the two foregoing propositions, one should note that the legal system already contains count-

129. Of course, even a market-driven message can have an effect in shaping people's ideas. Such *unintended* effects should be deemed constitutionally irrelevant. *See infra* text accompanying notes 155-62, 184-88.

less contexts in which an actor's purposes have been defined as legally relevant and in which the difficulties in fact finding have been accommodated.[130] Both within the law and more informally, human beings are forever being judged by their purposes, and properly so. Our capacity for moral choice is so much of the human self-image.

Thus, despite the apparent problems involved in determining whether a particular actor was engaged in selling a market-driven message, pandering with a market-driven message, or enlightening with speaker-driven self-expression, some patience may be warranted. Once one determines that the categories have normative constitutional significance, one can confront the problems of developing legal doctrines to put those categories into practical operation.[131]

A normative constitutional distinction can and should be drawn between decisions to sell the market-driven message, to pander with the market-driven message, and to enlighten with speaker-driven self-expression. Such is the task of the following sections. These sections consider whether an actor's choice to sell the market-driven message warrants special constitutional solicitude as part of "the freedom of speech." They will explore this question from the perspective of a First Amendment informed by three normative perspectives: the value of speech in enabling citizens to engage in democratic self-government; the role of speech in enabling individuals to attain personal fulfillment and autonomy; and the relationship be-

130. Indeed, federal campaign law restricting contributions to political campaigns itself requires a determination as to whether a donation was "made for the purpose of influencing" an election. If so, restrictions apply. If not, restrictions do not apply. *See, e.g.*, 26 U.S.C. § 9032 (1976). The criminal law, of course, is filled with provisions that make an actor's purposes legally relevant, and require proof of those purposes beyond a reasonable doubt.

The Court's constitutional law of defamation requires a determination of whether a defendant speaker acted with "actual malice"—i.e., whether the defendant knew his statements about the plaintiff were false or was reckless as to their falsity. *See infra* notes 256-61 and accompanying text.

131. Beyond questions of workable legal doctrine, there is a fourth reason for paying attention to an actor's purposes and motives when endeavoring to define communication that should be deemed a valuable part of "the freedom of speech" worthy of constitutional protection. Principles affect the way in which people think and talk about issues. If discourse about the freedom of speech were informed by principles that elevate efforts to enlighten with the speaker-driven message and that denigrate efforts to sell or pander with the market-driven message, behavior in the marketplace of ideas might be improved. *See infra* notes 263-64; 303-05 and accompanying text.

tween Congress's copyright power and the First Amendment's prohibition of laws abridging the freedom of speech.

B. DO CHOICES TO SELL THE MARKET-DRIVEN MESSAGE DESERVE CONSTITUTIONAL PROTECTION AS SPEECH?

1. Democratic Self-Governance Perspectives

> A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.
>
> —James Madison[132]

It is broadly accepted that speech is protected because it is necessary for democratic self-government.[133] "Democratic self-government," however, is not self-defining. Thus, the following analysis will consider the normative significance of decisions to sell the market-driven message from the perspective of two significant strands in American constitutional law that posit the manner in which our democracy ought to operate: republicanism and pluralism.

In versions of democracy with a republican emphasis, citizens ideally would act in pursuit of the public welfare through political discourse. Versions of republicanism posit that each citizen has a right and a responsibility to seek the public welfare through debate and deliberation and to vote according to his (or her) view of the public welfare.[134] Law should be the

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132. 9 THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910).

133. *See, e.g.*, Mills v. Alabama, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."); MEIKLEJOHN, *supra* note 26, at 26-27 ("The principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issues should be decided by universal suffrage."); SUNSTEIN, *supra* note 13, at xvii ("My goal in this book is to evaluate the current system in light of the relationship between political sovereignty and the free speech principle."); Bork, *supra* note 26, at 26 (arguing that only "explicitly and predominantly political speech" is entitled to constitutional protection).

134. Versions of republicanism frequently posit that each citizen has an *equal* right and *equal* responsibility to participate in the formation of public policy. *See, e.g.*, GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 233 (1992) ("Republican citizenship implied equality."). Commentators have built upon this premise of equality in critiquing the Supreme

community's best collective judgment about rules that will best serve its long-term public interests.[135]

By contrast, in versions of democracy with a pluralist emphasis, there is a less ambitious model of citizen behavior. Pluralism forgoes aspirations for a public-spirited deliberation about public policy. Rather, from a pluralist perspective, democratic self-government provides the mechanisms by which citizens can pursue self-interest in a process of interaction with each other—whether cooperative or competitive.[136] Although

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Court's invalidation of governmental efforts to limit the impact of powerful speakers on public discourse. *See* Bruce Ackerman, *Crediting the Voters: A New Beginning for Campaign Finance*, 13 THE AMERICAN PROSPECT (1993), http://www.prospect.org/archives/13/13acke.html; SUNSTEIN, *supra* note 13, at 98 (arguing that "[e]fforts to . . . ensure that [economic inequalities] are not turned into political inequalities[] should not be seen as impermissible redistribution"). This Article pursues a critique of current judicial doctrine that does not depend on this equality perspective. At the same time, it is not inconsistent with, and could be supplemented by, greater emphasis on equality in defining the extent to which actors are engaged in "the freedom of speech" protected by the First Amendment.

135. *See, e.g.*, SUNSTEIN, *supra* note 13, at 18 (positing a "central constitutional goal of creating a deliberative democracy"); *id.* at 20 (suggesting the need for "broad and deep attention to public issues"); *id.* (positing a precondition of "political equality" as reflected in "one person-one vote").

136. First Amendment scholars have characterized Justice Holmes's jurisprudence as having been predicated on pluralist premises and Justice Brandeis's opinions as having reflected republican premises. *See, e.g.*, MEIKLEJOHN, *supra* note 26, at 71-82 (examining Holmes's emphasis on individual self-interest and his resulting belief in competing pluralist interest groups); SUNSTEIN, *supra* note 13, at 23-28 (comparing Holmes's conception of interest groups competing in a marketplace of ideas to advance their self-interest with Brandeis's more romantic view of communication as civic participation). In Sunstein's view, pluralism and republicanism would have different responses to governmental efforts to promote public deliberation or to curb inequalities in speaking power derived from inequalities in wealth. *See id.* at 28. I suggest that this is not necessarily so. At least with respect to entrepreneurial decisions to sell the market-driven message, pluralism and republicanism can have converging implications.

Furthermore, Sunstein distinguishes between pluralism's marketplace view of democracy and republicanism's view of "civic competition." *See id.* at 28. He suggests that from Holmes pluralist perspective, "truth" is defined as that which "emerges through 'free trade in ideas,'" such that no idea is intrinsically more worthy than another. *Id.* at 25. "For Holmes, [truth] seems to have no deeper status." *Id.* Sunstein also suggests that for Holmes, not only is politics a "market," but it is a market "like any other." *Id.* The former proposition seems incontrovertible. The second, I suggest, is manifestly wrong for several reasons. First, to posit that trade in ideas is indistinguishable from trade in sneakers and cigars ignores that the First Amendment gives the freedom of speech (whether conceived in market or civic terms) a special status. Second, positing this equivalency between markets in ideas and markets for products ignores the foundational and, therefore, prior position that rulemak-

this notion of pluralism is normatively less demanding than is republicanism, it has its own normative frames of reference. It posits not only that majorities have the power to rule but that a majority among "the People" have the right to rule. It encompasses, as well, a norm of political equality that is nearly universally articulated, even if somewhat vaguely: each citizen, as a member of the sovereign People, has equal status and an equal right, through the franchise, to contribute to the formation of public policy.[137]

The republican and pluralist notions of democracy have been balanced in our constitutional heritage, with each emphasized in different institutional contexts. In *The Federalist No. 10*, for example, James Madison's fear of "majority faction" seems to view a pluralist version of democracy as too often descriptive of the electorate's behavior. "A zeal for different opinions," Madison said, has "divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good."[138] Voters might in fact pursue public policy based on short-term and selfish concerns.[139] In doing so, they might act contrary to "the permanent and aggregate interests of the community."[140] Madison sought to prevent such effects of majority faction through the structure of the nation's

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ing processes must occupy. Markets in products require rules. In the American scheme, the Constitution provides rules for making rules—including the rules by which markets in products are conducted. Third, pluralist democracy can have deeply normative roots. From such a perspective, it is not necessary to embrace republican ideals in order to accord society's rulemaking procedures a privileged status—even over its procedures for economic market exchange. For more on Sunstein's treatment of Holmes and pluralism, see *infra* notes 175-81 and accompanying text.

137. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 566 (1964) (holding that the Equal Protection clause "guarantees the opportunity for equal participation by all voters in the election of state legislators" and prohibits diluting the weight of votes "because of place of residence").

138. THE FEDERALIST NO. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961).

139. *See* WOOD, *supra* note 134, at 253 ("Madison's *Federalist* No. 10 was . . . [a] frank acknowledgment of the degree to which private interests . . . had come to dominate American politics. . . . Madison and the Federalists . . . were not modern-day pluralists. They still clung to the republican ideal of an autonomous public authority that was different from the many private interests of the society."); *see also* ROBERT H. WIEBE, SELF-RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY 13-14 (1995) (stating that American revolutionaries claimed a republican virtue in contrast with British corruption).

140. THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

legislative process. This suggests Madison's embrace of republican objectives, at least as an ideal toward which governmental structures and processes should be oriented. Ideally, democratic self-government should pursue "the permanent and aggregate interests of the community."[141] If voters cannot be relied upon to act as republican citizens, then at least the government's structure should discourage pluralist efforts to undermine the republican vision of public policy.[142]

Furthermore, as suggested in Hamilton's *The Federalist No. 78*, a significant part of the Constitution's function was to provide a method for ensuring that at least the nation's fundamental public policy would respect the republican objectives of providing for the community and the future, as well as for the self and the present. Hamilton suggested that the people themselves, in making "the supreme law of the land" in the Constitution's text, endeavor to make public policy with extraordinary care; and that this carefully crafted policy, enforced by politically unaccountable judges, is designed to supersede the decisions of majority factions—that is, decisions by "the people themselves" reflecting "ill humors" stirred up by "the arts of designing men."[143] Thus, for Hamilton as for Madison, pluralist democracy might describe the electorate's ordinary behavior. Republican democracy was an ideal to be approximated through a range of constitutional structures, devices, and substantive provisions.[144]

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141. *Id.*

142. Senators theoretically approach issues of public policy differently than do members of the House, in large part because their six-year term of office provides a longer separation from the momentary impulses of the electorate than does a Representative's two-year term. *Compare* THE FEDERALIST NO. 63, at 384 (James Madison) (Clinton Rossiter ed., 1961) (arguing that the Senate six-year term provides "sufficient permanency . . . as a defense to the people against their own temporary errors and delusions"), *with* THE FEDERALIST NO. 52, at 327 (James Madison) (Clinton Rossiter ed., 1961) (arguing that because of their two-year terms, House members have "immediate dependence on, and an intimate sympathy with, the people"). More importantly for present purposes, people as voters approach life's questions differently than do people as consumers, in large part because as consumers people make decisions for the self and the moment. As voters, people can make decisions oriented not only toward the future, but focused more on the welfare of the community as well.

143. THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

144. Both the pluralist and republican strands have run through American thought and discourse about democracy through the years. Robert Wiebe, for example, describes the rhetoric of labor and farmer leaders from the late nine-

Constitutional scholars have long noted that the two justices most responsible for modern First Amendment doctrine had different understandings of the freedom of speech because each viewed democracy from a different perspective. Justice Holmes embraced a pluralist perspective of "excessive individualism."[145] According to Meiklejohn,

> Mr. Holmes sees a human society as a multitude of individuals, each struggling for his own existence, each living his own life, each saving his own soul, if he has a soul to save, in the social forms of a competitive independence. Always, therefore, he tends to interpret the constitutional cooperation of one hundred and more millions of Americans, together with past and future generations who belong to the same community, as if they had no fundamental community of purpose at all. The theory of strife he can understand—but not the theory of cooperation. A nation tends to be, for his mind, a huge collocation of externally related atoms.[146]

Justice Brandeis, on the other hand, embraced a perspective that emphasized a more ambitious and optimistic republican notion of the political process. Cass Sunstein, build-

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teenth century, at a time when society was understood as becoming increasingly fractured. The rhetoric suggests an optimistic reliance on republican strands in the American democratic tradition:

> The Knights did not speak just for wage earners or the Populists just for farmers. Each invited all respectable citizens to join in the national revival. Both envisaged sweeping social changes from simple, peaceful mechanisms: cooperatives, land reform, the subtreasury, bimetalism. Correcting the crucial errors would bring all Americans together again. . . .
>
> Behind these expectations of wholeness lay the vision of the People, the American citizenry deciding in the common interest.

WIEBE, *supra* note 139, at 124. He also describes the reliance on the rhetoric of pluralist difference and equality underlying the expansion of those eligible to vote during the first half of the nineteenth century. *See infra* note 171. Republican strands shaped the Progressive movement of the late nineteenth century: "[P]rogressives favored quality, not quantity: better informed, more alert, less gullible citizens. Their model voter was an individual who approached political problems as scientific issues to be resolved objectively in the public interest, then cast his secret ballot accordingly." WIEBE, *supra* note 139, at 164; *see also* David Chang, *Conflict, Coherence, and Constitutional Intent*, 72 IOWA L. REV. 753, 767-75 (1987) (discussing the motive of political self-constraint as a basis for constitutional mandates).

145. MEIKLEJOHN, *supra* note 26, at 71.

146. *Id.* at 71-72. Indeed, Holmes's pluralism has been viewed as merely a description of the way America operated, rather than resting on or promoting any prescriptive notion. *See, e.g.*, EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE 168 (1973) (describing criticism of Holmes's "functional approach" to law, which "led directly to the doctrine that 'might makes right'").

ing on Meiklejohn's earlier analysis of the distinctive strands in the thought of both Holmes and Brandeis, observes that

> Brandeis thinks that a democracy requires a certain sort of person, one who takes citizenship seriously.... Hence—in words foreign to Holmes—Brandeis writes that "the greatest menace to freedom is an inert people"; hence "public discussion is a political duty"; hence the free speech principle is connected with faith in "the deliberative forces" in government.[147]

The following sections suggest that from both republican and pluralist perspectives, decisions to sell the market-driven message as a commodity may not warrant special protection as part of "the freedom of speech." Because the Supreme Court has defined First Amendment interests with respect to both speakers and listeners,[148] the following discussion considers whether both dissemination and receipt of the market-driven message, when sold for economic profit, should be deemed worthy of special protection as an essential part of "the freedom of speech" under a republican-oriented First Amendment and a pluralist-oriented First Amendment.[149]

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147. SUNSTEIN, *supra* note 13, at 27.

148. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("[T]he people as a whole retain their ... collective right to have [radio] function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."); *see also* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 757 (1976).

149. *Cf.* PURCELL, *supra* note 146, at 5. Purcell suggests that "[d]uring the nineteenth century ... [t]he democratic ideal ... was widely accepted as an axiom of life. Though Americans were unconcerned with elaborate theoretical justifications, they were nevertheless convinced that democracy was both rationally and morally the best possible form of government." *Id.* Purcell examines the impact of "scientific naturalism as a philosophical world view"—i.e., of empiricism, skepticism, and the scientific method of inquiry—on the views held by American intellectuals about democracy during the first two-thirds of this century and finds a fundamental erosion of that nineteenth century faith. *Id.* at 10-11.

The scientific naturalists would not credit ethical or moral beliefs as anything more than emotion (and, as such, not provably true or false). *Id.* at 48-49. Purcell quotes Eric Temple Bell, once president of the Mathematical Association of America, as having said that "[t]he philosophic theory of values is to the propagation of bunk what a damp, poorly lighted cellar is to that of mushrooms." *Id.* at 59-60. "By the early thirties the most fundamental epistemological assumptions of American intellectuals rejected the idea that any prescriptive ethical theory could possess rationally compelling authority." *Id.* at 73. Said George H. Sabine in 1937, "in politics and ethics one can postulate what values one chooses[;] consistency will then determine what follows, but it cannot either rule out or substantiate the postulate." *Id.* at 199-200.

It was scientific naturalism, and its jurisprudential expression of legal realism, more than conventional justifications of democracy, that endured crisis

in the late 1930s and the aftermath of World War II. The proposition that values could be neither demonstrably true nor false was sorely tested by Hitler, and by Stalin, and the emotional revulsion was felt not only by ordinary folk, but by intellectuals as well. The moral relativism of scientific naturalism became a target for those, such as Catholics, who were entirely comfortable with values, as well as for intellectuals who sought somehow to reclaim values within the perspectives of scientific naturalism. *See id.* at 159-78.

The naturalistic intellectuals responded to these attacks by arguing that it was moral certainty that led to totalitarianism; moral relativism actually supported open and contingent democracy. *See id.* at 200. Democracy was justified instrumentally as providing privilege to fewer values than do authoritarian systems, and promoting a freedom of speech which, in a context of moral relativism, allows political processes at least to resemble the experimental methods of science. *Id.* at 205. "[D]emocracy alone was based on a rational and scientific attitude toward human understanding and political morality. Scientific naturalism necessarily implied an open, diverse, democratic social order." *Id.* The "relativist theory of democracy," as Purcell calls these views, was based on the notion that all ideals (propositions of value) are essentially equal. This is quite different from the pluralism of the more traditional sort—that all men are essentially equal. Furthermore, Purcell notes that the naturalists' justification of democracy was both prescriptive in this sense and descriptive, as "an empirical description of the social consequences of philosophical relativism and absolutism." *Id.* at 239.

It is unclear whether the prescriptive or descriptive versions of "the relativist theory of democracy" would have anything to say about whether the speaker-driven or market-driven should be viewed as privileged under the First Amendment. Yet, one might speculate that from the prescriptive perspective, relativist theory might deem it irrelevant whether a person is articulating his own beliefs or packaging those of others, so long as he does not seek to suppress the beliefs of others. Indeed, the relativist view might welcome the market-driven message as part of the bread and circuses of our time that could forestall impulses toward mass ideological movements.

Although there may have been a fundamental difference between the views about democracy held by "Americans" in the nineteenth century and the views held by certain American "intellectuals" in the twentieth century, one must consider the relevance, if any, of such differences for questions about how the First Amendment should be interpreted. Intellectuals of this ilk neither have been given, nor have they seized, governmental authority. Government, politics, and public policy remain deeply grounded in a priori, unprovable belief. To scientific naturalists, the enterprise of constitutional interpretation, to the extent that it must be prescriptive, must be nonsense. Yet whatever claim certain intellectuals might have had to superior insight, changes in their views concerning the moral basis of democracy would not be relevant for those who believe, for example, in originalism as the proper method of constitutional interpretation. For others, who acknowledge that original intent must somehow be relevant in interpreting constitutional text, but who believe that modern social circumstances must somehow be incorporated as well, ideological changes could be relevant. What is unclear, however, is how a notion that the ideology of some intellectual elite has evolved should affect the task of interpreting the Constitution. Purcell notes that even in the twentieth century, "the great majority of Americans . . . simply accept[] democracy as an ethical good on grounds of tradition, faith, habit, and necessity." *Id.* at 169. If participants in the prevailing political culture, including gov-

a. Republican Perspectives

i. On the Interests of the Speaker

From the perspective of democracy with a republican emphasis, not even all *self*-expression intended to persuade would be worthy of the highest solicitude. The pursuit of short-term personal interests through speech intended to persuade others is at odds with the republican ideal of disinterested deliberation about the permanent and aggregate interests of the community. Madison surely would not conclude that government should be permitted to prohibit self-interested, speaker-driven self-expression simply because such speech fails to abide by the ideals of republicanism. Despite this, he would be able to distinguish between the high value of discourse about the general good and the lower value of discourse about personal interest.

One who seeks to sell a market-driven message, however, has no purpose of participating in public discourse at all. Rather, the seller of the market-driven message seeks simply to engage in commerce as a participant not in the marketplace of ideas, but the marketplace of products. He is neither contributing to the community that with which republican decisionmaking is concerned—each citizen's honestly held views about the community's interest; nor is he seeking to get from the community that to which republican decisionmaking views as his entitlement—the community's careful consideration of the merits of *his* views. He is thinking about selling a product. The product may be formed with words and symbols, but the ideas conveyed are not being put to uses relevant to republican democracy and its creation of public policy. He is not concerned about persuading or being persuaded. Thus, he should be viewed as no more entitled to the First Amendment's special solicitude than is the manufacturer of shoes, sailboats, or saunas.[150]

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ernment officials, continue to believe (or speak as if they believe) in democracy in a morally vague, unskeptical, and nonempirical way, it is difficult to justify the proposition that these intellectuals' skepticism about any moral basis for democracy should provide the perspective from which the First Amendment's meaning is constructed.

150. Meiklejohn did not address this question, but did address another that goes further than is necessary here. For Meiklejohn, even some who express their own ideas are not engaged in the protected "freedom of speech":

> The First Amendment was not written primarily for the protection of those intellectual aristocrats who pursue knowledge solely for the fun

Alexander Meiklejohn invoked the republican notion of deliberation as an ideal approach to making public policy and the town meeting as a model of republican deliberation. Reasoning from the premise that the town meeting "is a group of free and equal men, cooperating in a common enterprise, and using for that enterprise responsible and regulated discussion,"[151] Meiklejohn distinguished between mere "speech," which is not protected, and "the freedom of speech," which is protected. For Meiklejohn, "debaters must confine their remarks to 'the question before the house.' . . . If a speaker wanders from the point at issue, . . . he may and should be declared 'out of order.' He must then stop speaking, at least in that way."[152] For Meiklejohn, even a speaker who expresses his heartfelt views about one issue is not participating in the "freedom of speech" if the community has agreed to discuss another issue. It follows a fortiori from this republican perspective that if an actor is not expressing his personal views at all—let alone his personal views on "the permanent and aggregate interests of the community"—he is not "cooperating in [the] common enterprise," and he is not participating in "freedom of speech."[153]

Indeed, Meiklejohn himself suggested that

> [t]he radio as it now operates among us is not free. Nor is it entitled to the protection of the First Amendment. It is not engaged in the task of enlarging and enriching human communication. It is engaged in making money. And the First Amendment does not intend to guarantee men freedom to say what some private interest pays them to say for its own advantage. It intends only to make men free to say what, as citizens, they think, what they believe, about the general welfare.[154]

> of the game, whose search for truth expresses nothing more than a private intellectual curiosity or an equally private delight and pride in mental achievement. It was written to clear the way for thinking which serves the general welfare.

