DISSENT, CORPORATE CARTELS, AND THE COMMERCIAL SPEECH DOCTRINE

"We are . . . clear that the Constitution imposes no such . . . restraint on government as respects purely commercial advertising."[1] With that single sentence in *Valentine v. Chrestensen*,[2] the Supreme Court not only created the category of commercial speech — nowhere to be found in the Constitution — but also declared that such speech was beyond the reach of the First Amendment.[3] *Valentine* was not the Court's finest moment. Justice Douglas, who joined the majority in *Valentine*, later characterized the decision as "almost offhand" and incapable of "surviv[ing] reflection."[4]

Despite its brevity[5] and lack of profundity, however, *Valentine* usefully demonstrates two essential points about commercial speech. For one, the *Valentine* Court's quick dismissal of the First Amendment claim reflects the intuition that commercial speech should not be entitled to full constitutional protection. To borrow a phrase from Justice Stevens, "few of us would march our sons and daughters off to war to preserve the citizen's right" to watch Super Bowl commercials.[6] At the same time, however, scholars have largely failed to develop a theory that both adequately defines commercial speech and justifies increased government regulation of it. The interplay between these two dynamics — the intuition that commercial speech should warrant less constitutional protection than other forms of speech, particularly political speech, and the failure to adequately justify that intuition — has made commercial speech doctrine one of the most conceptually thorny areas of First Amendment law.

The result of this theoretical underdevelopment has been doctrinal incoherence.[7] Less than a year after *Valentine*, in *Murdock v. Pennsylvania*,[8] the Court backtracked from its rash pronouncement and indi-

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[1] Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

[2] 316 U.S. 52.

[3] *See* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 627 (1990) ("[T]he Supreme Court plucked the commercial speech doctrine out of thin air.").

[4] Cammarano v. United States, 358 U.S. 498, 514 (1959) (Douglas, J., concurring).

[5] The opinion occupies a meager four pages in the U.S. Reports and contains less than a thousand words.

[6] Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 70 (1976) (plurality opinion). The original quotation was made in a slightly different speech context: "[F]ew of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice." *Id.* The idea for this application of Justice Stevens's *bon mot* comes from DANIEL A. FARBER, THE FIRST AMENDMENT 154 (2d ed. 2003).

[7] An excellent example of the intricate and problematic nature of the commercial speech doctrine can be found in EUGENE VOLOKH, THE FIRST AMENDMENT (2001). An outline of the Court's "basic" test stretches over nearly three pages. *See id.* at 233–35.

[8] 319 U.S. 105 (1943).

cated that, as Professor Laurence Tribe explains, "commercial speech must receive some protection where the primary motive of the individual appeared noncommercial despite the solicitation of money."[9] A generation later, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[10] the Court finally held that the First Amendment applies to commercial speech.[11] However, the Court maintained that commercial speech was entitled to a "different degree of protection" than other forms of speech.[12]

This holding left two issues in its wake, one old and one new. Because commercial speech is a unique First Amendment category, the Court continues to have to draw a line between commercial and noncommercial speech — a task with which the Court has "repeatedly struggled."[13] In addition, the Court must now identify the type of government interests it will require to justify regulation of commercial speech. With no coherent theory as to *why* commercial speech should be protected differently than other kinds of speech, the Court has struggled to deal with these issues.

This Note proposes a new focus for the commercial speech debate — a focus that aims to provide some traction on these twin issues. Corporations represent large concentrations of communicative power in today's society, and, as a result, there are many "speech markets" where commercial speech is not adequately countered. This is particularly true when the interests of corporations align and encourage cartel-like behavior. Drawing on dissent-based free speech theories, this Note argues that governments should be freer to regulate commercial speech when that speech is not adequately "checked" in the marketplace of ideas. This distinction between "self-regulating" commercial speech and "non-self-regulating" commercial speech should influence the decision as to when regulation of commercial speech is appropriate, as well as the decision as to what level of scrutiny courts should

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[9] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-15, at 891 (2d ed. 1988) (citing *Murdock*, 319 U.S. at 112). Professor Tribe notes that the landmark decision in *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964), upheld "the right of a newspaper to publish a paid political advertisement," and that *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), protected for-profit film distributors under the First Amendment. TRIBE, *supra*, § 12-15, at 891–92. *See also Murdock*, 319 U.S. at 112 (holding that a Jehovah's Witness's sale of religious literature was entitled to full First Amendment protection since the sale was "incidental and collateral" to his religious aims (quoting State v. Mead, 300 N.W. 523, 524 (Iowa 1941)) (internal quotation mark omitted)).

[10] 425 U.S. 748 (1976).

[11] *See id.* at 770. Since *Virginia State Board*, the Court has acted as if the First Amendment protects "purely" commercial advertising, suggesting that *Valentine* is no longer good law. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 584 (1980) (Rehnquist, J., dissenting) (noting that *Virginia State Board* was the first case in which the Court protected commercial speech).

[12] *Va. State Bd.*, 425 U.S. at 771 n.24.

[13] TRIBE, *supra* note 9, § 12-15, at 894.

apply to government regulations of commercial speech. Applying this distinction may be particularly appropriate in the realm of commercial speech because advances in marketing and information science have made identifying the distinction easier in this context than in other speech arenas.

This Note proceeds as follows: Part I delineates the confused state of the Supreme Court's commercial speech jurisprudence, arguing that the failure to develop a workable theoretical rationale supporting commercial speech's lesser constitutional protection has resulted in doctrinal incoherence. Part II introduces dissent-based free speech theories — which have heretofore been relatively underrepresented in the commercial speech literature — and details how such theories may provide theoretical guidance when considering commercial speech questions. Part III attempts to make dissent-based free speech theory pragmatically operational in the commercial speech context by introducing and explicating the distinction between self-regulating and non-self-regulating commercial speech. This Part uses hypothetical examples to explore the appropriate criteria for differentiating between self-regulating and non-self-regulating speech — with customer preferences, shopping patterns, and market share concentration as important drivers — and assesses the usefulness of this distinction, as well as its administrability, in light of the current doctrine. Part IV concludes by addressing some questions prompted by this analysis.

I. THE PROBLEMATIC DOCTRINE OF COMMERCIAL SPEECH

A. A Doctrine in Search of a Theoretical Justification

The government regulates commercial speech in ways that would be unconstitutional if applied to other forms of speech. Securities laws regulate how business enterprises talk to the public and their shareholders; labor and employment laws regulate how they talk to their employees; and a host of other regulations control nearly every aspect of their communications.[14] Intuitively, most people see no problem — constitutional or otherwise — with this state of affairs.

