

## **The Commercial Difference**

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### **Abstract**

When it comes to the First Amendment, commerciality does, and should, matter. This article develops the view that the key distinguishing characteristic of commercial or corporate speech is that the interest at stake is “derivative,” in the sense that we care about the speech interest for reasons other than caring about the rights of the entity directly asserting a claim under the First Amendment. To say that the interest is derivative is not to say that it is unimportant, and one could find commercial and corporate speech interests to be both derivative and strong enough to apply heightened scrutiny to the restrictions that are the usual subject of debate, namely, restrictions on commercial advertising and restrictions on corporate campaigning.

Distinguishing between derivative and intrinsic speech interests, however, helps to uncover three types of situations in which lesser or no scrutiny may be appropriate. The first is in the context of compelled speech. If the entity being compelled is not one whose rights we are concerned with, this undermines the rationale for subjecting speech compulsions to heightened scrutiny under the First Amendment. The second is in the context of speech among commercial entities. In these cases, the transaction may be among entities none of which merit First Amendment concern. The third is in the context of unwanted marketing. It makes no sense to protect listeners’ access to information they do not want to receive.

Highlighting the difference that commerciality makes helps to explain better certain exceptions, or apparent exceptions, that existing case law already makes to heightened scrutiny. It also provides insight in a number of current controversies, such as that over cigarette labeling. It has particularly important implications for consumer privacy regulation, suggesting that regulation of both the consumer data trade and commercial data collection merit significantly less scrutiny than might be applied to restrictions on the privacy-invasive practices of ordinary individuals.

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INTRODUCTION

Courts and commentators have struggled for some time to determine what, if anything, is different about “commercial speech” or “corporate speech,” as compared to “fully-protected speech.” Many share some intuition that either commercial speech, corporate speech, or both are somehow lesser forms of speech, less deserving of the protections of the First Amendment. Others have found no principled way to distinguish these forms of speech from those that all agree should be protected.

This article develops the view that the key distinguishing characteristic of commercial or corporate speech is that the interest at stake is “derivative,” in the sense that we care about the speech interest for reasons other than caring about the rights of the entity directly asserting a claim under the First Amendment.<sup>1</sup> We assign such speech rights for instrumental purposes, to vindicate what are really the speech rights of others. In some cases, we mean to vindicate the rights of others as listeners; in other cases, the rights of others as speakers.

The fact that a speech interest is derivative, however, need not undermine its strength or importance. Perhaps commercial speech and/or

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<sup>1</sup> See Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*, 79 CAL. L. REV. 1229, 1233 (1991).

corporate speech should receive full protection under the First Amendment. Those arguments are entirely consistent with the derivative nature of the speech interests at stake in the usual contexts in which the question arises, namely, restrictions on commercial advertising and restrictions on corporate campaigning.

Distinguishing between derivative and intrinsic speech interests, however, helps to uncover three types of situations in which lesser or no scrutiny may be appropriate. The first is in the context of compelled speech. If the entity being compelled is not one with intrinsic rights to “freedom of mind,” this undermines the rationale for subjecting speech compulsions to heightened scrutiny under the First Amendment. The second is in the context of speech among commercial entities. In these cases, the transaction may be among entities none of which merit First Amendment concern. The third is in the context of unwanted marketing. It makes no sense to protect listeners’ access to information they do not want to receive.

Highlighting the derivative nature of certain speech interests helps to explain better certain exceptions, or apparent exceptions, that existing case law already makes to heightened scrutiny. For example, antitrust laws have long prohibited price collusion among competitors, without worrying about any First Amendment limits on the government’s ability to stop one company from conveying a certain kind of information to another.<sup>2</sup> Within the framework developed here, this result is easily understood as a natural consequence of the information being passed solely from one commercial entity to another.

The derivative nature of speech interests also has important implications for current controversies, ranging from cigarette labeling to privacy regulation. In prior work, I examined the constitutionality of consumer privacy regulation, concluding that most such regulation should be subject to minimal First Amendment scrutiny as either a form of commercial compelled speech or a regulation of speech among commercial entities.<sup>3</sup> This article provides the general theoretical framework for the analysis in that earlier work, and broadens the application of the framework beyond the examples explored there.

This article draws upon a broad literature that has so far generally addressed the relevant issues in isolation, for example, with respect to commercial speech, corporate speech, compelled speech, or the interface

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<sup>2</sup> See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1781 (2004).

<sup>3</sup> See Felix T. Wu, *The Constitutionality of Consumer Privacy Regulation*, 2013 U. CHI. LEGAL F. 69.

between privacy law and freedom of expression. This work brings together these various pieces within a single framework.

Part I below explains the theory of derivative speech interests and shows how a wide variety of conceptions of corporate or commercial speech fit the model. Part I.C describes why this framing does not necessarily change the results of the existing jurisprudence around corporate campaigning or commercial advertisements. The subsequent parts describe the types of cases in which the derivative status of corporate and commercial speech makes an important difference. Part II explores the implications for speech compulsions. Part III examines transactions among commercial entities. Finally, Part IV addresses restrictions on unwanted marketing.

## I. DERIVATIVE SPEECH INTERESTS

Sometimes we recognize a First Amendment claim because there is intrinsic value in protecting the interests of the claimant. In the paradigmatic First Amendment case, the government has tried to prevent someone from speaking, and the silenced person is asserting a personal right not to have the government interfere with his or her speech.<sup>4</sup>

In other cases, however, the entity asserting the First Amendment claim may not be the one we actually care about. Instead, we allow such an entity to assert the claim in order to protect the interests of others. In such cases, we might say that the relevant speech interests are “derivative,” rather than intrinsic.<sup>5</sup> It could be that the ultimate interests are those of the audience or recipients of the speech.<sup>6</sup> Or it could be that the First Amendment claim helps to protect someone else’s ability to speak.<sup>7</sup>

Corporate speech and commercial speech should both be understood to be derivative speech interests. In each case, the major justifications for generally protecting freedom of expression point toward a protection of corporate and commercial speech that is instrumental, valuable not to protect the corporate or commercial speaker, but as a means to protecting the speech interests of others. This understanding of corporate and commercial speech need not undermine the existing doctrinal structures that the Supreme Court has built around these types of speech, but it does have important implications that will be explored in the subsequent Parts.

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<sup>4</sup> See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>5</sup> See *Dan-Cohen*, *supra* note 1, at 1233.

<sup>6</sup> *Dan-Cohen* calls these “passive” derivative speech interests. See *id.* at 1234.

<sup>7</sup> *Dan-Cohen* calls these “active” derivative speech interests. See *id.*

### A. Corporate Speech

The status of corporations, as compared to natural persons, has been a pervasive and continuing source of controversy across many different areas of law.<sup>8</sup> Prominent among the controversies is the question of what sort of protection corporate speech receives under the First Amendment, particularly in the area of corporate campaign speech and financing. The Supreme Court has alternately recognized a First Amendment right of corporations to contribute to campaigns,<sup>9</sup> upheld a prohibition on using general corporate treasury funds to support or oppose political candidates,<sup>10</sup> and then reversed course, striking down a prohibition on the use of general treasury funds for electioneering.<sup>11</sup> The *Citizens United* case in particular has generated not just academic commentary, but much public discussion about its merits both as a legal and social policy matter.