MEIKLEJOHN, *supra* note 26, at 45-46.

151. *Id.* at 23.

152. *Id.*

153. In discussing deliberation, Meiklejohn emphasized the importance of articulating all viewpoints rather than enabling all individuals to articulate their beliefs. Thus, nine people whose views are the same as one already expressed might be denied the opportunity to speak, in favor of one person who wishes to express views that have not yet been heard. This is a perspective rooted in republicanism rather than pluralism. *See id.* at 94-98.

154. *Id.* at 104; *see also* SUNSTEIN, *supra* note 13, at 17-18 (observing that "[n]ewspapers and broadcasting stations in turn operate largely . . . on the profit principle").

ii. On the Interests of the Listener

One might object to this suggestion on the ground that although the seller of the market-driven message may not be concerned with the ideas being disseminated, the consumers—or the "audience"—are so concerned. Indeed, the audience might crave the market-driven message. Furthermore, consuming the market-driven message that has been sold for profit might affect the way people think, just as can listening to the speaker-driven message that has been disseminated to enlighten. Indeed, the Supreme Court has stated that

> [i]t cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.[155]

From the perspective of a First Amendment rooted in a democracy with a republican emphasis, however, these objections are misplaced.

The market-driven message when sold for profit might well be desirable to people but surely not all that is valuable in the marketplace of commerce—as is the latest fashion in sneakers or automobiles—warrants protection as "speech" in the republican marketplace of ideas. Although people might crave the market-driven message as entertainment and escapism, their consumption of the message hardly draws upon the responsible characteristics of the American citizen that forces herself to focus, with discipline, on the difficult task of thinking carefully about public policy. Indeed, for the audience as republican citizens, what is of distinctive constitutional value is information about each other's honestly-felt and well-considered views. Only this information enables people to make collective judgments about the permanent and aggregate interests of the community. One who seeks to sell the market-driven message

155. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) (footnote omitted). Justice Clark continued, "'The line between the informing and the entertaining is too elusive for the protection of [a free press]. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine.'" *Id.* (quoting Winters v. New York, 333 U.S. 507, 510 (1948)). This Article's analysis is concerned with defining this "elusive" line in terms of the intent with which speakers speak and listeners listen.

fails to reveal his views at all, let alone his views about the general interest.[156]

To be sure, the audience might be thinking thoughts, and want to think particular thoughts, when pursuing television shows or movies for entertainment. But people think when they commit crimes, play tennis, use drugs, and have sex, and they engage in those activities with a goal of having certain thoughts and experiencing particular feelings. But a republican rooted First Amendment implies a privileged status for speech in which speaker and listener think specifically about identifying the permanent and aggregate interests of the community; not for activities simply because they might trigger thoughts.[157]

Furthermore, to the extent that the consumers of the market-driven message spend their time engaged in such entertainment, they have less time and attention to devote to speakers who are engaged in self-expression through the speaker-driven message. Engaging in entertainment is not equivalent to engaging with one's fellow citizens about community values and public policy.[158] People seek entertainment to satisfy certain immediate desires. Entertainment displaces an

156. Although the market-driven message does, indeed, contain messages and convey ideas received by the audience, the content of the market-driven message is determined by what appeals to large numbers of people for entertainment or escapism. *See, e.g.*, Broadcast Services; Financial Interest and Syndication Rules, 56 Fed. Reg. 26,242 (1991) (codified at 47 C.F.R. § 73.662) (removed from C.F.R. in 1996). Thus, the messages are likely to reflect the short-term and personal desires of the community. These desires may well not even concern public or governmental matters. Even if disseminators of the market-driven message intended these ideas in a speaker-driven way (which by definition they do not), they would be second-class ideas from the republican perspective. The ideas conveyed would not concern the permanent and aggregate interests of the community.

157. From this perspective, the freedom of speech is not exercised unless both speaker and listener seek a meeting of the minds, a common understanding, about the general welfare. Meiklejohn expressed such a view, in suggesting that the First Amendment's

> purpose is to give every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal. When a free man is voting, it is not enough that the truth is known by someone else. . . . The voters must have it, all of them. The primary purpose of the First Amendment is, then, that all the citizens shall, so far as possible, understand the issues which bear upon our common life.

MEIKLEJOHN, *supra* note 26, at 88-89.

158. *See* Collins & Skover, *supra* note 37, at 1105 ("The human drive for pleasure, fueled by so many aspects of a highly capitalistic and technological society, is greatly accelerated by the amusement medium.").

individual's consideration of his own long-term interest, let alone his consideration of the permanent and aggregate interests of the community.[159]

Alexander Meiklejohn and his town meeting are again instructive. For the town meeting as a model of republican decisionmaking processes,

> the point of ultimate interest is not the words of the speakers, but the minds of the hearers. The final aim of the meeting is the voting of wise decisions.... And this, in turn, requires that so far as time allows, all facts and interests relevant to the problem shall be fully and fairly presented to the meeting....
>
> ... What is essential is not that everyone shall speak, but that everything worth saying shall be said.... Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.*[160]

For Meiklejohn, therefore, it would be "out of order" for "twenty like-minded citizens" each to read the same position statement at the meeting—even if members of the audience might wish to hear the same tune sung over and over again. To do so would add nothing relevant to the community's deliberation and, because time is necessarily limited, could prevent the consideration of different views that other members of the community espouse.[161]

Thus, consumption of the market-driven message—core activity in the entrepreneurial realm of consumer sovereignty—seems an activity antithetical to the aspirations of citizen behavior in a republican democracy.[162] Given our premises (for

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159. *Id.* ("[A] society that dedicates more than a quarter of every day to television is less likely to embrace the Madisonian ideals of critical discourse and civic participation.").

160. MEIKLEJOHN, *supra* note 26, at 25-26 (emphasis in original).

161. *Id.*

162. Indeed, Meiklejohn belittled discourse intended to shape ideas, and received by an audience in that spirit, when the mutual concern of speaker and listener was self-interest rather than the public good. He recoiled against Holmes's prescription that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Id.* at 86; *see supra* notes 133, 142-43 and accompanying text. Pursuant to this Holmesian perspective, a pluralist perspective,

> [w]e Americans ... have taken the "competition of the market" principle to mean that as separate thinkers, we have no obligation to test our thinking, to make sure that it is worthy of a citizen who is one of "the rulers of the nation." Each one of us, therefore, feels free to think

this section) that speech is protected because of its role in enabling the processes of republican decisionmaking, there is no good reason to accord decisions to sell or to consume the market-driven message a *privileged* status—especially in the face of potential government efforts to displace the disseminators of market-driven messages with those who wish to engage in speaker-driven self-expression. The point, again, is not that the government must regulate decisions to sell the market-driven message under a republican-oriented First Amendment, but that it may.

b. Pluralist Perspectives

Because republicanism is so far removed from American political practice, it is a weak and unlikely perspective from which to define the parameters of the First Amendment's "freedom of speech." People pursue short-term and personal interests pervasively, both in politics and in private interaction. Thus, a pluralist model of politics provides a far better fit.

The Federalist's notion of pluralism seemed to contain both descriptive and prescriptive elements. It was descriptive (and, indeed, disappointed) in noting ways in which voters, through selfishness or shortsightedness, might fail to pursue the permanent and aggregate interests of the community. But *The Federalist*'s view of pluralist democracy is prescriptive when comparing it with circumstances that deviate even more from a republican ideal. Thus, Madison implies that majority faction is to be preferred to minority faction, because at least the former vindicates the majoritarian element of "the republican principle":

> If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution.[163]

Many versions of pluralism are rooted in an additional moral notion about the equal political status of each voter.[164]

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as he pleases, to believe whatever will serve his own private interests. MEIKLEJOHN, *supra* note 26, at 86.

163. THE FEDERALIST NO. 10, at 80 (James Madison) (Clinton Rossiter ed., 1961).

164. See, for example, *Wesberry v. Sanders*, where Justice Black, for the Court, determined that "in its historical context, the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to

be worth as much as another's." 376 U.S. 1, 7-8 (1964) (citations omitted). Justice Black relied on the proposition that "[o]ne principle was uppermost in the minds of many delegates: that, no matter where he lived, each voter should have a voice equal to that of every other in electing members of Congress." *Id.* at 10. Whatever question there might be as to whether most (rather than simply many) delegates favored such a principle of political equality, it seems clear that voter equality has been a long and substantial strand in American political discourse. Although disagreeing with Justice Black that the framers intended to mandate "one person, one vote" for congressional elections, Justice Harlan acknowledged that "many, perhaps most, of them also believed generally . . . that within the States representation should be based on population." *Id.* at 27. Justice Harlan also noted that Congress has periodically enacted legislation under Art. I, § 4 requiring that congressional districts contain "as nearly as practicable an equal number of inhabitants." *Id.* at 42-43; *see also* WOOD, *supra* note 134, at 259-61. The point here is not to establish that *Wesberry* was correctly decided or that it was not. Rather, it is that the value of political equality has been a consistent theme in American thought about democracy, even from a pluralist perspective in which republican ideals were ignored or deemphasized. *Cf.* Gray v. Sanders, 372 U.S. 368, 381 (1963) ("The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.").

In 1816, Thomas Jefferson asserted that "a government is republican in proportion as every member composing it has an equal voice in the direction of its concerns . . . by representatives chosen by himself." Reynolds v. Sims, 377 U.S. 533, 573 n.53 (quoting Letter from Thomas Jefferson to Samuel Kercheval, *in* 10 WRITINGS OF THOMAS JEFFERSON, 1816-1826, at 38 (Paul Leicester Ford ed., 1899)).

Robert Wiebe describes the development of fractured political parties and homogeneous local political "lodges" in the 1840s. He notes,

> A grudging acceptance of differences sufficed to give 19th century lodge politics its distinctive form of equality. It was an equality that had nothing to do with a belief in everybody's worth or in everybody's right to his own habits, customs, and faith. It implied no willingness whatsoever to rub elbows with strange people. . . . Hate . . . played an important role in defining the culture of lodge politics.
>
> This equality was strictly procedural: preparing for elections, voting, participating in the results, and on round again. . . . Participation trained citizens—in effect, it made people citizens.
>
> Decentralization was crucial to this process. So was the general leveling of authority that generated a sense of all groups holding some for themselves and no group holding a great deal for any purpose. It was a curious validation of James Madison's faith that in an extensive republic, suspicious, fragmented factions would police one another's power. . . .
>
> But what held all this together? The political parties themselves fell short . . . . What gave heterogeneity its wholeness in the 19th century, what created unity, pure and simple, out of this diversity, was the single moment of a general election. Here democratic culture came full circle. At the beginning, it was the franchise that defined each white man as the equal of every other, validated his right to self-determination, and invested him with public authority. At the end it was using those same badges of sovereignty that transformed other-

Unless a voter's neighbors inform him of their desires, he can decide neither how to persuade them nor how to compromise with them. To respect the equal political status of each member of the community, therefore, pluralist decisionmaking depends upon exchanges of earnestly held beliefs and ideas.

Such a prescriptive notion of pluralism posits the right of citizens to pursue their personal and short-term interests through persuasion and voting.[165] Democracy with a pluralist

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> wise scattered, suspicious men of every type and persuasion into one governing People. . . . For that instant, they were the American People. Then the moment passed; they left as they had come, with all their divisive attachments intact.

WIEBE, *supra* note 139, at 81-83; *see also* SUNSTEIN, *supra* note 13, at 20 (observing that Madisonian democracy is founded on "political equality" and that "[a]t least in the public sphere, every person counts as no more or no less than one").

165. It is hardly deniable that democracy in American constitutional law has rested on a normative foundation. From the Constitution's Preamble, in which "the People of the United States" claimed the right to create their preferred government, to Justice Marshall's acknowledgment in *Marbury v. Madison* that "the people have an original right" to the government they want, political actors were speaking and acting not as descriptive chroniclers and combatants wielding raw power but as participants in a normatively rooted enterprise.

Prescriptive versions of pluralism also frequently posit that each individual has an *equal* right to participate. *See* ROBERT A. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT 8 (1967). Dahl's interpretation of the pluralist impulse in America posits the virtue of "multiple centers of power . . . to tame power, to secure the consent of all, and to settle conflicts peacefully . . . because constant negotiations among different centers of power are necessary in order to make decisions." *Id.* at 24; *see id.* at 40. Robert Wiebe sees a similar commitment to equality in America's "logic" of democracy, in both its variant emphases on individual (pluralism) and community (republicanism) even at a time when only white men enjoyed an equal moral status:

> Since all white men governed themselves equally as individuals, all white men combined as equals to govern themselves collectively. Individually, each white man made his contribution to the whole, an additive idea about citizenship that could be traced back to Aristotle. Collectively, all white men formed the governing people, a holistic idea about civic life that only congealed early in the 19th century . . . .

WIEBE, *supra* note 139, at 15.

This notion of political equality is reflected in the way in which the Supreme Court has interpreted the Constitution to allocate voting rights. "One person, one vote" is a foundational characteristic of pluralist democracy. No one is entitled to have his personal preferences count for more than those of his neighbors in the law's accommodation of private interests. In *Wesberry v. Sanders*, Justice Black characterized a prevailing view at the Constitutional Convention: "[N]o matter where he lived, each voter should have a voice equal to that of every other in electing members of Congress." 376 U.S. 1, 10 (1964). In *Reynolds v. Sims*, Chief Justice Warren articulated similar sentiments:

emphasis responds to the problems created because each individual's consciousness is separated from each of his fellows'. We are separated beings, with personal values and interests, and we all wish to maximize the benefits we gain from this life. Because our desires may conflict, each of us might potentially limit the extent to which others might benefit from their lives. Because our desires may coincide, each of us might potentially help others to increase satisfaction and happiness.

Thus, democracy with a pluralist emphasis is concerned with providing a system that can, as justly as possible, create the rules by which the conflicting interests of intrinsically valuable human beings are resolved. It is also concerned with providing space within which individuals can communicate about their concerns and interests, toward maximizing the extent to which those interests are cooperatively vindicated within the confines of existing law.

i. On the Interests of the Speaker

For pluralist democracy, "speech" is the means through which each citizen may endeavor to garner support for his preferences.[166] Thus, to qualify as "speech," communication must

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> [E]ach and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature.

377 U.S. 533, 565 (1964).

Prescriptive rules of the political process—and the separation of the economic sphere from the more fundamental sphere of politics (the sphere within which the rules for economic transactions are made)—can be derived from a premise of political equality and are reflected in the near universal view that it is permissible and desirable to prohibit vote buying. During the pluralist trends of the early nineteenth century, when political equality was a driving theme among "white men," to use Robert Wiebe's phrase, the Governor of New York proposed in 1852 that a person who tries to bribe a voter should lose his own franchise. WIEBE, *supra* note 139, at 71. To corrupt another's expression of political will, in other words, was such a violation of the rules of the game that one deserved to be disqualified from playing. Each individual has a right to pursue his own preferences in public policy, but only to the extent of exercising one vote.

166. Gordon Wood reports the views held by organizations of New York artisans in 1765: "*Self-interest* is the grand Principle of all Human Actions . . . . And in the great essential Interests of a Nation, . . . as every individual is interested, *all have an equal Right to declare their Interests,* and to have them regarded." WOOD, *supra* note 134, at 246 (second emphasis added). Wood

be undertaken with an intent to persuade others to embrace the views articulated by the speaker. Activity that is not undertaken with this intent to persuade is not "speech" because it is not relevant to the goals of pluralist decisionmaking—*providing the means by which people can maximize their preferences, as affected by the problems and potential from interaction with others, through persuasion.*[167]

Robert Bork has reasoned about the meaning of the First Amendment based on the notion that "the freedom of speech" is protected because it is necessary for democratic self-government. He has argued that only when speech is "explicitly political" should it be deemed constitutionally protected.[168]

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notes that this was an early statement of notions of "popular pluralistic representation" and "interest-group politics" that "would be more fully developed over the following decades." *Id.* at 245-46.

167. Justice White, dissenting in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), made a similar point. In *First National Bank*, Justice White determined that a Massachusetts statute prohibiting corporations from expending money to influence the vote on referenda proposals did not violate the First Amendment. He was concerned that political positions taken by corporations do not necessarily reflect the values of shareholders. Although "investors are united by a desire to make money, . . . [t]his unanimity of purpose breaks down . . . when corporations make expenditures . . . designed to influence the opinion or votes of the general public on political and social issues that have no material connection with or effect upon their business." *Id.* at 805-06. White suggested, therefore, that "when a profitmaking corporation contributes to a political candidate this does not further the self-expression . . . of its shareholders in the way that expenditures from them as individuals would." *Id.* at 806. Because, in his view, "[i]deas which are not a product of individual choice are entitled to less First Amendment protection," *id.* at 807, any intrusion on the freedom of speech by the challenged statute was not so significant as to warrant its invalidation.

168. Bork, *supra* note 26, at 20. On similar grounds, Chief Justice Rehnquist has criticized the proposition that the protection of commercial speech is consistent with the notion that the First Amendment is "primarily an instrument to enlighten public decisionmaking in a democracy":

> I had understood this view to relate to public decisionmaking as to political, social, and other public issues, rather than the decision of a particular individual as to whether to purchase one or another kind of shampoo. It is undoubtedly arguable that many people in the country regard the choice of shampoo as just as important as who may be elected to . . . political office, but that does not automatically bring information about competing shampoos within the protection of the First Amendment.

Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 787 (1976) (Rehnquist, J., dissenting); *cf.* Collins & Skover, *supra* note 37, at 1105 (expressing concern that television is problematic under the First Amendment because it makes citizens "less likely to embrace the Madisonian ideals of critical discourse and civic participation").

A better view of what should qualify as protected speech from the perspective of a First Amendment rooted in pluralist democracy is substantially broader. From a pluralist perspective, "speech" surely does include discussion intended to persuade others about matters of public policy, for through this discussion, individuals act to maximize the extent to which their concerns are vindicated. But, beyond this, a pluralist rationale for protecting speech would extend as well to discussion intended to persuade others to engage in private transactions within the confines of existing law and public policy. Of course, such speech has been treated as protected under conventional First Amendment doctrine.

The concern of pluralist democracy is with the right of each individual to maximize the extent to which her preferences are vindicated in the context of relationships with others—whether in cooperation or in conflict.[169] The reasons for a pluralist concern for public policy—creating rules which, given a context of conflict and potential compromise among individuals, can provide the greatest satisfaction for the greatest number—apply with similar force to private interaction within existing public rules. Indeed, it would be odd if speech intended to induce (legally permissible) private cooperation were deemed unprotected, while speech intended to induce public action were

169. Concern for the ability of each individual to pursue his particular concerns was at the foundation of notions about voting rights and representation during the American revolutionary era. The notion of "virtual representation," in which one empowered element of society—for example, England—was viewed as naturally and properly taking account of and promoting the interests of another (and powerless) element of society—for example, the colonies—was rejected in favor of demands for actual representation. "Apparently the interests of the individuals with the community were so peculiar, so personal, that the only ground and reason why any man should be bound by the actions of another who meddles in his concerns is, that he himself choose that other to office." GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 182 (1969) (quotations omitted). Because the justification for actual representation is the existence of each individual's particular interests and the right of each individual to pursue those interests through voting, a freedom of speech derived from that right to vote should encompass the right honestly to articulate the individual's views and preferences, so that his fellows can meaningfully take account of his desires. It would not extend, however, to "speech" that expressed other than the actor's own views and preferences. To hold otherwise would be to permit individuals to endeavor to manipulate the judgment and votes of others, who have an equal right to the consideration of their own unique concerns and preferences. One has a right to pursue one's preferences by voting, and by speaking. This analysis reflects a prescriptive notion of pluralism, rather than a more descriptive version that could countenance strategic behavior.

deemed protected.[170] When private cooperation is induced, public action can be rendered unnecessary. Private cooperation within existing public rules enhances the satisfaction of the cooperating individuals without harming the interests of the broader community as reflected in its public rules and policies.[171]

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170. One could, however, sketch such a scenario, based on a notion that private, voluntary interaction is inferior to public interaction. While such a notion might be consistent with certain strands of republicanism, a pluralist focus on individuals and their right to pursue personal desires provides no basis for drawing such a line.

One also might draw such a line by reference to certain class or status-based propositions. During the individualist and competitive 1840s, a person's status in the community could vary significantly depending on whether the person was viewed from an economic or political perspective. Wage earners, according to Robert Wiebe, were held in low social esteem, and suffered a vulnerable legal status. But as citizens, as political actors, they were the equals of other citizens:

> What did alter the wage earner's democratic standing was to change identities, then reenter public life through lodges that affirmed their members' independence: now no longer wage earners but Irish Democrats or Iowa Grangers or Civil War veterans. By making themselves invisible as wage earners, their citizenship lost its ambiguity .... [W]age earners recast themselves in work-neutral terms ... and acquir[ed] public equality as they did. A democratic problem that could not be resolved in the working world, in other words, found its most effective answer in the political world.

WIEBE, *supra* note 139, at 95-96. In its time, a notion that workers are the political equals of their fellow citizens, but socially inferior, suffered a deep internal tension. Even if at one time such a notion could have justified the proposition that speech directed toward public action is more valuable and worthy of protection than is speech directed toward voluntary and legal private action, there no longer exists such a prevailing view about the social inferiority or incapacity of persons, at least as defined by reference to categories of economic activity or other private endeavor.

171. Robert Wiebe suggests that in the first half of the nineteenth century, Americans emphasized the individual as a participant in democracy and that in this pluralist sense, "19th century democracy acknowledged no significant contradictions between individual self-interest and collective action. The People sacrificed no individuality." *Id.* at 83.

Vincent Blasi argues that political rationales for the protection of speech provide no basis for viewing nonpolitical expression—such as literature or scientific inquiry—as protected. *See* Vincent Blasi, *Free Speech and Good Character*, 46 UCLA L. REV. 1567, 1569-70 (1999). This seems wrong, however, at least if the political rationale for protecting speech is made in a pluralist, rather than a republican, context. From the pluralist perspective, any speech seeking a meeting of the minds between two or more people, within the law, enhances social welfare. Literature, to the extent reflecting a desire by an author to communicate her ideas to the reader, qualifies as valuable. Scientific inquiry so qualifies as well, as the researcher or theorist seeks truth and to disseminate her view of truth to persuade, or to be tested by, colleagues.