However, an adequate theoretical justification of our intuitive acceptance of these regulations has not been forthcoming. While scholars and judges have put forward several rationales for the commercial speech doctrine,[15] none of these rationales presents a compelling case

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[14] *See* Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1214–15 (1983) (listing various forms of accepted government regulation of commercial speech).

[15] For a catalog of the leading theories attempting to justify lesser free speech protection for commercial speech, see RODNEY A. SMOLLA, THE FIRST AMENDMENT 113–15 (1999); KATH-

for why *commercial* speech in particular should be singled out for lesser First Amendment protection. A brief examination of the leading theories illuminates this point.[16]

1. Commercial Speech Is Functionally Different from Other Forms of Speech. — The Supreme Court has proposed two functional explanations for the "commonsense" distinction between commercial speech and other forms of speech: first, the former is more objectively verifiable, and, second, it is less likely to be chilled by regulation because commercial speakers are motivated by the lure of profits.[17] Both explanations prove unsatisfactory.[18] Some forms of commercial speech are impossible to verify ("All the news that's fit to print") and some forms of noncommercial speech are verifiable ("We balanced the budget last year"). In addition, noncommercial speech is often inspired by a range of motives, both financial and nonfinancial, that make it, at least in certain instances, equally unlikely to be chilled. Finally, these arguments are only useful to explain the regulation of false factual allegations; verifiability and heartiness are irrelevant when considering many other types of commercial speech regulation, including blanket prohibitions on advertising.[19]

2. The Regulation of Commercial Speech Does Not Implicate Autonomy Concerns. — Professor C. Edwin Baker contends that commercial speech is entirely dictated by market forces and profit motivations, and, thus, is not a reflection of individual choice and is not worthy of First Amendment protection.[20] This argument is problematic for two reasons. First, it assumes that commercial speech is never reflective of the creative energies and autonomous beliefs of the individuals who formed and constitute the corporate entity.[21] Second, it

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LEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 184–86 (2d ed. 2003); and Martin H. Redish, *First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy*, 24 N. KY. L. REV. 553, 565–78 (1997).

16 For an article that discusses these theories at greater length, see Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of* 44 Liquormart, 1996 SUP. CT. REV. 123.

17 *See Va. State Bd.*, 425 U.S. at 771 n.24.

18 For a general refutation of both theories, see, for example, Kozinski & Banner, *supra* note 3, at 634–38; and Shiffrin, *supra* note 14, at 1218.

19 *See* Redish, *supra* note 15, at 568.

20 *See* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 194–224 (1989); C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976); C. Edwin Baker, *Paternalism, Politics, and Citizen Freedom: The Commercial Speech Quandary in* Nike, 54 CASE W. RES. L. REV. 1161, 1162 (2004) [hereinafter Baker, *Paternalism*] (noting that "our strongest advocates of free speech," including Justice Black, "consistently rejected granting any protection to commercial speech").

21 Baker's thesis would not explain why corporations, particularly private corporations, donate money to charities, keep unnecessary employees on staff, disseminate public service messages, and engage in innumerable other forms of communication that may not be strictly mandated by profit motives.

ignores the value of speech to the listener.[22] In particular, Baker's theory is incompatible with a marketplace-of-ideas theory of free speech, as commercial speech could be important "for listeners trying to find truth, wisdom, or other insight."[23]

3. Congress Can Regulate the Economy, So It Should Be Able to Regulate Commercial Speech. — This classic "the greater includes the lesser" argument has been advanced by members of the Court in the past.[24] The logic is as follows: since the demise of the *Lochner* era, Congress has been able to regulate economic activity; thus, it would follow that Congress also has the "lesser power" to regulate advertising or speech that relates to economic activity.[25] This argument presupposes that speech is the lesser right; in fact, however, the First Amendment makes speech the primary right.[26] By the logic of this argument, the state could "outlaw all protest against laws it has enacted, because its greater power to regulate or prohibit a particular activity includes within it a lesser power to outlaw speech attendant to that activity."[27] Such an outcome is untenable.

4. The First Amendment Only Protects Political Speech. — Finally, some theorists argue that the First Amendment should only protect political speech, in part because that is what preoccupied the Framers.[28] Even if one accepts this assertion, which is by no means indisputable,[29] it still does not justify the commercial speech doctrine.

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[22] Even granting that some forms of commercial speech are less valuable to listeners, it seems reasonable to posit that commercial speech does have some value to listeners. And, as Professor Martin Redish argues, this value is of some constitutional significance, as "at least a significant portion of the value served by free expression is the benefit received by the reader, viewer or listener." Redish, *supra* note 15, at 570; *see also* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 763 (1976) ("As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate.").

[23] Baker, *Paternalism*, *supra* note 20, at 1163 n.8 (citing Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971)).

[24] *See, e.g.*, Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 346 (1986); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 591–94 (1980) (Rehnquist, J., dissenting). This argument was first put forward in Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979).

[25] *Posadas*, 478 U.S. at 346.

[26] The First Amendment was, of course, ratified after Congress's commerce power was established, and the language of the Amendment ("Congress shall make no law") indicates that its primary purpose was to cabin Congress's affirmative powers.

[27] Jonathan W. Emord, *Contrived Distinctions: The Doctrine of Commercial Speech in First Amendment Jurisprudence*, Cato Institute Policy Analysis No. 161, Sept. 23, 1991, http://www.cato.org/pubs/pas/pa-161.html.

[28] *See* Kozinski & Banner, *supra* note 3, at 632.

[29] First, and most obviously, the First Amendment does not distinguish between political and nonpolitical speech (or between commercial and noncommercial speech). Second, it is not clear that the Framers had a "coherent theory of free speech"; in fact, they "appear not to have been

First, many types of nonpolitical speech receive protection greater than that afforded commercial speech.[30] Second, the distinction between political and nonpolitical speech almost certainly does not map onto the distinction between commercial and noncommercial speech; commercial speech may not only be concerned with political topics,[31] but may also be vital to "an individual's 'private self-governing' process."[32] In fact, Professor Robert Post argues that the patchwork-quilt doctrine of commercial speech results from the Supreme Court's attempt to "express[] the theory . . . that the constitutional function of communication is to inform an *audience* of citizens about matters pertinent to democratic decision making."[33] The trick then becomes the actual drawing of the line between commercial and political speech — a task that, as evidenced by the existing state of commercial speech doctrine, has not yet been satisfactorily accomplished.

