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Essay

Commerce & Communication[†]

Ronald K.L. Collins* & David M. Skover**

It is a matter of public interest that [private economic] decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

—Harry Blackmun¹
(jurist)

Great advertising is a storyteller, a romantic voice, an emotional persuader. . . . It must persuade in a way that romances and lures the customer unsuspecting into the brand's sticky web.

—David N. Martin²
(ad man)

† This is another installment of a much longer work in progress, entitled *The Death of Discourse*. The first installment, *The First Amendment in an Age of Paratroopers*, appeared at 68 TEX. L. REV. 1087 (1990), and portions of another installment, *Paratexts*, appeared at 44 STAN. L. REV. 509 (1992). The most recently published essay to be included in the work, *Pissing in the Snow: A Cultural Approach to the First Amendment*, is found at 45 STAN. L. REV. 783 (1993).

We are grateful to a number of our friends and colleagues for their thoughtful, and sometimes critical, written comments: Janet Ainsworth, Dan Barbiero, Jeanne Clark, Sidney DeLong, Hans Linde, John Mitchell, and Pierre Schlag.

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1. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

2. DAVID N. MARTIN, ROMANCING THE BRAND: THE POWER OF ADVERTISING AND HOW TO USE IT 9 (1989).

When we use TV, we're not using it to support First Amendment rights or artistic freedoms, we're using it because it's a good business decision for our client . . .

—Betsy Frank³
(ad woman)

Communication is the handmaiden of commerce.

America's channels of public discourse serve more and more as the purveyors of private profit. Daily, our nation's mass media cater to the desires of the marketplace as they deliver a feast of messages to consume. These messages remind us, in Madonna's words, that "we are living in a material world."⁴ Yet these messages are more than solicitations to buy—they are the codes of our culture. In this commercial domain, we are largely the sum of what we buy.

"We live by symbols," said Oliver Wendell Holmes.⁵ No symbol is more celebrated in our system of free speech than his icon of the marketplace of ideas.⁶ In the *ideal* marketplace, there is a "free trade in ideas"⁷ that fosters rational decisions by the citizen. In the *real* marketplace, however, there is a free trade in commercial images that encourages fantasized decisions by the consumer. Much discourse moves between these two poles, though America's commercial culture tends ever more away from the *ideal* and toward the *real* marketplace. Ironically, this *real* marketplace is often surrealistic: it is a place where the consumer exchanges money for magic, where commercial communication promises fantasy more than utility. This, at least, characterizes much in the marketplace of ideas as it operates in our system of mass advertising. It is a system frequently premised on the substitution of imagery for idea. Thus, it transforms the marketplace of ideas into a marketplace of commercial symbols.

In our culture of advanced capitalism, there is a striking redundancy in the notion of "commercial speech."⁸ More specifically, public discourse cannot be significantly separated from the influences of commer-

3. Jeff Silverman, *TV's Creators Face a New Caution*, N.Y. TIMES, Dec. 8, 1991, § 2, at 1, 31 (quoting Betsy Frank, vice president of the Saatchi & Saatchi advertising agency).

4. MADONNA, *Material Girl*, on LIKE A VIRGIN (Sire/Warner Bros. Records 1984) (written by Peter Brown & Robert Rans).

5. OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 270 (1920).

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

7. *Id.*

8. Unless the context indicates otherwise, when we use the expression "commercial speech" or its equivalents, we refer to forms of communication that (1) either presume a seller-buyer relationship and/or enhance the ethos of consumption, (2) are mass-oriented, and (3) are primarily imagistic in character.

cialism. As Burt Neuborne, a First Amendment authority and a spokesman for the Association of National Advertisers, accurately observes: "As a means of expressing shared values and a common national ideology, advertising dwarfs any other genre of communication."⁹ To ignore the influences of commerce is to misunderstand the nature of much discourse in modern America. To overlook the relationship between commerce and communication is to place the First Amendment in a false light. To comprehend more fully the phenomenon of commercial speech, we must look beyond First Amendment cases and commentary to the *actual* ways in which our culture communicates about and through commodities. We must think less about the marketplace of ideas and more about the marketing of items. Today, we stand to learn more about the operations and values of social communication from Saatchi & Saatchi¹⁰ than from Holmes and Brandeis.

To this end, we start from the beginning. Part I presents an account of the commercial message-making industry and the culture of modern mass advertising. We mark the movement from the product-information format that typified early mass advertising to the "lifestyle" format more in vogue today. We then examine the processes and consequences of modern mass advertising and contrast these to a model that we label "classified communication." Part II discusses two key free speech values—rationality and individuality—as they are reconfigured in the new ages of "reason" and "self."¹¹ Finally, Part III explores free speech options in our capitalistic system and argues that, in much of our culture, image is all, truth is irrelevant, there is no right to know, and we are as we consume. Against this backdrop, if modern commercial expression is to be constitutionally protected in a more honest way, it is primarily because it is speech in the service of selling. What this portends for the individual

9. BURT NEUBORNE, *FREE SPEECH—FREE MARKETS—FREE CHOICE: AN ESSAY ON COMMERCIAL SPEECH* 19 (1987) (published under the auspices of the Association of National Advertisers, Inc., New York, N.Y.).

10. Saatchi & Saatchi became the world's largest advertising agency in 1986 by mergers and takeovers that created a company with \$7.5 billion worth of business. See ERIC ÇLARK, *THE WANT MAKERS* 40 (1988).

11. While rational decisionmaking and individual self-realization are not the only normative values that theoretically may be promoted by the First Amendment, they are nonetheless the values most frequently invoked by courts and legal commentators to justify the extension of constitutional protection to expressive activities. See, e.g., THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6 (1970) (arguing that free speech promotes the realization of human character and potentialities); ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 9-14 (1960) (proposing the "self-governance" rationale for First Amendment protection of expression); Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 130-41 (1989) (describing the premises underlying the justification for freedom of speech); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 2 nn.1-2 (explaining that jurists and scholars often use the "marketplace of ideas" metaphor to legitimize First Amendment freedoms).

and the culture, and for the defenders and critics of commercial speech, is the subject of all that follows.

I. Communication About and Through Commodities¹²

How do we communicate with each other? This is as much a question about commercialism as it is about discourse. Whether public or private, our communications are infused with the objects, the symbols, and the ideology of commercialism. We talk about commodities, we refer to ideas and feelings given symbolic form and meaning by commodities, and we express the cultural values embodied in our commodified social system. But how does that system work?

A. *The Ways of Advertising: From Information to Lifestyle*

The history of modern advertising is the story of the general movement from product-information to image and lifestyle advertising. Spanning the period from the advent of the Industrial Revolution to the present, modern advertising has changed its primary direction and focus. Once largely a utilitarian vehicle for informing the consumer about the construction, operation, and benefits of goods or services, the advertisement has become more of a "transformative" vehicle. Mass advertising now typically encodes goods and services with symbolic meanings independent of their functional values.

Of course, advertising has been a staple of commerce in economies since ancient times. In primarily oral cultures, street merchants "shouted out the advantages of their pottery, fabrics, cattle, and even their slaves"¹³ The oldest known written advertisement is a 3000-year-old Babylonian tablet requesting the return of a slave.¹⁴ Centuries later, Gutenberg's invention of moveable type ushered in a new age of commercial communication. The first printed advertisement in English appeared in 1477, announcing the sale of Easter rule books published by William Caxton.¹⁵ Shop signs and broadsides nailed to public buildings were common advertising devices prior to newspapers.¹⁶ By the middle of the seventeenth century, British newspapers, known as "mercuries," spread a

12. This section title derives from WILLIAM LEISS, STEPHEN KLINE & SUT JHALLY, *SOCIAL COMMUNICATION IN ADVERTISING* 1 (2d ed. 1990) (asserting that modern social influences derive largely from "the discourse through and about objects").

13. CHARLES PANATI, *THE BROWSER'S BOOK OF BEGINNINGS: ORIGINS OF EVERYTHING UNDER (AND INCLUDING) THE SUN* 167 (1984); see also GILLIAN DYER, *ADVERTISING AS COMMUNICATION* 15 (1982).