The debate has sometimes been popularly framed as one about whether “corporations are people.”<sup>12</sup> That framing, however, is not necessarily helpful to determine what rights (or obligations) corporations should have under the law or the Constitution. On the one hand, corporations certainly do not have the moral valence of human beings. On the other hand, corporations are legal constructs to which legal rights or duties can attach, just as they can to individuals.

The academic debate over the nature of the corporation similarly does not determine how we ought to regard corporate speech.<sup>13</sup> A corporation may be a “real,” or “natural entity,”<sup>14</sup> and yet not be

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<sup>8</sup> See, e.g., *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (Nov. 26, 2013) (raising the question of whether the Religious Freedom Restoration Act of 1993 protects for-profit corporations); *FCC v. AT&T Inc.*, 131 S. Ct. 1177 (2011) (holding that a corporation does not have “personal privacy” within the meaning of the Freedom of Information Act); *Santa Clara County v. So. Pacific R.R. Co.*, 118 U.S. 394 (1886) (noting the unanimous view of the Court that the Fourteenth Amendment’s Equal Protection Clause applies to corporations).

<sup>9</sup> See *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

<sup>10</sup> See *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990).

<sup>11</sup> See *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010); see also *American Tradition Partnership, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (reaffirming the holding of *Citizens United*).

<sup>12</sup> See Ross Ramsey, *Court Stays the Course on Politics and Business*, N.Y. TIMES, June 29, 2012, at A19A (referring to the “‘corporations are people’ movement” as having gotten a boost in the wake of the Supreme Court’s decision in *Bullock*); Ashley Parker, *‘Corporations Are People,’ Romney Tells Iowa Hecklers Angry Over His Tax Policy*, N.Y. TIMES, Aug. 12, 2011, at A16.

<sup>13</sup> See James David Nelson, *Conscience, Incorporated*, 2014 MICH. ST. L. REV. (forthcoming) (making a similar point with respect to corporations asserting a right to free exercise of religion).

<sup>14</sup> See David Millon, *Theories of the Corporation*, 1990 Duke L.J. 201, 211.

equivalent to an individual under the First Amendment. Alternatively, a corporation may be nothing more than an aggregation of individuals,<sup>15</sup> but it might not have the same speech rights as those individuals standing alone. Finally, even if a corporation is an artificial entity, which owes its existence entirely to the state's largesse,<sup>16</sup> the state's power to create or destroy corporations does not necessarily entail a power to restrict the speech of the entity it has created.<sup>17</sup>

Regardless of how one might characterize the corporate entity, it is not the sort of entity that should be regarded as having intrinsic rights under any of the major theories for why we ought to protect freedom of expression.<sup>18</sup> One major strand of free speech theory values free expression because of the integral role it plays in the self-development of the speaker.<sup>19</sup> This value is grounded in the intrinsic worth of human beings as such. Corporations lack such intrinsic worth, and there is little reason to attach intrinsic value to the "self-development" of corporations, whatever that might mean.<sup>20</sup> Another strand values free expression for its role in fostering deliberative democracy.<sup>21</sup> Here too, individuals, not corporations, are the fundamental units of democracy, and it is the ability of individuals to make collective decisions that forms the basis for evaluating whether democratic ideals are being served. Still another major strand of free speech theory is that free expression is the means by which knowledge and truth are developed.<sup>22</sup> Those values, however, are ones

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<sup>15</sup> See *id.* at 220.

<sup>16</sup> See *id.* at 206.

<sup>17</sup> Somewhat analogously, for example, the state's power to create or eliminate limited public fora does not give the state carte blanche to discriminate among speakers within the fora it creates. See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) ("Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms.").

<sup>18</sup> See generally TAMARA R. PIETY, *BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA* (2012).

<sup>19</sup> See, e.g., THOMAS I. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* (1966); STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* (1990).

<sup>20</sup> See PIETY, *supra* note 18, at 58 ("Corporations are not human beings, so they lack the expressive interests related to self-actualization and freedom that human beings possess. Corporations are not moral subjects or ends in themselves. They are a means to an end.").

<sup>21</sup> See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 26 (1971) (arguing that "the discovery and spread of political truth" is the only principled basis upon which to protect freedom of expression).

<sup>22</sup> See Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 *CAL. L. REV.* 2353, 2363 (2000) ("The theory of the marketplace of ideas focuses on 'the truth-seeking function' of the First Amendment.").

that focus on the recipients of speech, rather than the corporate or commercial speakers.

Despite the sharp disagreements among the Justices in *Citizens United* about the relative value—and dangers—of corporate campaign speech, the competing opinions there can all be read to focus at least in some measure on the derivative, rather than intrinsic, value of the speech. Perhaps unsurprisingly, the dissent quite explicitly adopts the view of corporate speech as a derivative speech interest.<sup>23</sup> The dissent then went on to argue that a business corporation cannot be understood to speak for any particular individuals, neither customers, employees, shareholders, nor officers or directors.<sup>24</sup> The dissent further argued that protecting listeners' interests is precisely what regulation of corporate campaign speech is designed to do.<sup>25</sup>

The majority opinion too though describes the relevant speech interests in derivative terms, focusing on the nature of the speech itself and particularly its value to listeners, rather than on any intrinsic rights in the corporation. The Court wrote that “[p]olitical speech is ‘indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.’”<sup>26</sup> Similarly, the Court focused on the need for corporate “voices and viewpoints” to “reach[] the public and advis[e] voters on which persons or entities are hostile to their interests.”<sup>27</sup> Thus, the focus in *Citizens United* was on the electorate, the recipients of the political speech at issue, not on the corporate speakers.

To be sure, there is other language in the majority opinion that seemed to personify corporations and to cast them as “disadvantaged”<sup>28</sup> or “disfavored”<sup>29</sup> speakers, whose “voices” have been “muffled.”<sup>30</sup> In each case though, such language is followed up by a renewed focus on voters, or some other set of underlying individuals. In distinguishing those cases in which the Court has allowed speakers to be disadvantaged, the Court

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<sup>23</sup> *Citizens United*, 558 U.S. at 466 (Stevens dissenting) (“Corporate speech, however, is derivative speech, speech by proxy.”).

<sup>24</sup> *Id.* at 467.

<sup>25</sup> *See id.* at 469-72.

<sup>26</sup> *Id.* at 349 (quoting *Bellotti*).

<sup>27</sup> *Id.* at 354.

<sup>28</sup> *Id.* at 340-41 (“By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice.”).

<sup>29</sup> *Id.* at 341 (“We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers.”).