B. The Incoherence of the Commercial Speech Doctrine

Doctrinal incoherence results from this theoretical underdevelopment. Without a coherent underlying rationale as to *why* commercial speech should receive less First Amendment protection,[34] courts struggle to determine both *which* speech should be considered commercial and *what standard* the government must meet in order to regulate it. The result is that the Court "hide[s] behind the constitutional smoke screen that is the commercial speech distinction,"[35] rotely applying the

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overly concerned with the subject." Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971).

30 *See* Kozinski & Banner, *supra* note 3, at 633 ("The Framers never expressed an interest in protecting literature either, but the idea that the first amendment protects artistic expression is not one that attracts much opposition." (citing Roth v. United States, 354 U.S. 476 (1957))).

31 "Political" speech by corporations was the issue in *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002). In that case, the California Supreme Court held that Nike could be liable under a state false advertising statute if corporate press releases and letters to newspapers and athletic directors around the country rebutting charges of mistreatment and underpayment of foreign workers proved to be false. *See id.* The U.S. Supreme Court granted certiorari in order to clarify the relationship between political and commercial speech, but unexpectedly dismissed the writ as improvidently granted. *See* Nike, Inc. v. Kasky, 539 U.S. 654, 655 (2003). The Court's failure to clarify this complex issue, and the resulting scholarly and media backlash, is discussed in Thomas C. Goldstein, Nike v. Kasky *and the Definition of "Commercial Speech"*, 2002–03 CATO SUP. CT. REV. 63.

32 Redish, *supra* note 15, at 566.

33 Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 5 (2000).

34 The commercial/noncommercial distinction may exist for administrative reasons: for example, rather than deciding if speech is verifiable, a court may prefer to determine whether it is commercial. However, it is not clear that the commercial/noncommercial distinction is particularly easy to draw. *See infra* section I.B. Further, if the underlying rationale of the theory is to regulate verifiable statements, any incremental improvement in administrability will almost certainly be outweighed by a dramatic decrease in accuracy, because it is doubtful that commercial statements are empirically more likely to be verifiable than political statements.

35 Redish, *supra* note 15, at 576.

Bolger test to determine whether speech is commercial and the *Central Hudson* test to determine whether the government can constitutionally regulate commercial speech.

Both the *Bolger* and *Central Hudson* tests appear to be straightforward at first glance, but neither has proven workable in practice. Under *Bolger v. Youngs Drug Products Corp.*,[36] the "Court has been content to define commercial speech as speech doing no more than proposing a commercial transaction."[37] However, this standard does not track any "principled distinction, either in the cases or in the values implicated by the first amendment, between commercial speech and other, similar speech that enjoys full first amendment protection."[38] As a result, lower courts are forced to "guess at the proper way to categorize speech in any given case."[39] For example, are the many advertisements that never "propose a commercial transaction" commercial speech? What about industry image campaigns ("Got milk?")? And, perhaps most importantly and perplexingly, what about corporate statements — even statements that encourage the purchase of a product — that concern political and/or religious issues ("Buy American")? In sum, commercial speech is a category that must "be applied arbitrarily in any but the easiest cases."[40]

The test articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*[41] is, if anything, even more difficult to apply. For a government regulation of commercial speech to be upheld, *Central Hudson* requires that the regulation directly advance an important government interest in a manner no more restrictive of speech than necessary.[42] Operating as "a watered-down version of the compelling interest test," the *Central Hudson* standard "requires a less substantial interest to justify regulation and less precision in the targeting of the regulation."[43] The precise contours of this standard remain elusive:

> [G]overnment cannot prohibit certain sorts of commercial billboards, but can prohibit the unauthorized use of certain words altogether. Government cannot prohibit the mailing of unsolicited contraceptive advertise-

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[36] 463 U.S. 60 (1983).

[37] FARBER, *supra* note 6, at 156. According to the California Supreme Court, *Bolger* held "that the combination of . . . three factors — advertising format, product references, and commercial motivation — provided 'strong support' for characterizing" speech as commercial. Kasky v. Nike, Inc., 45 P.3d 243, 254 (Cal. 2002), *cert. dismissed*, 539 U.S. 654 (2003) (emphasis omitted) (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67 (1983)).

[38] David F. McGowan, *A Critical Analysis of Commercial Speech*, 78 CAL. L. REV. 359, 382 (1990).

[39] *Id.* at 383.

[40] Kozinski & Banner, *supra* note 3, at 648.

[41] 447 U.S. 557 (1980).

[42] *Id.* at 564–66.

[43] FARBER, *supra* note 6, at 158–59.

> ments, but can prohibit advertisements for casino gambling. Government cannot require professional fundraisers to obtain licenses, but can prohibit college students from holding Tupperware parties in their dormitories.[44]

As such, the Court's decisions stand as little more than "ad hoc subject-specific examples of what is permissible and what is not."[45] Thus, the end result of thirty years of jurisprudential development — since the Court held in *Virginia State Board* that the First Amendment applies to commercial speech — is doctrinal incoherence: "[u]nless a case has facts very much like those of a prior case, it is nearly impossible to predict the winner."[46]

Some scholars use this incoherence to argue that the Court should abandon the commercial speech doctrine altogether and presume that commercial speech is entitled to full First Amendment protection.[47] In the eyes of these scholars, the commercial speech doctrine is particularly pernicious in our capitalistic society, because the Court could reasonably label as commercial all speech involving matters of public concern.[48] Despite these concerns, however, the doctrine persists. At least one Justice has called for its demise,[49] but the Court has balked at abandoning the "commonsense" distinction between commercial and noncommercial speech.

II. COMMERCIAL SPEECH AND THE VALUE OF DISSENT

A. Dissent-Based Free Speech Theories

The commercial speech doctrine rests on an intuitive supposition that commercial speech should receive less First Amendment protection than other forms of speech, but lacks a theoretical framework to justify that intuition and define commercial speech. This state of af-

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[44] Kozinski & Banner, *supra* note 3, at 631 (footnotes omitted) (citing Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989); Riley v. Nat'l Fed'n of the Blind, Inc., 487 U.S. 781 (1988); S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm'n, 483 U.S. 522 (1987); Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328 (1986); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981)).

[45] *Id.*

[46] *Id.*

[47] *See* SMOLLA, *supra* note 15, at 114 (citing Burt Neuborne, *A Rationale for Protecting and Regulating Commercial Speech*, 46 BROOK. L. REV. 437, 448–53 (1980); Jeffrey M. Shaman, *Revitalizing the Clear-and-Present-Danger Test: Toward a Principled Interpretation of the First Amendment*, 22 VILL. L. REV. 60 (1976)).

[48] *See* Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 235 (1998) (noting the "indisputability of the intersection between governmental and corporate interests," which "renders puzzling" the lesser protection given to commercial speech).