Indeed, Blasi's own argument as to why speech should be viewed as con-

Thus, the notion that speech is protected because it is necessary for the operation of democracy with a pluralist emphasis readily extends to protecting "commercial speech"—that is, speech which "does 'no more than propose a commercial transaction.'"[172] From the liberal-pluralist perspective, the communication necessary to enable individuals to make mutually beneficial bargains within the parameters of existing law is just as important as is the communication necessary to enable individuals to make decisions about the merits of existing law.[173]

That communication intended to persuade others about personal interests and private transactions should be deemed protected speech for a First Amendment rooted in notions of pluralist democracy does not at all imply that a choice to *sell* the market-driven message should be deemed protected as well. Decisions to sell the market-driven message do not express the views or desires of its disseminator. Rather, like the manufacturer of cars and sneakers, the entrepreneur has created a product by predicting market demand. His purpose is to satisfy and capitalize upon that market demand.

Although such decisions to respond to anticipated market demand might be valuable from the policy perspective of laissez faire and consumer sovereignty, they are irrelevant from the perspective of the freedom of speech with a pluralist emphasis. No one argues that choosing to produce and to sell a car with-

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stitutionally valuable is instrumental in a way similar to the instrumental nature of a pluralist rationale for protecting speech. According to Blasi, "a culture that prizes and protects expressive liberty nurtures in its members certain character traits. . . . Such character traits are valuable . . . not for their intrinsic virtue but for their instrumental contribution to collective well-being, social as well as political." *Id.* at 1569. A pluralist rationale for protecting speech would not distinguish between self-expression that is expressly political from that which is not. So long as the impetus for self-expression is to persuade others, one committed to pluralist democracy would value the speech as a potential vehicle for augmenting social welfare.

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

173. *See* DAHL, *supra* note 165, at 17-18 ("If I hold that no one can, as a general matter, know my goals and values better than I myself, then no doubt I will insist that the process of making decisions must provide me with a full opportunity to make my views known; and even if I am willing to leave details to experts, I do not want anyone else to have more power over the decision, in the last say, than I do. A solution along these lines might well appeal to me as the best attainable, given the inescapable conditions . . . that my need for human fellowship impels me to live in a society, that I cannot live with others without sometimes disagreeing with them, and that I must therefore find some way to adjust our conflicts that will appeal to all of us as fair.").

out seat belts is speech protected by the First Amendment. No one argues that choosing to purchase a car without seat belts is speech. No one argues that choosing to drive a car without seat belts is speech. These activities are not speech because they do not involve the expression of one's personal ideas for the purpose of engaging the agreement of others or challenging the views of others. From this perspective, speech is the debate about the merits of existing law. Speech is the bargaining for voluntary transactions within existing law. The transactions, themselves, however, are not speech.[174]

Of course, Coase, Posner, and Epstein argue that such voluntary transactions are no less socially valuable than is the speech that enables people to reach the agreement to engage in the transaction, and, indeed, that the transactions are no less socially valuable than is speech about public policy. Yet, even they attach this value, as a matter of constitutional law, not to the First Amendment's freedom of speech, but to the Fifth Amendment's protection of property. Contrary to their views, the conventional notion holds not only that production and consumption decisions are not part of the First Amendment's freedom of speech, but also that norms of laissez faire are matters of policy discretion rather than constitutional mandate under the Fifth Amendment.

The proponents of the "parity" of speech and property markets and those who assert the primacy of speech over property markets agree that transactions in property are not speech. Cass Sunstein, however, a proponent of the conventional wisdom, has presented an analysis that blurs the boundaries between speech and property markets. Indeed, he has apparently endorsed the Krattenmaker and Powe notion that laissez-faire market policies rooted in norms of consumer sovereignty are consistent with, and implicit in, the notion that the First Amendment protects a free "marketplace of ideas."

174. In contrast, urging people to buy a car—an example of so-called "commercial speech"—is relevant to decisionmaking in a democracy with a pluralist orientation. Similarly, urging people to buy or watch the market-driven message is relevant. When such advertising consists of speaker-driven messages, the actor is seeking to persuade others to act in a way that serves his interests. *Cf.* discussion *infra* Part III.C. Thus, a programming decision to carry and air *Murphy Brown*, to the extent animated by a concern to profit from predicted market demand, would not deserve special constitutional protection from the perspective of a First Amendment rooted in concerns for pluralist democracy. A commercial urging people to watch *Murphy Brown*, however, could.

Sunstein says that this view "can be traced to Justice Holmes's great *Abrams* dissent, where the notion of a 'market in ideas' received its preeminent exposition."[175] He elaborated on his understanding of this view: "Under the marketplace metaphor, the First Amendment requires—at least as a presumption—a system of unrestricted *economic* markets in speech. Government must respect the forces of supply and demand."[176] Sunstein rejects this Holmesian conception of the marketplace of ideas—as he interprets Holmes—because "it confuses modern notions of consumer sovereignty in the marketplace with democratic understandings of political sovereignty."[177] He argues that "for purposes of assessing the system of free expression, Madison's conception of sovereignty is the governing one."[178]

Significantly, Sunstein's version of Madisonian majoritarianism is essentially *republican*, where citizens debate matters of public policy with "respect for the facts, a commitment to reasoned argument, and an effort to reach collectively beneficial outcomes rather than to behave . . . in a narrowly self-interested manner."[179] Based on this republican understanding of the First Amendment, Sunstein argues that government should be freer than it has been to regulate television programming:

> Democratic liberty should not be [confused] with "consumer sovereignty." . . . People might well choose to view a silly situation comedy at night, while also enthusiastically supporting a [government] requirement of media attention to public affairs. Their support of that requirement, operating through democratic channels, could reflect a reasoned judgment. . . . [D]emocratic judgments should prevail, so long as they do not intrude on anything that is properly characterized as a right.[180]

Sunstein thus addresses the relationship between consumer sovereignty and the First Amendment. He suggests that government should be deemed relatively free to regulate television programming decisions. His analysis is problematic, however, for two reasons.

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175. CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 169 (1997) (emphasis added).

176. *Id.* (emphasis added).

177. *See id.* at 170-71.

178. SUNSTEIN, *supra* note 13, at 72.

179. *See id.*

180. *Id.* at 73.

First, his argument that the First Amendment does not encompass consumer sovereignty is rooted exclusively in the narrow and unrealistic normative framework of republicanism. Consumer sovereignty may be at odds with a republican pursuit of the long-term general welfare, but so is interest group politics. Yet, Sunstein does not argue that self-interested political persuasion is beyond the freedom of speech protected by the First Amendment. Indeed, he neglects the relationship between self-interested persuasion and the First Amendment.

Second, by equating Holmes's notion of the "marketplace of ideas" with consumer sovereignty, Sunstein cedes Holmes to Director, Coase, and Epstein. Ironically, Sunstein thus ascribes some plausibility to their assertion that consumer sovereignty is a constitutional norm begging for vigorous protection, by linking it, at least rhetorically, to this conventional constitutional metaphor of the speech "marketplace." If Sunstein is correct about the relationship between Holmes's speech marketplace and economic markets in speech, one would need to reject Holmes and pluralism to justify rejecting Coase's views about the constitutional parity of speech and property markets. Recall Sunstein's proposition: "Under the marketplace metaphor, the First Amendment requires—at least as a presumption—a system of unrestricted *economic* markets in speech. Government must respect the forces of supply and demand."[181]

But Sunstein's analysis misinterprets the meaning of Holmes's commitment to the free competition of ideas in "the market." The facts about which Holmes wrote in his *Abrams* dissent involved the prosecution of advocates for the Russian Communist revolution. Abrams had distributed leaflets urging American factory workers to stop producing weapons that were to be used not only in the war against Germany, but also, he claimed, against the Russian revolutionaries. He was convicted of "incit[ing], provok[ing], and encourag[ing] resistance to the United States."

This was unpopular speech, not sold for any anticipated economic profit, but expressed at great risk to the speakers. It had nothing to do with entrepreneurial motives to exploit the economic forces of supply and demand. Abrams had not determined that American factory workers wanted to hear calls for a political strike and that they would purchase his leaflets in order to enjoy his message. Abrams was not engaged, in other

181. SUNSTEIN, *supra* note 175, at 169 (emphasis added).

words, with the production and sale of market-driven messages in a regime of consumer sovereignty. Abrams was expressing a personal viewpoint—and doing so at great risk to himself—and his purpose was to engage others in communication about right and wrong.

In finding Abrams's speech constitutionally protected, Holmes suggested that the First Amendment requires free space for competition among proponents of different versions of the truth:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow [such] opposition . . . seems to indicate that you think the speech impotent, . . . or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men [realize] that time has upset many fighting faiths, they may come to believe even more than they believe [in] the very foundations of their own conduct[,] that the ultimate good desired is better reached by free trade in ideas—that *the best test of truth* is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes can be safely carried out.[182]

Holmes, of course, is talking about a "marketplace" of ideas in a highly metaphorical sense, having significant distinctions from an economic market. An economic market involves producers whose calculations constitute supply curves and consumers whose values constitute demand curves. Holmes views the free trade in ideas as "the best test of truth." When people *test truth*, they necessarily are engaged in an exploration of their own beliefs. Speakers can *test* truth only when engaged in self-expression.[183] Listeners can *test* the truth of ideas only when exploring what they believe, not when simply experiencing what they enjoy. Indeed, the truth that results when a *thought* gets accepted in the "market" does not involve economic transactions at all.

Voters did not pay Newt Gingrich for the privilege of embracing his "Contract with America." The scientific community did not pay Albert Einstein for the opportunity to embrace his theory of general relativity. The American people did not pay Martin Luther King for his prescriptions on racial justice. These were not relationships between seller and buyer in the

182. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (emphasis added).

183. For a consideration of "Socratic" exploration and the "devil's argument," see *infra* note 228.

regime of consumer sovereignty. These were relationships among people seeking some notion of "truth" in a context of mutual exploration. It was this sort of relationship, not that between producer and consumer, that Holmes had in mind.

In short, Holmes does not equate the "truth" resulting from self-conscious argument about the virtues of communism versus the virtues of capitalism with the point of intersection between a product's supply curve and its demand curve in economic markets. Holmes's pluralist marketplace of ideas would not—as my foregoing analysis endeavors to suggest—equate the value of a television programming decision with the value of a political speech. Indeed, the notion of "truth" Holmes discusses involves determinations of right and wrong among people self-consciously discussing and considering questions of right and wrong—like Abrams and the factory workers he was addressing. Neither the commercial television programmer, nor the manufacturer of trendy sneakers, is engaged in *testing truth through speech* when putting together a product to satisfy anticipated purchaser preferences in the regime of consumer sovereignty.

Thus, while a notion of free trade in a regime of "consumer sovereignty" would view efforts to sell the market-driven message as fully worthy of protection as a *property* right, such was not Holmes's view of speech in *Abrams*. Indeed, Holmes's marketplace concept is tied to the significant second strand of Madisonian constitutionalism that Sunstein overlooked—the factional pursuit of self-interest. Madison viewed faction as inherent in politics. Because inherent, the speech engaged in by factions—self-interested political persuasion—must be viewed as a component of any "freedom of speech" that is constitutionally protected as necessary for democratic self-government. Thus, while Sunstein did conclude that consumer sovereignty is distinguishable from republicanism and its concomitant freedom of speech, he failed to consider whether consumer sovereignty is distinguishable from pluralism and *its* concomitant freedom of speech.

* * *

The foregoing has suggested that from the perspective of democracy with a pluralist emphasis, speech is the means through which people can purposefully overcome their separated consciousness. Speech is the means though which both disagreement and agreement are revealed. Speech is the

means through which disagreement might be transformed into agreement through compromise.

Speech *enables* transactions to occur in the regime of citizen sovereignty—as the discussion that precedes voting and the enactment of laws. Secondarily, speech *enables* transactions to occur in the regime of consumer sovereignty—as the bargaining that *precedes* contract's meeting of the minds—so long as those transactions sought to be induced are within the boundaries of existing law. Thus, from the perspective of democracy with a pluralist emphasis, activity does not involve speech unless both the communicator and the recipient are self-consciously engaged in a dynamic of informing, and learning about, each other's views.

From the perspective of a First Amendment rooted in democracy with a pluralist emphasis, the freedom of speech is comprised of efforts, self-interested or not, to persuade others through self-expression. It is concerned, in other words, with *communication*—communication that can enable individuals to understand one another, to identify differences, to reveal commonalities, to find circumstances where law must mediate public conflict and where contract and exchange can exploit private agreement. Because decisions to sell the market-driven message do not involve this communicative intent, they should be deemed unprotected by a First Amendment rooted in democracy with a pluralist emphasis.

ii. On the Interests of the Listener

From the perspective of those who receive speech in a democracy with a pluralist emphasis, the constitutionally protected interest is in having access to solicitations, to efforts by their fellows to inform, to induce agreement, to find common ground, and to bridge difference. The value of speech is in informing the listener what the speaker believes, or possesses, that could be of benefit to each. The value of speech is as the informational vehicle by which utility-enhancing exchanges can occur. This value is realized only when *both* the speaker and the listener participate, anticipating that there could be a *meeting of the minds* between them. There can be no such meeting of minds when the disseminator produces or sells, and the audience receives, the market-driven message, because the com-

municator of the market-driven message has not expressed what is on his mind at all.[184]

Joseph Burstyn's passages about the constitutionally protected status of motion picture entertainment suggests potential objections to this analysis:

> It cannot be doubted that motion pictures are a significant medium for the communication of ideas. *They may affect public attitudes and behavior in a variety of ways,* ranging from [a] direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.[185]

Burstyn thus implies two objections to the proposition that decisions to sell—and to consume—the market-driven message should be deemed unprotected (or low value) speech, from the perspective of the interests of listeners in a system of pluralist democracy. First, listeners may feel that they benefit from the market-driven message. Indeed, by definition, the market-driven message—when produced as a product to be sold for profit in the regime of consumer sovereignty—is something that a good number of people want to hear. Second, the market-driven message contains ideas, and the recipient of that message thinks thoughts because of it.[186] Thus, one might argue that the audience's concern for market-driven speech is distinguishable from a consumer's concern for cars and sneakers. Market-driven speech affects the thinking of those who hear it. The sale and purchase of market-driven speech may be commerce, *but it is commerce in words.* From the perspective of a First Amendment concerned with enabling the processes of pluralist decisionmaking, these objections do not bear scrutiny.

On the first objection: That people might feel they benefit from having access to the market-driven message (when sold for profit) is not a sufficient reason for concluding that from the perspective of the audience, a First Amendment rooted in the needs of pluralist decisionmaking should be deemed to accord to it a specially protected status. People feel that they benefit from having access to cars, sneakers, prostitution, cigarettes,

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184. *Cf.* J. MILL, ON LIBERTY 32 (R.B. McCallum ed., 1946) (writing that people must hear arguments from those "who actually believe them; who defend them in earnest, and do their very utmost for them," rather than from others who may merely report the arguments).

185. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) (emphasis added).

186. *See id.*

and any number of products and services that are routinely subject to extensive regulation. This, however, does not transform these goods and services into protected speech. To qualify as valuable and protected "speech" for a First Amendment with a pluralist emphasis, the communicator must benefit the audience in a particular way—informing them of the communicator's views. Only such honest communication enables the meeting of minds, public or private, that pluralism celebrates.

On the second objection: It is true that the market-driven message—even when sold for profit—contains ideas and that the recipient thinks thoughts in reaction to it. But from the perspective of a First Amendment rooted in pluralist democracy, this also should not be sufficient to qualify the market-driven message as protected speech within "the freedom of speech." Anything that humans create contains whatever ideas underlie the creation. Furthermore, as discussed above, people think thoughts in response to driving a car (with or without seatbelts), playing football (with or without a helmet), smoking cigarettes (with or without spiked nicotine), and every other activity.[187] When the audience interacts with a television show, a movie, or even a book as entertainment or escapism, its relationship to the communication is not relevant to the processes of pluralist democracy. The audience's use of the ideas cannot be to find common ground between disseminator (i.e., the television programmer) and listener, because the disseminator has not expressed his views at all. With no prospect for a meeting of minds, there is no basis for finding that the audience has a privileged interest in receiving the market-driven message from the perspective of a First Amendment rooted in concerns for pluralist democratic decisionmaking.

Thus, from a pluralist perspective, the relevant dynamic for analyzing the First Amendment value of an audience's consumption of the market-driven message is one of *economic transaction*, by which I mean an exchange of goods for services, services for money, or other things of value to the participants. We never have considered such economic transactions to qualify as constitutionally protected speech. Even Director, Coase, and Epstein do not make such an argument. Whether eco-

187. To be sure, there can be market transactions involving words and ideas as commodities. But from a pluralist perspective, speech is not a commodity but a medium. It is not the end, but a means to the end of creating agreement. A solicitation to purchase market-driven speech is protected. The market-driven speech itself is not. It is just another commodity.

nomic transactions should be deemed entitled to vigorous constitutional protection under the Fifth Amendment as a property interest is an entirely different question. For the First Amendment, however, when deemed concerned with according special protection to speech because of its essential place in democratic decisionmaking processes with a pluralist emphasis, this exclusion of the market transaction from the ambit of protected "speech" is entirely appropriate.[188]

2. Personal Fulfillment Perspectives

Republican and pluralist versions of democratic rationales for protecting the freedom of speech imply that an actor is not engaged in "speech" unless engaged in *self-expression.* Self-expression, in this sense, connotes the communication of an individual's own values, beliefs, and views, for the purpose of testing those views against others' or persuading others to adopt those views. The individual looks within, decides what is most important to her at the time, and candidly expresses her views to test them against those of others or to persuade others to adopt them.

Some have argued that whatever the value of self-expression may be to democratic self-government, self-

188. While an economic transaction is not "speech," the negotiations and representations that precede the transaction are "speech." The sale of a pair of sneakers is not "speech." The negotiations and representations that precede that sale are "speech." A contract for the sale represents a meeting of the minds about the issue at hand, the fruit of the negotiations and representations.

Likewise, the "sale" of the market-driven message—through dissemination and consumption—is a transaction in a commodity. Representations urging the sale of the market-driven message involve communication seeking a meeting of the minds and, therefore, are "speech." Thus, to the extent that a decision to broadcast *Murphy Brown* represents the sale of a market-driven message, neither the broadcast nor its reception by the consumer should be deemed part of "the freedom of speech," so far as a First Amendment rooted in notions of pluralist democracy would be concerned. But the broadcaster's advertisement for *Murphy Brown*, urging viewers to watch it, could be protected as "speech." Such expression could indeed communicate the true views of the actor—the Columbia Broadcasting System. It would be a speaker-driven message, seeking to induce a meeting of the minds between speaker and listener, leaving to the listener the decision that determines whether a meeting of the minds in fact occurs. Thus, the speech is a transaction cost, rather than the commodity which is the subject of the transaction.

This analysis assumes a personification of a corporation that might not be supportable. Whether corporations should be understood as "persons" for Fourteenth Amendment purposes, and for First Amendment purposes, is beyond the scope of this Article.

expression also is valuable because it promotes self-fulfillment—i.e., that it is a particularly valuable method by which individuals achieve self-realization. Thus, a concern for self-fulfillment could provide a rationale for placing special value—and, perhaps, constitutional value—on self-expression. Indeed, the personal fulfillment value was promoted by Thomas Emerson as a rationale for the protection of speech.[189] It well fits contemporary impulses toward self-indulgence. Yet, it is a problematic basis for understanding why the framers of the First Amendment were concerned about "the freedom of speech."

Frederick Schauer has noted two difficulties. First, to determine whether a particular choice or activity would qualify for constitutional protection under the First Amendment as informed by the personal fulfillment value, "the freedom of speech" must be defined by reference to this particular normative perspective. Second, to justify the proposition that speech warrants constitutional protection based on the personal fulfillment value, one must identify how "the freedom of speech" promotes personal fulfillment in a way significantly distinguishable from the way in which other activities contribute to personal fulfillment.

People gain fulfillment, after all, from a wide range of activities. Some are fulfilled by smoking marijuana. Others are fulfilled by manufacturing cigarettes, or driving recklessly, or building tall structures, or paying low wages. Indeed, the relationship between seller and buyer in the context of consumer sovereignty is one in which each seeks fulfillment, of one sort or another, from an exchange. Fulfillment in the sense of enjoyment, or satisfaction, from putting one's desires into action fails to distinguish any notion of speech from other sources of enjoyment or satisfaction.

To justify the view that individual fulfillment underlies the Constitution's protection of speech, one must posit that there is something special about speech *as a source of individual fulfillment* that justifies (and justified to the framers) giving to that particular source of fulfillment a privileged constitutional status.[190] Not even Director, Coase, and other proponents of

189. *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970).

190. *See* Frederick Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284, 1290-92 (1983) (discussing the significance of self-fulfillment as a rationale for protecting speech).

the notion that speech markets and property markets are of equal value, argue that "speech," "liberty," and "property" have indistinguishable constitutional meaning. Ross Perot might well have been deeply fulfilled by building his businesses, and Donald Trump may be deeply fulfilled by building his structures, but neither speech absolutists who embrace the personal fulfillment value nor proponents of speech and property market parity would likely claim that Perot's and Trump's business activities should be privileged *as speech* under the First Amendment. If the legal category of "speech" in the First Amendment is to have meaning distinct from the legal category of "liberty" or "property" in the Fifth Amendment, one must identify the particular sort of personal fulfillment an actor gains by participating in the freedom of speech and why this sort of fulfillment is distinguishable from that gained from other activities.

Schauer suggests that the best case version of self-fulfillment as a justification for protecting the freedom of speech is an Aristotelian notion of how people should seek fulfillment rather than an Epicurean notion of how people do seek fulfillment:

> This conception of the rich life is derived from ideas of personal growth, self-fulfillment, and development of the rational faculties. Under this conception, one who is enjoying the good life may be neither content nor euphoric in the ordinary sense.... He should feel satisfied in the knowledge that he is realizing his full potential. If it is the power of reason that distinguishes man from other forms of animal life, then only by fully exploiting this power can one be said to enjoy a full life.[191]

A purely subjective, Epicurean notion of self-fulfillment would fail to provide a rationale for according special constitutional protection to any particular source of self-fulfillment—whether speech, religion, or the pursuit of property. Indeed, the purely subjective definition of the good is a characteristic of consumer sovereignty. From this perspective, there may well be a parity—though not an identity—between the markets of speech and property. What determines whether something is valuable is whether someone determines that it is valuable to himself.