14. CHARLES GOODRUM & HELEN DALRYMPLE, *ADVERTISING IN AMERICA: THE FIRST 200 YEARS* 14 (1990).

15. *Id.* at 8.

16. *Id.* at 13.

variety of notices, ranging from merchant shipping tables to patent medicine advertisements.¹⁷ In the American colonies, as many as ten of sixteen newspaper columns were set aside for advertising in the first daily newspaper.¹⁸ Prior to the Civil War, most newspaper advertising consisted of merchants offering goods and services to customers in their own locales.¹⁹ The styles and objectives of early newspaper ads became the models for the first period of the modern era of advertising. As America became more industrialized from the 1880s to the 1920s, mass-appeal advertising paralleled the mass production of goods.²⁰ Nationwide advertising directed the public's attention to the increasing variety and quantity of products distributed on a nationwide basis.²¹ The primary focus of most advertising design and copy during this period was the product itself—its construction, its performance, its uses, its price, and its advantages.²² Product-information advertising aimed both to familiarize the newspaper reader with the national brand and to introduce new products and educate the consumer as to their purposes. When Daimler's and Benz's automobiles first appeared in 1885, when Eastman Kodak's cameras were first produced in 1888, and when Marconi's radio was first heard in 1896, manufacturers turned to advertising to explain the products to prospective consumers and to rationalize their purchases.²³

Ad copy writing took on a formulaic style, popularized as "reason-why" salesmanship by the celebrated ad men Albert Lasker and Claude Hopkins.²⁴ The turn-of-the-century trade journal *Printers' Ink* described

17. See DYER, *supra* note 13, at 16.

18. See GOODRUM & DALRYMPLE, *supra* note 14, at 13.

19. See *id.* at 17.

20. See, e.g., MICHAEL SCHUDSON, *ADVERTISING, THE UNEASY PERSUASION: ITS DUBIOUS IMPACT ON AMERICAN SOCIETY 180-82* (1984) (discussing the advancement of mass production and the "democratization," or broad consumption, of goods by the 1920s).

21. See GOODRUM & DALRYMPLE, *supra* note 14, at 23 (discussing how nationwide advertising familiarized consumers with new, trademarked versions of generic products); JULES HENRY, *CULTURE AGAINST MAN 17-19* (1963) (discussing advertising's efforts to create new needs as mass production outstripped population growth); LEISS ET AL., *supra* note 12, at 153 (noting that advertising agencies shifted from "space sellers" to "sell[ing] the new national branded products").

22. See GOODRUM & DALRYMPLE, *supra* note 14, at 23 (describing the "role that advertising played . . . in the introduction of new products—explaining what they were and how they were to be used"); LEISS ET AL., *supra* note 12, at 240, 280 (noting that during the "idolatrous phase," the lavish descriptions of [products'] qualities contained an unmistakable undertone of equally genuine pride in their manufacture"); T.J. Jackson Lears, *The Rise of American Advertising, in AMERICAN MEDIA 257-58* (Philip S. Cook et al. eds., 1989) (discussing the ongoing feud in the first two decades of the 20th century between those who espoused "reason-why" copy to persuade potential buyers with facts, and those who proclaimed the best method to be "atmosphere" advertising, appealing to buyers' emotions with attractive pictures and little information).

23. See GOODRUM & DALRYMPLE, *supra* note 14, at 23-24 ("The advertisements had to explain the benefits [of the new products] . . .").

24. See Lears, *supra* note 22, at 258 ("Each piece of reason-why copy contained a vigorous sales argument, crammed with facts and pock-marked with dashes, italics, and exclamation points.").

reason-why copy as "[l]ogic, plus persuasion, plus conviction, all woven into a certain simplicity of thought—pre-digested for the average mind, so that it is easier to *understand* than to *misunderstand* it."²⁵ A revealing example of this advertising style was the 1905 advertisement for Gillette razors in which "we find testimonials, scientific data from the University of Chicago, and an exploded drawing of the new instrument."²⁶ In summary, the basic character of advertising in the early modern period was more information than image, more rational than emotive, more need-based than desire-based. Thus, prior to the 1920s, "the implied relationship between people and products [was] utility. . . . The question for the consumer [was], What does this product do?"²⁷

The product-information advertising form declined significantly after the 1920s.²⁸ Generally speaking, it was replaced by a model of competitive mass advertising that stressed product imagery and product personality. "Product-image" advertising placed commodities within natural or social settings (such as landscapes or households) in order to project the meanings and values associated with those settings onto the commodities.²⁹ Similarly, "product-personality" advertising equated the personal attributes of individuals (product users or members of a particular social group) with the qualities of the commodity; in its most exaggerated form, this advertising culminated in the "personification" of the product itself, infusing commodities with human traits or animal characteristics.³⁰ Thus, for example, a fragrance could be sexy or a vehicle tiger-like.³¹

As product-information advertising yielded to product-image and product-personality advertising, "the older factual, prosy notice which focused upon the specifications of the commodity . . . gave way to a more lyrical type of appeal which focused instead upon the desires of the consumer."³² Charles Revson, the founder of Revlon, Inc., acknow-

25. STEPHEN FOX, *THE MIRROR MAKERS: A HISTORY OF AMERICAN ADVERTISING AND ITS CREATORS* 50 (1985) (emphasis in original). Regarding reason-why copy, Fox has observed: "Instead of general claims, pretty pictures, or jingles, an ad should offer a concrete *reason why* the product was worth buying. Not charming or amusing or even necessarily pleasing to the eye, a good ad was a rational, unadorned instrument of selling. . . ." *Id.*

26. GOODRUM & DALRYMPLE, *supra* note 14, at 114.

27. LEISS ET AL., *supra* note 12, at 280. *But see* T.J. Jackson Lears, *From Salvation to Self-Realization: Advertising and the Therapeutic Roots of the Consumer Culture, 1880-1930*, in *THE CULTURE OF CONSUMPTION: CRITICAL ESSAYS IN AMERICAN HISTORY, 1880-1980*, at 18 (Richard W. Fox & T.J. Jackson Lears eds., 1983) (challenging the notion that "reason-why" advertising originally was more informative than emotive).

28. *See* LEISS ET AL., *supra* note 12, at 63 (noting that, from the 1920s forward, the consumer rather than the product became the "key ingredient" in the advertising "message system").

29. *See id.* at 63, 244.

30. *See id.* at 246-54, 272-74, 291-92.

31. *See* ROLAND MARCHAND, *ADVERTISING THE AMERICAN DREAM: MAKING WAY FOR MODERNITY 1920-1940*, at 358 (1985) (describing advertisements featuring personification).

32. DAVID M. POTTER, *PEOPLE OF PLENTY: ECONOMIC ABUNDANCE AND THE AMERICAN*

ledged as much when he claimed: "In the factory we make cosmetics, in the store we sell hope."³³ Influenced by the new forms of advertising, the meaning of the commercial exchange altered fundamentally: transactions of money for product image and personality largely eclipsed the earlier transactions of money for product utility. This new economic exchange was predicted by an early twentieth century ad man, James Collins, who presciently labeled it an "economy of symbolism."³⁴ Later, in *The Mechanical Bride*, an equally prescient Marshall McLuhan analyzed the nonrational advertising phenomenon as aiming "to generate heat not light."³⁵

A combination of factors interacted to promote the emergence of product-image and product-personality advertising between the 1920s and the early 1950s. Among the most significant were the emergence of photography and radio, the rise of parity products, and the nascent industry of audience demographics and market segmentation strategies.