[49] *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 522 (1996) (Thomas, J., concurring) ("I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech.").

fairs is unsurprising; "the complexity of social reality" typically leaves general speech theories incomplete as "scholars . . . too often buil[d theories] without sufficient regard for the diverse contexts in which speech regulation exists."[50] Perhaps it is time "to move *away from* a general theory of the first amendment."[51]

Instead of tying the regulation of commercial speech to a holistic free speech theory, perhaps it is better to refocus the doctrine of commercial speech on one particular value of free speech. This approach is taken in the realm of political speech by theorists who think First Amendment doctrine should be informed by the societal value of having speakers available to dissent from and "check"[52] existing "customs, habits, traditions, institutions, and authorities," particularly when they are related to dominant cultural power hierarchies.[53] The thought is that dissent[54] discourages the abuses of power[55] and inefficiencies that result from monopolistic speech markets.[56]

Dissent theorists do not purport to have a complete First Amendment theory; indeed, they doubt that a single "organizing symbol makes sense in First Amendment jurisprudence."[57] This leads them to deem inadequate theories based on images such as a "town hall meeting" and a "marketplace of ideas," as well as theories based on "liberty, equality, self-realization, respect, dignity, autonomy, or even tolerance."[58] Instead, dissent-based theories are offered "as a possible sup-

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[50] Shiffrin, *supra* note 14, at 1283.

[51] *Id.*

[52] *See generally* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527 (1977) (articulating the value of encouraging speech that checks "the abuse of power by public officials").

[53] STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA 93 (1999).

[54] This Note groups Professor Vincent Blasi's "checking theory" with dissent-based free speech theories. Although Professor Blasi's theory predates many dissent theorists' work and focuses exclusively on the political realm, it shares with dissent theory a desire to encourage speech critical of the existing dominant paradigms. So, although dissent theory, unlike Professor Blasi's approach, extends to all power structures, including corporations, and thus is more applicable here, the theories will be used relatively interchangeably.

[55] *See* Blasi, *supra* note 52, at 527 (listing examples of "countervailing" speech that prevented abuses of power).

[56] Although the two theories are in some ways similar, a dissent-informed approach to commercial speech differs from Professor Baker's autonomy-based approach. A dissent-informed approach does not deny that commercial speech has value or that such speech may be the product of individual choice; instead, it worries about the ability of commercial speakers to monopolize particular speech markets. This concentration of communicative power and the attendant lack of a "check" on the commercial speech — not anything inherent in commercial speech per se — is the harm dissent-theory targets.

[57] STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 5 (1990). Professor Shiffrin goes on to say that "it is likely that any single organizing symbol [in the First Amendment context] is too costly." *Id.* at 6.

[58] *Id.* at 5.

plement to, not a substitute for, the values that have been at the center of twentieth-century thinking about the First Amendment."[59]

B. Commercial Speech — Uniquely Suited for Dissent Theory

Dissent theory may be particularly well suited to inform commercial speech doctrine, for two reasons. First, the unique value of dissent resonates with the strong intuition that commercial speech should receive less protection than other forms of speech.[60] In the modern world, large corporations accrue great communicative power, and such corporations are often the speakers in the more difficult commercial speech cases. There is often very little dissent from corporate speech.[61] A dissent-informed approach to commercial speech recognizes the massive imbalance in material resources between corporate advertisers and other speakers[62] as well as the state's role in creating this imbalance. In fact, this recognition — of the state-created communicative power of large corporations and the need to ensure that other speech can compete in the marketplace without being drowned out[63] — is already used to justify restrictions on corporate communication in the realm of campaign finance.[64] Thus, while dissent-based speech theories do not offer a complete theoretical justification for commercial speech regulation, they do suggest that the government may be more justified in regulating commercial speech when there is no natural marketplace opposition to the speech and when the speech, "merely by its 'loudness' (quantity), corrupts the quality of public . . . discourse."[65]

Second, a dissent-informed approach may be particularly effective in the commercial speech context for pragmatic reasons.[66] A common

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[59] Blasi, *supra* note 52, at 528; *see also* SHIFFRIN, *supra* note 57, at 108–09.

[60] *See* Kozinski & Banner, *supra* note 3, at 653 (suggesting that the intuitive bias toward regulating commercial speech can be based on distrust of unrestrained markets).

[61] See SHIFFRIN, *supra* note 53, at 107–09, for a brief discussion of how the media fails to adequately check corporations.

[62] *See* Shiffrin, *supra* note 14, at 1281.

[63] For a sustained discussion of this issue, see David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 YALE L. & POL'Y REV. 236 (1991). Although Professor Cole examines campaign finance reform, his article is consistent with the Legal Realist view "that powerful private actors . . . have a certain degree of public power that must be controlled." Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833, 849 (2001).

[64] *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 668–69 (1990) ("By requiring corporations to make all independent political expenditures through a separate fund made up of money solicited expressly for political purposes, the Michigan Campaign Finance Act reduces the threat that huge corporate treasuries amassed with the aid of favorable state laws will be used to influence unfairly the outcome of elections."); *cf.* McConnell v. FEC, 540 U.S. 93 (2003) (allowing limits on "electioneering communications" by corporations).

[65] Baker, *Paternalism*, *supra* note 20, at 1184.

[66] For a discussion of the value of pragmatism in First Amendment adjudication, see Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737 (2002).

criticism of dissent theories is that they are difficult to incorporate into free speech doctrine: How should dissent be defined? How is the relevant speech market defined? At what point does a speech market contain a sufficient amount of dissent? These definitional issues are less problematic in the realm of commercial speech. The line between self-regulating and non-self-regulating commercial speech — that is, between speech that is adequately checked in the marketplace and speech that is not — is more easily identified than is the corresponding line in other speech arenas.

Competition is well understood in the business arena, at both the macro and micro levels. Market structure dictates the inherent level of competition in a commercial speech marketplace. At one extreme, monopolistic providers and corporate cartels face no opposition to their speech; at the other, perfect competition engenders a deep and robust speech market. An entire branch of economics — industrial organizations — is dedicated to understanding the structure of markets and the strategies of the firms that constitute those markets.[67] Furthermore, the advanced nature of marketing and information theory has pushed the understanding of competition down to the level of individual speech predicates. For almost all products, advertisers and marketers understand which attributes constitute customer consideration sets — that is, the product elements that customers actively shop for and compare among providers.[68] Thus, most corporations know whether consumers actually consider any single attribute when deciding to make a purchase.[69]

This understanding of market dynamics, both micro and macro, makes the distinction between self-regulating and non-self-regulating speech markets more easily cognizable in the context of commercial speech than in other speech arenas. A court should be able to determine whether corporate speech interests are "divided" or "united" with respect to any given speech predicate based on an understanding of market and product competition; this determination, in turn, should indicate whether consumers will receive dissenting messages through

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[67] *See generally* WILLIAM SHEPHERD, THE ECONOMICS OF INDUSTRIAL ORGANIZATIONS (1985).