But, as Schauer correctly notes, the Constitution's specification of speech for protection—and its additional specification of religion and property for protection—implies that each has a politically defined value—not a purely subjective value—that is

191. FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 49 (1982).

distinct from the others. Invoking an Aristotelian notion of self-fulfillment—rational self-development—as a justification for valuing the freedom of speech can provide a political, rather than purely subjective, basis for identifying that which would warrant special protection as "speech." Indeed, Schauer finds an implicit definition of speech in the Aristotelian ideal:

> [M]inds do not grow in a vacuum. Intellectual isolationism is almost wholly inconsistent with intellectual development.... [I]ntellectual self-development comes from communication of our ideas to others. Our thoughts are refined when we communicate them. Often we have an idea in some amorphous and incipient stage, but see it develop or see its weaknesses for the first time when the idea must be specifically articulated in a form intelligible to some other person.
>
> Seen in this light, communication is an integral part of the self-development of the speaker, because it enables him to clarify and better understand his own thoughts. Communication may also be inseparable from the self-realization of the hearers, the recipients of communication.[192]

This definition of the freedom of speech implicitly distinguishes speech from other sources of self-fulfillment. In so doing, it is consistent with the conventional notion of constitutional law that rejects a parity of markets in speech and property. It also is remarkably similar to the notion of speaker-driven self-expression, disseminated for the purpose of enlightening self and others, that this Article suggests is the implicitly proper definition of "speech" for a First Amendment dedicated to the promotion of democracy with either a republican or pluralist emphasis.

It is, furthermore, a definition of speech that excludes decisions to create a market-driven message, and to sell that message for economic profit. One who manufactures a market-driven message does not identify his own ideas. He cannot refine his ideas when communicating the market-driven message to others, because he has not presented his own ideas. The hearers cannot benefit from discourse about the "speaker's" ideas, again because the "speaker" has disseminated content derived externally, rather than from his own beliefs and values. Thus, whatever rational self-development comes from the self-conscious and interactive search for understanding among uniquely intelligent human beings cannot come from the sale, or consumption, of the market-driven message.

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192. *Id.* at 54-55.

Those who believe that "the freedom of speech" is protected by the First Amendment because of the role that this freedom plays for individual fulfillment come perilously close to proponents of consumer sovereignty who see a constitutional parity between markets of speech and property. Part of the value of consumer sovereignty, after all, is its promise of a mechanism for satisfying each individual bargainer, according to her own values. While proponents of consumer sovereignty profess to be agnostic about whether one source of fulfillment is better than another—leaving that decision to the individual—proponents of the freedom of speech based on norms of personal autonomy must see speech as a special source of fulfillment. Their difficult task, as Frederick Schauer has so effectively pointed out, is to explain why speech is special and to define what human activities qualify as speech.

Although proponents of property rights based on norms of consumer sovereignty and proponents of speech rights based on norms of personal autonomy are all concerned with the value of individual fulfillment, the boundaries between speech and property need not be breached. Each is a distinctive constitutional category, implicitly with a distinctive meaning. Speech absolutists who deny a parity of markets must explain why the speech they see as absolutely protected is distinguishable from the property rights they see as minimally protected. Even proponents of consumer sovereignty who urge the parity of markets must respect the legally distinct categories of "speech" and "property" implicit in constitutional language. Parity of constitutional value does not imply identity in constitutional meaning. Thus, for both the speech absolutists and the proponents of consumer sovereignty, the fulfillment one gains from engaging in speaker-driven self-expression must be distinguishable from the fulfillment one gains from selling the market-driven message.

The foregoing analysis suggests that for both views of constitutional law, one who sells the market-driven message is engaging in activities to which the rights of property—not the rights of speech—are relevant. The difference between the speech absolutists and the proponents of consumer sovereignty is in the constitutional status of property rights. There should be no difference in their judgment as to whether selling the market-driven message is an exercise of speech rights or of property rights.

3. Copyright Perspectives

The Constitution accords Congress power to "Promote the Progress of Science and Useful Arts, by securing, for limited Times, to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Commentators have considered whether there is a tension between Congress's copyright power and the First Amendment's prohibition of laws "abridging the freedom of speech."[193] Through the copyright, an author has the right to forbid the dissemination of his work entirely or to withhold it except upon terms satisfactory to him.[194] Enforcement of this right prevents persons who have not obtained the author's consent from disseminating the copyrighted "speech." Some have argued that by preventing those who wish to use or to disseminate another's material from doing so without her consent, copyright abridges of the freedom of speech for the would-be user,[195] even as it protects the freedom of speech—more precisely, the concomitant "editorial discretion" not to speak—for the creator and those to whom she sells her rights.[196] What, if anything, can copyright reveal about the relationship between entrepreneurial decisions to sell the market-driven message and the freedom of speech?

The copyright power often is understood as having been granted to Congress toward securing "the general benefits derived by the public from the labors of authors."[197] This economic rationale for copyright is concerned with the benefits derived by the public from the economically motivated creativity of authors and can thus be understood as expressing the values of consumer sovereignty. It is based on the behavioral premise that "the provision of a special reward"—i.e., the limited mo-

193. *See, e.g.*, 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.10[A], at 1-62.1 to -63 (1988).

194. "Publication of an author's expression before he has authorized its dissemination seriously infringes the author's right to decide when and whether it will be made public." Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 551 (1985).

195. *See* NIMMER & NIMMER, *supra* note 193, at 1-63; *cf.* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974) ("[The] compulsion to publish that which reason tells [newspapers] should not be published is unconstitutional." (quotations omitted)); Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L. REV. 321, 395-407 (1989) (discussing authorities that state that copyright arguably protects the holder's First Amendment rights by safeguarding the interest in *not* speaking).

196. *See* Samuels, *supra* note 195, at 401.

197. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (quotations omitted).

nopoly rights in their writings and discoveries—would "motivate the creative activity of authors and inventors," to the benefit of the consuming public:[198]

> The copyright law, like the patent statutes, makes reward to the owner a secondary consideration. . . . "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors." It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius.[199]

Thus, the author envisioned by this economic rationale for copyright is one who would not have produced a work but for the incentive of economic reward. William Landes and Richard Posner have conceived the author envisioned by copyright in these economically calculating terms: "*For a new work to be created*, the expected return—typically, and we shall assume exclusively, from the sale of copies—must exceed the expected cost."[200]

Authors may, and frequently do, sell their copyright to publishers, broadcasters, and other mass disseminators of the authors' works.[201] Those to whom the copyright is sold have all

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198. *Id.*

199. *Id.* (quoting United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948)); *see id.* at 477 (Blackmun, J., dissenting) ("Copyright is based on the belief that by granting authors the exclusive rights to reproduce their works, they are given an [economic] incentive to create, and that 'encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors' . . . . The monopoly created by copyright thus rewards the individual author in order to benefit the public." (quoting Mazer v. Stein, 347 U.S. 201, 219 (1954))).

200. William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 327 (1989) (emphasis added).

Copyright also has been justified by a competing notion that authors have "natural rights" "to reap the fruits of their creations . . . and to protect the integrity of their creations as extensions of their personalities." CRAIG JOYCE ET AL., COPYRIGHT LAW § 1.05[B] (3d ed. 1994); *see* PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY 165-70 (1994). Congress and the Supreme Court have seemed to reject this notion, which would justify Congress's copyright power "not because [authors] need protection as an inducement for their efforts, but rather because they deserve protection as an inherent natural right attaching to the act of creation." PAUL GOLDSTEIN, COPYRIGHT § 1.13.2 (2d ed. 2000); *see also* Wheaton v. Peters, 33 U.S. 591, 660-61 (1834); H.R. REP. NO. 2222, 60th Cong., 2d Sess. 7 (1909), *quoted in Sony Corp.*, 464 U.S. at 429 n.10 ("The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings.").

201. *See, e.g.*, Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S.

rights to control the work that had been accorded to the creator. Indeed, in most circumstances, the owner of a copyright seeking its enforcement is a publisher, broadcaster, or other sort of entrepreneurial disseminator. For these actors, copyright does not serve to induce creativity; rather, the copyright induces entrepreneurial investment and sales toward maximizing return on the investment. Yet, the economic rationale for copyright is still applicable, for through the actions of these entrepreneurs, whose investment is protected by the copyright, the public gains access to products that otherwise would not be so readily available.

Is there a conflict between copyright (as informed by an economic rationale) and the freedom of speech? Does copyright protect the First Amendment interests of authors (and publishers) at the expense of the speech rights of would-be users? How should one understand the relationship between copyright and the freedom of speech?

a. On the Interests of the Creator and Licensed Disseminator of Works

This Article's analysis has thus far suggested that from the three normative perspectives underlying "the freedom of speech"—republican democracy, pluralist democracy, and personal fulfillment—there may well be no reason to view the author and entrepreneur who seek to sell a market-driven message as engaging in activity warranting First Amendment protection. The author who creates a market-driven message for the purpose of selling it, and the entrepreneur who buys the market-driven message for the purpose of selling it, are the paradigmatic actors envisioned by the economic rationale for copyright—the author who needs the incentive of reward in the economic marketplace in order to create, and the publisher who needs protection for his property in order to invest.[202] Thus, this Article's analysis implies that there may well be no reason to view their work as part of "the freedom of speech" entitled to special constitutional protection. From this perspective, then, the paradigmatic creators and entrepreneurs contemplated by

539, 547 (1985) (explaining the common practice of authors to sell their rights to publishers).

202. *See, e.g.*, Landes & Posner, *supra* note 200, at 327 ("For a new work to be created, the expected return—typically . . . from the sale of copies—must exceed the expected cost.").

the economic rationale for copyright are not people engaged in the freedom of speech.

In contrast, one who seeks to enlighten through disseminating a speaker-driven message—one who engages in self-expression—has a motive to speak apart from the promise of economic reward. This is an individual who, like Martin Luther King, is concerned with the search for truth through self-expression and who is willing to sacrifice time and other personal resources in order to persuade.[203] This is not the actor envisioned by Landes and Posner, who creates a new work only when the anticipated economic reward exceeds the expected cost. This actor who, under the foregoing analysis, has the purest claim to protection as a participant in the First Amendment's freedom of speech does not need the protection of copyright to induce his communication. This speaker would not seek the protection of copyright—at least for purposes of protecting the scarcity (hence commercial value) of his message—and, indeed, presumably would be pleased if his message were disseminated as far and as wide as possible.[204] For the paradigmatic speaker warranting First Amendment protection—the actor who pedagogically engages in speaker-driven self-

203. *See* King v. Mister Maestro, Inc., 224 F. Supp. 101 (S.D.N.Y. 1963); Estate of Martin Luther King, Jr., Inc. v. CBS, Inc., 194 F.3d 1211 (11th Cir. 1999); *supra* note 183 and accompanying text. This is not to suggest that persons who are granted copyrights should be viewed as categorically excluded from the First Amendment's protection of "editorial discretion." In fact, copyright has not been constructed exclusively from an economic rationale. Beyond this, some actors who do engage in speaker-driven self-expression, and who might seek a First Amendment freedom not to speak, would have an interest in seeking the protection of copyright, so long as the law provided it. The point is simply that *if* one relies on an economic rationale for copyright, the paradigmatic actor warranting copyright protection would be precisely the entrepreneur seeking to sell a market-driven message who, under the analysis presented in this Article, is least entitled to the First Amendment's protection.

204. When Universal City Studios sued Sony for copyright infringement based on the sale of video tape recorders, Fred Rogers, producer and star of public television's *Mr. Rogers' Neighborhood*, did not object to home video recording of his program. He was happy that this then-new technology would enable more people to see, and be influenced by, his program than otherwise would be the case. *See Sony Corp.*, 464 U.S. at 445 n.27. Rogers seems to be one who believes in the message his program conveys and who conveys that message for the purpose of enabling others to see his truths. He seems to engage in the creation of a speaker-driven message and disseminates that message to enlighten. In contrast, Universal City Studios was a profit-seeking corporation. It was concerned with maintaining control over access to its commercial programming to maintain its scarcity, hence its economic value and return. *See id.* at 420.

expression to enlighten self and others—the economic rationale for the protection of copyright is irrelevant.[205]

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205. Again, this is not to argue that no rationale for copyright could warrant protecting one who speaks purely motivated by a desire to enlighten through self-expression. Rather, it is to suggest that the economic rationale for copyright does not extend to persons who are motivated to speak by a pursuit of truth rather than by a pursuit of profit. Indeed, some natural right notion that authors should be entitled to control the use of their works by others could well justify according certain protections of copyright to those engaged in speaker-driven self-expression. The notion that an author has a right to control the use of his words, to maintain the meaning of his words as *he* intended, can even be understood as consistent with republican, pluralist, or self-fulfillment rationales for the freedom of speech. But this justification for such protection is entirely separate from the economic rationale for copyright.

The insistent objection concerned with the complexities of an actor's mixed motives in the real world must be confronted as well. Even if it is theoretically correct that one who speaks the truth purely as she sees it is the paradigmatic actor entitled to the First Amendment's protection, and one who purely seeks profit by selling the speaker-driven message is the paradigmatic actor warranting the protection of copyright—and that there is no reason to extend the protections of one area of law to the other area's paradigm—the real world is not organized into such neatly defined categories.

As previously suggested, rarely might it be said that an author is motivated purely by a speaker-driven desire to enlighten, with no concern for making money. Few have unlimited resources such that they can devote as much of their resources as they wish to self-expression. Most people must spend most of their time earning a living. In doing so, they sacrifice energies that otherwise might be devoted to self-expression. Authors—even those motivated primarily by a sense of art—who seek to earn a living through their writing may sacrifice the purity of self-expression so that their product might be more attractive to potential buyers. Perhaps no one can engage in pure self-expression, undiluted or unaffected by the pressures of earning a living. Conversely, entrepreneurs concerned with maximizing the return on their investments might well choose to forgo a project that they view as excessively offensive to their own values, no matter how profitable that project might prove to be. Perhaps no one engages in pure commercialism, unaffected by some sense of personal conscience.

That reality is complex, and that motives cannot easily be ascertained, might justify a decision to create doctrines tending to accord First Amendment protection to entrepreneurs who sell speech and copyright protection to speakers who seek to enlighten the world. If we cannot reliably apply a category's theoretical boundaries to real world complexities, then perhaps we should not try. This is a prophylactic or "breathing space" justification, however, and is very different from a proposition that entrepreneurs who sell words *deserve* First Amendment protection and that speakers who seek to persuade with self-expression *deserve* the protection of copyright. *See supra* notes 184-88, 193-201 and accompanying text.

Yet, concessions to the messiness of reality would be inapplicable to circumstances in which reality turns out not to be so ambiguous. Furthermore, such concessions might be achieved through legal doctrines specifically tailored to minimize the costs of erroneous determinations of fact. In short, the messy reality justification for a prophylactic decision extending copyright protection to the speaker not motivated by profit, and First

This Article has suggested that proponents of free economic markets should disentangle their notions that commercial television programmers are properly treated both as economic actors in the regime of consumer sovereignty and as speakers exercising "editorial discretion" protected by the First Amendment. Rather, whatever constitutional interest against regulation such programmers have is properly conceived as a property interest protected by the Fifth Amendment. The analysis now also suggests that copyright—*to the extent that it covers actors because of, and relevant to, an underlying economic rationale*—does not protect First Amendment *speech* interests of either authors or publishers. Rather, it protects their *property* interests in maximizing the return on their investment.

Does this proposition intensify a concern that copyright compromises the First Amendment? Does copyright infringe the constitutionally protected freedom of speech of would-be users simply for the sake of protecting the *property* interests (rather than the speech interests) of authors and publishers?

b. On the Interests of Users

The analysis developed thus far would suggest that any putative copyright violator's First Amendment rights should be understood as depending on his motive for dissemination. If the nonauthorized disseminator does not personally believe in the message contained in the copyrighted work and is not concerned with its dissemination to enlighten others, he is not concerned with engaging in discourse about which a First Amendment with either a pluralist or a republican emphasis would have special concern. He is, furthermore, not engaged in Aristotelian self-expression, such that the personal fulfillment rationale for the freedom of speech would be applicable. Indeed, if the nonauthorized disseminator views the copyrighted work simply as a product to be offered in the economic marketplace and sold for a profit, a pluralist, republican, or Aristotelian

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tection to the speaker not motivated by profit, and First Amendment protection to the entrepreneur who uses words, leaves room for other ways of dealing with the messy reality problem. In contrast, justifying First Amendment protection for the entrepreneur, and copyright protection for the actor seeking enlightenment, on the proposition that each actor *deserves* the protection of both areas of law would render the parsing of mixed motives and factual complexities irrelevant. The point here is to challenge this notion of just desserts and to suggest the importance of endeavoring to parse motives, however complex that task might be.

rooted First Amendment should be no more concerned with state enforcement of the copyright holder's property right than it would be with state enforcement of any law prohibiting the theft of private property.[206]

The proposition that "the freedom of speech" and copyright can be understood as envisioning paradigmatic actors with very different motives and intent is reinforced by the doctrine of "fair use." "Fair use" defines circumstances in which it is not a violation of copyright for unauthorized persons to disseminate or otherwise to use copyrighted material. Congress has identified four factors that are

> especially relevant in determining whether the use was fair . . . : (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the substantiality of the portion used in relation to the copyrighted work as a whole; (4) the effect on the potential market for or value of the copyrighted work.[207]

The first factor is concerned with the putative violator's reasons for using the copyrighted material. In the preamble to § 107, Congress has identified six purposes for which an unauthorized user may have acted that would establish eligibility for a finding of "fair use": "purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research [are] not an infringement of copyright."[208] The Supreme Court has noted that in evaluating

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206. The analysis applies as well for state imposition on the liberties of an *authorized* disseminator of an author's copyrighted work. Indeed, this is the scenario which has been the primary concern of this Article—state imposition on the discretion of broadcasters who have purchased authors' copyrights or who are authorized disseminators of authors' copyrighted works. If the government were, for example, to mandate free prime-time television broadcast time for political candidates, it arguably would have displaced market-driven decisions to sell a product with speech higher on the hierarchy of values encompassed by "the freedom of speech"—speaker-driven messages disseminated to enlighten.

Of course, one might suspect that many political commercials are not examples of the speaker-driven message intended to enlighten. Political candidates notoriously pander to the electorate, creating market-driven messages with polls and focus groups, with the intent to benefit on election day from an existing distribution of values. For consideration of whether an effort to pander with the market-driven message should be deemed worthy of special constitutional protection, whether it should be deemed more worthy than efforts to sell a market-driven message, and whether a candidate's pandering in a political advertisement is constitutionally distinguishable from a corporation's pandering in a product commercial, see *infra* Part III.C.

207. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560-61 (1985).

208. 17 U.S.C. § 107 (1992).

"the purpose and character of the use" under factor one, "[t]he [inquiry] here may be guided by the examples given in the preamble to § 107, looking to whether the use is for criticism, or comment, or news reporting, and the like."[209]

Furthermore, § 107 indicates that "the commercial or nonprofit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions."[210] Indeed, an actor's commercial intent to sell copyrighted material for profit weighs against a finding of "fair use." "The fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use. '[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.'"[211]

Thus, when purposes such as criticism, comment, news reporting, teaching, scholarship, or research are pursued for profit, the Court has seemed concerned about the degree to which a potential infringer was motivated by the statutorily favored purposes, and how much it was motivated by a bare concern for profit. In *Harper & Row Publishers Inc. v. The Nation*, for example, the Court found that one magazine's use of passages from Gerald Ford's memoirs (which were licensed to another magazine), did not constitute "fair use." In considering the purpose of the use, the Court determined that a purpose of news reporting, per se, did not necessarily weigh in favor of defendant's use. Indeed, this defendant, *The Nation*, had admitted a "purpose of scooping the forthcoming hardcover and *Time* extracts."[212] Thus, "*The Nation*'s use had not merely the incidental effect but the *intended purpose* of supplanting the copyright holder's commercially valuable right of first publication."[213] Because "[f]air use distinguishes between a true scholar and a chisler who infringes a work for personal profit," *The Nation*'s commercial motive, underlying its news reporting purpose, for using the copyrighted material weighed against a

209. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578-79 (1994) (quoting 17 U.S.C. § 107).

210. H.R. REP. NO. 94-1476, at 66 (1976).

211. *Harper & Row Publishers Inc.*, 471 U.S. at 562 (quoting Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 451 (1984)) (alteration in original).

212. *Id.*

213. *Id.*

finding of "fair use."[214] The Court has, therefore, at least intimated that while purposes such as criticism, comment, news reporting, teaching, scholarship, or research may qualify a use as fair, a motive to enlighten, rather than one simply to profit, must underlie these purposes.

One can understand these congressional choices and judicial interpretations as consistent with the hierarchy of First Amendment norms developed in this Article. When undertaken in a noncommercial context, the six purposes Congress has listed can all be understood as reflecting a purpose to enlighten with speaker-driven self-expression. Research and scholarship are paradigmatic examples of an actor's search for truth. Publication of research and scholarship are paradigmatic examples of an actor's purpose to induce others to embrace—or to challenge—his understanding of the truth. And so it is with the purposes of criticism, comment, reporting news, and teaching—particularly when undertaken in a noncommercial context.[215] When pursued in a noncommercial context, these purposes provide the strongest version of factor one—"the purpose and character of the use"—to support a finding of "fair use." These purposes to enlighten by disseminating one's true beliefs—these *pedagogical* objectives—have been identified by Congress as having a social value higher than either a copyright holder's *commercial* objectives (which must be tempered by "fair use") or another nonauthorized user's *commercial* objectives (which are far less likely to qualify as "fair use").

Thus, when viewed from a perspective resting on an economic rationale, copyright is concerned with assigning priori-

214. *Id.* (quotations omitted); *see also* Ass'n of Am. Med. Colls. v. Mikaelian, 571 F. Supp. 144 (E.D. Pa. 1983) (finding an admission exam preparation course's use of copyrighted questions had a commercial rather than an educational purpose), *aff'd mem.*, 734 F.2d 3 (3d Cir. 1984).