Technological developments, primarily those in photography and radio, offered novel and dynamic opportunities for the presentation of products. Importantly, photography's representational realism conveyed images as old print illustrations never could, and radio's sound conquered distance and time in transmitting commercial messages. Marketers exploited the possibilities of photography by intensifying the symbolic association between goods and the consumer's self-image. The "new possibilities for the visual in advertising . . . stimulated the development of emotional, affective, or 'mood' advertising."³⁶ Likewise, marketers exploited the potential of Marconi's medium by commercializing radio's content and revolutionizing advertising's form. For example, today's popular "soap opera" is the progeny of radio's experiments in blending dramas with detergents.³⁷ Under the influences of photography and radio,

CHARACTER 171 (1954); see also LEISS ET AL., *supra* note 12, at 155 ("Products are presented less and less on the basis of a performance promise, and more on making them 'resonate' with qualities desired by consumers—status, glamour, reduction of anxiety, happy families—as the social motivations for consumption."); *id.* at 291 ("Such information is not, except incidentally, the economist's information, which is composed of the product's characteristics, but rather the imagistic associations between the product and what is known about individuals and their expectations in life, including their feelings about status, peer-group influence, roles, [and] social mobility . . ."); Sut Jhally, *Image-Based Culture: Advertising and Popular Culture*, WORLD & I, July 1990, at 507, 508 (noting the representations of people who "stand for" social values in image-product advertising).

33. CHARLES H. SANDAGE & VERNON FRYBERGER, *ADVERTISING THEORY AND PRACTICE* 191 (9th ed. 1975) (quoting Charles Revson).

34. Lears, *supra* note 22, at 265 (quoting James Collins).

35. MARSHALL MCLUHAN, *THE MECHANICAL BRIDE* v (1951).

36. SCHUDSON, *supra* note 20, at 63.

37. See LEISS ET AL., *supra* note 12, at 141 ("The soap operas were written by the agencies and usually revolved around emotionally excruciating family dilemmas. The challenge was to develop product 'tie-ins.' (The term 'soap opera' itself, of course, refers to the sponsorship of detergent manufacturers and testifies to the blending of advertising and programming.)").

product facts yielded increasingly to product fictions, and utility deferred increasingly to fantasy.

Additionally, competitive mass production resulted in substantially similar consumer goods. Products, standing alone, were essentially indistinguishable by their ingredients and functions. Numerous beverages, breakfast foods, cosmetics, and detergents, for example, became "parity products," set apart only by their brand names.³⁸ "If products [did] not differ materially, they [could] nonetheless differ or be made to differ in *attributed* qualities, or 'image.' If consumers believe[d] a product to be distinctive, this belief in itself [could] become a product attribute."³⁹ Marketers began to differentiate goods less by factual product information and more by product image and personality. "When brand image represents the only distinctive feature the advertiser has to sell, he is more likely to use irrelevant and nonrational appeals"⁴⁰ Essentially, advertising parity products took much of the reason out of reason-why copy.⁴¹ As ad man Rosser Reeves explained anecdotally: "Our problem is—a client comes into my office and throws two newly minted half dollars onto my desk and says, 'Mine is the one on the left. You prove it's better.'"⁴²

Audience demographics and market segmentation strategies were among the more significant responses of the advertising industry to the parity product phenomenon. Armed with data about prospective consumers—age, profession, income, gender, geographic locale—the advertiser could "target" that segment of the population most susceptible to a particular commercial message. Earlier advertising agents had sold *products* for manufacturers; by contrast, demographic and segmentation strategists now sold *audiences* to manufacturers. For example, once advertising agents identified the special audiences of certain newspapers and magazines, they could better align those audiences with their clients' products. As advertising historians Charles Goodrum and Helen Dalrymple put it: "[Agencies] designed ads that 'looked like' the identified audience, talked like it, [and] were shown doing the things that audience did."⁴³ In like fashion, "[p]ublishers began to regard their publications

38. GOODRUM & DALRYMPLE, *supra* note 14, at 45.

39. SCHUDSON, *supra* note 20, at 50 (emphasis in original).

40. LEO BOGART, STRATEGY IN ADVERTISING 5 (2d ed. 1990).

41. See Lears, *supra* note 22, at 260 (discussing how reason-why advertising became less fact-based as product differentiation became more difficult); see also SCHUDSON, *supra* note 20, at 62 (noting that with the increasing number of advertisements for similar competing products, advertising became less informative as it aimed to be more distinctive and memorable "with a few eye-catching words or pictures").

42. GOODRUM & DALRYMPLE, *supra* note 14, at 45 (quoting Rosser Reeves).

43. *Id.* Moreover, the authors state: "[Marketers] frequently sold the identical product in four and five different packages at different prices and different sizes and different quantities to appeal to the

not so much as products to be sold to readers, but more as vehicles that organized audiences into clearly identifiable target groups that could be sold to advertisers; [thus,] the audiences themselves became the 'products'"⁴⁴ From this vantage point, the early notion of "product placement" meant placing potential buyers in the laps of manufacturers and distributors.

In sum, commercial photography and radio broadcasting "caused the first cracks to appear in the strictly rational orientation of the product-information format"⁴⁵ Furthermore, as goods became more indistinguishable, advertising pitches became more distinctly alluring. Similarly, whereas the focal point of "reason-why" advertising campaigns was "What does this product do?", the focal point for audience demographics and market segmentation was "Who will buy this product?"⁴⁶ Cumulatively, these factors increasingly distanced advertising from factual product information.

Notions of lifestyle preoccupied the American mind more and more in the late 1950s and throughout the 1960s, as the newly released Xerox copy machine became a corporate status symbol at one end of the cultural spectrum and the beatnik movement captured the imagination of the young at the other end. Increased affluence and the widespread popularity of television, among other things, opened the door for advertisers to promote the lifestyle ethic. Once inside, the advertising industry told commercial stories that linked the individual to a social group or an economic class and simultaneously associated products with the style of consumption of that group or class.

"Lifestyle" advertising typically portrayed work activities (the homemaker baking or the office executive negotiating) or leisure scenes (golfing or entertaining) and depicted products as essential elements within those contexts. This form of advertising thereby gave the impression of a nexus between the lifestyle and the product. For example, life insurance could be sold not by explaining actuarial facts and premiums, but rather by picturing tender moments of a loving family around the hearth, a family whose security needed to be ensured. By way of another example, it was the "Pepsi generation"—surfing, dancing, racing—that lived life to the fullest. In regard to deciphering these messages, Professors Leiss, Kline, and Jhally explain: "[T]he unifying framework of interpretation is action or behavior appropriate to . . . a social group or situation, rather than use,

different customer elites." *Id.*

44. LEISS ET AL., *supra* note 12, at 102; see also SUT JHALLY, *THE CODES OF ADVERTISING* 127-28 (1987) (describing segmentation strategies as "user-centred").

45. LEISS ET AL., *supra* note 12, at 281.

46. See GOODRUM & DALRYMPLE, *supra* note 14, at 45 (discussing the advent of advertising strategies focused on the audience in response to the "challenge of the identical product").

satisfaction, or utility."⁴⁷ The lifestyle format predictably distanced advertising even further from utilitarian messages and their reason-why logic.

The commercial television format and more sophisticated demographic research strategies fostered the growth of lifestyle advertising. Time took on a new meaning when commercial television was the medium. Programming of all kinds—from news broadcasts to mini-series—was delivered in compact packages suitable for the sale of advertising time blocks. Ever-rising costs cut the advertising slot into increasingly narrower time frames. The original one-minute commercial was replaced by the thirty-second one, which was in turn reduced to a fifteen-second blip. Obviously, time constraints had their impact on the logic of advertising; when seconds were the measure, there was little time for reasoned argumentation, comparative analysis, or meaningful product information. Lifestyle advertising's seductive images could have greater impact within such crammed quarters.⁴⁸

With Freudian fervor, "psychographics" revealed what was latent in earlier demographic research: consumers could be divided into market segments characterized by particular psychological makeups, and advertisers could use this knowledge to their profit. "The ultimate goal of this research approach is to develop a group's so-called psychographic portrait, consisting of generally applicable personal values, attitudes, and emotions."⁴⁹ As Hal Himmelstein notes, "Psychographics moves beyond such often unreliable demographic information as income, age, sex, and place of residence, all of which are incomplete descriptive data rather than interpretive information."⁵⁰ Aided by these more refined profiles, advertisers could better identify and exploit the wish-fantasies of potential consumers. Like demographic research prior to the 1960s, psychographics sold "segmented" people to producers, who in turn sold products to the segmented marketplace. Accordingly, psychographics further marginalized the role of product facts in favor of lifestyle images.