[68] Without delving into modern customer science in depth, it is important to note that corporations increasingly use sophisticated analytic techniques and research methods to determine why customers buy their products and how they shop for those products. *See, e.g.*, Eric K. Clemons et al., *Hyper-Differentiation Strategies: Delivering Value, Retaining Profits*, *in* PROCEEDINGS OF THE 36TH HAWAII INTERNATIONAL CONFERENCE ON SYSTEM SCIENCES (2002), *available at* http://csdl2.computer.org/comp/proceedings/hicss/2003/1874/08/187480225b.pdf.

[69] For example, when purchasing a car, nearly all consumers consider the price and model, but fewer consider the material used to line the trunk. Credit cards are another example: everyone considers the price and rewards programs when choosing which card to use, but few customers consider the agate type at the bottom of an application. *See id.*

the market.[70] Government regulation of commercial speech should be allowed only if corporate interests are united behind a speech predicate; in other words, when there is a "corporate speech cartel" that can anticompetitively stifle dissent.

Rather than focusing definitional efforts on justifying a line between commercial and noncommercial speech, a dissent-informed theory of speech suggests that the correct distinction is actually between self-regulating speech and non-self-regulating speech.[71] The remainder of this Note explores this distinction, first clarifying the meaning of self-regulating and non-self-regulating commercial speech and then explaining why this distinction is useful.

III. SELF-REGULATING AND NON-SELF-REGULATING COMMERCIAL SPEECH

A. Delineating the Distinction

The best way to explicate the distinction between self-regulating and non-self-regulating speech is to consider a set of stylized examples. To begin, consider the following two regulations:

> A. A state mandates that cigarette companies list on their packaging the adverse health consequences of using their products.
>
> B. A state bars a monopolistic power company from promoting energy consumption.[72]

In both examples, the government is stepping in and countering a speech message not adequately checked in the marketplace. In exam-

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[70] Regulation may be necessary to foster dissent in a particular commercial speech market — a place where corporate interests are "united." For example, it is unnecessary for the government to regulate individual beer advertisements highlighting the attributes of different brands, because the competitors will provide consumers with different perspectives. However, the government may be justified in regulating the beer industry overall if it wants to prevent alcohol abuse because there is no adequate dissent from the broader message conveyed by the beer industry as a whole. For a brief discussion of the distinction between "divided" and "united" business interests, see SHIFFRIN, *supra* note 53, at 109.

[71] Any speech can be analyzed under this theory, since the values encouraged are by no means limited to commercial markets. In fact, the entire purpose of this exercise is to reorient commercial speech doctrine away from line-drawing between commercial and noncommercial speech. The application of dissent-informed principles makes an overinclusive definition of commercial speech less important because the primary inquiry regards the level of competition the speech faces in the marketplace. Thus, to avoid this messy commercial/noncommercial distinction, for the purposes of the situations discussed in this Note, all speech that could be considered commercial is considered as such.

[72] This hypothetical closely mirrors *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

ple A, the interests of cigarette companies are united, as every company produces a product that causes adverse health consequences. Although consumers would certainly change their purchasing patterns if they were made aware of these health consequences, none of the marketplace participants has an incentive to disclose this information to gain a competitive advantage. In example B, the state is regulating a monopoly. Again, there will be no voice in the marketplace to counter the power company's message. Thus, in both instances, a plausible argument can be made using dissent principles to justify government regulation.[73]

Next, consider the following two regulations:

> C. A state makes it illegal for a sneaker manufacturer to advertise that its sneakers are the "lowest priced on the market" if the sneakers are not in fact the lowest priced on the market.
>
> D. A state makes it illegal for a sneaker manufacturer to respond to allegations by human rights activists that it does not pay a living wage to overseas workers by advertising in local newspapers that its "workers are paid in accordance with applicable local laws" if the overseas workers are not in fact paid in accordance with local laws.[74]

Under existing First Amendment doctrine, regulation C is clearly allowed. The regulation targets verifiably false commercial speech used to promote a product — sneakers either are or are not the lowest priced on the market. There is a long history of regulating false advertising and much in the way of scholarly opinion that such advertising should be subject to regulation,[75] both for instrumental reasons[76] and because it does not implicate the core values the First Amendment was written to protect. But regulation of the speech in example C is not necessary from a dissent perspective. Because the price of sneakers is

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[73] Of course, other reasons may militate against the appropriateness of these regulations. In particular, the utility regulation may be ill-suited to achieve its goal — it is unclear whether the restriction will actually limit energy consumption. Thus, it may make sense for courts to continue to evaluate government regulations of unchecked commercial speech under some form of intermediate scrutiny to ensure that such regulations are sufficiently tailored to pursue a tenable goal.

[74] This example mirrors the facts of *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002), *cert. dismissed*, 539 U.S. 654 (2003). The false advertising statute at issue in *Nike* targeted not only verifiably false, but also misleading or deceptive, advertising practices. *See id.* at 250. However, because the California Supreme Court took the lower court's determination that the speech was "false and misleading" as a given, the *Nike* case may more closely resemble example C. *See id.* at 247, 319.

[75] *See, e.g.*, BAKER, *supra* note 20, at 196; Post, *supra* note 33, at 5.

[76] *See supra* p. 895. Chiefly, commercial speech is considered less likely to be chilled and more easily verifiable.

one of the biggest determinants of sneaker sales, and because the sneaker market is robustly competitive, corporate speech interests will clearly not be united with respect to this predicate. Because the sneaker manufacturer's message should be adequately countered in the marketplace through "private counterspeech,"[77] regulation C is unnecessary absent other grounds for regulation.[78]

Much like regulation C, regulation D targets false speech and would probably be allowed under existing First Amendment doctrine.[79] From a dissent-based perspective, however, regulation D is fundamentally different from regulation C, because it is not clear whether corporate speech interests would be united behind or divided over the speech predicate in question. Nonetheless, the nature of the corporate interests should be determinable based on the economic analysis of market and product competition discussed earlier, and this will indicate if the government regulation should stand.