215. These activities frequently may be pursued for profit. It does not necessarily follow, however, that the critic, the reporter, the commentator, or the scholar chooses to disseminate a market-driven message rather than to engage in self-expression. One reporter, who works for a paper with a strong sense of journalistic ethics, may believe that what she reports is true, yet seek to profit from disseminating her information. Another reporter, who works for a paper that presents sensationalism to lure readers, may well not believe her reporting, but write what she (or her editor) believes the public wants to read. The latter engages purely in market-driven expression for sale; the former engages in mixed purposes of disseminating truth, but does so in an institutional context that seeks to profit from the fact that there is an economic market for the truth. For a discussion of the First Amendment hierarchy of values given the reality of mixed motives, see *infra* Part III.B.

ties to the competing *property* interests of entrepreneurial creators, publishers, and users. It accommodates First Amendment concerns in part through notions of "fair use," which *tend* to view those seeking to enlighten self and others through speaker-driven self-expression as entitled to a right of fair use.[216] Prohibiting entrepreneurial users from using copyrighted material does not impinge on First Amendment concerns, because the entrepreneurial user—under this Article's analysis—is not engaged in the freedom of speech. Permitting pedagogical users engaged in self-expression to use copyrighted material as a "fair use" does not impinge the freedom of speech, because there is no impingement.[217]

In short, in defining the law of "fair use," congressional choices and judicial interpretations imply the hierarchy of norms that this Article's previous analysis has sought to reveal: *a purpose to enlighten with a speaker-driven message is more socially valuable than is a purpose to sell a market-driven message—notwithstanding the Director-Coase view about the "parity" of markets.*[218] This Article has suggested reasons to justify

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216. It is widely understood that copyright mitigates potential tension with the First Amendment through the notion that only particular forms of expression are protected, while ideas are not. *See, e.g.*, Samuels, *supra* note 195, at 322-23 n.1.

217. In addition to "the purpose and character of the use," a finding of "fair use" depends on "(2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107 (1995). One can understand the remaining three factors relevant to finding "fair use" as consistent with—if not derived from—the proposition that self-expression for enlightenment is more socially valuable than is an entrepreneurial decision to sell a market-driven message. In particular, factors (3) and (4) can be understood as indicia of whether one who uses copyrighted material does so with the purpose of enlightenment through self-expression, or with the purpose of profiting from selling a market-driven message. The larger the portion of a work used, the less likely that the user is engaging in self-expression. The larger the effect on the potential market for the copyrighted work, the more likely that the user is, in fact, acting with the commercial purpose of affecting the copyright holder's market.

218. A finding that a user acted with a noncommercial purpose does not, of course, mandate a finding of "fair use," nor does finding a commercial purpose preclude a finding of "fair use." *See* Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 451 (1984); Campbell v. Acuff-Rose-Music, Inc., 510 U.S. 569, 584 (1994). Congress might well have concluded that even noncommercial uses of copyrighted material could excessively undermine the value of that material to the copyright holder. It also might well have concluded that certain commercial uses might only marginally undermine the copyright holder's economic value, thus serving the economic rationale for copyright both by hav-

this proposition not just as a matter of policies that may underlie our copyright law, but as a matter of First Amendment prescription, rooted in notions of the freedom of speech derived from pluralist, republican, and personal fulfillment perspectives.

C. DO CHOICES TO PANDER WITH THE MARKET-DRIVEN MESSAGE DESERVE SPECIAL CONSTITUTIONAL PROTECTION? POLITICIANS AND THE FREEDOM OF SPEECH

> [P]andering pays no regard to the welfare of its object, but catches fools with the bait of ephemeral pleasure and tricks them into holding it in the highest esteem.
>
> —Plato[219]

One might object to this Article's analysis on the ground that its suggested constitutional devaluation of decisions by television programmers to sell the market-driven message might imply a similar devaluation of decisions by politicians to pander to voters with the market-driven message. Any suggestion that a politician warrants the First Amendment's solicitude only when earnest and forthright in expressing her true beliefs, one might argue, is too far removed from conceivable reality to be seriously contemplated. Furthermore, if political pandering and entrepreneurial selling with the market-driven message are of equally low constitutional status, then mandating free television time for political candidates would seem to show favoritism for one type of low-status message over another and, therefore, might violate the prohibition of content-motivated regulations.[220] These objections require considering whether there are reasons to attribute distinguishable constitutional value to a politician's pandering with the market-driven message and a television programmer's selling of the market-driven message.

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ing induced the original author to create, and by enabling a secondary author to use the original work—both to the benefit of the consuming public and norms of consumer sovereignty. Whatever particular balance Congress might have struck, the analysis suggests that pedagogical uses of material for speaker-driven self-expression are more likely to outweigh a copyright holder's commercial interests than is a competing entrepreneurial use.

219. PLATO, GORGIAS 46 (Walter Hamilton trans., Penguin Books ed. 1980).

220. For a consideration of whether content-motivated regulation of efforts to sell the market-driven message should be permissible under the First Amendment, see *infra* Part V.A.

This Article has identified two components of an actor's intent in disseminating a message: first, the intent with which the actor develops the *content* of his message; and second, the purpose for which the actor *disseminates* that message. Both the politician's pandering and the entrepreneur's selling disseminate the market-driven message—that is, a message the *content* of which is determined by predicting market demand.[221]

The politician's pandering and entrepreneur's selling can be distinguishable, however, on the second element of communicative intent: the reason for dissemination. A politician who panders with the market-driven message may not believe what he is saying, but he does seek to persuade others about the virtue of the message. A politician seeks to secure as many votes as possible. Thus, Bill Clinton advocated a middle class tax cut during his quest for the democratic nomination in 1992 and aired television commercials seeking votes on that basis. Four years earlier, George Bush advocated a constitutional amendment "to protect the flag" against arsonists and aired television commercials seeking votes on that basis.

An entrepreneur who sells the market-driven message does not care whether the purchaser embraces any particular ideas or values expressed. Rather, he is concerned with whether the consumer will be sufficiently attracted to the product—whether because of the stars, the characters, the setting, the stories—to "purchase" it in the first place and, perhaps, with whether the consumer is so satisfied with the product that she will want to "purchase" another version of it in the future. Thus, Rupert Murdoch presented *Living Single* and other programs geared toward an African-American audience. He may well not have been sympathetic to the messages conveyed (whatever they might have been) and was probably unconcerned with whether people embraced those ideas. As a rational profit maximizer in the regime of consumer sovereignty, Murdoch wanted ratings for his fledgling network. He wanted viewers to consume the programs as entertainment and advertisers to purchase the programs as products. He identified an underserved compo-

221. The market of values and preferences from which the pandering politician seeks to benefit is different from the market of values and preferences from which the entrepreneur seeks to benefit. Politicians speak to people in their capacity as *voters*; entrepreneurs speak to people in their capacity as *consumers*. For more on the proposition that the same individual thinks differently about the same questions depending on the context in which she places herself, see *infra* note 223 and accompanying text.

nent of the viewer market and sought to create and to sell entertainment products that would meet otherwise unfulfilled market demand.

Indeed, the point about the absence of communicative intent—the intent to persuade with an intended message—in *selling* a market-driven message is reinforced when one recognizes that a politician's pandering has an analogous event in the context of commerce: the commercial advertisement. Through the advertisement, the seller wishes to persuade an audience of the merits of some product. This is the difference between commercials advertising *Living Single* and the program itself. The seller wishes to persuade an audience of the value of some idea. A seller might, or might not, believe his message: that watching *Living Single* is the best way to spend half an hour after dinner, or that Coke is "The Real Thing," or that people will be better off for having joined "The Pepsi Generation." Advertising a product that was developed through market research is functionally equivalent to advertising a politician's positions that were developed through focus groups. Each seeks to capture and build upon predicted market demand.

Thus, whether there is some inconsistency in treating the politician's pandering as protected by the First Amendment, while denying such protection to a commercial television programmer's efforts to satisfy consumer demand, is not revealed simply by noting that both actors seek to use the market-driven message. Indeed, the Article has thus far considered only the appropriate status under the First Amendment of speaker-driven self-expression and entrepreneurial decisions to *sell* the market-driven message.

Because part of the earlier analysis stressed the importance of speaker-driven self-expression—i.e., that a speaker actually believe the truth of the messages she conveys—as a condition of value under the First Amendment, it would be helpful to consider the implications of this proposition for the proper constitutional status of the politician's pandering. The full question at this point would consider the constitutional status of the politician's pandering and the entrepreneur's pandering—i.e., an entrepreneur's advertising that does not express his actual beliefs about his product, but instead conveys a message, designed to persuade, that he thinks his audience would want to hear.

1. Political Pandering versus Entrepreneurial Pandering from a Republican Perspective: "The Arts of Designing Men"

Democracy with a republican emphasis values the expression of one's honestly held views about "the permanent and aggregate interests of the community." Pandering, whether political or entrepreneurial, satisfies neither condition. First, pandering does not involve *self*-expression. It involves, in this sense, a lie. Second, both political and entrepreneurial pandering also seem unlikely to be designed to appeal to notions about the permanent and aggregate interests of the community. The pandering politician appeals to concerns and impulses at the forefront of voters' minds—the here and now rather than the permanent; the interests of the self rather than those of the community. Thus, a strict application of the republican ideal would find neither the politician's pandering nor the entrepreneur's pandering particularly worthy of protection as part of the freedom of speech. In *The Federalist No. 78*, Alexander Hamilton spoke of "the arts of designing men" as inducing the electorate to support "dangerous innovations" adverse to the long-term and general welfare.[222]

The pandering commercial advertiser seeks to appeal to concerns even farther removed from the republican ideal. When politicians construct a market-driven message with which to pander, they are attuned to polling data which taps into people's attitudes as *voters* about matters of public policy. When an entrepreneur constructs a market-driven message to advertise a product for sale, they are attuned to people's values as *consumers* seeking immediate gratification for the self. Thus, the pandering politician taps into audience values that are, at least arguably, more forward-looking and community oriented than does the entrepreneur who advertises a product, or who sells the market-driven message. In short, the "market" relevant to the marketplace of ideas for the pandering politician is not the same as the "market" relevant to the marketplace of products for the entrepreneur's market-driven message.

Consider the responses to President Clinton's difficulties with the Monica Lewinsky affair. The public-at-large reacted very differently to the Lewinsky story depending on whether people were asked about its importance to the nation in a pub-

222. THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

lic opinion poll or were given the opportunity to watch a seemingly endless supply of television programs devoted to the subject. Pollsters found that when questioned about matters of public policy, people minimized the significance of the scandal and wished the matter to be dropped. They were responding *as citizens*. Television ratings, however, indicated that when seeking entertainment, people were quite interested in hearing more about the matter. They were acting *as consumers*.

That people have different responses to the same information when presented in different contexts is entirely reasonable. Indeed, that people might approach issues in a more disciplined manner when raised in a context explicitly concerned with public policy than when raised in a context touching simply on life's everyday private choices is implicit in so much of the theory of representative government on which much of the American system rests.[223]

Although neither actor engages in *self*-expression and neither seeks to communicate about the permanent and aggregate interests of the community, it does not necessarily follow that a politician's pandering with a market-driven message and an entrepreneur's pandering with a market-driven advertisement are equally valueless in the context of the freedom of speech in a democracy with a republican emphasis. From this republican perspective, a politician's pandering is far from ideal because she fails to express her own views about the permanent and aggregate interests of the community. Indeed, she is not even necessarily parroting the majority's notions of the long-term general welfare, because people as ordinary voters are more likely to think about public policy from a short-term and personal perspective. Yet, one might argue that from a republican perspective, pandering to the public policy impulses of a majority of the electorate is more valuable than is an advertisement for a television program or for a can of Coke. Although Rupert Murdoch's advertisement for *Living Single* involves communicative intent, his communication is not about matters of public policy at all, let alone about policy as conceived with reference to the long term and general welfare.

223. *See supra* note 142; *cf.* David Chang, *A Critique of Judicial Supremacy*, 36 VILL. L. REV. 281, 295 (1991) (arguing that people might create constitutional provisions "to enforce a greater commitment to certain values . . . than they can trust themselves, and their legislative representatives, to respect" (emphasis omitted)).

2. Political Pandering versus Entrepreneurial Pandering from a Pluralist Perspective

As earlier suggested, republicanism is an unrealistically demanding normative framework from which to develop the meaning of the First Amendment's freedom of speech. Though Madison in *The Federalist No. 10* and Hamilton in *The Federalist No. 78* articulated a republican vision of ideal political behavior, they recognized that a more shortsighted and self-centered pursuit of interests is inevitable in real life. The constitutional design had to account for and accommodate the pluralist impulses of the people.[224]

The Supreme Court has defined commercial speech as "speech which does no more than propose a commercial transaction."[225] As earlier suggested, the larger objective of pluralism is to enable individuals to maximize the extent to which their concerns are vindicated, given the problems of conflict among them or the possibilities created by cooperation among them. From this perspective, speech designed to induce voluntary private transactions within the confines of existing law as much serves the pluralist objectives as does speech designed to induce agreement about public policy—that is, policy defining those private transactions should be regulated. Thus, pluralism, unlike republicanism, readily attaches value to *honestly* expressed statements proposing a commercial transaction. The matter at issue now, however, is the status of entrepreneurial pandering—the proposal of a commercial transaction that does not reflect the seller's true views about the merits of the product he is offering.

Developing a sense of the relative value of a politician's pandering versus an entrepreneur's pandering from the perspective of democracy with a pluralist emphasis requires sensitive and careful analysis. As earlier suggested, the larger objective of pluralism is to enable individuals to maximize the extent to which their concerns are vindicated, given the problems of conflict among them or the possibilities created by cooperation among them.[226] Only the truthful articulation of one's personal values and priorities enables others to determine whether to agree, to contest, or to compromise. Only the truth-

224. *See supra* notes 163-65 and accompanying text.

225. *See, e.g.*, Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973).

226. *See supra* note 164.

ful articulation of one's beliefs enables others to determine how to respond and how to persuade. Dishonesty in articulating one's personal perspective fails to respect the equal right of each member of the political community to contribute to the formation of public policy. One who does not express his true views and values, according to his own priorities, precludes a true meeting of the minds between himself and his audience. This point suggests that any form of pandering, whether by politician or by entrepreneur, may not warrant protection as part of the freedom of speech relevant to democracy with a pluralist emphasis.

The point holds with respect to entrepreneurial pandering. Consider statements that entrepreneurs might make in advertising their product. Assume that corporate executives decide to disseminate the message that "cigarettes are not harmful to your health." Assume that they make these statements, not believing them to be true, but believing that making the statements will strike a chord with consumers, inducing them to make a purchase. Should this statement be deemed protected as part of "the freedom of speech" from a pluralist perspective?

It should not. The pluralist perspective posits the equal right of individuals to pursue their interests through speech and to make decisions that maximize personal welfare, given the problems created by conflict and the possibilities created by agreement. Understanding the nature of disagreement, or how to attempt forging a meeting of the minds, requires that the advertiser express his honest beliefs about the product being advertised.

Established doctrine concerning the constitutional status of false statements can be understood as roughly consistent with this analysis. In *Gertz v. Robert Welch, Inc.*, considering the extent to which the First Amendment limits legislative discretion to impose liability for defamation, the Supreme Court said the following:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in uninhibited, robust, and wide-open debate on public issues.[227]

227. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) (quotations omitted).

The distinction between a statement of fact and the statement of an idea is elusive and, in my view, unproductive. Individuals and society have as much at stake in the articulation of propositions of fact, true or not, as in the articulation of ideas, *so long as the speaker believes what she is saying.* There was value in the Ptolemaic notion that the earth is at the center of the universe, because it reflected what Ptolemy—and those, like the Pope, who were persuaded—actually believed. There was value in Galileo's notion that the sun is at the center of the solar system, because it reflected what Galileo—and those persuaded—actually believed. The Ptolemaic view was not more valuable, and the Galilean view less, simply because the Pope viewed the former as true and the latter as false. Indeed, one cannot determine whether a viewpoint of fact is false or true unless it is articulated and scrutinized. Galileo's speech, therefore, had value despite having been initially viewed as false; Ptolemy's speech had value despite having ultimately been viewed as false. The value lies in each speaker's honest expression of his views, endeavoring to enlighten self and others, in a self-conscious *exploration* of the truth.

Although the *Gertz* Court may have been misdirected in its effort to distinguish the constitutional status of "facts" and "ideas," its suggestion that "the intentional lie" and "the careless error" do not warrant protection as part of "the freedom of speech" was suggestively promising. Persons who express ideas, believing them to be false, necessarily are not engaged in self-expression for purposes of enlightening self and others.[228] Persons who express ideas, with reckless disregard for their truth or falsity, also are unconcerned about promoting understanding. Persons who express ideas carelessly are more concerned about winning than about promoting understanding. Where an entrepreneur seeks to induce a sale, to persuade another person of the virtue of a product or a choice, a pluralist respect for the equal right of that person to his preferences would mandate the truthful expression of one's beliefs.

Is the same conclusion warranted with respect to the politician's pandering with the market-driven message? More careful attention to the politician's role in our democracy might suggest a different conclusion. A politician's role—arguably—is

228. This is not to suggest that "Socratic" expression of statements one believes to be false should be deemed unprotected. The fundamental enterprise of Socratic dialogue, of course, is to deepen understanding and the search for truth.

one less involving speaking for herself in contests about public policy and more involving speaking for, or asking to speak for, a majority of the community. Indeed, a tradition of debate has questioned how a legislative representative should make decisions in voting on matters of public policy. Should she exercise independent judgment and make the case for her decisions to her constituents? Should she vote according to her interpretation of her constituents' present or anticipated preferences? The former notion is more rooted in republican notions of representation; the latter is in the spirit of pluralist notions of democracy.[229]

To the extent that the political candidate—and, even more so, the government official—is a representative or proxy for the larger part of the community, pandering to existing or predicted values can be understood as part of the process by which members of the community communicate, and seek a meeting of the minds, among themselves. Whether the politician panders to the impulsive and selfish side, or to the deliberate and magnanimous side, she enables a discourse about issues that might separate people, or link them together, as lawyers in litigation enable their clients to engage in a discourse which they are otherwise unable to pursue.

This analysis suggests that from the perspective of a First Amendment with a pluralist emphasis, a politician's pandering with the market-driven message has value. That value is a function of the politician's unique role as representative—as proxy for the people. Indeed, significantly, the politician's rights and responsibilities in voting—and speaking—for the community are not a function of the pluralist's empowerment of each individual citizen and the conditions and limitations of that empowerment. As a member of the legislature, the representative's right to vote is different from that of the ordinary citizen—both in its basis and its extent. Thus, the politician-as-representative-to-be derives a right to vote as a member of a legislature from her status as elected representative "by, of, and for" the community. As a member of the legislature, the power attached to the right to vote is not simply to choose the personnel of government; indeed, she has become part of the

229. *The Federalist No. 52* (James Madison) suggests that the House was designed to promote representation intimately tied to voter preferences; *The Federalist No. 63* (James Madison) suggests that the Senate was designed to promote the exercise of independent representative judgment. *See supra* note 142.

personnel of government. Rather, her power to vote is to participate directly in the creation of public policy. In contrast, from a pluralist perspective, the individual citizen has a right only equal to that of all others to have her preferences taken into account. For the individual citizen, honesty in *self*-expression is essential if fellow citizens are to be able to account properly for their neighbors' concerns. It is a condition that implicitly attaches to each citizen's equal status and equal right to contribute to the formation of public policy. Thus, from this reading of democracy with a pluralist emphasis, pandering by a politician can play an essential role in government as it should work and is, therefore, worthy of protection as part of "the freedom of speech."

3. Political Pandering versus Entrepreneurial Pandering from a Personal Fulfillment Perspective

Earlier analysis suggested that however weak self-fulfillment may be as a rationale for according constitutional protection to the freedom of speech, an Aristotelian notion of developing the power of reason provides the least implausible version.[230] From this perspective, an individual must be engaged in self-expression for purposes of enlightenment to qualify as engaging in this particular freedom of speech. Neither the pandering politician nor the pandering entrepreneur is engaged in such expression. Neither is engaged in activity relevant to rational self-development. Neither explores his own beliefs with others by articulating them for others to hear and to respond. From this perspective, neither would warrant the First Amendment's protection.

4. Political Pandering versus Entrepreneurial Pandering from the Perspective of Congress's Copyright Power

The paradigmatic actor contemplated by the economic rationale for copyright needs an economic incentive to create—an incentive that would be diluted if law did not prohibit others from pirating the creator's work. The actor who constructs a market-driven message for sale is such an actor to which the copyright power is relevant. The actor who seeks to enlighten self and others through the expression of her beliefs does not need economic incentive to speak and is not one to whom the copyright power is relevant. Indeed, such persons are often

230. *See supra* Part III.B.2.

willing to *expend* personal resources of time, money, and reputation in endeavoring to seek truth with others.[231]

That Congress has been given the power to protect copyright, but is prohibited by the First Amendment from abridging the freedom of speech, does not appear particularly relevant for analyzing the constitutional status of political versus entrepreneurial pandering. Political panderers seek to persuade others about the truth of their positions. They seek political power, not economic reward, from pandering with the market-driven message. Indeed, they seek money contributions to spread their word. In contrast, entrepreneurial panderers—those who advertise their products or services in terms that they do not actually believe—seek economic reward from inducing consumers to make purchase decisions.

Both political and entrepreneurial panderers have something in common, however, that distinguishes their advertisements from market-driven messages for which copyrights are sought. Both panderers would be happy if their advertisements were repeated, verbatim, as often and as widely as possible. This is quite unlike the copyright holder, who seeks to restrict others from disseminating his product to maintain its scarcity and, therefore, its economic value. Thus, the copyright perspective distinguishes decisions to create and to sell the market-driven message from decisions to pander politically or entrepreneurially with the market-driven message. It does not, however, provide a basis for distinguishing the politician's pandering from the entrepreneur's pandering.