Advertising today need not be one-dimensional. To a greater or lesser degree, it may tap into all of the historical marketing formats: information, image, personality, and lifestyle advertising. The choice or mix of advertising forms depends on the intended audience, the product or service type, the social context for use, and the advertising medium employed.⁵¹

47. LEISS ET AL., *supra* note 12, at 262.

48. See JHALLY, *supra* note 44, at 107 ("Much of the style and content of advertisements . . . is structured and conditioned by how much time is available to work with.").

49. HAL HIMMELSTEIN, TELEVISION MYTH AND THE AMERICAN MIND 64 (1984); see also JHALLY, *supra* note 44, at 78-79, 123-24, 128 (explaining that advertisers tailor ads to appeal to the demographic market reachable by particular advertising spots).

50. HIMMELSTEIN, *supra* note 49, at 64.

51. See, e.g., BOGART, *supra* note 40, at 59 (discussing the use of different advertising strategies

Consumers are likely to look for more product information when considering advertisements of certain items (*e.g.*, homes) than others (*e.g.*, cosmetics).⁵² Obviously, advertising does not speak in the same tongue to all people at all times for all things. Still, the appeal to the nonrational pervades much of contemporary advertising. That appeal may manifest itself in different fashions, but generally it remains dominant. Like a milder form of “*ice-nine*” in *Cat’s Cradle*,⁵³ it permeates everything.

B. *Communication in a Commercial Culture*

On the eve of the twenty-first century, America’s marketplace of ideas has largely become a junkyard of commodity ideology. Each day of our lives, twelve billion display ads, two and one-half million radio commercials, and over three hundred thousand television commercials are dumped into the collective consciousness.⁵⁴ Advertising consumes almost “sixty percent of newspaper space, 52 percent of magazine pages, 18 percent of radio time, [and] 17 percent of network television prime time.”⁵⁵ During a lifetime, most people will devote a full year and one-half to watching commercials.⁵⁶ Product and service messages are plastered on everything from the painted sides of cows to food-dyed hot dogs, placed strategically in everything from books to movies, situated on everything from restaurant menus to the bottoms of holes on putting greens, pumped into everything from doctors’ reception rooms to grade school classrooms, and zapped through everything from phones to fax machines.⁵⁷ The *Philip Morris Magazine*—a slick and upscale periodical—boasted a circulation of more than twelve million, making it one of the largest circulation magazines in America.⁵⁸ Over half of all American journalism and communications

to reach different target audiences); JHALLY, *supra* note 44, at 170 (“[T]here is no one relation of people to things in advertising or one message that is communicated through advertising.”); SCHUDSON, *supra* note 20, at 51, 64 (examining advertisers’ attempts to tailor advertising according to the nature of the product and the target audience).

52. SCHUDSON, *supra* note 20, at 51, 64.

53. KURT VONNEGUT, JR., *CAT’S CRADLE* 32-36, 158-91 (1963) (describing a fictional substance, *ice-nine*, a “tiny grain” of which could teach atoms of water to “stack and lock, to crystallize, to freeze” in a “novel way,” resulting in a chain reaction that could invade all objects and freeze the entire earth).

54. See BOGART, *supra* note 40, at 1-2.

55. LEO BOGART, GANNETT FOUND. MEDIA CENTER, *THE AMERICAN MEDIA SYSTEM AND ITS COMMERCIAL CULTURE* 6 (1991). A shorter version of this paper, with the same title, appears in *MEDIA STUD. J.*, Fall 1991, at 13.

56. See MARTIN, *supra* note 2, at 104.

57. Information on file with the Center for the Study of Commercialism, Washington, D.C.; see also Julia Reed, *Ads Where You Least Expect Them*, *U.S. NEWS & WORLD REP.*, Mar. 9, 1987, at 46 (reporting ads located on standard-sized billboards on trucks, on videocassette tapes, in computer programs, and between songs on rock albums).

58. See Edward C. Baig, *Is Bigger Better for Philip Morris?*, *FORTUNE*, May 8, 1989, at 69; see also Alex Kozinski & Stuart Banner, *When Speech Isn’t Free*, *PHILIP MORRIS*, Summer 1991, at 26.

students forsake the fourth estate for careers in advertising.⁵⁹ All this and more made possible by the some \$130 billion dropped into advertising annually.⁶⁰

The figures alone reveal the telling link between commerce and communication. But this is only the quantitative part of the story. Qualitatively, what can we say about commercial discourse? Ideally, "advertising is simply the distribution of information about products . . . that enables consumers to make rational choices."⁶¹ Ideally, it satisfies the high mission generally ascribed to commercial expression by economists. And ideally, its effects are confined to commercial transactions. Does the ideal, however, comport with reality?

Advertising mogul John O'Toole does not think so: "In reality, advertising is not about products but a person and his life . . ."⁶² Echoing O'Toole, advertising industry experts Al Ries and Jack Trout hold that advertising "concentrate[s] on the perceptions of the prospect. Not the reality of the product."⁶³ They continue: "One prime objective of all advertising is to heighten expectations. To create the illusion that the product or service will perform the miracles you expect. And presto, that's exactly what the advertising does."⁶⁴ Elaborating on this theme, advertising critic Linda Benn maintains: "Although advertisers ostensibly sell products, their true stock-in-trade is the image, which portrays ideals, values, and ways of life in the service of one thing: to get the consumer to buy, usually with appeals that have little connection to the product's intrinsic value."⁶⁵

What precisely characterizes the phenomenon to which these commentators refer? Generally, the mass advertising process takes from the culture, transforms what it takes, and then tenders back what it took and transformed. More specifically, the advertiser appropriates the culture's images and ideas and then associates them with particular products and services. By this association, a subtle but significant metamorphosis occurs: the meanings of images and ideas are infused into products and services, just as the meanings of products and services are infused into images and ideas. Once this metamorphosis is complete, advertising

Philip Morris Magazine was free to its readers, contributing to its vast circulation.

59. EDWARD J. WHETMORE, *MEDIAMERICA: FORM, CONTENT, AND CONSEQUENCE OF MASS COMMUNICATION* 272 (4th ed. 1989).

60. See, e.g., Ronald K.L. Collins & Michael F. Jacobson, *Commercialism Versus Culture*, *CHRISTIAN SCI. MONITOR*, Sept. 19, 1990, at 19 (noting that 1990 advertising expenditures exceeded \$130 billion).

61. LEISS ET AL., *supra* note 12, at 352.

62. JOHN O'TOOLE, *THE TROUBLE WITH ADVERTISING: A VIEW FROM THE INSIDE* 89 (1980).

63. AL RIES & JACK TROUT, *POSITIONING: THE BATTLE FOR YOUR MIND* 8 (1st rev. ed. 1986).

64. *Id.* at 30.

65. Linda Benn, *The Ethics of Advertising*, *WORLD & I*, Dec. 1990, at 531, 534-35.

releases the altered meanings back into a commercialized world ready to deliver products and services.