It is possible to envision three potential market reactions to the speech targeted by regulation D. First, the sneaker manufacturer's competitors could aggressively advertise that they pay their overseas labor a living wage, perhaps questioning whether the sneaker manufacturer's claims are true. Such challenges to the ads would evidence that corporate speech interests were divided over this issue; thus, regulation would be unnecessary.

Second, if no competitive counterspeech resulted from the sneaker manufacturer's ad, this could be evidence that many, if not most, sneaker shoppers do not consider this variable in determining what shoes to buy.[80] If this were the case, corporate interests would be neither united behind nor divided over the sneaker manufacturer's speech — instead, the speech predicate would be competitively irrelevant from a commercial perspective.[81] If sneaker consumers found out that

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[77] Emord, *supra* note 27.

[78] Of course, if the speech, in the short term before the competitive speech market counters it, would cause a "direct, imminent, or great harm," regulation would be justified. *Id.* Also, note that tort and contract law provide many grounds for consumers to recover in false advertising situations even absent speech regulation. In addition, the untruthful company may suffer reputational harms, the threat of which should deter misconduct.

[79] *See supra* note 31.

[80] The accuracy of this conclusion depends on the product and the variable. For the purposes of this example, it should be assumed that the quality in question is not salient to more than a handful of consumers. This claim is obviously empirical and would have to be tested, because concerns ancillary to product quality and price do sometimes become important — the "Buy American" car ads in the 1980s exemplify this phenomenon. Because the salience of these ancillary qualities will be common knowledge to industry-specific experts, a court could uncover it through factfinding.

[81] Of course, if this were truly the situation, one might ask why the sneaker company had responded to the allegations in the first place. There could be several explanations for the sneaker company's reaction; for example, the ad might be targeted at political actors so as to discourage

the manufacturer was lying and did not care, it is difficult to see how the speech could be considered commercial. As noncommercial speech, the sneaker company's statements would be entitled to full First Amendment protection.

However, the absence of market competition does not inevitably indicate that the speech regulation at issue is inappropriate. The sneaker manufacturer's competitors might remain silent not out of apathy, but rather because of self-interest. If there were evidence that the sneaker manufacturer's competitors were refusing to compete in the marketplace over this trait despite its importance to consumers — perhaps because they treated their employees similarly or had agreed to a mutual nonaggression pact — the case for regulation would be much stronger. If this were the case, the corporate speech interests at issue would be decidedly united and the sneaker company — and possibly its competitors — would be able to effectively silence discussion over an issue of importance. Thus, there may be a dissent rationale for regulating this speech in addition to any other justifications for the regulation of false advertising.[82]

These hypothetical examples begin to illuminate what appears to be a plausible line between united and divided corporate speech interests, and, therefore, self-regulating and non-self-regulating commercial speech. Two final examples will further elucidate this framework:

> E. A state makes it illegal for a door-to-door Bible salesperson to promote the Bible as "offering divine salvation" unless the Bible does in fact provide such salvation.

This example presents a challenging regulation for a dissent-based theory because the countervailing market force that would lead to self-regulation is not as immediately clear as in example C. However, the nature of the claim implies that it falls into the category of self-regulating speech, because, generally speaking, a customer buying a Bible evaluates it against the claim made by the salesperson. The Bible does not have a monopoly on offers of spiritual enlightenment or self-help — numerous other books, religious and otherwise, make similar claims. Thus, there are adequate voices in the market countering the claims of the salesperson. His claims would properly be considered

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legislation on overseas labor practices. If this were the case, the speech would be political and therefore entitled to the protection accorded to such speech.

[82] Given property laws and distance, it is often difficult to obtain information about overseas working conditions. This fact offers further support for a dissent-informed rationale for regulating commercial speech — it seems very unlikely that private citizens would be able to effectively check commercial speech in such a situation.

self-regulating speech, and regulation would be unnecessary under a dissent-informed approach.

F. A state bans the advertising of cigarette prices at any place other than the point of sale.[83]

On its face, this regulation appears to be similar to regulation A, as the government is regulating the speech of an industry that produces a "vice" product. However, this ban does not appear to serve dissent principles; as with the speech targeted by regulation C, marketplace competitors will be able to "check" each other's pricing claims. So, although, from a dissent perspective, the government is allowed to restrict industry-wide messages, there does not appear to be such a "uniting" of commercial interests in this case. (Contrast this regulation with one that prohibits cigarette companies from advertising their product in a glamorous fashion.)

Given the above hypothetical examples, a potential framework for the evaluation of commercial speech issues emerges:

TABLE 1

	Self-Regulating	*Non-Self-Regulating*
Examples	C, D (?), E, and F	A, B, and D (?)
Type of Speech	Speech over issues that "divide" corporate interests. Typically includes speech made by providers in competitive markets about product traits that are actively shopped by consumers.	Speech over issues that "unite" corporate interests. Typically includes speech by monopoly providers and industry level speech that has no opposition in the marketplace.
Government Regulation	Dissent principles do not justify regulation.	Dissent principles could justify some form of regulation.
Level of Judicial Scrutiny	Courts should apply strict scrutiny.	Courts should apply intermediate scrutiny.

This dissent-based framework proposes guidelines for government speech regulation, distinguishing between self-regulating and non-self-regulating speech. Self-regulating commercial speech is defined as

[83] This hypothetical mirrors the facts of *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

commercial speech that is adequately checked in the speech market. This speech is typically made by providers in competitive markets about product traits that are actively shopped by consumers. Thus, consumers can readily determine if the speech is false, misleading, or erroneous. Dissent principles do not encourage government regulation of this speech, and such regulation should be permissible only if it survives strict scrutiny.[84]

Conversely, non-self-regulating speech is defined as commercial speech that is not adequately checked in the speech market because corporate interests are united. This type of speech consists of two main categories: speech by monopoly providers and industry-level speech that has no opposition in the marketplace, such as the sum total of all cigarette advertisements.[85] Courts should be more receptive to government regulation of this type of speech, since the speech markets in which it occurs will not generate sustainable dissent. Of course, the fact that a speech market is non-self-regulating should not permit the government to regulate with impunity — proposed regulations should still have to survive intermediate scrutiny.[86]

B. Is the Distinction Preferable to the Status Quo?

Building upon the general advantages of a dissent-informed approach,[87] the self-regulating/non-self-regulating distinction appears to be desirable for at least three reasons.

First, a dissent-informed approach provides a theoretical justification for the regulation of commercial speech that resonates with common intuition. Many existing speech regulations target precisely this type of unchecked speech,[88] and the Supreme Court has struck down

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[84] Certain FDA regulations would probably fall into this category. While some drug markets are non-self-regulating monopolies — for instance, when there is only one drug that can cure a disease — many are in fact extremely competitive. Notwithstanding these features of drug markets, the state's interest in public health and safety may justify a departure from the general rule, as the potential health consequences of misleading drug advertisements may occur too rapidly to await market-driven speech correction.