* * *

The foregoing has suggested that from the perspective of personal fulfillment, there is no basis for extending First Amendment protection to either form of pandering. Furthermore, Congress's copyright power does not provide a basis for distinguishing political from entrepreneurial pandering. At least from the perspective of democracy with a pluralist emphasis, however, and perhaps from the perspective of democracy with a republican emphasis, there is reason to accord constitutional value to the politician's pandering while denying such value to the entrepreneur's pandering. Thus, the political rationales for protecting the freedom of speech—in particular, the more plausible pluralist perspective—can draw a meaningful distinction between political pandering and entrepreneurial

231. *See supra* note 183 and accompanying text.

pandering with the market-driven message. These conclusions supplement earlier analysis suggesting that entrepreneurial decisions to *sell* the market-driven message do not warrant protection under the First Amendment from the perspective of republican democracy, pluralist democracy, individual fulfillment, or Congress's copyright power.[232]

IV. DOCTRINAL IMPLICATIONS OF THE UNPROTECTED DECISION TO SELL THE MARKET-DRIVEN MESSAGE: MANDATING FREE TELEVISION TIME FOR POLITICAL CANDIDATES

A. BROAD CONSIDERATIONS

Free-market arguments that television programmers should be treated as are other entrepreneurs in a regime of consumer sovereignty are inconsistent with the proposition that they should also be treated as are speakers under the First Amendment. The entrepreneurial motives underlying decisions to create a message-as-product, and relationships with others as seller to buyer, are otherwise understood as property interests to be protected under the Fifth Amendment, rather than speech interests to be protected under the First Amendment. The First Amendment's freedom of speech is concerned with a different set of values than those encompassed by the notion of consumer sovereignty. Whether one considers the definition of "speech" from the perspective of democracy with a republican emphasis, democracy with a pluralist emphasis, autonomy in the development of the rational self, or the implications of economic rationales for Congress's copyright power, the freedom of speech extends to efforts to enlighten self and others through the honest expression of one's actual beliefs. It

232. If this analysis about the low constitutional status of an entrepreneur's decisions to sell the market-driven message is persuasive, but the effort to distinguish the politician's pandering from the entrepreneur's pandering is not, one might explore the permissibility of regulations, for example, placing conditions on the kinds of advertisements that politicians could present—especially if given free television time. For now, however, the analysis will proceed from the premise that, from a pluralist perspective, one can persuasively distinguish between entrepreneurial pandering with the market-driven message as unprotected by the First Amendment and political pandering with the market-driven message as protected by the First Amendment. This leaves intact the earlier analysis suggesting that entrepreneurial decisions to sell the market-driven message should not be viewed as part of the First Amendment's freedom of speech.

does not extend to efforts to anticipate the consumption desires of others, to construct products that satisfy those desires, and to sell such products for profit—no matter how much the products created might look like speech or, indeed, might constitute speech, if undertaken with different purposes.

The analysis suggests, therefore, what one might call the "market-driven message principle"—a principle denying protection under the First Amendment to entrepreneurially motivated decisions to construct and to sell market-driven messages. It is now appropriate to consider how this principle might be implemented in practice. The following sections will consider issues arising in the enforcement of the market-driven message principle in the context of proposals to mandate free television time for political candidates.

Proposals to require broadcasters and cable operators to provide free time for political advertising have been quite modest. In early 1997, for example, Representative Slaughter introduced the "Fairness in Political Advertising Act of 1997."[233] This bill would impose on television broadcasters a duty to provide at least two hours of free air time to candidates for statewide or national office during each even-numbered year.[234] Furthermore, the bill would require that the time be allocated in segments of "varying lengths of not more than 5 minutes nor less than 10 seconds"[235] and that "at least one-half is broadcast during the hours of 7:00 p.m. to 10:00 p.m."[236] The FCC would be obliged not to renew the license of a broadcaster that fails to comply with these requirements.[237] The legislation also directs the FCC to promulgate regulations imposing the same obligations on cable operators.[238]

The National Association of Broadcasters, among others, opposes this legislation on policy and constitutional grounds. In particular, the NAB argues that mandating free air time violates the constitutionally protected "editorial discretion" of broadcasters.[239]

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233. H.R. 84, 105th Cong. (1997).
234. *Id.* § 2(c)(2)(A).
235. *Id.* § 2(c)(2)(B).
236. *Id.* § 2(c)(2)(C)(i).
237. *Id.* § 2(c)(1).
238. *Id.* § 3.
239. *See* Dan Morgan, *A Made-For-TV Windfall; Candidates' Air Time Scramble Fills Stations' Tills*, WASH. POST, May 2, 2000, *available at* 2000 WL 19606800.

The requirement that broadcasters set aside two hours per national or statewide candidate, in five second to ten-minute intervals, during primetime hours could affect the broadcasters in two ways. First, the broadcaster might simply replace a paid commercial with a legally-mandated unpaid political commercial. Second, the broadcaster might replace time otherwise devoted to programming with an unpaid political commercial while endeavoring to sell and fill regularly slotted paid commercial time.

Under the first scenario, the broadcasters' programming choices would be unaffected. They would not be able to claim plausibly, therefore, that their editorial discretion to select programming has been abridged at all. Broadcasters might argue that they possess privileged "editorial discretion" to choose the advertising they will broadcast. A recognition that even their *programming* decisions reflect entrepreneurial decisions to manufacture and to sell the market-driven message for profit—and that such decisions do not warrant protection as speech under the First Amendment—mandates rejecting any notion that the decision about to whom to *sell* their air time qualifies as protected "editorial discretion." Whatever protection such sales decisions have are properly understood as arising under the Fifth Amendment's protection of property, rather than the First Amendment's protection of speech.[240]

240. Broadcasters have argued, and the Supreme Court has agreed, that regulations intruding on their discretion to select advertisers does impinge "editorial discretion" protected by the First Amendment. In *CBS, Inc. v. Democratic National Committee*, the Court considered whether the FCC was obliged under the First Amendment to prohibit broadcasters from refusing to carry paid political or public advocacy advertisements. 412 U.S. 94 (1973). Noting that "Congress intended to permit private broadcasting to develop with the widest possible journalistic freedom consistent with its public obligations," *id.* at 110, Chief Justice Burger's plurality opinion determined that "[t]he licensee's policy against accepting editorial advertising cannot be examined as an abstract proposition, but must be viewed in the context of its journalistic role," *id.* at 118.

In *CBS, Inc. v. FCC*, CBS, ABC, and NBC challenged an FCC order to accept a thirty-minute paid political advertisement from President Carter's reelection committee. 453 U.S. 367 (1981). They argued that accepting the advertisement would disrupt regular programming and offered to sell five minute time slots instead. *Id.* at 372. Although the Court rejected the argument that the Commission had "unduly circumscrib[ed] their editorial discretion," its analysis proceeded from the premise that the choice of advertisers does involve editorial discretion protected by the First Amendment. *Id.* at 395-96. The Court determined that the regulation at issue was not unconstitutional because of specific physical characteristics of broadcast frequencies—in particular, the need for regulation to prevent broadcast chaos, and the scar-

Under the second scenario, the broadcasters' programming choices would be affected. Rather than the forty-six or so minutes per hour of programming presented during prime time, broadcasters might be left with forty minutes per hour of programming. Thus, for several weeks every two years, NBC might have to produce and broadcast episodes of *ER* with six (or so) fewer minutes of story, as would CBS with its *Diagnosis Murder*. Perhaps *Friends* or *Frasier* or other half-hour series might have to skip a broadcast week.

Given the current doctrinal premise that the programming decisions of television broadcasters are exercises of "editorial discretion" protected by the First Amendment, media corporations claim that such regulations violate the First Amendment on several grounds: first, the regulations arguably discriminate against some speech and in favor of other speech based on content; second, the regulations arguably violate what can be called "the *Buckley* admonition"; and third, the regulations arguably compel broadcasters to speak against their will.[241]

This Article's suggestion that the entrepreneurially motivated decision to sell the market-driven message does not qualify for protection as "speech" under the First Amendment would dispose of each of these arguments. To regulate such programming decisions by mandating the broadcast of free political advertising would no more necessarily violate the prohibition against content-motivated government action than does the regulation of other categories of "unprotected speech"—such as obscenity, defamation, or fighting words.

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city of broadcast frequencies: *Id.* at 395-97. These are the factors on which the *Red Lion* Court relied in upholding the "fairness doctrine." Red Lion Broad. Co. v. FCC, 395 U.S. 367, 396-401 (1969).

Of course, as has been noted, the proposition that physical characteristics of the broadcast spectrum justifies treating broadcasters differently from other speakers under the First Amendment has been severely undercut not only by technological advances but by the incisive analysis of free-marketeers such as Director, Coase, and Epstein. *See supra* notes 17-21, 28-30, 36 and accompanying text. If the Court were to accept their arguments discounting the significance of the physics of broadcasting, then broadcasters could be deemed entitled to the full gamut of protections under the First Amendment—including the "editorial discretion" to choose advertisers. If the Court were to accept my argument, however, that entrepreneurial choices to sell the market-driven message should not be understood as "editorial discretion" protected by the First Amendment at all, then technological changes, or changes in our understanding of the significance of technology, would be irrelevant.

241. *E.g.*, *Turner I*, 512 U.S. 622, 649-59 (1994); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 247 (1974).

Indeed, mandating free time for political candidates during primetime hours does not regulate with reference to the content of the displaced television programs. It regulates only by reference to time periods when the programs air. The time selected for mandating free time for political candidates is based on the fact that the television entrepreneurs have created the maximum possible audience during those hours by successfully responding to the forces of consumer sovereignty.[242]

Second, a principle denying protection as speech to decisions to sell the market-driven message also can dispose of "the *Buckley* admonition." As discussed above, this principle, articulated by the Supreme Court in *Buckley v. Valeo,* has long vexed efforts to reform political campaigns:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources and to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.[243]

The *Buckley* admonition proscribes efforts to redistribute speaking opportunities when such reforms involve displacing the "speech" of those who, in the absence of the regulation, would speak. The *Buckley* admonition, however, does not address the permissibility of efforts to enhance speaking opportunities for some that intrude on the *non*-speech interests of others.

Third, viewing the programming decisions of commercial television corporations as entrepreneurial action in the regime of consumer sovereignty also helps to dispose of arguments that mandating free time for political candidates would force the television businesses to speak against their will. Indeed, as discussed above, the Supreme Court has shown a vastly greater willingness to tolerate regulations that require non-speaking property owners engaged in commerce—such as, for example, the owner of a shopping center[244]—to grant access to speakers

242. For consideration of whether it should be deemed permissible for the government to engage in content-motivated regulation of entrepreneurial decisions to sell the market-driven message, see *infra* notes 270-88 and accompanying text.

243. Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (per curiam) (quotations omitted).

244. Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980); *see supra* text accompanying notes 81-83.

than to tolerate regulations that require speaking property owners not to speak[245] or to convey the messages of others.[246]

Furthermore, one can connect this point to the concerns raised by the *Buckley* admonition. Compelling a shopping center owner to grant access to speakers does not displace any speaking the shopping center has been doing and increases the quantity of public discourse.[247] Compelling a television station to displace entrepreneurial decisions to sell the market-driven message to grant access to speakers also does not displace any speaking the television station has been doing and increases the quantity of public discourse. Compelling a *traditional* newspaper editor to carry a certain message, however, may impinge on that speaker's chosen message by displacing his speech and replacing it with that of someone else.[248] The *Buckley* admonition, concerned with an actor's personal First Amendment rights,[249] is not compromised in the former situation. It is compromised in the latter.

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245. *See Buckley*, 424 U.S. at 143.

246. *E.g.*, Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston, Inc., 515 U.S. 557, 573 (1995) (holding that a state may not require parade organizers to include a group expressing a message with which the organizers disagree); Wooley v. Maynard, 430 U.S. 705, 714-17 (1977) (holding that a state may not require the display of the state motto on private property by persons who disagree with it).

247. *Pruneyard*, 447 U.S. at 85-88.

248. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256-58 (1974). This point assumes that, as a matter of fact, the content decisions made by newspaper editors are not driven by entrepreneurial considerations. Whether the assumption holds true in general, or for particular newspapers, might be contested. My point here is not to suggest a blanket proposition that all newspaper editors engage in speaker-driven self-expression and are, therefore, protected. Indeed, the market-driven message principle would hold that if a newspaper editor makes decisions about the content of the paper predominantly for entrepreneurial considerations responding to the forces of consumer sovereignty, she would be engaged in activity not protected as speech under the First Amendment, but as property under the Fifth.

249. *Cf.* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 812-15 (1996). Justices Thomas, Rehnquist, and Scalia determined that cable television operators maintain personal rights of speech not held by broadcasters under existing—but unstable—doctrine:

> In *Turner*, by adopting much of the print paradigm, and by rejecting *Red Lion*, we adopted with it a considerable body of precedent that governs the respective First Amendment rights of competing speakers. In *Red Lion*, we had legitimized consideration of the public interest and emphasized the rights of viewers, at least in the abstract. Under that view, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." After *Turner*, however, that view can no longer be given any credence in the cable context. *It is the operator's right that is preeminent.*

* * *

Despite all this, a principle denying protection to entrepreneurially motivated decisions to sell the market-driven message leaves room for putative "speakers" to claim that they *are* concerned with enlightening self or others through *self*-expression and, therefore, *are* entitled to the First Amendment's greatest protection. Such a claim would create an issue of fact. If a court determined, as a matter of fact, that the broadcaster was concerned with enlightening through disseminating a speaker-driven message, then the traditional notion of protected "editorial discretion," and its established strongly protective doctrines, would be applicable. If, however, a court determined that the broadcaster was concerned with selling a market-driven message, then the constitutional concerns about intruding on its protected interests would fade. Established doctrine, which depends on and emerges from those concerns, would have to be supplanted.

Broadcasters also might concede that market-driven concerns enter into their programming choices and into their choices of which commercial advertisements to carry. They might claim, however, that programming decisions involve a complex amalgam of a media corporation's market-driven and persuasive speaker-driven objectives. Rupert Murdoch, for example, vetoed the production of a movie about Clarence Thomas and Anita Hill. The movie would have been potentially profitable for his Fox television network, but offended his personal values.[250]

To the extent that programming decisions are made with a measure of speaker-driven concerns, a broadcaster might argue, they warrant a measure of protection as part of the First Amendment's freedom of speech, even under the market-driven message principle. To deny protection because broadcasters are entrepreneurs as well as speakers arguably would allow the market-driven message principle to devour speech that otherwise warrants protection.

Id. at 816 (Thomas, J., concurring in part and dissenting in part) (emphasis added) (quoting Red Lion Broad Co. v. FCC, 395 U.S. 367, 390 (1969)). This proposition presupposed that the activity in which cable operators are engaged qualifies as "speech" for purposes of the First Amendment.

250. *See* Bernard Weinraub, *Hill v. Thomas, Again in the Court of Senate Opinion*, N.Y. TIMES, Aug. 22, 1999, *available at* 1999 WL 30478819 (asserting that Murdoch opposed the film because he "was a friend of Justice Thomas and believed that Justice Thomas had been railroaded at the confirmation hearings").

Such a claim would require consideration of both a normative question and a practical question. One must determine in a normative sense whether a broadcaster who makes programming decisions with a hybrid motivation warrants protection as a participant in the freedom of speech. Furthermore, one must determine how to answer the factual question of whether a broadcaster was acting simply to sell a market-driven message, purely to enlighten with a speaker-driven message, or for hybrid considerations.

B. THE CLAIM OF HYBRID MOTIVATION: NORMATIVE ISSUES OF CONSTITUTIONAL SIGNIFICANCE

In response to an intrusion on their programming discretion, justified in part on the ground that they are concerned with selling a market-driven message, broadcasters could argue: the government cannot know what was in the mind of Rupert Murdoch or Brandon Tartikoff. It does not know what is in the mind of the CBS Board of Directors. Network executives have political values and concerns. They do try to contribute responsibly to public awareness and public discourse, even while paying attention to market share and the bottom line. When you intrude on our programming discretion, by displacing minutes or episodes of *ER*, or *Friends*, or *Frasier*, you are taking away time in which we are indeed engaged, at least partially, with a concern for enlightening with a speaker-driven message. That is still an intrusion on our editorial discretion, and one which compromises constitutional values.

This is an argument that concedes what could hardly be denied—that television programmers, at least in part, are concerned with selling a market-driven message. Yet it seeks to claim a corner of the First Amendment's protective blanket, by asserting, in the fashion of Ben Stein,[251] that broadcasters endeavor to enlighten with speaker-driven self-expression to the extent that the market will bear.[252] At this point, however, at least while operating within the principle that would deny protection to the market-driven message, the broadcasters admit to being imperfect First Amendment claimants.

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251. Stein argued that television programmers pursue an ideologically motivated persuasive agenda. *See supra* notes 112-22 and accompanying text.

252. *Cf.* BETTIG, *supra* note 124, at 36. Bettig has an ambiguous view about the extent to which the capitalists who own the mass media endeavor to shape public ideology in a way that serves their interests or to shape their product in a way that fits the existing tastes and values of the consumers.

Assuming, for now, that broadcasters make primetime programming decisions in part because of both entrepreneurial and pedagogical considerations, the Fairness in Political Advertising Act of 1997[253] would impinge partially on both constitutionally unprotected and protected choices. Intruding on programming decisions, therefore, would involve circumscribing a degree of protected "editorial discretion." Furthermore, it also, arguably, would partially violate *Buckley*'s foundational admonition that "restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[254]

One can respond to these points in several ways. First, one might argue that *any* influence of market-driven considerations undermines, if not obliterates, the value of putative speech—from the perspective of republicanism, pluralism, or self-fulfillment, all of which place value on *self*-expression. When one decides what to say by reference to external considerations, one does not express one's true values, perspectives, and priorities.

This extreme position begs a rather obvious response. Few people speak without considering how their message will play in public. A professor might decide not to make a particular point at a faculty meeting if he anticipates a negative response. A citizen similarly might decide to remain silent at a town meeting. If speech must be purely speaker-driven to warrant special constitutional protection, very little of what people actually say is worthy of protection indeed.

This suggests that such a purist position is untenable and leads to a second response to a broadcaster's assertion of hybrid motivation. One might posit that the more purely a statement reflects a motive for enlightening with a speaker-driven message, the more valuable and worthy of constitutional solicitude it is. The more purely a statement reflects a motive to profit from the sale of a market-driven message, the less valuable *as speech* and less worthy of protection it is *as speech*. Along such lines, one might posit that there are different ways in which a person with hybrid motivation can take account of speaker-driven and market-driven considerations.

First, one's primary motive could be pedagogical—to enlighten oneself or others by engaging in speaker-driven self-

253. H.R. 84, 105th Cong. (1997).

254. Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (per curiam).

expression. A speaker would like to press his highest priorities but might choose to censor his remarks, or forgo some of his preferences, based on an anticipated audience response. Second, one's primary motive could be entrepreneurial—to profit economically by selling market-driven messages. An actor would like to disseminate a product that she anticipates will generate the most revenue, but might choose to censor her product, or forgo some profits, because the "speech" otherwise disseminated would excessively offend her personal values.

Thus, so long as one's motive for speaking is to enlighten, whatever one *says* purposefully expresses one's personal values, preferences, and priorities. When one's motive for "speaking" is entrepreneurial, it is only what remains *unsaid* that purposefully reflects one's values, preferences, and priorities. When the entrepreneur acts, what is "said" reflects the desires of consumers when those desires are within the limits of tolerability for the entrepreneur. Rupert Murdoch, for example, decided to present *Living Single* because he believed it would find a market, not, one would suppose, because it expressed his views of truth. He decided not to present a movie about Clarence Thomas and Anita Hill because the project offended his personal values, not because he thought it would fail to find a market.

A democratic rationale for protecting the freedom of speech, whether with a republican or a pluralist emphasis, would find no special reason for protecting the dissemination of messages that are merely tolerable to the actor, rather than affirmatively reflecting the actor's preferences and priorities. So with the rationale of self-fulfillment. Thus, if television programmers decide what to air based on market-driven factors, and decide not to air some projects based on speaker-driven factors, their activity is predominantly market-driven and not "editorial discretion" worthy of special constitutional solicitude.

In summary, one might posit that if one's impetus to speak is to enlighten self or others through the expression of personal views, and one's impetus for self-censorship is rooted in market-driven considerations, one's speech remains worthy—or more worthy—of special constitutional solicitude. Conversely, if one's impetus to "speak" is to profit from the sale of market-driven messages, and one's impetus for self-censorship is rooted in personal notions of truth and propriety, one's "speech" is unworthy—or less worthy—of special constitutional solicitude. In the higher value scenario, one's principle for selecting mes-

sages is speaker-driven; one's principle for exclusion is market-driven. For the lower value scenario, one's principle for selecting messages is market-driven; one's principle for exclusion is speaker-driven. This analysis suggests a hierarchical continuum of value within a framework of a First Amendment informed by republican democracy, pluralist democracy, or personal fulfillment.

C. PROBLEMS OF PROOF; BURDENS OF PROOF

In determining how to construct doctrine for the adjudication of an actor's intent, it is critically important not only to consider factors relevant for proving the actor's intent, but also—and more fundamentally—to consider who should bear the burden of proving the actor's intent. In our present context, one must consider whether the government should bear the burden of proving that the actor was engaged primarily in unprotected activity (i.e., entrepreneurial decisions to sell the market-driven message) or whether the actor should bear the burden of proving that he was engaged primarily in protected activity (i.e., decisions to enlighten with speaker-driven self-expression).

This section will confront the burden of proof question in two ways. First, it will explore the implications of an established context in which an individual's claim to First Amendment protection depends on a factual determination of bona fides: defamation actions.[255] Second, it will address in a more

255. One can successfully assert a claim that a government regulation burdens the Free Exercise of religion only when the activity regulated is "conduct motivated by sincere religious belief." Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 893 (1990) (O'Connor, J., concurring in the judgment); *see also* Thomas v. Review Bd., Ind. Employment Sec. Div., 450 U.S. 707, 716 (1981) ("The narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that petitioner terminated his work because of an honest conviction that such work was forbidden by his religion."). Thus, established doctrine in this area requires exploring a constitutional claimant's values and beliefs, toward determining whether she was expressing those beliefs in a particular context, just as would the market-driven message principle I have suggested in this Article. Most Free Exercise claims, however, have not been opposed by the government on the ground that the claimant's interest was based on concerns other than sincere religious belief. *E.g.*, Lyng v. Northwest Indian Cemetery Prot. Ass'n, 485 U.S. 439, 447 (1988) (noting that the Government did not dispute "that the Indian respondents' beliefs are sincere"). Thus, the Free Exercise context may not allay the concerns some might have about whether such a principle concerned with an actor's bona fides can be implemented effectively. *See* United States v. Ballard, 322 U.S. 78, 86-87 (1944).

general and systematic way factors to consider for allocating burdens of proof in constitutional adjudication.

1. Learning from the Defamation Analogy

In *New York Times Co. v. Sullivan*, the Supreme Court ruled that a public official could not recover "damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[256] Speech is defamation and is unprotected by the First Amendment, depending on the speaker's intent. Where the speaker does not intend to express his beliefs—whether by speaking with a knowledge of falsity or a lack of concern with whether his statements are true—he may be liable in a defamation action by a public official.