There is something of a parasitic quality about such advertising. It feeds on the organisms of noncommercial culture—the culture's past and present, ideology and myths, politics and customs, art and architecture, literature and music, and even its religions. Moreover, "[c]ertain values such as love, friendship, neighbourliness, pleasure, happiness and sexual attraction are the staple diet of advertisements" ⁶⁶ In general, advertising indiscriminately and completely draws from these sources their essential symbols. But, in another sense, advertising ceases to be parasitic: having reworked the meaning of cultural symbols, it sends them back in commercial forms. Thus understood, advertising "does not reflect meaning but rather *constitutes* it." ⁶⁷ A moment's deliberation will reveal an irony here, one best articulated by an advertising executive: "[W]hat we're doing is wrapping up your emotions and selling them back to you." ⁶⁸

Mortals yearn for meaning, for ways to structure existence. Ready to exploit this yearning, the advertising system provides us with structures of meaning in the name of consumption. ⁶⁹ Gillian Dyer describes advertising's process for structuring meaning in the following way:

[Advertisements] create structures of meaning which sell commodities not for themselves as useful objects but in terms of ourselves as social beings in our different social relationships. Products are given 'exchange-value': ads translate statements about objects into statements about types of consumer and human relationships. . . . And once this initial connection has been made we almost automatically accept the object for the feeling. People and objects can become interchangeable as in, for example, the slogans "The Pepsi generation", "The Martini set". ⁷⁰

The "exchange-value" enables us to think of products in terms of power, beauty, success, and the like. In a more socially objectionable way, this exchange-value enables us to think of and relate to people in terms of products. For example, women are commodified to sell everything from cars to colognes. Their bodies, their sexuality, and their mystique are

66. DYER, *supra* note 13, at 80 (noting that these qualities are "often confused with or transferred to the possession of things").

67. JHALLY, *supra* note 44, at 129 (emphasis in original).

68. Jhally, *supra* note 32, at 510 (quoting an unidentified advertising executive).

69. See JEAN BAUDRILLARD, *Consumer Society*, in *SELECTED WRITINGS* 10 (Mark Poster ed., 1988) ("If we consume the product as product, we consume its meaning through advertising.").

70. DYER, *supra* note 13, at 116.

traded in countless economic transactions.⁷¹ Advertising thus pimps its products.

Only select values are traded in advertising's exchanges, however. Life is pictured as a Land of Oz—but without the Wicked Witch. It is a land of perpetual bliss, abundance, and novelty. Whatever darkness there is can be lightened by advertising's magic. Reality as fantasy requires that certain kinds of information about products and services be suppressed: for example, "the conditions of work in factories[,] the level of wages and benefits of workers[,] . . . [and] the effect on the environment of producing goods through particular industrial processes"⁷² These and other *real-world* facts are anathema to advertising's mission. Bleak truths and cynical attitudes must be kept at bay.

In sum, today's mass advertising often has less to do with products than lifestyles, less to do with facts than image, and less to do with reason than romance. Above all, it is more a total cultural system than an exclusively informational one; it is "a social discourse whose unifying theme is the meaning of consumption."⁷³ This system refactors the marketplace-of-ideas equation: the *ideas* component is de-emphasized in favor of the *marketplace* component. "Commercial culture assigns no value or meaning to communications apart from their market value"⁷⁴ Hence, in the commercial culture, truth is that which sells.⁷⁵

C. *Commercial Communication and Its Consequences*

What follows when the values of communication are fused to the market? That is, what are the cultural ramifications of the commodification of discourse? Consider the following:

- (1) The logic of discourse changes as commercial communication moves further and further away from the informational format.
- (2) By commercially recontextualizing images and ideas, mass advertising debases the normative values once associated with them.
- (3) Insofar as advertising succeeds, the identity of the consumer is continually reshaped by a relationship to goods and services; indeed,

71. See, e.g., Ronald K.L. Collins, *Sexism for the Many*, L.A. TIMES, Nov. 20, 1991, at B7 ("The everyday reality is that women's sexuality is used to sell things, their commodified bodies are plastered on advertising to stimulate men to buy things. Their very identity as autonomous persons is electronically transformed into media images of marketable chattel.")

72. JHALLY, *supra* note 44, at 50.

73. LEISS ET AL., *supra* note 12, at 352.

74. BOGART, *supra* note 55, at 2.

75. HENRY, *supra* note 21, at 50; see also STUART EWEN, ALL CONSUMING IMAGES 265 (1988) (discussing how even television newscasts stress the entertaining and dramatic elements of the news during ratings seasons).

the identities of goods and services themselves are reshaped as they are invested with fetishistic powers far exceeding their normal utility.

(4) Because of mass media's heavy reliance on advertising revenues, advertisers can directly influence the content of communication and indirectly reshape the media in their own images.

(5) A primary constant in mass advertising is the message to change products and services constantly—a discourse in the service of waste.

(6) When messages are disseminated largely because of their market value, the ideals of citizen-democracy succumb to those of consumer-democracy.

(7) As politicians mimic the strategies of mass marketing, the line between important political discourse and advertising blurs.

Having summarized these consequences, we now probe each in turn.

1. *Distortion of Logic and Debasement of Values.*—The 1960s African-American political declaration “Black is Beautiful” became a promotional anthem for hair products.⁷⁶ Marketers later capitalized on the “X” in Malcolm X to sell baseball caps that since have become fashion statements.⁷⁷ John Lennon’s *Revolution* became a commercial *cause célèbre* for peddling sneakers,⁷⁸ even as the songwriter warned listeners to “free your mind instead.”⁷⁹ Women’s equality became synonymous with the liberty to smoke: “You’ve come a long way, baby!”⁸⁰ Meanwhile, gasoline and chemical companies polluted the communications environment with unspoiled views of snow-capped mountains and green fields. Advertisers identified silverware with the timeless beauty of spruce trees.⁸¹ A shirt commercial showed only a daisy field as the voice-over assured us that “[t]his shirt makes you *feel* like a daisy.”⁸² And Betsy

76. See TORBEN VESTERGAARD & KIM SCHRÖDER, *THE LANGUAGE OF ADVERTISING* 167 (1985).

77. See Marcy Magiera, *Spike Lee’s “Malcolm X” Gets New Kind of Tie-Ins*, *ADVERTISING AGE*, July 13, 1992, at 36.

78. See WILLIAM J. DOWLDING, *BEATLESONGS* 208-09 (1989).

79. THE BEATLES, *Revolution* (Apple Records single 1968). Interestingly, the same company that used *Revolution* to sell sneakers in 1987 recently launched a new ad campaign featuring John Lennon’s *Instant Karma*. Whereas the former commercial stirred up protests from Beatles fans and a lawsuit from Paul McCartney, the latest effort to transform Lennon’s sound into a sales pitch was undertaken with Yoko Ono’s permission and has generated no critical response. See Paul Farhi, *Well, We All Shine . . . Shoes? Is There Any Song Madison Avenue Won’t Steal?*, *WASH. POST*, Mar. 22, 1992, § 6, at 1 (“Advertisers have been grafting popular songs onto ad campaigns for so long that no one complains, even when Aretha Franklin transforms a song that wasn’t hers, ‘Rescue Me,’ into ‘Deliver Me’ for Pizza Hut.”).

80. See *ROLLING STONE*, Jan. 1991, at 18.

81. WHETMORE, *supra* note 59, at 279.

82. *Id.* (emphasis in original). For an unconventional discussion of the “daisy field” ad, see MARSHALL MCLUHAN, *CULTURE IS OUR BUSINESS* 180-81 (1970).

Ross's "Old Glory" is waved constantly in the hawking of everything from clothes to cakes.