[85] An interesting hypothetical to consider is the following: In theory, there will always be an implicit commercial cartel behind the consumerist message "buy something." Would a dissent-informed approach allow for government regulation to encourage dissent against this message? While the political tenability of such a program is doubtful, the answer is probably yes, so long as the program was reasonable. For example, the government could place a moderate tax on commercial advertising and use the proceeds of that tax to fund anti-consumerist speech.

[86] Though this intermediate scrutiny may approximate the *Central Hudson* test described and critiqued at pp. 1898–99, it would be easier to apply consistently if the Court adopted a dissent-informed approach. While the Court would still have to balance interests, the orientation of the commercial speech doctrine toward the facilitation of dissent should channel its inquiry, making it more focused, systematic, and determinate.

[87] *See supra* section II.B.

[88] Government regulation of non-self-regulating speech is very common. Antitrust regulation is the paradigmatic example, but consider also the heavy regulation of the "small print" found in

speech regulations of self-regulating markets in the past.[89] In addition, a dissent-informed approach actually encourages private citizens to counter appropriately unchecked commercial speech by potentially limiting the ability of corporations to use their resources to drown out dissent.

Second, a dissent-informed approach is more speech-protective than the existing commercial speech doctrine. A dissent-informed approach places a large slice of currently regulable speech beyond the reach of the government's authority, and thus fits well with the modern presumption that speech is entitled to strict scrutiny protection absent a compelling theoretical reason to the contrary. And because non-self-regulating speech still receives intermediate scrutiny protection, very little heretofore unregulable speech is brought within the ambit of government regulation.[90] Taken as a whole, the dissent-informed approach appears to strike a sensible balance between the competing societal needs of protecting commercial speech and encouraging dissent.

Finally, while "it is often difficult to distinguish predatory behavior . . . from vigorous competition,"[91] the self-regulating/non-self-regulating distinction should be easier to administer in a principled manner than the commercial/noncommercial distinction.[92] To begin,

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consumer lending (particularly credit card) agreements. Regulation of cigarette advertising also falls in this category. Also note that non-self-regulating speech bears some similarities to the unenforceable provisions in adhesion contracts. In the former, the government steps in to regulate in the absence of true market competition; in the latter, the courts (with legislative approval) step in to regulate in the absence of a true meeting of the minds.

89 *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976) (rejecting a state prohibition on price advertising by pharmacies).

90 Under the dissent-based approach, the only way heretofore unregulable speech would be brought within the ambit of government regulation is if the speech both meets the Court's existing standards and occurs within an uncompetitive speech market. In these cases, "close" regulations that narrowly fail the *Central Hudson* test may be adjudged constitutional. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 566–67 (2001) (holding that certain aspects of a Massachusetts law prohibiting speech by cigarette manufacturers violated *Central Hudson*).

91 PHILLIP AREEDA & LOUIS KAPLOW, ANTITRUST ANALYSIS, § 126, at 36 (1997).

92 The argument for the proposed approach being more administrable than the current one does not reduce precisely to a comparison of the administrability of the self-regulating/non-self-regulating distinction to that of the commercial/noncommercial distinction, because the scope of application envisioned for the proposed approach is limited to commercial speech. This Note is not arguing for a similar dissent-informed approach in other speech arenas, such as political speech (largely because there is no parallel to antitrust law in these other contexts). That said, the approach outlined in this Note should still be more administrable, by the following logic: if the doctrine of commercial speech were focused on dissent principles, the commercial/noncommercial distinction would no longer be as relevant; the Court could thus define any speech that is arguably commercial as such (since the true interest would be in encouraging dissent against united corporate interests). As discussed *infra* at pp. 1910–11, once a speech predicate passed this very soft initial screen, the self-regulating/non-self-regulating distinction would be much easier to administer in a principled fashion than the existing commercial/noncommercial distinction. Given the unimportance and ease of administering the initial screen, it is reasonable to assume that the difference in administrability between the self-regulating/non-self-regulating concept and the

there is already a body of statutory and case law — antitrust, or competitions, law — focused on encouraging competition and discouraging the "concentrat[ion]" of power "in the hands of one or a few firms."[93] While it is often impossible for antitrust law to produce clear-cut answers,[94] courts have done a better job of generating defensible standards to define both market boundaries and clearly uncompetitive activity than they have done of delineating the distinction between commercial and noncommercial speech.[95] Whereas the Court in the latter context has resorted to "ad hoc subject specific" determinations,[96] antitrust law has developed in a relatively principled fashion, leading to predictable results.

Take, for example, the Sherman Act,[97] the "basic statute" of antitrust law.[98] This statute both explicitly prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce"[99] and holds liable "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce."[100] A large body of federal common law has emerged delineating these statutory categories[101] — case law that would provide an excellent starting point for the reorientation of the commercial speech doctrine. Consider how the sample regulations that target united corporate interests analogically map to the two broad categories of anti-competitive activity prohibited by the Sherman Act. The sce-

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commercial/noncommercial concept would be greater than the added burden of performing the initial commercial/noncommercial screen.

93 *See* PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW, § 110, at 23 (1978). *See also* Standard Oil Co. v. FTC, 340 U.S. 231, 249 (1951) (noting that the antitrust laws "sought to protect" competition and "sought to prevent" anti-competitive behavior, chiefly monopoly) (quoting A.E. Staley Mfg. Co. v. FTC, 135 F.2d 453, 455 (7th Cir. 1943)).

94 *See* AREEDA & KAPLOW, *supra* note 91, § 105, at 5.

95 The argument that viewing commercial speech issues through an antitrust lens will both better orient judges toward the true concern with commercial speech — its unchecked nature in the marketplace — and provide analytical traction in distinguishing regulable from unregulable speech mirrors a similar argument made in the context of voting rights law. *See* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998). Professors Issacharoff and Pildes argue that the Court's regulation of the democratic process should be informed by corporate law principles which emphasize the "importance of the background competitive structures within which managers make decisions." *Id.* at 647. According to Professors Issacharoff and Pildes, focus on these corporate law principles will both alert the Court to potential political lockups and also help it identify them. *Id.* at 648.

96 Kozinski & Banner, *supra* note 3, at 631.

97 15 U.S.C. §§ 1–7 (2000 & Supp. IV 2004).