The *New York Times* Court determined that the plaintiff bears the burden of proving that the defendant acted with a belief that his statements were false or without caring whether his statements were true. Furthermore, such proof had to amount to more than a preponderance of the evidence. Rather, the plaintiff must prove the defendant's "actual malice" with "convincing clarity."[257] This section will explore both the substantive notion that a speaker who acts with "actual malice" has not engaged in protected speech and the procedural notion that the plaintiff in a defamation action bears the burden of proving "actual malice" by "clear and convincing" evidence.

The substantive notion that an actor does not engage in protected "speech" when he speaks believing his statements are false, or not caring whether they are true, can be understood as closely related to the notion that selling, or pandering with, the market-driven message is of low First Amendment value. Like one who sells or panders with a market-driven message, one who speaks with "actual malice" has not engaged in self-expression. He has not expressed his views about how the world is or should be. From the perspective of pluralist notions of democracy, such communication does not warrant protection because the actor fails to respect the right of his fellows to account accurately for his views. One who speaks with "actual malice," like one who purveys the market-driven message, has expressed ideas that cannot possibly be the basis for a meeting

256. 376 U.S. 254, 279-80 (1964).
257. *Id.* at 285-86.

of minds between speaker and listener, simply because the speakers are not expressing what their minds believe.[258] From the perspective of republican notions of democracy, one who speaks with actual malice, like one who purveys a market-driven message, has no thought or interest in deliberating about the permanent and aggregate interests of the community. From the perspective of personal fulfillment, one who speaks with actual malice, like one who purveys a market-driven message, has not engaged in the self-expression that can promote an Aristotelian development of the rational self.

More important for present purposes than a normative congruence between denying protection to "actual malice" and to decisions to sell the market-driven message is the enforceability of both principles in practice. The notion of actual malice in defamation actions, and the requirement that it be proved by clear and convincing evidence, has been workable. To the extent that the legal system can cope with the task of adjudicating whether the plaintiff has proved (by clear and convincing evidence) that a defendant in a defamation action has acted with "actual malice," it would seem able to cope at least as well with the task of adjudicating whether the government has proved (by clear and convincing evidence) that a television broadcaster or cable operator has chosen programming during a certain time period because of unprotected entrepreneurial motives to sell market-driven messages for profit.

The *New York Times* Court justified placing a heavy burden of proof on the plaintiff in a civil defamation action in large part because of concern about excessively "chilling" protected speech:

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a . . . "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." The rule thus dampens the vigor and limits the variety of public de-

258. Indeed, one might suspect that in many circumstances, the dissemination of allegations with "actual malice" might be motivated by an entrepreneurial concern to sell a market-driven message. If a headline will sell newspapers, then use it (thus, entrepreneurially market-driven), regardless of whether it is true (thus, "actual malice").

bate. It is inconsistent with the First and Fourteenth Amendments.[259]

One can assume that it is sensible to consider whether one or another rule of liability and burden of proof may discourage or encourage the "'unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[260] One also can assume that the *New York Times* burden of proof was necessary to avoid a constitutionally problematic chill of expression that a speaker believes to be true.[261] It does not follow from such concerns, however, that a putative speaker must always be insulated from regulation by favorable burdens of proof to avoid "chilling" constitutionally valuable speech.

Consider the behavioral pressures that would be created by a regime in which television broadcasters bear the burden of proving that their primetime programming choices are speaker-driven, intended to express truth, rather than market-driven and disseminated as a product. It seems unlikely that the broadcasters would forgo broadcasting altogether. This is quite unlike the "chill" anticipated by the Court in *New York Times*, whereby potential critics of government action would steer clear of expressing criticism altogether, for fear of tort liability. The broadcaster is engaged in the business of broadcasting. The regulation in question imposes not tort liability, but a loss of control of discrete broadcasting time periods and a possible loss in profits. Unless this possibility of lost profits fundamentally undermines the broadcasting business, it is not plausible that broadcasters would choose to forgo the very activity which produces their profits, simply because they have lost control of a portion of broadcasting time.[262]

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259. *Id.* at 279 (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).

260. *Id.* at 269 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

261. For a discussion of the problematic notion that there is no constitutional value in a false statement of fact, see *supra* notes 227-28 and accompanying text.

262. In an analogous context, the Supreme Court has determined that "commercial speech"—that is, commercial advertising—is hardier than political speech. One who disseminates a commercial advertisement generally is pursuing a high priority—his livelihood. *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 772 n.24 (1976) ("Since advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely."). This strong incentive to disseminate the message contrasts with that of the person who might think about discussing a public issue. Similarly, commercial broadcasters have a high incentive to disseminate their programming, which, after all, is the basis of their livelihood.

Rather, if the prospect of governmentally-mandated free air time for political candidates were to have any behavioral influence on broadcasters, it seems more likely that it would influence them to exercise their "editorial discretion" in a way that, in appearance if not in actuality, selects programming for speaker-driven expressive purposes, rather than because of market-driven entrepreneurial considerations.[263] If broadcasters were influenced to disseminate more speaker-driven messages, instead of selling market-driven messages, then "the freedom of speech" is arguably enhanced, because more speech is better than less.

On the other hand, if broadcasters were influenced to *pretend* to disseminate more speaker-driven messages, and courts were unable to determine in constitutional adjudication that programming displaced by regulation is market-driven and, therefore, without special First Amendment protection, broadcasters would reclaim the "editorial discretion" otherwise lost under the market-driven message principle. This analysis thus suggests that so far as "chill" is concerned, regulation permitted under the market-driven message principle would have either a positive or a neutral impact on the freedom of speech.[264]

2. The Market-Driven Message and Burdens of Proof

These benign expectations about the problem of "chill" ordinarily associated with regulations of speech allow one to focus on other considerations relevant to allocating burdens of proof for issues of material fact in constitutional adjudication. Courts and scholars have generally paid too little attention to burdens of proof in constitutional adjudication.[265] Some space will be devoted here to the subject.

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263. Broadcasting corporations might well create new executive positions, perhaps "Corporate Policy Directors" or "Corporate Message Officers," whose responsibility it would be to develop (or appear to develop) the company line on matters of public policy, which would be translated (or appear to be translated) into television programming. Whatever role, real or apparent, these "Corporate Policy Directors" might play in programming decisions, one could hardly doubt that traditional programming executives would continue to focus on market research and market share and continue to play a central role in making ultimate programming decisions.

264. If, however, media corporations were encouraged to disseminate speaker-driven messages—i.e., their corporate view on the way things are and should be—questions concerning the propriety and desirability of their control of such massive speech resources could be intensified. For a discussion of issues of private power and speech, see SUNSTEIN, *supra* note 13, at 234-40.

265. *See* David Chang, *Discriminatory Impact, Affirmative Action, and In-*

A burden of proof is necessary—indeed, adjudication is necessary—because courts lack perfect knowledge about legally relevant facts in disputes between members of the community. The burden of proof determines which party prevails in the face of uncertainty about a legally relevant fact. With uncertainty comes the possibility of error. Thus, burdens of proof are vehicles through which the legal process can endeavor to avoid erroneous decisions. In the context of constitutional adjudication, a court might find erroneously that a challenged policy is unconstitutional or find erroneously that a challenged policy is not unconstitutional.

In thinking about how to allocate the burden of proof as a mechanism for avoiding erroneous legal decisions, judgments about the relative evil or harm from each kind of erroneous decision can be one relevant factor. Is it worse erroneously to uphold a policy and thereby wrongly to permit an intrusion on the freedom of speech, or, is it worse erroneously to invalidate a policy and thereby wrongly prohibit the electorate from enforcing the policy that its representatives have determined should govern?

Relying on this normative factor to justify a decision allocating the burden of proof in constitutional adjudication must always be difficult. Constitutional values restricting legislative discretion are, by definition, important constitutional values. But valid electoral discretion is an important and foundational constitutional value as well. Whether a judicial decision wrongly intrudes on the freedom of speech or wrongly intrudes on legislative discretion, a foundational constitutional value has been wrongly compromised. Whatever difficulty judges and scholars have identifying constitutional values (e.g., whether "the freedom of speech" is predicated on values of democratic self-governance only or concerns of personal fulfillment as well) is compounded when the focus must be refined and the weight (as opposed to the mere existence) of the putative value must be identified.

The difficulty in weighing the relative significance of a constitutional value limiting democratic discretion and the value of valid democratic discretion is particularly acute with respect to the freedom of speech. *Indeed, to the extent that the freedom of speech is protected to promote effective democratic self-*

nocent Victims: Judicial Conservatism or Conservative Justices?, 91 COLUM. L. REV. 790, 835 n.153 (1991).

government, wrongly intruding on legislative discretion impinges the very object of the First Amendment's concern. If a court wrongly upholds a law against a First Amendment challenge, then the freedom of speech—which exists to make democratic processes work—is wrongly compromised. If, however, a court wrongly invalidates a law against a First Amendment challenge, then valid democratic discretion, which the First Amendment is designed to promote, has been compromised.

This difficulty is even further compounded when the particular regulation at issue reflects a legislative judgment as to how the democratic processes can be improved. Under such circumstances, an erroneous invalidation of a regulation *wrongly* denies the electorate a policy which its representatives have determined would improve democratic processes, in the name of a constitutional provision itself concerned with ensuring the proper operation of democratic processes. How difficult it must be to declare that the erroneous invalidation of the electorate's choices in the Fairness in Broadcasting Act,[266] for example, would be worse, or better, than erroneously failing to invalidate that policy would be.

But another consideration can be helpful in thinking about allocating the burden of proof in constitutional adjudication. For an issue of fact that is legally significant for proving unconstitutionality, if one can make a judgment that in a certain category of circumstances, it is more likely than not that this fact has occurred, it would make sense, in cases where such circumstances exist, to place the burden of disproving that fact on the government. Conversely, if one can identify a category of circumstances in which it seems more likely than not that this fact has not occurred, it would make sense, in cases where such circumstances exist, to place the burden of proving that fact on the challenger.

Consider one context in which this probabilistic perspective for allocating the burden of proof with respect to a constitutionally relevant fact has been dispositive. Racial classifications challenged under the Equal Protection clause are presumptively unconstitutional. The government bears a heavy burden to rebut that presumption. Part of the rationale for this presumptive unconstitutionality of racial classifications is (1) the normative understanding that *if* a law was enacted because of

266. S. 742, 100th Cong. (1987); *see supra* text accompanying note 50.

racial prejudice, it is unconstitutional; and (2) the procedural or predictive understanding that laws using racial classifications *more likely than not* were enacted because of racial prejudice. As Chief Justice Burger explained in *Palmore v. Sidoti*, racial classifications are presumptively unconstitutional because they are "more likely to reflect racial prejudice than legitimate public concerns."[267]

Consider whether one might employ this predictive, probabilistic kind of analysis in determining how to allocate the burden of proof with respect to the question of fact that is constitutionally relevant under the market-driven message principle. One may ask: Did a putative speaker disseminate what purports to be protected speech primarily with an intent to enlighten with speaker-driven self-expression or primarily with an entrepreneurial intent to sell a market-driven message? In addressing this question, one might identify indicia suggesting a probability of an actor's pedagogical purposes as well as indicia suggesting a probability of entrepreneurial purposes. Such indicia would ideally involve matters of fact that are easily proved or about which there is unlikely to be dispute. When indicia suggest a probability that an actor seeks to sell a market-driven message, the actor would bear the burden of proving otherwise by reference to other evidence.

Suppose, for example, that the government can establish the following facts, by clear and convincing evidence, about a broadcaster subject to the free primetime political advertising provisions of the Fairness in Broadcasting Act:

1. *The broadcaster is a profit-seeking corporation.* This factor does not by itself suggest anything about the likelihood that a given message is pedagogically or entrepreneurially motivated but could help to suggest such motivation in conjunction with other factors.

2. *The product from which the broadcaster seeks to make a profit is the sale of advertising time during its programming.* This factor implies that the broadcaster views its programming as a product that must be made appealing to advertisers and, ultimately, to consumers. Because advertisers are looking for the maximum audience, they would want to purchase commercial time during popular programs. In order to ensure that their programming is popular with the viewing audience and, therefore, appealing to advertisers, the broadcaster would act reasonably by tailoring its programming to the anticipated desires of the viewing audience. As it

267. 466 U.S. 429, 432 (1984).

makes sense to suppose that broadcast corporations behave in a reasonable, profit-seeking fashion (as do other profit-making corporations), it makes sense to infer a likelihood that profit-making broadcast corporations that sell commercial time to advertisers construct or select their programming as market-driven messages.

3. *The broadcaster charges the highest rates for, and makes the largest profits from, the sale of advertising time during "primetime" hours—i.e., hours in which more people watch television than during another other daily time period.* The higher the rates charged for advertising time, the more likely that the broadcaster is concerned primarily, if not exclusively, with making a profit. The greater the profit motive, the more likely that the broadcaster has constructed or selected its primetime programming as market-driven messages for sale.

4. *The broadcaster selects programming to present by reference to predicted audience ratings, market research, and other bases from which to anticipate popularity.* When the broadcaster relies specifically on information concerned with predicting audience demand in selecting programming, it is reasonable to infer its concern with selling a market-driven message.

5. *The broadcaster selects programming to retain, and to cancel, by reference to measured audience ratings, market research, and other indicia of popularity.* When the broadcaster relies specifically on information concerned with predicting audience demand in retaining or canceling programming, it is reasonable to infer its entrepreneurial concern with selling a market-driven message.

If the government can establish these facts about a broadcaster that challenges regulatory intrusion on "editorial discretion" (such as through the Fairness in Political Advertising Act[268]), it is reasonable for an adjudicating court to erect a presumption that the broadcaster is primarily concerned with selling a market-driven message and, therefore, engaged in commercial activity for which the First Amendment should be deemed to provide no special protection. The broadcaster would remain free to rebut this presumption, and assert a constitutional immunity from regulation, by proving that its general approach to primetime programming, or its approach to particular primetime programs, is primarily to enlighten with a speaker-driven self-expression.[269] One might expect such re-

268. H.R. 84, 105th Cong. (1997).

269. On the other hand, suppose that the following facts are established about an actor who claims to be engaged in the protected dissemination of

buttal to be a difficult task and, I suggest, one that is appropriately so.

Indeed, it is not self-evident that the government should bear the burden of proving these indicia of market-driven motivation. If one asserts a constitutional privilege, one arguably bears some sort of burden to establish that the privilege has been infringed. Yet perhaps the fact that the actor is engaged in the dissemination of words and pictures justifies a *presumption* that he is engaged in protected "speech." Lawyers, judges, politicians, and ordinary people surely have always assumed as much. From a predictive perspective, it perhaps makes sense to suppose that, in general, people who are engaged in using words and pictures are probably doing so to engage in "the freedom of speech"—that is, to engage pedagogically in self-expression. To the extent that this prediction does make sense, it is reasonable to place the burden on the government to prove the existence of circumstances in which that prediction is untrue or in which a contrary prediction is warranted. Such is the point of placing the burden on the government to prove the five indicia of market-driven entrepreneurial motivation. Where the state can meet this burden, it makes sense to presume that the actor, more likely than not, is engaged in predominantly entrepreneurial activity. Thus, based on a probabilistic perspective, where the government proves the existence of these five indicia of market-driven motivation, the burden should shift to the actor asserting a First Amendment privilege to prove that it was acting predominantly with a protected purpose of enlightening with speaker-driven self-expression.

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market-driven messages:

1. The actor is expending money to disseminate the putative speech, without receiving profit-making compensation in return for the dissemination of that speech. *See supra* note 182.
2. The actor does not conduct market surveys before deciding what to say.
3. If the actor is an organization, its membership has been drawn together by a common idea, and the putative speech in question is an expression of that common idea.

These facts would tend strongly to support an inference that the actor was engaged in speaker-driven self-expression.

For a discussion of categories of evidence from which reckless disregard for truth may be inferred in the analogous context of defamation, see, e.g., Gyong Ho Kim, *Evidentiary Behaviors Constituting Reckless Disregard for the Truth*, 20 COMM. & LAW 39, 48-50 (1998).

V. BROADER IMPLICATIONS OF THE UNPROTECTED DECISION TO SELL THE MARKET-DRIVEN MESSAGE

A. CONTENT-MOTIVATED REGULATION OF THE UNPROTECTED MARKET-DRIVEN MESSAGE

Joseph Burstyn Inc. v. Wilson invalidated a state scheme requiring that a film be licensed before it could be exhibited "for pay or in connection with any business."[270] One might take the foregoing analysis to suggest that if a distributor or movie house presents a film as a market-driven message for sale, it should be deemed not to warrant special solicitude under the First Amendment and could be subject to such a licensing provision, as well as a wide array of other regulations.

But the market-driven message principle should not necessarily be taken so far. Indeed, even if one accepts the notion that decisions to sell the market-driven message should not be deemed to be part of "the freedom of speech," the government should not be free to regulate such decisions in a content-motivated way. This part will first examine how this notion relates to existing judicial doctrine, and then explore *why* the regulation of unprotected activity—i.e., sale of the market-driven message—for content-motivated reasons nevertheless should be viewed as constitutionally problematic.[271]

1. Unprotected Speech and Content-Motivated Regulation: Doctrinal Considerations

In *R.A.V. v. City of St. Paul*, the Supreme Court considered a First Amendment challenge to a state statute that imposed criminal penalties for displaying a symbol "'which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender.'"[272] The Minnesota Supreme Court had determined

270. 343 U.S. 495, 497 (1952) (quotations omitted).

271. This Article's analysis will likely be of interest to those supporting—and opposing—Al Gore, Joseph Lieberman, and William Bennett in contemplating the regulation of media portrayals of violence based on concerns about the effects of such speech on children and others. *See, e.g.*, *Gore Takes Tough Stand on Violent Entertainment*, N.Y. TIMES, Sept. 11, 2000, at A1. This section should be a caution, however, that any contemplated regulations must not be motivated by disagreement with the content perceived in market-driven messages, even though manufactured as products for sale.

272. R.A.V. v. City of St. Paul, 505 U.S. 377, 380 (1992) (quoting ST. PAUL. MINN., LEGIS. CODE § 292.02 (1990)).

that this statute applied only to "expressions that constitute 'fighting words' within the meaning of *Chaplinsky*"[273]—and, as such, "not within the area of constitutionally protected speech."[274]

Justice Scalia determined, however, that even with respect to such categories of unprotected speech, the government may not engage in discriminatory regulations motivated by the content of ideas expressed:

> [T]hese areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.) . . . . [T]hey may [not] be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.[275]

Scalia identified two circumstances in which a selective regulation of "unprotected speech" is permissible. First, the government may regulate when the basis for the regulation "consists entirely of the very reason the entire class of speech at issue is proscribable."[276] Under such circumstances, he suggests, there is "no significant danger of idea or viewpoint discrimination."[277] Second, the government may regulate a "content-defined subclass of proscribable speech" when that subclass is "associated with particular 'secondary effects' of the speech, so that the regulation is *'justified* without reference to

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273. *Id.* at 381 (paraphrasing *In re* Welfare of R.A.V., 464 N.W.2d 507, 510-11 (Minn. 1991)).

274. *Id.* at 383 (quoting Roth v. United States, 354 U.S. 476, 483 (1957)). In *Chaplinsky v. New Hampshire*, the Supreme Court identified "fighting words" as one of several categories of speech that are unprotected by the First Amendment:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution.

315 U.S. 568, 571-72 (1942) (quotation omitted).

275. *R.A.V.*, 505 U.S. at 383-84.

276. *Id.* at 388.

277. *Id.*

the content of the . . . speech.'"[278] Again, Scalia says, such a basis "for distinction refute[s] the proposition that the selectivity of the restriction is 'even arguably conditioned upon the sovereign's agreement with what a particular speaker may intend to say.'"[279]

Thus, if a court were to embrace the suggestion that decisions to sell the market-driven message should be deemed unworthy of the First Amendment's special solicitude, it would not follow, at least as a matter of established doctrine, that the government could regulate programming decisions in a content-motivated way. Rather, finding that an actor is engaged in selling a market-driven message would simply eliminate concerns that a content-motivated regulation displacing that actor's "editorial discretion"—such as the Fairness in Political Advertising Act[280]—would involve, in the words of *Buckley v. Valeo*, "restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others."[281]

2. Unprotected Speech and Content-Motivated Regulation: Normative Considerations

Justice Scalia has noted why the First Amendment has been deemed to prohibit content-motivated regulations of speech. "The rationale of the general prohibition . . . is that content discrimination 'raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'"[282] Such a concern about the government's purposeful policing of public discourse emerges from two very different scenarios. First, government officials might seek to suppress criticism of themselves or their policies and thereby *separate* themselves from the majority of the electorate by undermining the processes of accountability. Second, government officials might *respond* to the community's conventional values and seek to effectuate prevailing impulses to purge public discourse of unpopular minority viewpoints.

278. *Id.* at 389 (quoting Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)).

279. *Id.* at 390 (quoting Metromedia, Inc. v. San Diego, 453 U.S. 490, 555 (1981) (Stevens, J., dissenting in part) (citation omitted)).

280. H.R. 84, 105th Cong. (1997).

281. 424 U.S. 1, 48-49 (1976) (per curiam).

282. *R.A.V.*, 505 U.S. at 387 (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991)).

Both scenarios of content motivation contradict the implications of a First Amendment designed to protect speech for the sake of democratic self-government. For government officials to seek to short circuit the processes of democratic accountability transforms them into a minority faction, to use Madison's framework, and prevents the operation of the otherwise available cure for minority faction—that is, the principle of majority rule inherent in "the republican principle."[283]

When government policy reflects the censorship impulses of the broader community, the problematic nature of content-motivated regulation is somewhat more complex. From a republican perspective, all viewpoints about "the permanent and aggregate interests of the community" should be heard. In Meiklejohn's words, purposefully purging public discourse of such viewpoints about which to deliberate is a "mutilation of the thinking process of the community."[284] From a pluralist perspective, purposefully denying people a right to express their viewpoints, no matter how unpopular, contradicts the proposition that each voter is entitled to an equal political status and a right to express her earnestly held views toward endeavoring to test her own views and to shape the views of others.[285]

Yet, one might ask how these concerns are implicated if the government were to pursue a content-motivated regulation of decisions to sell market-driven messages. After all, the foregoing analysis has suggested that entrepreneurial decisions to sell the market-driven message warrant no special constitutional protection, in part because its disseminators lack a purpose of participating in public discourse. So long as those who wish to engage in self-expression by disseminating speaker-driven messages remain free to do so, how is democracy with either a republican or pluralist emphasis compromised by the content-motivated suppression of activity that does not qualify as protected speech?