Nothing is sacred in the mass advertising world, either logically or normatively. Logically, there is often no rational connection between the commercial image and what is being sold.⁸³ For example, is Brand X silverware *truly* like a spruce tree? How? Why is it more like a spruce tree than nonbiodegradable plastics? Or does wearing Brand Y shirt *truly* make you feel like a daisy? Why? And what does it really mean to feel like a daisy? Such a misuse of language occurs when words are divorced from any logical referent, what the French sociologist Henri Lefebvre has called "the decline of the referentials."⁸⁴ The logic of mass advertising capitalizes on meaninglessness. If intelligible at all, it is a special brand of logic. Jules Henry, in *Culture Against Man*, labeled it "pecuniary logic": "a proof that is not a proof but is intended to be so for commercial purposes."⁸⁵ Henry explained:

This kind of thinking—which accepts proof that is not proof—is an *essential* intellectual factor in our economy, for if people were careful thinkers it would be difficult to sell anything. From this it follows that in order for our economy to continue in its present form people must learn to be fuzzy-minded and impulsive, for if they were clear-headed and deliberate they would rarely put their hands in their pockets; or if they did, they would leave them there. If we were all logicians the economy could not survive⁸⁶

One need not be an Aristotle or a Bertrand Russell to understand a troubling truth latent here: "[I]n order to exist economically as we are we must try by might and main to remain stupid."⁸⁷ If these assessments seem exaggerated, then consider the views of an advertising insider. In his book *Strategy in Advertising*, Leo Bogart, the former advertising executive and executive vice president and general manager of the Newspaper Advertising Bureau, put it this way: "[Advertising] has helped devalue the coin of communication by developing a massive, unthinking tolerance for nonsense We are forced to take for granted too much that is

83. In this regard, Judith Williamson has argued that the consumer's willingness to accept the illogical juxtaposition of products and images or ideas in commercial advertising is a function of two forces: the *form* of the advertisement itself (putting two objects side by side so that they coexist) and the false assumption that something "must 'make sense' simply because it exists" as it is shown. Thus, "a product and an image/emotion become linked in our minds, while the process of this linking is unconscious." JUDITH WILLIAMSON, *DECODING ADVERTISEMENTS: IDEOLOGY AND MEANING IN ADVERTISING* 30 (1978).

84. HENRI LEFEBVRE, *EVERYDAY LIFE IN THE MODERN WORLD* 110-23 (Sacha Rabinovitch trans., 1971).

85. HENRY, *supra* note 21, at 48.

86. *Id.* (emphasis in original).

87. *Id.* (emphasis omitted).

ridiculous.”⁸⁸ Indifferent to such criticism, the advertiser exclaims: *Vive la bagatelle!*⁸⁹

Moving to the normative realm, when the mind makes a quantum leap from a culture’s values to the commercial objects with which they are juxtaposed, it does so at a cost to the common meaning of those values. For example, why should the ideal of nonviolent social reform as heralded in the song *Revolution* be equated with Brand X sneakers? Can this be done without perverting the songwriter’s hope to “change the world”?⁹⁰ T.J. Jackson Lears offers this response: “Think, for example, of the beating that words like . . . ‘revolutionary’ have taken in the consumer culture. One does not need to assume a precapitalist unity between word and thing to concede . . . [that, u]nder capitalism, visual and verbal signs become detached from all traditional associations and meaning in general is eroded.”⁹¹ Additionally, why should the ideal of the flag (raised at Iwo Jima) be the stock-in-trade of jean and pastry ads? Do we not risk debasing the symbol of American sacrifice by these associations?

These examples demonstrate that the energizing of the commercial culture occurs, in part, by enervating the noncommercial culture; the meanings of commodities develop as the standard meanings of symbols collapse. Advertising, seen in this light, “waters down values, wears them out by slow attrition, makes them banal and, in the long run, helps Americans become indifferent to them and even cynical.”⁹² This can be seen by way of two striking illustrations. In the summer of 1991, National Public Radio aired the following interview concerning the advertising strategies of a major clothing manufacturer:

National Public Radio Interviewer Linda Wertheimer: [T]hree controversial [double-page clothing] ads depict a very young nun kissing a priest, a newborn baby only seconds old and a little blonde white girl next to a little black boy whose hair is fashioned in something that looks a little bit like horns. . . . What about these ads? What do nuns and priests, and newborns and little toddlers, blonde and black, have to do with selling T-shirts?

88. BOGART, *supra* note 40, at 7.

89. “Long live triviality!”

90. THE BEATLES, *supra* note 79. Consider in this regard the following observation by Torben Vestergaard and Kim Schrøder:

Because it ignores the substance of the meanings it appropriates, advertising can draw on the most unlikely referent systems and even use “ideas, systems, phenomena in society whose actual content and body of thought is hostile to advertising and might seem completely alien to it. But the more hostile, the better use advertising can make of it, for its recuperation from criticism then seems all the more miraculous.”

VESTERGAARD & SCHRØDER, *supra* note 76, at 164 (quoting WILLIAMSON, *supra* note 83, at 170).

91. Lears, *supra* note 27, at 21. Notably, Lears’s observation came at least four years prior to the controversy over the commercial use of John Lennon’s *Revolution*.

92. HENRY, *supra* note 21, at 65.

Bob Garfield, advertising critic for Advertising Age: An important element of this whole campaign is to create controversy and generate publicity, which not only has a media value all of its own, it also enhances every consumer's exposure to [the clothing manufacturer's] ads So that when you're paging through some magazine and run across a picture of this newborn baby covered with the blood and the vernix and with the umbilicus still attached, instead of casually passing it, being aware of the controversy, . . . you're apt to look at it more seriously and to react one way or another.⁹³

Commenting on what he called "distraction marketing," Mr. Garfield continued:

These ads were created for the express purpose of ticking people off, for creating controversy, for inflaming consumer outrage and so forth and so on. . . . It's really very cunning advertising . . . for a lot of reasons.

Not only is there the publicity benefit, they also are a great example of what I call distraction marketing, and it's distracting because rather than focus on trying to . . . come up with some sort of rational benefit for buying a \$49 cotton T-shirt, which [the clothes manufacturer] knows is not a rational kind of consumer behavior, they're kind of supplying a little three-card monte in creating a distraction over here so you won't pay attention to . . . the facts of the matter being that a \$119 cardigan sweater is not a particularly good buy.⁹⁴

Thereafter, the same national clothing company mounted a \$60 million advertising campaign aimed at shocking the consumer and presumably geared to enhance the products' name recognition. In the service of selling jeans and sweaters, the magazine ads depicted real-life tragedies: an anguished family at the bedside of a dying AIDS victim;⁹⁵ three women mourning over a shrouded corpse, apparently shot and left to die in a pool of blood in the street;⁹⁶ hundreds of refugees frantically swarming aboard a ship at dock;⁹⁷ and an armed soldier clenching a human bone.⁹⁸ In these and similar ads, the explicit commercial message was limited to a

93. *All Things Considered* (National Public Radio broadcast, July 30, 1991) (transcript on file with the *Texas Law Review*).

94. *Id.*; see also Stuart Elliott, *Benetton Stirs More Controversy*, N.Y. TIMES, July 23, 1991, at D22.

95. VANITY FAIR, Mar. 1992, at 132-33 (advertisement); see also Paula Span, *Colored With Controversy*, WASH. POST, Feb. 13, 1992, at D1.

96. Gary Levin, *Benetton Brouhaha*, ADVERTISING AGE, Feb. 17, 1992, at 62.

97. VANITY FAIR, *supra* note 95, at 130-31 (advertisement).

98. Levin, *supra* note 96, at 62; ROLLING STONE, Apr. 19, 1992 (Spring Fashion Collection), at 18-19 (advertisement).

colorful company logo strategically situated in the scenes.

These advertisements were an extraordinary way to provoke public attention, draw media publicity, and apparently engender future profits. Advertisers even plug into religion to preach their commercial gospel. For example, a radio station's billboard depicted Pope John Paul II listening to a stereo headset and read: "Father Knows Best." Another billboard ad displayed a Catholic sister singing along to the tunes on her radio with the caption: "Nun Better."⁹⁹ Other ads are similarly brash but are not always perceived as such. For example, an advertisement for extravagant jewelry in the form of a cross ran in a Florida newspaper on Good Friday in 1991; it urged readers to "Share Our Passion."¹⁰⁰ What is even more amazing than the advertiser's boldness is that the ad drew little or no public complaint.¹⁰¹ (We suspect that Bernardino of Siena, the patron saint of advertisers,¹⁰² would deny his blessings to such missions.)