<sup>30</sup> *Id.* at 354 (“The censorship we now confront is vast in its reach. The Government has ‘muffle[d] the voices that best represent the most significant segments of the economy.’”) (quoting *McConnell* at 257-58).

wrote that “[b]y contrast, it is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes.”<sup>31</sup> Later, in specifying who has been disfavored, the Court characterized the campaign restrictions as creating “disfavored associations of citizens,” suggesting a concern for individual speakers that might underlie the corporate form.<sup>32</sup> Finally, the trouble with muffling voices does not seem to have been inherent in the very fact of voice itself, but because then “the electorate [has been] deprived of information, knowledge and opinion vital to its function.”<sup>33</sup> Thus, the competing opinions can be understood not as disagreeing about whether voters should be the ultimate focus of the inquiry, but as disagreeing about whether voters’ interests would ultimately be served by preventing corporate voices from “drowning out . . . noncorporate voices,”<sup>34</sup> or by respecting those voters’ ability to receive all “voices and viewpoints” and then “to judge what is true and what is false.”<sup>35</sup> In that sense, the Justices seem to agree that corporate speech interests are derivative.

### B. Commercial Speech

The commercial speech doctrine has been both controversial and unsettled throughout virtually its entire history. In the early part of the twentieth century, commercial speech fell wholly outside the First Amendment.<sup>36</sup> Then, in 1976, the Supreme Court held that commercial speech *was* protected by the First Amendment, albeit not necessarily to the same extent as noncommercial speech.<sup>37</sup> Not long after, the Court articulated the intermediate scrutiny test for commercial speech restrictions that it continues to apply today.<sup>38</sup> In the decades since, the

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<sup>31</sup> *Id.* at 341.

<sup>32</sup> *Id.* at 355.

<sup>33</sup> *Id.* at 354 (quoting CIO).

<sup>34</sup> *Id.* at 470.

<sup>35</sup> *Id.* at 354-55. See also Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 144-45 (2010) (arguing that the competing opinions in *Citizens United* can be understood as a competition between the liberty and equality visions of free speech and that its outcome “is best explained as representing a triumph of the libertarian over the egalitarian vision of free speech”).

<sup>36</sup> See *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (“[T]he Constitution imposes no . . . restraint on government as respects purely commercial advertising.”).

<sup>37</sup> See *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770-73 (1976).

<sup>38</sup> See *Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y.*, 447 U.S. 557, 566 (1980). The Court stated the test as follows:

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that



Court has tended to strike down laws under the *Central Hudson* test, rather than uphold them, leading some commentators to suggest that in practice, the distinction between commercial and noncommercial speech may be fading.<sup>39</sup>

Throughout the evolution of the commercial speech doctrine, the Supreme Court has never been very clear on precisely what counts as “commercial speech.” The paradigmatic example is that of commercial advertising or promotion. At times, the Court has characterized commercial speech as that which “does no more than propose a commercial transaction.”<sup>40</sup> In other cases, the Court has held that the category extends beyond that narrow formulation, and it has articulated factors that, at least in conjunction with one another, can trigger the commercial speech doctrine.<sup>41</sup> In *Central Hudson*, the Court suggested that commercial speech was “expression related solely to the economic interests of the speaker and its audience.”<sup>42</sup>

Difficult as it may be to define precisely, the Supreme Court has consistently viewed commercial speech protection as designed to protect the interests of the audience. The Court has explained that “the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides.”<sup>43</sup> In *Virginia Board* itself, the Court emphasized the importance of the “free flow of commercial information” to both

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provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

*Id.*

<sup>39</sup> See Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOYOLA L.A. L. REV. 67, 67-68 (2007) (“In every recent commercial speech case decided by the Supreme Court, the First Amendment argument prevailed. . . . While it would be incorrect to suggest that commercial speech is today deemed fungible with fully protected speech in all contexts, it is at least true that the gap between the two is far narrower than it was in 1976.”).

<sup>40</sup> See *Virginia Board*, 425 U.S. at 771 n.24.

<sup>41</sup> See *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66-67 (1983) (pointing to the “fact that these pamphlets are conceded to be advertisements,” the “reference to a specific product,” and “the fact that [the speaker] has an economic motivation for mailing the pamphlets” and holding that the “combination of all these characteristics . . . provides strong support for the . . . conclusion that the informational pamphlets are properly characterized as commercial speech,” even though any one factor standing alone would not have been sufficient).

<sup>42</sup> *Central Hudson*, 447 U.S. at 561.

<sup>43</sup> *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

consumers and society as a whole.<sup>44</sup> The focus on listeners also explains why false or misleading commercial speech falls entirely outside the First Amendment.<sup>45</sup> Such information only harms consumers, rather than helping them, and tends to pollute the flow of information.

Commentators are sharply divided about whether the modern trend toward greater protection for commercial speech is positive. Some have argued that there is no principled basis to distinguish commercial speech from fully-protected speech.<sup>46</sup> Others have argued that commercial speech deserves little or no protection at all under the First Amendment.<sup>47</sup> Still others defend, at least in some measure, the current view of commercial speech as entitled to some, but subordinate, First Amendment protection.<sup>48</sup>

Despite the doctrinal disagreements, however, there appears to be relatively broad agreement that commercial speech interests are primarily, if not exclusively, derivative speech interests, in that it is the interests of listeners, rather than those of the commercial speakers themselves, that matter. Ed Baker, for example, in advancing a primarily speaker-based view of the First Amendment as requiring the government to respect individual autonomy, ultimately rejects protection for commercial speech, because listener interests are not at the core of the First Amendment under his views.<sup>49</sup> Tamara Piety accepts that listeners might matter, but she too is ultimately skeptical of protection for commercial speech, arguing that the crucial question is “whether the net effect of commercial speech is to enhance listeners’ self-fulfillment and autonomy interests” and finding “reason to think that it is not.”<sup>50</sup>

Robert Post, in defending the intermediate status of commercial speech, defines it as “the set of communicative acts about commercial subjects that within a public communicative sphere convey information of relevance to democratic decision making but that do not themselves form part of public discourse.”<sup>51</sup> For Post, a key distinction is between acts that have value as part of public discourse and acts that simply convey

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<sup>44</sup> *Virginia Board*, 425 U.S. at 763-64. See also Tamara R. Piety, “A Necessary Cost of Freedom”? *The Incoherence of Sorrell v. IMS*, 64 ALA. L. REV. 1, 29-30 (2012).

<sup>45</sup> See *Central Hudson*, 447 U.S. at 566.

<sup>46</sup> See Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990); Redish, *supra* note 39.

<sup>47</sup> See C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981 (2009).

<sup>48</sup> See Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1 (2000).

<sup>49</sup> See Baker, *supra* note 47, at 985.

<sup>50</sup> PIETY, *supra* note 18, at 80.

<sup>51</sup> Post, *supra* note 48, at 25.

information.<sup>52</sup> Acts that are part of public discourse have intrinsic value to both speakers and listeners, whereas acts that merely convey information derive their value from the value of that information to those who receive it.

Martin Redish, on the other hand, has rejected a distinction between commercial and noncommercial speech. In doing so, however, he has similarly emphasized “the free speech benefits that may flow to the listener or reader from reading or hearing speech emanating from corporations,” whether or not “the speaker itself deserves the benefits of constitutional protection.”<sup>53</sup> Thus, even those championing heightened protection for commercial speech have tended to focus on the interests of listeners rather than speakers.<sup>54</sup>

### C. *Derivative Interests in Traditional Settings*

To say that corporate and commercial speech interests are derivative is not necessarily to undercut their strength. One could recognize those interests as derivative and nevertheless advocate heightened, even strict, scrutiny in the core cases raising those interests.