Although the market-driven message does not contain the ideas and priorities of its disseminator, it does contain ideas. If the government were to determine which market-driven mes-

283. THE FEDERALIST NO. 10, at 80 (James Madison) (Clinton Rossiter ed., 1961); *see supra* text accompanying note 163.

284. MEIKLEJOHN, *supra* note 26, at 26.

285. *See supra* notes 163-81 and accompanying text. For an illuminating discussion of difficulties in justifying protection for unpopular extremist speech, see generally LEE C. BOLLINGER, THE TOLERANT SOCIETY (1986).

sages could not be disseminated, according to the values and priorities of government officials, the government will be engaging in censorship for the purpose of shaping public values. Indeed, whether the values underlying the censorship are concerned with insulating officials from electoral accountability or with vindicating the communities mores against unpopular views, content-motivated censorship of broadcasters' market-driven messages involve governmental efforts to shape public opinion. To be a bit more precise, content-motivated censorship of broadcasters' market-driven messages would reflect governmental efforts to prevent public opinion from being influenced in certain ways—to channel, through the placement of ideological barriers, the evolution of public values.[286]

Thus, the fact that the government might limit its content-motivated censorship to (unprotected) market-driven speech does not dispose of concerns about the potential for a dominating control of the ideas to which people are exposed. If market-driven messages constitute most of the messages that are disseminated through the mass media, and if government were free to shape the ideology of television entertainment in a content-motivated way, the risk that the government could effectively "drive certain ideas or viewpoints from the marketplace" would seem to exist, even though the regulations would not intrude upon protected speech interests of either the broadcasters or the audience.[287] Given the nature of the mass media—its command of the public's attention in a persistent quest for entertainment—the risk remains that through purposeful manipulation of programming content, government could become, essentially, a behemoth participant in public discourse—displacing a group of entrepreneurially motivated private gatekeepers by a politically motivated public gatekeeper.[288]

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286. To censor, in a content-motivated way, *Murphy Brown*'s criticism of Dan Quayle (arguably a content-motivated action of the sort that seeks to circumvent processes of accountability) would be an exercise of purposeful control by the government over ideas to which people are exposed. Similarly, to censor, in a content-motivated way, *Murphy Brown*'s celebration of unmarried motherhood (arguably a content-motivated action of the sort that seeks to effectuate the community's favored values) would be an exercise of purposeful control by the government over ideas to which people are exposed.

287. *R.A.V.*, 505 U.S. at 387 (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991)).

288. For a discussion of the dangers of government domination of public discourse, see generally MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA (1983).

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In contrast to these hypothetical efforts to discriminate among market-driven messages for content-motivated reasons, one can understand a proposal like the Fairness in Political Advertising Act[289] as quite a different enterprise. First, the Act does not distinguish between programming that is to be displaced by free advertising time for political candidates by any reference to content. Rather, broadcasters are directed to provide air time during primetime hours. This sort of selectivity focuses on a factor indicating a likelihood that the programmers whose discretion would be displaced intended to create a market-driven message, and to sell it. As such, the regulatory intrusion on primetime programming satisfies Justice Scalia's notion that the government may select which subcategories of unprotected speech to regulate by reference to the factor which renders the "speech" unprotected. In other words, the element that renders the market-driven message unprotected is its underlying motivation. Programming disseminated during primetime hours is more likely than programming disseminated at other times to have been shaped and selected because of market-driven factors. It is more likely to reflect decisions to sell the market-driven message for profit rather than to enlighten through self-expression.

Second, the government can justify its choice to focus on primetime programming by reference to "particular 'secondary effects' of the speech, so that the regulation is 'justified without reference to the content of the . . . speech.'"[290] The "secondary effect" of primetime programming is its potential to reach the maximum possible audience. It is presented at times when many people have the opportunity, and have developed the habit, to watch television. A desire to present the speech of political candidates, by displacing the market-driven speech of television broadcasters, at a time when the largest possible audience is available does not suggest an effort to censor the programming that otherwise would be presented in a content-motivated way. As Justice Scalia noted, when the government justifies a regulation of "unprotected speech" by reference to such "secondary effects," it "refute[s] the proposition that the selectivity of the restriction is 'even arguably conditioned upon

289. H.R. 84, 105th Cong. (1997).

290. *R.A.V.*, 505 U.S. at 389 (quoting Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)).

the sovereign's agreement with what a speaker may intend to say.'"[291]

Third, the Fairness in Political Advertising Act does not raise either of the two normative concerns about content-motivated regulation. By displacing popular (primetime) entertainment programming, it cannot readily be understood as reflecting an effort to silence minority dissent. Furthermore, by providing time for political candidates to communicate with the public, it can facilitate, rather than undermine, the processes of electoral accountability.

Fourth, unlike the content-motivated censorship of entrepreneurial decisions to sell market-driven messages, the Fairness in Political Advertising Act envisions *replacing* activity that is not part of "the freedom of speech"—i.e., the broadcasters' sale of market-driven programming—with activity at the core of concerns for democratic self-government. The protected speech of the broadcaster has not been impinged, because the broadcaster was not engaged in protected speech. But the quantity of speech, of purposefully persuasive communication, has been enhanced, as political candidates use the opportunity to express their views to the voters—their potential constituents. Thus, *Buckley*'s admonition that the government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others" is not violated.[292] Furthermore, by augmenting the amount of protected speech, by replacing entertainment through which people seek to escape life's difficult realities with speech about the issues of the day, the Act would facilitate opportunities for the voters to deliberate about their own interests and values and those of their fellow citizens.

B. CULTURAL CRITIQUES OF COMMERCIAL TELEVISION

Ronald Collins and David Skover have argued that uses of modern telecommunications media, both by those who control it and by its audience, are alien to the classical, Madisonian First Amendment's conception of a responsible citizenry actively engaged in deliberative discourse. They give several reasons for this proposition.

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291. *Id.* at 390 (quoting Metromedia, Inc. v. San Diego, 453 U.S. 490, 555 (1981) (Stevens, J., dissenting in part) (citation omitted)).

292. Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (per curiam).

First, they suggest, the content of television programming is rooted in entrepreneurial motives. "With profit maximization as the governing norm, television distorts traditional First Amendment values by associating the lowest passions with the highest ideals."[293] Second, "the economics and aesthetics of commercial television have profound influence" on political speech.[294] Political candidates employ the methods of commercial advertising, and "the gulf between important political expression and pure amusement nearly vanishes."[295] Third, advertising on television exploits and promotes the public's pervasive pursuit of pleasure and entertainment.[296] Commercial television thrives in our culture of "self-indulgent . . . consumption."[297]

Collins and Skover see modern American culture as posing a new threat to the First Amendment, entirely different from the classical fear of governmental manipulation. It is a threat of a disengaged, unthinking, passive, pleasure-pursuing citizenry to whom reasoned discourse is unappealing and irrelevant. Based on this proposition, they frame a First Amendment "paradox": "To save itself, the traditional First Amendment must destroy itself." The government must be allowed to regulate commercial television—"governmental 'abridgment' of expression"—to address the cultural threat to the classical version of free speech. But with such governmental abridgment, they say, First Amendment protection collapses into First Amendment tyranny.[298]

They propose a different response to the paradox: abandon the classical understanding of the freedom of speech as a starting point, in favor of an understanding rooted in modern American cultural values and practices.

> The animating spirit of the cultural approach is that, once we confront the reality of First Amendment hypocrisy, we will no longer wish to perpetuate it. On the one hand, we may restructure life, law, and discourse in order to actualize Madisonian ideals. On the other hand, we may give up all Madisonian pretenses and romp in a debauched dystopia.[299]

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293. COLLINS & SKOVER, *supra* note 37, at 16-17 (quotation omitted).
294. *Id.* at 16.
295. *Id.* at 17.
296. *Id.* at 22.
297. *Id.* at 27.
298. *Id.* at 4 (quotations omitted).
299. *Id.* at 215.

Under the former, they see American culture as transformed. Under the latter, they see the First Amendment as transformed, protecting all sorts of "communication" enthusiastically and without apology:

> When we feed on TV and video soma for an average of some forty-seven hours weekly, consume the fruits of a yearly advertising budget of $149 billion, splurge some $10 billion annually to gorge our insatiable sexual appetites, and more, we are unlikely to tolerate a First Amendment regime that is intolerant of such pleasurable practices.[300]

Collins and Skover have suggested exploration of a "cultural approach" to the First Amendment.[301] The "cultural approach" would look not to scholars' views of history for giving meaning to the First Amendment; rather, it would look to scholars' views of popular culture to determine the meaning that the practices of the American masses give to "the freedom of speech." "The cultural approach recognizes that First Amendment values are to be determined as much by what We the People practice as by what they, the elite, preach."[302] Thus, they explore—but do not (quite yet) advocate—a new conception of the First Amendment that would replace the classical approach and that would embrace as valuable (and constitutionally protected) the commercial culture that the masses embrace as valuable.

Collins and Skover present a powerful critique of American culture and demonstrate how far we are from a republican conception of political community. But consider two objections to their suggestion that the classical First Amendment is incompatible with, and irrelevant to, modern American culture.

First, their notion of the classical, Madisonian First Amendment is republican. As this piece has also suggested, republican ideals of deliberation about the public good are indeed offended by the commercialism and escapism that characterize modern mass media. Like Cass Sunstein and his analysis of commercial television, however, Collins and Skover disregard the less normatively demanding pluralist strains in American constitutional tradition. They do not explore whether a more modest version of classical First Amendment theory, rooted in democracy with a pluralist emphasis, would also view most mass communications activity as unprotected and, if so, which aspects, *and why*.

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300. *Id.* at 213.
301. *See id.* at xxi.
302. *Id.* at 214.

The founders' republican view was always aspiration. They recognized that in everyday behavior, citizens would not pursue "the permanent and aggregate interests of the community" and that government would be beset by faction. The national legislative structure and the supremacy of constitutional law were structural devices to approach the republican ideal better than unvarnished political behavior otherwise would.[303]

Our modern pleasure-seeking culture deviates far less from the pluralist reality that *The Federalist No. 10* recognized than from the republican ideal to which it aspired. Furthermore, the freedom of speech was to be pursued, and protected, in politics as practiced—in other words, in democracy with all its pluralist shortcomings. The freedom of speech necessary for pluralist self-government empowers each member of the community to pursue self-interest through persuasion, to deal with the problems posed by disagreement, or to take advantage of the opportunities provided by agreement and cooperation. Thus, this classical pluralist understanding of politics and the First Amendment does not deviate from the realities of American political behavior so much as does republicanism.[304]

Of course, so much of what is presented on television has nothing to do with political behavior or even, more broadly, with the pursuit of self-interest through persuasion. And this leads to a second objection to the Collins and Skover analysis: in a circular way, they assume that the pervasive telecommunications pleasure and entertainment practices of Americans are, and must be, *popularly* understood as "speech" *protected by the First Amendment*. A First Amendment that denied protection to so much of what Americans understand to be "speech," they argue, would be so alien to American culture as to be incompatible with and irrelevant to our culture.

One might acknowledge that interpreting a constitutional provision in a way that starkly deviates from prevailing values

303. *See supra* notes 163-63.

304. Indeed, our government is still a representative democracy. This, in itself, is a republican characteristic that recognizes the distinction between private impulse and public action. Beyond this, our government is still a representative democracy circumscribed by constitutional limits and judicial review. These are republican characteristics that recognize the distinction between short-sighted public action and public actions in pursuit of "the permanent and aggregate interests of the community." *See supra* notes 163-63. If one is to question whether classical notions of the First Amendment are inconsistent with popular American culture, then one must question whether constitutionalism in general is inconsistent with popular American culture.

is perilous in practice and questionable as a matter of interpretive theory. But, as just suggested, Americans remain committed to electoral democracy, at least of the pluralist variety. A First Amendment whose reach is limited to protecting those activities relevant to pluralist democracy—including self-expressive efforts to persuade in private transactions—would hardly be alien to American norms. It might give a legal meaning to the word "speech" different from an ordinary or lay understanding. But that is true of the words used in many legal provisions.

Thus, the second reason for rejecting the enterprise of employing the values of mass culture as the exclusive basis for generating the meaning of the First Amendment reflects, perhaps, a more conventional notion of law than Collins and Skover may have. This perspective does not surrender the meaning of law—especially constitutional law—entirely to the practices of mass culture. The legal meaning of words and the popular meaning of words may well be different. Simply because people might understand television broadcasts or pornographic pictures to be speech should not necessarily determine that such broadcasts and pictures should be deemed speech for specific legal purposes. Similarly, even without reference to law, simply because people may find certain activities enjoyable does not necessarily mean that those activities are valuable for all purposes, at all times, in all contexts. There is a time and place for everything. This truth is acknowledged even in mass culture.

Thus, if Collins and Skover were to assert that the classical First Amendment—understood not as republican, but with a pluralist emphasis—deviates too far from prevailing cultural understandings about what is valuable and what is "speech," they would need to posit that ordinary Americans are unable to understand that words can have different meanings in different contexts and, indeed, that activities can be differently valuable, depending on the context in which one is acting. Yet, the people surely are capable of making a distinction among valuable activities. The people surely are capable of understanding that even though playing basketball, for example, might be enjoyable, it is not *necessarily* part of the First Amendment's freedom of speech, simply because it has that sort of value; that even though watching a basketball game on television may be enjoyable, it is not *necessarily* part of the First Amendment's freedom of speech, simply because it has that sort of value; that

even though watching *ER* on television may be enjoyable, it is not *necessarily* part of the First Amendment's freedom of speech, simply because it has that sort of value.

The "First Amendment paradox" that Collins and Skover see is too stark. The First Amendment need not "destroy itself to save itself." There need not be draconian regulation, such as a politically impossible Prohibition of television that some urge,[305] to forge republican citizens from pleasure-seeking zombies. Republican citizens were never possible, as Madison recognized. Pluralist citizens were possible, and remain so. Furthermore, on the other side, the pursuit of pleasure during our ever-expanding leisure time need not overwhelm the realm of politics, persuasion, and self-interested discourse. Simply because Americans spend so much time on entertainment, simply because entertainment interests compete with interests rooted in competitive or cooperative interaction, need not mean that the interest in pluralist self-governance must be destroyed. After all, people had daily concerns that diverted them from politics in the nineteenth and early twentieth centuries. Those diversions might have been work, or family, or religion, or whiskey, rather than leisure and self-conscious entertainment. But they were diversions from politics nevertheless.

These diversions, however, unlike watching television, were not popularly conceived as speech. They did not present a danger of overwhelming our *understanding* of "the freedom of speech" protected by the Constitution. The danger to "the freedom of speech" comes not just from the popular mindset, but from a failure of the leadership that the trained legal mindset exists to provide. Most of our fellows steeped in modern American culture, it seems, can still comprehend the differences between expressing personal values, and playing to an audience. They still can understand the differences between pursuing persuasion and pursuing entertainment. And if informed of it, they could comprehend—even embrace—a principle, and its underlying rationale, that the First Amendment protects self-expression intended to persuade, but does not protect entrepreneurial decisions to sell designed to play to an audience.

Thus, the First Amendment need not destroy itself to save itself. The First Amendment need only define itself to save it-

305. *See, e.g.*, George Anastoplo, *Self-Government and the Mass Media: A Practical Man's Guide*, *in* THE MASS MEDIA AND MODERN DEMOCRACY 161, 223-24 (Harry M. Clor ed., 1974) (arguing for the abolition of television as a means of enlarging the freedom of speech).

self. More precisely, those charged with responsibly interpreting constitutional provisions need to define "the freedom of speech" that warrants special constitutional protection. Scholars, lawyers, and judges need to reveal the option to the electorate and their representatives that the people might, if they choose, command the use of mass communications technologies for self-expression and other activities relevant to democratic self-government. Those who define the terms of the constitutional order must acknowledge that the people might choose to create space for speech that is protected by the First Amendment, by displacing entrepreneurial market-driven activities that are not; that reform might start on a small scale, by mandating free time for political candidates; that these choices, if made carefully, can be constitutionally permissible. For if scholars, judges, and, ultimately, political leaders fail in this definitional responsibility, those who control the channels on our television sets—by exercising *entrepreneurial* discretion, rather than the "editorial discretion" that they claim—can long control the channels through which the freedom of speech otherwise might flourish.

CONCLUSION

Proponents of economic deregulation argue that television programmers should be treated both as are other businessmen in the regime of consumer sovereignty and as are other speakers under the First Amendment. Some argue further that property rights under the Fifth Amendment are just as fundamental as are speech rights under the First Amendment, and should be protected just as vigorously. This latter argument has not shaken the conventional wisdom that political rights—including the freedom of speech—are constitutionally foundational, whereas property rights are politically derivative. Almost all who adhere to this conventional view about the relationship between speech and property—as well as those who urge the "parity" of markets—accept the proposition that television programmers exercise "editorial discretion" protected by the First Amendment.

This Article has challenged this point of agreement that connects those who assert the constitutional parity between speech and property and those who assert the constitutional primacy of speech over property. It has suggested that the programming decisions of commercial television businesses should not qualify as "editorial discretion" protected by the First

Amendment to the extent that they involve entrepreneurially motivated decisions to manufacture and to sell market-driven content.

The significance of human actions is often determined by the purposes for which they are undertaken. The rationale for free economic markets is predicated on notions of incentives and human purposes in response to those incentives. The quest for economic reward in exchanges with freely acting consumers will induce producers to create and sell products that serve the desires of those consumers.

This Article has tried to show how four different normative frameworks relevant to the First Amendment's freedom of speech also elevate human purposes as the definitive factor distinguishing "speech" from other actions. It also has tried to show that the purposes and choices relevant to entrepreneurial responses to market incentives in the regime of consumer sovereignty are distinct from the purposes and choices relevant to republican democracy, pluralist democracy, personal fulfillment, and the implications for the First Amendment of economic rationales for Congress's copyright power. For each of these four normative contexts relevant to defining the freedom of speech, choices to enlighten self and others through speaker-driven self-expression—rather than choices to sell products that satisfy anticipated consumer demand—are worthy of protection under the First Amendment.

Those who urge the constitutional parity of speech and property markets do not—and should not—argue that speech and property are the same thing. Their arguments about the worth of property rights and the value of human choices responding to economic incentives can stand on their own ground. Those who deny the constitutional parity of speech and property markets clearly recognize that speech and property are not the same thing. They recognize, at least implicitly, that the choices relevant to economic markets are not the same as the choices relevant to the freedom of speech. But they have failed to apply this insight to the programming decisions of commercial television corporations. What appears to be speech is, fundamentally and essentially, property—property that has been molded in the way that any entrepreneur molds his product. It is a product shaped by economic market incentives. It is a product governed by the behavioral pressures of consumer sovereignty. Choices to create and to sell this product should be understood as property interests protected under the Fifth

Amendment, rather than as speech protected by the First Amendment.

To identify choices and activities that lack special constitutional protection *as speech* is not to determine that they lack special worth. It is, rather, to determine that their worth is to be debated and resolved in the political processes that the Constitution both protects and circumscribes. An individual's desire to serve in the military is widely understood to be worthy. But it has not been deemed a matter of special constitutional entitlement. A corporation's desire to pursue a policy of affirmative action in hiring and promotion might be viewed as laudable—and, not so long ago, widely praised. But that choice has not been deemed a matter of special constitutional entitlement. Commerce is, of course, a valuable human activity. Consuming products for entertainment, for escapism, and for relaxation, are widely cherished activities. But, at least as a matter of conventional legal understanding, the sale and consumption of products have not been deemed to be matters of special constitutional entitlement. The worth, desirability, and permissibility of most aspects of our lives are to be determined politically.

And so it would be for those who wish to sell the market-driven message under the perspective presented in this Article. To determine that choices to sell (and to consume) the market-driven message lack special solicitude under the First Amendment is not to determine that these choices are without value. It is simply to determine that they are without the kind of *special* value *as speech* that warrants insulating them from being weighed in the political process against competing values.

Self-expression, the expression of one's views, values, and priorities, is essential to a definition of what should qualify as speech for a First Amendment dedicated to the processes of democratic self-government or to Aristotelian self-fulfillment. Democratic decisionmaking, whether with a pluralist or republican emphasis, requires that voters know the views of their fellows, to determine where agreement exists, where compromise can be found, and where concession need be made. Only self-expression can enable others to account adequately for the actor's views. Only when the actor chooses to express his own views does his choice have relevance to his right to participate in the processes of democratic self-government, or to the special role speech can play in personal fulfillment, and qualify as having claim to special solicitude under the First Amendment.

A desire to sell the market-driven message does not involve its disseminator's self-expression in a quest for truth. A decision to sell a market-driven message is a decision to respond entrepreneurially to the values of others. To the extent that the programming decisions of television broadcasters—so much of what today occupies the means of effective communication—are so likely to be market-driven in an entrepreneurial way, refuting their claim to constitutional privilege can open a range of otherwise unthinkable options for reforming political campaigns and for enriching public discourse.

The "market-driven message principle" would reject the proposition that entrepreneurially motivated decisions to sell a market-driven message qualify for special solicitude as "editorial discretion" protected by the First Amendment. This Article has pursued the implications of the market-driven message principle in the context of relatively modest proposals to provide free television time for political advertising. It has explored how judicial doctrine might be constructed both to serve the normative foundations of the market-driven message principle and to resolve the practical difficulties of adjudicating legal issues that require determination of an actor's intent.

It is so important that our imagination be liberated from petrified assumptions about what qualifies as "speech" and our political will freed to pursue measures that go beyond providing free advertising time for candidates. It is important because democracy in America is ailing. The First Amendment, rooted as it is in concerns to preserve and promote the processes of democratic self-government, should be a vehicle for resurrecting the discourse that is essential for democracy, not for burying it under mounds of commercial transactions masquerading as "speech."

It is, therefore, important to think as carefully as we can about what "speech" should mean, to distinguish what may merely be politically desirable from that which is constitutionally essential. The production and consumption of entertainment are merely desirable, and debatably so, at that. The expression of self by individuals and groups to inform their neighbors what they believe, and their neighbors' thoughts and expression of those thoughts in response, are constitutionally essential. The representation of views in the community by political candidates is constitutionally essential. With these distinctions drawn, the electorate, through its representatives, could be freed to determine that market-driven programming,

pleasant and entertaining though it might be, should at times be displaced, so that the people might yield less to the impulses of self-indulgence and focus more on the rights and responsibilities of self-governance.