Such advertising is as much, if not more, a commentary on the transformation of normative values in the commercial culture as it is a description of the products for sale. In fact, the creative director who designed the startling clothes campaign professed *only* to be illustrating socially significant events: "[E]verybody uses emotion to sell a product. The difference here is we are not selling a product. We want to show . . . human realities that we are aware of."¹⁰³ Admittedly, such advertising, whatever its purpose, may sometimes have collateral positive effects, as perhaps in directing the public's attention to social issues. The point,

99. See *Radio Station Tunes into Controversy with Boards*, ADVERTISING AGE, Apr. 20, 1992, at 17.

100. See Sun-Sentinel (Palm Beach, Fla.), Mar. 29, 1991, at A4 (advertisement). Above this statement, the ad read in part: "This Easter, faith shines bright with [Company X's] unique crosses of semi-precious gems surrounded with diamonds. Gifts as beautiful as they are meaningful. . . . Blue Topaz cross, \$1,650. . . . Large rubelite cross, \$6,300. Also available in blue topaz, \$4,995; peridot, \$5,250; green tourmaline, \$7,300." Not to be outdone, another company earlier advertised its own diamond, 18-karat gold cross pendant for \$17,500. N.Y. TIMES, Mar. 24, 1991, at 3.

101. One possible explanation for the public's tolerance of advertising's communion with religious symbolism is that consumerism increasingly has become America's "new time religion" and advertising its greatest prophets. See Jhally, *supra* note 32, at 511 ("Some commentators have even described advertising as part of a new *religious* system in which people construct their identities through the commodity form and in which commodities are part of a supernatural magical world where anything is possible with the purchase of a product." (emphasis in original)); Father John Kavanaugh, *New Time Religion: Accept Consumerism in Your Heart*, ADBUSTERS, Winter 1993, at 18, 20-21 (commenting on commercial advertising in mass media as the new religion); Bill Kowinski, *Graven Images*, ADBUSTERS, Winter 1993, at 25, 25 ("By the advent of the '80s, Americans believed in consumption as salvation, as the only way they knew: shop 'til you drop, spend 'til the end, buy 'til you die. Buying was the new time religion, and the shopping mall its cathedral of consumption."); Kalle Lasn & Nicholas Racz, *An Interview with Sut Jhally*, ADBUSTERS, Winter 1993, at 22, 23 (asserting that the religion of advertising is more powerful than traditional religion).

102. See BUTLER'S LIVES OF THE SAINTS 149-51, 439 (Michael Walsh ed., 1985).

103. Levin, *supra* note 98, at 62 (quoting Oliviero Toscani, in-house creative director for Benetton).

however, is that the commercial culture is ultimately enhanced even when the advertiser identifies a socially significant issue as its own on which to pronounce. From this vantage point, the American culture is no longer commercial simply because it values materialism and furnishes an abundance of consumer goods. Ours has become a commercial culture in a much more intrinsic and pervasive sense. The beliefs, ideas, and behaviors that mold or reflect our national character are now re-created in a product's image.¹⁰⁴ Once this occurs, the old norms take on a new meaning inseparable from the commercial ethic.

2. *Conversion of Consumer and Commodity Identities.*—"I think, therefore I am," said René Descartes.¹⁰⁵ Were he alive today, Descartes more appropriately might say "I buy, therefore I am." In effect, the founder of modern philosophy would be confirming that, in our consumer culture, to be is to buy, and what is bought identifies who we are.

Mass advertising does more than sell goods and services; it is a discourse of symbols that *characterizes* consumers. Insofar as advertising succeeds, the identity of the consumer is continually reshaped by a relationship to goods and services. Advertising critic Judith Williamson captures this point: "We differentiate ourselves from other people by what we buy. . . . In this process we become identified with the product that differentiates us."¹⁰⁶ Differentiation and consumer self-identification are, of course, the objectives and the *modus operandi* of modern marketing strategies: many advertisements portray reality by personality attributes and lifestyle images. Advertising displays the kinds of cars we should own, the kinds of clothes we should wear, the kinds of alcohol and soda we should drink, the kinds of perfumes and colognes we should use—in short, the kinds of people we should be.¹⁰⁷

The lesson of advertising is that we learn who we are by how and by how much we perceive existence through the commercial lens. Our discourse and visions of life are colored by advertising's fictions. "[W]hether

104. Consider the statement of the former advertising executive Leo Bogart:

In this respect our culture differs from the cultures of other places and times, in which expression has either been valued as an end in itself or because of its ability to please a patron. Commercial culture assigns no value or meaning to communications apart from their market value, that is, the price that someone is willing to pay for them.

BOGART, *supra* note 55, at 2.

105. See RENÉ DESCARTES, *MEDITATIONS ON FIRST PHILOSOPHY* 101 (George Heffernan ed. & trans., 1990) (1641).

106. WILLIAMSON, *supra* note 83, at 46 (emphasis omitted).

107. See DYER, *supra* note 13, at 14 ("It [advertising] is a powerful tool of existing economic and social relations and as such has to purvey the values which perpetuate and endorse the current socio-economic structure"); see also WILLIAMSON, *supra* note 83, at 13 ("We are made to feel that we can rise or fall in society through what we are able to buy.").

or not it sells cars or chocolate, [advertising] surrounds us and enters into us, so that when we speak we may speak in . . . the language of advertising and when we see we may see through schemata that advertising has made salient for us."¹⁰⁸ By this process, we are invited to invade the bodies of commercial fantasy figures and become them—making us a kind of “body snatcher” in the marketplace.

Beyond reshaping our identities, advertising reshapes the identities of goods and services as it invests them with fetishistic powers far exceeding their normal utility. In primitive magic, a fetish was an amulet or talisman that carried spirit powers. In current usage, a fetish is any object infused with emotional charge.¹⁰⁹ With the decline of reason-why advertising, it did not take marketing experts long to appreciate the fetishistic potential of advertisements. A 1912 trade journal suggested as much: “[It is] possible through advertising to create mental attitudes toward anything and invest it with a value over and above its intrinsic worth.”¹¹⁰ Only a decade later, advertising agent James Wallen proclaimed that “you do not sell a man the tea, but the magic spell which is brewed nowhere else but in a teapot.”¹¹¹

A consumer culture that savors a particular liquor because it helps on “the rocky road to love,”¹¹² that splashes on a particular cologne because “everyone needs a hero,”¹¹³ or that writes with a particular pen to create literature as great as “The Case Book of Sherlock Holmes”¹¹⁴ is a culture that injects products with powers. It is a culture in which “[i]deas, feelings, time past and time future, worlds and people can all be miraculously contained in objects. . . . Life and meaning are attached to objects that might seem worthless in themselves. In all societies but our own we call this fetishism.”¹¹⁵

3. *Redefining the Medium and Its Messages.*—What is the connection between advertising revenues and the forms and functions of media? It has long been assumed that media managers have regarded the public as their principal customers, that publications and programs were themselves the primary products that the media delivered, and that commercial messages

108. SCHUDSON, *supra* note 20, at 210.

109. IVOR EVANS, *BREWER'S DICTIONARY OF PHRASE & FABLE* 417 (14th ed. 1989); *see* JOHN CIARDI, *A BROWSER'S DICTIONARY AND NATIVE'S GUIDE TO THE UNKNOWN AMERICAN LANGUAGE* 130 (1980) (defining fetish as “any object that attracts compulsive and excessive attention from a person or a cult”).

110. Lears, *supra* note 22, at 263 (quoting an unspecified article in *JUDICIOUS ADVERTISING*).

111. *Id.* at 265 (quoting James Wallen).

112. *See* WILLIAMSON, *supra* note 83, at 148.

113. *ROLLING STONE*, Oct. 20, 1988, at 13 (advertisement).

114. *WASHINGTONIAN*, Dec. 1990, at 56-57 (advertisement).

115. WILLIAMSON, *supra* note 83, at 150 (citations omitted).

should be independent from noncommercial messages. These assumptions implied a hierarchy of communication elevating content over commerce.

Generally, these assumptions are no longer valid. The new assumptions are the exact opposites of their predecessors: media managers now regard advertisers, not the public, as their principal customers;¹¹⁶ the media now deliver readers and audiences as "products" to the advertisers;¹¹⁷ and the wall between commercial and noncommercial editorial content has been breached. Today, content is not categorically elevated over commerce; in fact, the two are often made indistinguishable.