The question of corporate speech, for example, has arisen largely in the context of corporate campaigning.<sup>55</sup> Even if the intrinsic interests at stake are those of the voters who are the target of such campaigns, rather than the corporations mounting such campaigns, one could justify heightened scrutiny of government attempts to restrict such campaigning. Particularly in the political context, one could argue that voters need the fullest possible information in order to make informed voting decisions.<sup>56</sup> Thus, we might be skeptical of any government regulation that restricts the speech available to voters. One might even suggest that certain viewpoints are only likely to be voiced by corporations, rather than individuals, for example, viewpoints that are pro-business or anti-labor. In that case, restricting corporate campaigning might deprive voters of information necessary to evaluate particular sides of contested issues.<sup>57</sup>

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<sup>52</sup> See *id.* at 20.

<sup>53</sup> Redish, *supra* note 39, at 87; see also Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971).

<sup>54</sup> See also Piety, *supra* note 44, at 22-23 (making a similar point about Redish’s 1971 article).

<sup>55</sup> See, e.g., *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

<sup>56</sup> See *id.* at 354.

<sup>57</sup> See *id.* at 356 (“When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.”).

Similarly, the question of commercial speech has been prominent in the context of commercial advertisements, and particularly advertisements for vices such as tobacco, liquor, or gambling.<sup>58</sup> Even if we think that advertisers do not have an intrinsic right against interference with their advertisements, we might think that consumers do have an intrinsic right not to have the government dictate what information about lawful products they can receive. We might be particularly wary of what seem to be paternalistic laws that hide information from people supposedly for their own good.<sup>59</sup>

To be sure, the arguments in favor of fully protecting corporate campaigning or commercial advertisements are not necessarily persuasive. One could instead think that corporate participation in campaigns distorts the available speech, rather than simply adding to it.<sup>60</sup> One could largely take the same view of most commercial advertisements.<sup>61</sup> The point here is that these questions are not settled one way or another merely by recognizing the derivative nature of corporate or commercial speech interests. In other types of situations, however, the derivative nature does matter, and it is to those situations that we now turn.

## II. IMPLICATIONS FOR COMPELLED SPEECH

One implication of commercial and corporate speech interests being derivative is that compelling these forms of speech need not raise the usual First Amendment concerns. In the context of fully-protected speech, the Supreme Court has held that compelling speech is just as problematic as restricting it.<sup>62</sup> But that shorthand equivalence elides the fact that the rationales for scrutinizing speech compulsions can differ substantially from the rationales for scrutinizing speech restrictions. When primarily listener interests are at stake, there is little reason to be concerned about compelled speech.

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<sup>58</sup> See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (tobacco); *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173 (1999) (gambling); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (liquor).

<sup>59</sup> See *44 Liquormart*, 517 U.S. at 503 (“The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good. That teaching applies equally to state attempts to deprive consumers of accurate information about their chosen products.”); *id.* at 518 (Thomas, J., concurring in the judgment) (“In cases such as this, in which the government’s asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, . . . such an ‘interest’ is *per se* illegitimate.”).

<sup>60</sup> See *Citizens United*, 558 U.S. at 469-72.

<sup>61</sup> See *PIETY*, *supra* note 18, at 62-65.

<sup>62</sup> See *W. Va. State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705 (1977).

A. *The Misfit Between Listener Interests and Scrutiny of Compelled Speech*

At first glance, it is not at all clear why compelled speech should be any kind of problem. For example, if we are concerned primarily about protecting the marketplace of ideas, then compelled speech seems only to be adding to that marketplace, and so long as we do not then restrict how people can respond to the compelled speech, we should be confident that truth and right thinking will win out in the end regardless of what has been compelled.<sup>63</sup>

The problem though is that such compulsions interfere with the “individual freedom of mind.”<sup>64</sup> To compel individuals to speak, even in circumstances in which it is clear that they might or might not be sincere, fails to accord due respect for those individuals as autonomous, thinking human beings whose views are independent of those of the state.<sup>65</sup> It also undermines First Amendment values of sincerity and truth that should be nurtured in citizen-speakers.<sup>66</sup> And it coerces thought in a manner that is illegitimate because it bypasses the speaker’s critical facilities in favor of persuasion through repetition.<sup>67</sup>

All of these rationales for scrutinizing compelled speech break down when our primary concern is with listeners, rather than speakers. From the listeners’ point of view, the compelled speech is not much different from the government’s choosing and promoting a view, which it is permitted to do under the government speech doctrine.<sup>68</sup> Unlike the speaker, the listener is being persuaded through reason, and with respect for the listener’s ability to make autonomous choices. In situations in which the speaker has no intrinsic speech interest, then the compelled speech harms neither the speaker nor the listener. This is perhaps easiest to see with respect to corporate speakers.<sup>69</sup> Repeated utterances do not

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<sup>63</sup> Cf. *Barnette*, 319 U.S. at 664 (Frankfurter, J., dissenting) (“It is not even remotely suggested that the requirement for saluting the flag involves the slightest restriction against the fullest opportunity on the part both of the children and of their parents to disavow as publicly as they choose to do so the meaning that others attach to the gesture of salute.”).

<sup>64</sup> *Barnette*, 319 U.S. at 637; *Wooley*, 430 U.S. at 714 (quoting *Barnette*).

<sup>65</sup> See Vincent Blasi & Seana V. Shiffrin, *The Story of West Virginia State Board of Education v. Barnette: The Pledge of Allegiance and the Freedom of Thought*, FIRST AMENDMENT STORIES, 99, 124-25 (2012).

<sup>66</sup> See *id.* at 125-27.

<sup>67</sup> See *id.* at 128-29.

<sup>68</sup> See *Johanns v. Livestock Marketing Ass’n*, 544 U.S. 550, 559 (2005).

<sup>69</sup> See Blasi & Shiffrin, at 127 n.123 (stating that the rationale in *Barnette* applies “only to natural persons,” rather than “corporate entities”).

have the same psychological effects on corporations that they do on individuals.

The rationales are equally misplaced with respect to non-corporate commercial speech. To see why, we first need to define what we mean by compelling commercial speech. The courts have already had difficulty defining commercial speech in the context of speech restrictions. Those difficulties appear to be heightened in the compelled speech context, since many of the usual defining characteristics of commercial speech no longer make sense. One of the indicia of commercial speech is that the speaker has an economic motivation for the speech.<sup>70</sup> But a speaker who is being compelled to convey a message is not motivated to speak at all, economically or otherwise. Nor is there much sense in looking to the speaker's motivation for objecting to the compelled speech. Similarly, because the government dictates the form of the speech, the form need not have any particular relationship to whether the speech is commercial.<sup>71</sup>

Rather than looking to form or motivation, we should instead look for a connection to commerce, and in particular, whether the compelled speech is incidental to a commercial transaction. Utterances that are incidental to a commercial transaction, even those made by an individual, do not have the same significance as those made by the individual as citizen. The words spoken by the individual as seller come with some measure of detachment, unlike those words spoken by the individual as citizen. Just as there is a social expectation of some distance between an individual's role as employee and his true self,<sup>72</sup> or between a student's role in reciting a poem and his or her role in pledging allegiance to the flag,<sup>73</sup> so too is there a social expectation of distance between what is said as an incident of a commercial transaction and what is said generally.