98 AREEDA & KAPLOW, *supra* note 91, § 104, at 4.

99 15 U.S.C. § 1 (Supp. IV 2004).

100 *Id.* § 2.

101 *See generally* AREEDA & KAPLOW, *supra* note 91, §§ 227–41, at 251–96 (discussing in detail the current state of the law on when an anti-competitive agreement exists); *id.* §§ 302–51, at 448–552 (discussing how the courts determine whether a competitor has monopoly power).

nario in which regulation D would be allowable[102] would ostensibly fall within the ambit of the first provision of the Sherman Act, while regulation B would target a corporate speaker that would be identified as a monopoly under the second provision.[103]

Furthermore, to the extent the open-textured language of the First Amendment requires judicial delineation as to the scope of permissible regulation,[104] pragmatically making these distinctions with the desired ends in mind is superior to attempting to determine whether a speech predicate fits within the transcendental category of commercial speech.[105] As discussed earlier, the mere fact that speech is "commercial" does not track — and has never tracked — any coherent rationale for regulation;[106] as such, judicial opinions that focus on identifying "commercial" speech appear untethered from the underlying concerns motivating the First Amendment.[107] Conversely, focusing on the competitiveness of the underlying speech market may explicitly cast aside the noble lie — that there exists a transcendental First Amendment right to freedom of speech that can be categorically delineated — and the attendant hope for "delusive exactness."[108] Instead, such a focus should help the law evolve so as to aim more appropriately for the true target, as defined by common intuition, of "commercial speech" regulation: unchecked corporate speech.[109]

Of course, the length of this Note precludes a full discussion of whether a dissent-informed approach will be easier to administer than the current standard. While courts certainly do have a much longer (and arguably more successful) history of delineating the contours of efficient markets than they do the boundaries of commercial speech, the purpose of this discussion is merely to demonstrate that the self-regulating/non-self-regulating distinction appears to track existing antitrust laws, and that this tracking potentially makes it a better candi-

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102 *See supra* p. 1906.

103 The length of this Note precludes a more detailed assessment of whether these regulations would specifically fit within the relevant categories under federal antitrust law. The purpose of this brief section is only to show that antitrust law plausibly provides a workable framework for distinguishing self-regulating from non-self-regulating speech.

104 *See* RICHARD FALLON, THE DYNAMIC CONSTITUTION 32–34 (2004).

105 *See* Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

106 *See supra* pp. 1895–97.

107 *See* Kozinski & Banner, *supra* note 3, at 651–53 (discussing the commercial speech doctrine's tenuous foundation); *cf.* Posner, *supra* note 66, at 738 (noting the superiority of a pragmatic approach to First Amendment jurisprudence over a formalistic approach).

108 Truax v. Corrigan, 257 U.S. 312, 342 (1921) (Holmes, J., dissenting).

109 *See* Posner, *supra* note 66, at 738 ("[Pragmatism] encourages the thought that the object of adjudication should be to help society to cope with its problems, and so the rules that judges create as a by-product of adjudication should be appraised by a 'what works' criterion rather than by the correspondence of those rules to truth, natural law, or some other high-level abstract validating principle.").

date for principled adjudication than the existing commercial/noncommercial distinction. Regardless of whether a dissent-informed approach is more administrable than the current distinction, the principles of dissent theory certainly track common intuition as to why commercial speech should be regulable. Even if the administrative superiority of a dissent-informed approach is empirically indeterminate, it is likely that such an approach sensibly targets well-tailored government regulation at speech markets where corporate interests are united.

IV. CONCLUSION — ISSUES RAISED BY THE DISSENT-INFORMED APPROACH

The application of a dissent-informed approach to commercial speech raises a number of questions. Given length constraints, this Part will touch on only two of the more salient ones.

First, the proposed framework could create an asymmetry in which different levels of protection are offered to speakers on opposite sides of a debate. Consumer activists would be able to target united business interests while receiving full First Amendment protection, whereas commercial speakers would receive lesser protection if they were making non-self-regulating claims.[110] However, if the principles of a dissent-informed theory are accepted, the activities of the consumer advocate should be *encouraged*. These advocates are almost universally speaking from a position of relative weakness compared to the corporations they are targeting. Thus, some measure of asymmetry — a sort of speech subsidy — is not a problem, but rather the goal.

The probable counterargument is that classic dissent theory proposes the encouragement of alternative voices, not the silencing of existing voices. While, in theory, this sentiment is noble, it ignores both existing regulations and practical reality. The government currently regulates monopoly speech and industry-wide advertising; the premise of this Note is that such regulation is justified by the fact that there are no existing voices in the marketplace to counter this speech. Practically, regulation is often more administrable and cost-effective than promoting alternatives to unchecked speech. Thus, there are existing analogues to, and pragmatic reasons for, regulating commercial speech rather than subsidizing dissenting viewpoints.

If dissent is truly a goal worth pursuing, the best way to pursue that goal today is through selective regulation. As laid out above, commercial speech is still highly protected under this approach — in

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[110] This is one of the most controversial elements of the California Supreme Court's decision in *Nike*. *See* Petition for Writ of Certiorari, Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (No. 02-575), 2002 WL 32101098.

fact, it is protected more under the proposed approach than under the existing commercial/noncommercial distinction. Overall, then, a narrowing of commercial speech rights in some circumstances is a small price to pay for speech markets that encourage dissent.

Finally, there may be a fear that regulation of non-self-regulating commercial speech will "chill" some commercial speech.[111] This concern is a valid one, but one that is not uniquely implicated by a dissent-informed approach. The dissent-informed theory outlined above is not, nor does it purport to be, a complete free speech theory. It merely provides some guidance as to when government regulation of commercial speech may be justified; it does not address how these regulations should be tailored to best avoid a "chilling effect." A dissent-informed approach could encourage regulation of some commercial speech that it would be entirely inappropriate to silence because of "chilling" concerns, but the latter analysis should not be conflated with the former.

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No brief analysis can address the myriad nuances of commercial speech doctrine. The primary goal of this Note is to show how a recognition of dissent principles could be useful in addressing commercial speech issues. Dissent-based free speech theories are difficult to implement, but the danger posed by accumulations of corporate power, coupled with modern scholars' excellent understanding of competitive commercial dynamics, seems to make such theories particularly relevant to commercial speech problems. Given the reluctance with which the government should silence speakers of any sort, it makes sense to determine, before regulating, if the speech marketplace itself is likely to correct any harmful or otherwise disfavored speech. Application of this principle to problems of commercial speech could go a long way toward addressing some of the thorny issues this difficult doctrinal category continues to present.

[111] The petitioners in *Nike* also raised this concern. *See id.*