Thus, the D.C. Circuit was wrong to impose heightened scrutiny on the FDA's requirement of graphical warning labels on cigarette packages.<sup>74</sup> The FDA had sought to update the mandatory cigarette warning labels with new text, and with graphical images to accompany each of the new warnings.<sup>75</sup> The D.C. Circuit held that because the graphical warnings were not designed to prevent consumer deception and did not consist solely of "purely factual and uncontroversial information," the mandatory warnings were subject to at least intermediate scrutiny.<sup>76</sup>

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<sup>70</sup> See *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983).

<sup>71</sup> *Cf. id.*

<sup>72</sup> See *Dan-Cohen*.

<sup>73</sup> See *Blasi & Shiffrin*.

<sup>74</sup> See *R.J. Reynolds Tobacco Co. v. Food & Drug Administration*, 696 F.3d 1205 (D.C. Cir. 2012).

<sup>75</sup> See *id.* at 1208-09.

<sup>76</sup> See *id.* at 1216.

Finding insufficient evidence that the new warnings would in fact advance an interest in discouraging smoking, the court held that requiring the graphical warnings would violate the First Amendment.<sup>77</sup>

The key distinction made by the D.C. Circuit was between factual and normative messages.<sup>78</sup> As I have argued previously though, distinguishing between factual and normative compulsions is a shaky basis upon which to hinge the level of scrutiny.<sup>79</sup> Disclosures that are seemingly factual are rarely neutral. The inclusion of trans fat contents on a nutrition label is not meant to serve equally those who are looking to consume more trans fat and those who are trying to avoid it.

Instead, what should have mattered in this case was that the entity being compelled was a corporate one, and the compelled speech was an incident of the underlying commercial transaction of selling cigarettes. Thus, the real interests at stake were those of the cigarette consumers, rather than those of the tobacco companies. Compelling speech from the tobacco companies only served the consumers' interests, by adding to the information available to them, both factual and normative.

#### B. *Limitations on Compelled Corporate or Commercial Speech*

The government's ability to compel corporate or commercial speech is not unlimited, however, and there are a number of situations in which compelled corporate or commercial speech might appropriately merit some greater level of First Amendment scrutiny. Greater scrutiny might apply to compulsions directed at certain types of corporations, particularly those that are more expressive in nature. Greater scrutiny might also apply when the compulsion is a condition of the compelled entity's own speech. Finally, we might scrutinize any government compulsion to ensure that the government cannot hide its own speech as that of another.

##### 1. Distinctions Among Corporate Speakers

Corporations come in a wide variety of types, and some might more plausibly assert speaker-based interests than others. The key

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<sup>77</sup> See *id.* at 1219.

<sup>78</sup> Some commentators have argued in favor of a similar distinction. See Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539 (2012); see also Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. (forthcoming 2014) (arguing that compelled speech is more problematic "when it attempts to persuade rather than just inform" or when it is "manipulative").

<sup>79</sup> See Wu, *supra* note 3, at 79-81.

concept developed by Dan-Cohen is that of “role distance.”<sup>80</sup> Where a person’s role within an organization is closely tied to her own personal identity, we say that the role distance is small; where the organizational and personal roles are relatively distinct, we say that the role distance is large. Where the role distance is small, we might worry that a compulsion on the corporate entity will function like a compulsion on an individual or set of individuals, in such a way as to raise the “freedom of mind” concerns discussed above.

For the usual for-profit corporation, no one, whether employee, executive, or shareholder, has such a small role distance,<sup>81</sup> and as a result, compulsions applied to such corporations are unproblematic. This is particularly true with respect to major publicly-traded corporations, which are often the ones trying to assert speech rights. Employees, executives, and shareholders of such corporations are particularly likely to have detached roles. Compelling R.J. Reynolds to place a particular image on its cigarette packages, for example, is far removed from compelling speech from any particular employee, executive, or shareholder of the company. Even with respect to a close corporation, corporate laws themselves operate to encourage and enforce a certain measure of separation between individual and corporate identity.<sup>82</sup> Absent circumstances that would support piercing the corporate veil, even the owners of a close corporation should generally be regarded as occupying a detached role.

Membership in a church, on the other hand, is an example of a role that is much more tightly bound to an individual’s identity. Thus, to compel a church to speak should attract greater scrutiny, even though the church may be organized as a non-profit corporate entity.

Media entities may well be ones that engender more “nondetached” roles. For example, in finding that a newspaper’s “exercise of editorial control and judgment” should be protected, the Supreme Court characterized the First Amendment intrusion as one of “intrusion into the function of editors.”<sup>83</sup> In speaking specifically about editors, rather than simply about the newspaper as a whole, the Court’s holding may have been animated by an understanding of editors as occupying a nondetached role. That is, editors may be understood as speaking not only for the newspaper, but for themselves as well, in a way that the average corporate executive does not. One can imagine similar results with respect to a director of a movie, for example, even if the director is understood to also

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<sup>80</sup> See Dan-Cohen, *supra* note 1, at 1237.

<sup>81</sup> See Nelson, *supra* note 13.

<sup>82</sup> See *id.*

<sup>83</sup> *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).



be speaking for the movie studio. Thus, compulsions directed at media entities may raise constitutional questions beyond those raised by compulsions directed at corporate entities generally.

## 2. Compulsions Conditioned on Speech

Compulsions that are triggered by the compelled entity's own speech merit greater scrutiny than compulsions that are triggered by something other than expression. In such cases, we could be concerned that the compulsion creates a chilling effect on the entity's own speech, to the detriment of the audience for that speech.

Most, if not all, of the existing Supreme Court cases scrutinizing compulsions directed at commercial entities can be explained by the Court's concern to avoid effectively restricting those entities' speech.<sup>84</sup> For example, the case of *Miami Herald Publishing Co. v. Tornillo* involved a Florida statute that required newspapers to print a reply from any political candidate criticized by a newspaper editorial.<sup>85</sup> In holding the statute unconstitutional, the Court characterized the compulsion as one that could chill the newspaper's own speech, because the paper might avoid coverage and criticisms that would trigger the right of reply.<sup>86</sup> Later, in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, the Court applied similar reasoning in striking down a requirement that a privately owned utility company include materials in its billing envelopes from a ratepayers group with views contrary to those of the utility.<sup>87</sup> In that case, the compulsion was not directly triggered by the utility's speech, but because access was "awarded only to those who disagree with appellant's views and who are hostile to appellant's interests, appellant must contend with the fact that whenever it speaks out on a given issue, it may be forced . . . to help disseminate hostile views."<sup>88</sup> Under such circumstances, the utility might well decide that "the safe course is to avoid controversy," thereby reducing the free flow of information and ideas that the First Amendment seeks to promote."<sup>89</sup> Thus, the focus was again on ensuring the "free flow of information."

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<sup>84</sup> See Wu, *supra* note 3, at 85-88.

<sup>85</sup> 418 U.S. 241 (1974).

<sup>86</sup> See *id.* at 257 ("Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced.").

<sup>87</sup> See 475 U.S. 1, 4, 7 (1986) (plurality opinion).

<sup>88</sup> *Id.* at 14.

<sup>89</sup> *Id.* (quoting *Tornillo*, 418 U.S. at 257).

Even when the problem has not been one of chilling competing views, the Court has also expressed concern over compulsions that might simply displace the entity's own speech. In *Tornillo*, the Court noted the practical constraints that precluded an "infinite expansion of [the newspaper's] column space to accommodate the replies that a government agency determines or a statute commands the readers should have available."<sup>90</sup> In *PG&E*, the concurring opinion of Justice Marshall, who provided the crucial fifth vote in the case, emphasized that "by appropriating, four times a year, the space in appellant's envelope that appellant would otherwise use for its own speech, the State has necessarily curtailed appellant's use of its own forum."<sup>91</sup>

It is true that the Court has in parallel adopted rationales that suggest that the compulsions are inherently problematic, as when the Court suggested that the forced inclusion of the ratepayers group's speech "impermissibly requires [the utility] to associate with speech with which [it] may disagree," causing it to be "forced either to appear to agree with [the ratepayers group's] views or to respond."<sup>92</sup> Even then though, in rejecting the view "that our decisions do not limit the government's authority to compel speech by corporations," the Court emphasized the "danger that appellant will be required to alter its own message."<sup>93</sup> What is protected by the First Amendment is "the message itself,"<sup>94</sup> rather than the corporate messenger, which is consistent with the view that what really matters is whether speech has been restricted, rather than whether the corporation has been compelled.

### 3. Deception About the Source of Speech

Finally, greater scrutiny of compelled speech might also be warranted if the government fails to make it clear that it is the ultimate source of the compelled speech. In general, if our focus is on listeners, then not only is the government justified in trying to eliminate deceptive speech, it should itself not be the source of any deception. This means

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<sup>90</sup> *Tornillo*, 418 U.S. at 257.

<sup>91</sup> *PG&E*, 475 U.S. at 24 (Marshall, J., concurring in the judgment). Similarly, in holding that intermediate scrutiny applied to the requirement that cable operators carry local broadcast stations, the Court characterized the requirement as more of a restriction than a compulsion. See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636-37 (1994) ("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*." (emphasis added).

<sup>92</sup> *PG&E*, 475 U.S. at 15.

<sup>93</sup> *Id.* at 16.

<sup>94</sup> *Id.*

first that the government should not be permitted to compel any form of misleading speech that would fall outside of the First Amendment under the *Central Hudson* test were the government to try to restrict that same speech.

This also means that the government should not be permitted to deceive as to the source or identity of the ultimate speaker. There may be circumstances in which we want to protect the anonymity of private speakers in order to protect their speech. Otherwise, fear of either government or private retribution might lead such speakers to censor their own speech.<sup>95</sup> No such rationale applies when it is the government that is speaking. Governments are not subject to retribution in the same way as private speakers.

Indeed, the potential for political “retribution” should not only be permissible, it should be encouraged. Compelling a commercial entity to say something it does not agree with can be framed as the government simply co-opting the resources of a private party in order to disseminate its own, government speech, an act not so different from the imposition of a special tax.<sup>96</sup> The check on abuse of such government power is purely political, namely, the ability of majorities to decide who will be elected to office, and thus what messages the government will espouse. In order for such political accountability to function, however, the electorate needs to understand that the message is indeed the government’s, and thus subject to political control. If the government could co-opt private parties to spread a message without revealing that it is a government message, it could insulate itself from that accountability.<sup>97</sup>

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<sup>95</sup> See *Doe v. Reed*, 561 U.S. 186 (2010) (“Plaintiffs explain that once on the Internet, the petition signers’ names and addresses can be combined with publicly available phone numbers and maps, in what will effectively become a blueprint for harassment and intimidation.”); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 341-42 (1995) (“The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry.”); *Talley v. California*, 362 U.S. 60, 65 (1960) (“Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts.”).

<sup>96</sup> See *Johanns v. Livestock Marketing Ass’n*, 544 U.S. 550, 559 (2005) (“We have generally assumed, though not yet squarely held, that compelled funding of government speech does not alone raise First Amendment concerns.”).

<sup>97</sup> See *id.* at 571 (Souter dissenting).

### III. IMPLICATIONS FOR SPEECH AMONG COMMERCIAL ENTITIES

#### A. *Transactions Among Commercial Entities*

Recognizing the distinction between derivative and intrinsic speech interests also matters in those situations in which all of the parties to the transaction have only derivative interests. These provide another category of cases in which diminished First Amendment scrutiny may be appropriate.

One example is that of regulation of data brokers or of transfers of personal data among commercial entities.<sup>98</sup> For example, in *Sorrell v. IMS Health Inc.*, the Court invalidated a Vermont law that prohibited the sale, disclosure, or use of pharmacy records about the prescribing practices of individual doctors for marketing purposes.<sup>99</sup> The main form of disclosure targeted by the regulation was the transfer of the data from the pharmacy through an intermediary like IMS Health to the pharmaceutical companies, which would then use the information to customize their sales pitches to doctors.<sup>100</sup> Ultimately, the Court ruled that the infirmity in the Vermont law was in denying to the pharmaceutical companies access to the prescriber-identifying information, while permitting access by many others, including groups interested in countering the pharmaceutical companies and promoting the prescription of generic drugs.<sup>101</sup> In dicta along the way, however, the Court suggested that perhaps the restriction on transfer was itself directly problematic, insofar as “the creation and dissemination of information are speech within the meaning of the First Amendment.”<sup>102</sup>

Whatever the merits of treating the transfer of information from the pharmacy to the pharmaceutical company as “speech” in the abstract,<sup>103</sup> once we examine the transaction more closely, we find that neither party has an intrinsic speech interest in the transaction. In the usual case, both parties will be major for-profit corporations. Neither of those corporations is capable of self-development. Neither is a citizen in our democracy.

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<sup>98</sup> See Wu, *supra* note 3, at 90.

<sup>99</sup> See 131 S. Ct. 2653, 2659 (2011). Those records are referred to as “prescriber-identifying information.” *Id.*

<sup>100</sup> See *id.* at 2660. The process of promoting drugs to doctors is known as “detailing.” *Id.* at 2659.

<sup>101</sup> See *id.* at 2663.

<sup>102</sup> *Id.* at 2667.

<sup>103</sup> See Ashutosh Bhagwat, *Sorrell v. IMS Health: Details, Detailing, and the Death of Privacy*, 36 VT. L. REV. 855, 876 (2012) (arguing that such a transfer should receive full First Amendment protection “only when the speech contributes meaningfully to the democratic process of self-governance”).

With respect to an interest in knowledge or truth, the matter is more complicated, since arguably knowledge and truth can be valuable to corporations as well as to individuals, and thus we might think that the corporate listener has as much claim to an original listener-based right as an individual listener. The value of knowledge and truth to corporations, however, is still fundamentally instrumental, and different in kind from their value to individuals. For individuals to know the truth is intrinsically good, or if instrumental, then instrumental as part of the self-development or democracy values described above. Corporations value knowledge because it increases efficiency. And while economic efficiency is obviously a social good, it is a good of a different order than the sorts of constitutional goods protected by the First Amendment and the Constitution. In other words, the ultimate value of knowledge is the knowledge that individual people have. Corporations may play an important intermediate role—more on that below—but corporate knowledge is not an end in itself.

Nor would the situation be any different if the pharmacist were an individual, and we posited that the pharmaceutical manufacturer was also an individual. Even if the transaction no longer involved corporations, it would still involve commercial entities, in this case, not only a commercial speaker, but a commercial listener as well. In this example, the individuals should be regarded as commercial entities with respect to the information at issue because their interest in the information derives only from their role as a party to a commercial transaction. The mere fact that the prescription information itself is being bought and sold is not enough to turn the parties into commercial entities; much fully-protected speech is bought and sold. For the pharmacist, however, the information is an incident of his business of filling prescriptions. For the pharmaceutical manufacturer, the information is an incident of her business of manufacturing prescription drugs. It is in their roles as pharmacist and pharmaceutical manufacturer that they are transacting, not their roles as citizens and individuals.

### *B. Privacy Invasions by Commercial Entities*

Some commentators have argued that privacy laws burden freedom of expression and should receive heightened scrutiny under the First Amendment.<sup>104</sup> This potentially includes not only laws that stop people from talking about others,<sup>105</sup> but also laws that inhibit the gathering and

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<sup>104</sup> See Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You*, 52 STAN. L. REV. 1049 (2000); Jane Yakowitz Bambauer, *Is Data Speech?*, 66 STAN. L. REV. (forthcoming 2014).

<sup>105</sup> See Volokh, *supra* note 104, at 1050-51.

creation of information in the first place.<sup>106</sup> Those that have advocated First Amendment scrutiny of privacy laws have not generally distinguished between commercial entities and individuals acquiring information.<sup>107</sup>

As argued above, however, commercial entities have derivative, rather than intrinsic, speech interests, and this includes when such entities are acting as listeners rather than speakers. In the context of privacy laws, the person from whom the information is being extracted is generally not a willing participant in the transaction; there is no willing “speaker.” Where the listener is a commercial entity then, this is another example in which the only party being restricted by the law does not have an intrinsic speech interest, and in which at least the particular transaction at issue does not create a reason to impose heightened scrutiny under the First Amendment.

### C. *Indirect Regulation of Noncommercial Transactions*

In some situations, though surely not all, commercial entities might be receiving or collecting information that they will ultimately pass on to individuals.<sup>108</sup> In those cases, we might be concerned that restricting the activities of these commercial entities might ultimately restrict noncommercial ones, and thus First Amendment scrutiny would still be appropriate, even if the interest of the commercial entities were understood as merely derivative.

At the outset, it is important to note that not every restriction on a commercial entity could plausibly raise a derivative interest. The pharmaceutical companies in *Sorrell* did not acquire prescriber-identifying information in order to thereby pass that information on to individuals.

Even when there may be an underlying noncommercial interest at stake, however, and therefore some First Amendment inquiry would be appropriate, recognizing the commercial interest as a derivative one circumscribes the nature of any resulting First Amendment review. On this view, the direct effects of a privacy regulation on a commercial entity like Lexis Nexis are legitimate. It is only the indirect effects on potential noncommercial recipients that are cause for concern.

When the government legitimately targets one kind of activity, but the government action might have problematic indirect speech effects, First Amendment review is substantially more deferential than when the direct effects of the government action are at issue. Consider, for example, the scrutiny applied to a content-neutral regulation. Such a

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<sup>106</sup> See Bambauer, *supra* note 104.

<sup>107</sup> See *id.*

<sup>108</sup> Bambauer gives the example of Lexis Nexis. See *id.*

regulation is constitutional “if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”<sup>109</sup>

The *O’Brien* test has often been called an intermediate scrutiny test, just as the *Central Hudson* test has been called an intermediate scrutiny test in the context of commercial speech. The “intermediate scrutiny” of the *O’Brien* test is not nearly as exacting though as the “intermediate scrutiny” of the *Central Hudson* test. If the *Central Hudson* test has been applied in a manner that sometimes borders on strict scrutiny, the *O’Brien* test has sometimes been applied in a manner that borders on rational basis review.

Consider the *O’Brien* case itself, which involved the constitutionality of a law against burning draft cards.<sup>110</sup> The defendant in that case argued quite reasonably that the burning of a draft card made no real difference to the actual operation of the draft system.<sup>111</sup> It was not as if the holder of the draft card were burning the actual record of his registration held by the government. The draft card itself was a mere receipt, a document that recorded relevant facts, such as the identity and registration status of a particular individual, but that did not itself make any of those facts more or less true. And yet the Court found that burning the draft card would impede “the smooth and proper functioning” of the draft system.<sup>112</sup> According to the Court, Congress had a “substantial interest” in preventing the destruction of these “receipts,” so as to avoid “a mix-up in the registrant’s file,” to make it easier for the registrant to contact his local board, and to remind the registrant to notify the board of any address changes.<sup>113</sup> In justifying the law under these rationales, the Court made no real attempt to ask whether there was a serious problem with any of these or whether the regulation would be at all effective in addressing these problems.

Contrast this with the commercial speech cases involving restrictions on advertising for alcohol, cigarettes, and gambling. In applying the *Central Hudson* test in those cases, courts have rigorously scrutinized the government’s evidence to determine how much the government’s interests would in fact be advanced by the challenged

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<sup>109</sup> United States v. *O’Brien*, 391 U.S. 367, 377 (1968).

<sup>110</sup> See *O’Brien*, 391 U.S. at 375.

<sup>111</sup> See *id.* at 378.

<sup>112</sup> *Id.* at 381.

<sup>113</sup> *Id.* at 378–80.

regulations.<sup>114</sup> The difference is that in the commercial speech cases, the effects on speech are the direct and intended effect of the regulations, rather than merely a byproduct, leading the courts to be much more skeptical of the regulations.

Thus, just as a content-neutral regulation is valid so long as it is tailored to the permissible non-content aim and does not have excessive impermissible content-based effects,<sup>115</sup> regulation of commercial data collection, itself a permissible aim, should at a minimum be permitted so long as the regulation is tailored to that aim, and does not have excessive effects on the ability of individuals to collect information.

#### IV. IMPLICATIONS FOR COMMERCIAL SPEECH DIRECTED AT UNWILLING LISTENERS

The derivative nature of corporate and commercial speech also has important implications in cases involving listeners who wish to block out a commercial entity's speech. Once we understand that the protection of commercial speech is justified by the protection of the listener, it becomes easy to see that as between the commercial speaker and the unwilling listener, the interests of the unwilling listener should win out.

Thus, there is no sensible argument that "do-not-call" regulations would violate the First Amendment.<sup>116</sup> The telemarketing calls restricted by the do-not-call regulations are corporate and/or commercial speech,<sup>117</sup> and thus are protected only to protect the recipients' access to such speech. If those recipients have specifically indicated that they do not wish to receive such calls, the telemarketers have no intrinsic right to speak nevertheless. While the Tenth Circuit ultimately upheld the do-not-call regulations against a First Amendment challenge, it did so only after applying the *Central Hudson* test.<sup>118</sup> In so doing, the court relied heavily on the evidence the government had put forward about the extent of the problem of unwanted telemarketing and the inadequacy of proposed alternatives.<sup>119</sup> There should have been no need, however, to clear a hurdle designed to preserve listeners' access to information in a case about whether those listeners could refuse to receive that information.

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<sup>114</sup> See *Liquormart*, 517 U.S. at; *R.J. Reynolds*,

<sup>115</sup> See *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989).

<sup>116</sup> See *Mainstream Marketing Services, Inc. v. FTC*, 358 F.3d 1228 (10th Cir. 2004).

<sup>117</sup> See *id.* at 1236 ("The national do-not-call registry's telemarketing restrictions apply only to commercial speech.").

<sup>118</sup> See *id.* at 1236-37.

<sup>119</sup> See *id.* at



And the level of scrutiny can make a real difference to the outcome of a case, particularly when privacy interests are at stake.<sup>120</sup> In an earlier case, the Tenth Circuit had come to the opposite conclusion about the constitutionality of an FCC order restricting telecommunications carriers from using customer information for marketing purposes, striking down the order after applying the *Central Hudson* test.<sup>121</sup> In that case, the court expressed its “concerns” about the privacy justification the government proffered, and it required the government to “specify the particular notion of privacy and interest served” and to establish that the interest was “substantial.”<sup>122</sup> Construing the relevant privacy interest narrowly to be that of avoiding embarrassment,<sup>123</sup> the court found no evidence that embarrassing disclosures would occur in the absence of the challenged order, and thus no evidence of real harm to justify the order.<sup>124</sup>

But if the First Amendment claim here is supposed to protect the customer’s access to marketing information, and that customer objects to having his personal information used for those marketing purposes, there is simply no First Amendment claim to raise at all. Any First Amendment interest that the carrier has is derivative of the interests of the very individual against whom the carrier is opposed.

It is possible that some of the customers were not unwilling recipients at all, and that those customers’ interests in receiving marketing information on the basis of their data was burdened by the order’s requirement to opt-in to the use of their data. One could then argue that scrutiny might be warranted in order to ensure access by these willing customers to valuable marketing information, particularly if an opt-in requirement is seen as a substantial barrier to the flow of that information.<sup>125</sup>

Framed in that manner, however, the First Amendment interests are easily seen to be far less weighty than the courts have generally

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<sup>120</sup> See Wu, *supra* note 3, at 81-82.

<sup>121</sup> See *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1240 (10th Cir. 1999). The challenged order applied to “customer proprietary network information,” which included call data, *id.* at 1228, 1228 n.1, and it largely prohibited carriers from using or disclosing the information except to provide the relevant telecommunications service, *id.* at 1229.

<sup>122</sup> *Id.* at 1234-35.

<sup>123</sup> See *id.* at 1235. The government had justified the order on the basis that information about “to whom, where, and when a customer places a call” was information that could be “extremely personal to customers” and “equally or more sensitive [than the content of the calls].” *Id.* at 1235 (quoting CPNI Order). The potential for embarrassment is but one possible privacy interest at stake in the use or disclosure of call data. See Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934 (2013).

<sup>124</sup> See *U.S. West*, 182 F.3d at 1237-38.

<sup>125</sup> See Michael E. Staten & Fred H. Cate, *The Impact of Opt-in Privacy Rules on Retail Markets: A Case Study of MBNA*, 52 DUKE L.J. 745 (2003).

characterized them. The government regulation does not constrain the speech that consumers can choose to receive. In order to receive a particular kind of marketing, the consumer need only affirmatively choose to receive it. Moreover, just as the economic incentive of the commercial speaker is thought to be sufficient to minimize any chilling effect from the imposition of liability for misleading commercial speech, that same economic incentive should overcome any barriers created by the need to obtain opt-in consent. The commercial speakers have every incentive to make it as easy as possible for consumers to opt-in to marketing.

This same analysis could have been applied in the case of *Sorrell v. IMS Health*.<sup>126</sup> Recall that in that case, the Supreme Court ultimately grounded its decision to strike down the Vermont law not in the law's restriction of the transfer of data from pharmacies to pharmaceutical companies, but in the law's restriction of the pharmaceutical companies' marketing practices to doctors.<sup>127</sup> Here too, as in *U.S. West*, the real interests are not those of the companies marketing to doctors, but those of the doctors interested in receiving information about brand-name drugs from the companies. And again, the law at issue did not prevent the doctors from receiving not only detailing visits, but detailing visits tailored to their prescription practices. The doctors need only have opted-in to such marketing. On that view, it would seem that the Court's heightened scrutiny was misplaced.

Still, the Court's decision seems to have been animated by its view that the Vermont law was not really about marketing that the doctors did not want, but rather about marketing that the state did not want. As the Court put it, the defect in the law was that it "burdened a form of protected expression that it found too persuasive."<sup>128</sup> This rationale is very much in line with the core rationale expressed by the Court in its commercial and corporate speech cases, namely that the First Amendment casts doubt on any regulation meant to limit persuasion.

Read in that way, the *Sorrell* decision is a relatively narrow one. It perhaps limits the government's ability to restrict marketing on the basis of persuasiveness, but not on the basis of whether the listener wants it.<sup>129</sup>

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<sup>126</sup> See 131 S. Ct. 2653 (2011).

<sup>127</sup> See *id.* at .

<sup>128</sup> See *id.* at 2672.

<sup>129</sup> See *id.* at 2669 (suggesting that a statute designed to give physicians greater control over the use of their information might pass muster, because then the statute's design would be "unrelated to any purpose to advance a preferred message"). *But see id.* ("Many are those who must endure speech they do not like, but that is a necessary cost of freedom."); Piety, *supra* note 44, at 5 (arguing that *Sorrell* represents a "major doctrinal shift" in "turning the rationale for commercial speech doctrine upside down by putting the speaker, rather than the public interest, at the center of the analysis").

It could thus pose no impediment, for example, to requiring websites to honor a do-not-track or do-not-target signal.<sup>130</sup> Such a requirement might seem superficially similar to the one at issue in *Sorrell*, insofar as both requirements restrict the use of certain personal information for marketing purposes. A restriction on behavioral advertising, however, would be aimed not at limiting its persuasiveness, but at recognizing the consumers' preference not to have their information used to market to them in particular ways.

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<sup>130</sup> Cf. Agatha M. Cole, *Internet Advertising After Sorrell v. IMS Health: A Discussion on Data Privacy & the First Amendment*, 30 CARDOZO ARTS & ENT. L.J. 283 (2012).