Examples are legion. Saturday morning cartoons frequently are guises for extended toy and cereal commercials.¹¹⁸ More recently, advertisers have become bolder, airing full-length children's programs that star animated commercial characters; these characters are drawn from corporate logos that are typically identified with snack food ads.¹¹⁹ Even family-hour programming is now integrally blended with commercialism. For example, a well-known fast-food clown, decked in the company colors, reads to children "from a book emblazoned with the company's golden arches symbol."¹²⁰ One consequence of this phenomenon is the conversion of regular programming into program-length commercials, or at least the blurring of lines between the two.

Additionally, media increasingly cater to advertisers by mixing commercial and noncommercial messages in a wide variety of formats: infomercials,¹²¹ documercials,¹²² commercial video news releases,¹²³

116. See, e.g., BOGART, *supra* note 55, at 5-6. A. Roy Megary, the publisher of the *Toronto Globe and Mail*, observed: "By 1990, publishers of mass circulation daily newspapers will finally stop kidding themselves that they are in the newspaper business and admit they are primarily in the business of carrying advertising messages." CLARK, *supra* note 10, at 317 (quoting Megary).

117. LEISS ET AL., *supra* note 12, at 102.

118. See IAN MITROFF & WARREN BENNIS, *THE UNREALITY INDUSTRY: THE DELIBERATE MANUFACTURING OF FALSEHOOD AND WHAT IT IS DOING TO OUR LIVES* 47 (1989); Susan Cohen, *Kidvideo Games*, WASH. POST, Apr. 7, 1991, § F (Magazine), at 18-21, 34-41. For a comprehensive survey on commercial advertising trends directed toward children, see CONSUMERS UNION EDUC. SERVS., *SELLING AMERICA'S KIDS: COMMERCIAL PRESSURES ON KIDS OF THE 90'S* (1990) [hereinafter *SELLING AMERICA'S KIDS*].

119. See Sharon Bernstein, *Frito-Lay, Fox Draw Up Cartoon Plans*, L.A. TIMES, Dec. 25, 1991, at F15 (discussing the controversy surrounding Fox Broadcasting's plan to air a weekly children's cartoon show based on a cartoon character created by a potato chip manufacturer to promote its snacks); Stuart Elliot, *Commercial Cartoon Furor Grows*, N.Y. TIMES, Mar. 5, 1992, at D1 (discussing the debate over proposed children's television programs that feature animated characters identified with products). Several public interest, nonprofit organizations, including Action for Children's Television and the Center for the Study of Commercialism, complained to the Federal Communications Commission about these practices. *Id.*; *Groups Ask Action on Product Placements*, L.A. TIMES, May 31, 1991, at F16.

120. Sharon Bernstein, *Advocates for Children's TV Air Their Beef with McDonald's*, L.A. TIMES, Dec. 20, 1991, at F6 ("There's only one thing you think of when you see Ronald McDonald and it's not running to the library for books.").

121. Infomercials present a thirty-minute to three-hour commercial as a talk show. See Stephanie

product placements,¹²⁴ and advertorials¹²⁵ are imaginative ways to pitch products. As the commercial line is pushed further into traditionally noncommercial quarters, even "reports" and "editorials" in newspapers and magazines are too often prepared to satisfy advertisers.¹²⁶

Brush, *Heeeeere's The Commercial!*, WASH. POST, Feb. 11, 1990, at F1 (describing TV commercials that simulate the look of TV talk shows); Stuart Elliot, *New Show Spurs Debate on Old Issue*, N.Y. TIMES, Jan. 21, 1992, at C15 ("Besides carrying conventional commercials, 12 minutes during each hour, as many as four of the seven segments in each show would feature guests who lace their interviews with pitches for merchandise . . . Toll-free telephone numbers for ordering would flash onto the screen."); Eugene Secunda, *Infomercials on Network?*, ADVERTISING AGE, Nov. 30, 1992, at 20 (discussing the advent of infomercials on network television); Jennifer Zickerman, *Infomercials on the Rise*, ADBUSTERS, Winter 1993, at 28 (noting that the deregulation of television advertising has resulted in purchases of network television time by companies who produce and market program-length commercials).

122. Documericals are paid TV program "documentaries" without explicit invitations to buy products. See Paul Farhi, *Hard News or Soft Sell?*, WASH. POST, Feb. 23, 1992, at H1, H14 (arguing that documericals may deceive viewers more because they do not explicitly urge consumers to make purchases).

123. A video news release

is an approximately 90 second electronic version of the PR profession's basic print tool, the press release. It's designed to promote the interests of its sponsor more subtly than TV commercials, which are required to clearly identify the advertiser. Its targets are the 700 local television station news shows currently produced in the nearly 300 U.S. media centers.

Eugene Secunda, *Video News Releases: The Hidden Persuaders Revisited?* 1 (Oct. 8, 1989) (unpublished paper delivered at the Annual Media Ecology Conference in Saugerties, N.Y., on file with the *Texas Law Review*); see also David Lieberman, *Fake News*, TV GUIDE, Feb. 22, 1992, at 9-10 (noting that video news releases, prepared by public relations firms, frequently appear in nightly network newscasts without attribution); Joanne Lipman, *'News' Videos That Pitch Drugs Provoke Outcry for Regulations*, WALL ST. J., Feb. 8, 1990, at B6 (noting that some 2000 to 2500 releases are offered annually to TV stations nationwide).

124. Movie producers reap sums ranging from \$10,000 to \$1,000,000 to include commercial products in their films. SELLING AMERICA'S KIDS, *supra* note 118, at 18. The movie *Total Recall* (Tri-Star 1991) projected some 55 "product placements" for 28 brands. *Groups Ask Action on Product Placements*, *supra* note 116, at F16. *Bull Durham* (Orion 1988) flashed an average of one brand name every two minutes. Michael F. Jacobson, *The Bull in 'Bull Durham'*, N.Y. TIMES, Dec. 23, 1988, at A39 (noting the product placements in *Bull Durham* and arguing that this is "a uniquely insidious and deceitful form of advertising"). Many nonprofit organizations have protested this practice. *Groups Ask Action on Product Placements*, *supra* note 116, at F16 (reporting that several public interest, nonprofit organizations, including Media Access Project, Consumer Federation of America, and the Center for the Study of Commercialism, complained of this practice to the Federal Trade Commission); Ric Kahn, *The Art of the Plug*, BOSTON PHOENIX, July 12, 1991, § 1, at 20 (describing a proposal of the Center for the Study of Commercialism that moviemakers be required to disclose at the start of a film that product placements are paid advertisements); see also Steven L. Snyder, Note, *Movies and Product Placement: Is Hollywood Turning Films into Commercial Speech?*, 1992 U. ILL. L. REV. 301 (arguing that product placements in movies should not disqualify them from First Amendment protection).

125. Advertorials are the print equivalent of infomercials: advertiser-paid stories designed to mimic news stories or editorials. See Scott Donaton, *Advertorials 'Are Like a Drug'*, ADVERTISING AGE, Mar. 9, 1992, at S16. Advertorials are even mentioned in the tables of contents of some magazines, and other magazines publish "advertiser indexes" to help readers find ads. See Maureen Goldstein, *Editorial for Sale, Cheap*, INSIDE MEDIA, Dec. 9, 1991 (no page number in original).

126. Gloria Steinem, the founding editor of *Ms.* magazine, describes the phenomenon of "compli-

In all of this, product-friendly "reporting" appears to honor objective journalistic standards while it advances the special financial interests of advertisers. These practices tend to camouflage their true commercial bent and thereby capitalize on the public's trust of noncommercial journalistic integrity. Commenting on such practices, *Washington Post* reporter Paul Farhi has observed that "even the most reputable broadcasters and publishers are knocking new holes in the wall that traditionally has separated news and entertainment from their advertising departments."¹²⁷ When this occurs, of course, "hard news" can all too easily collapse into "soft sell," with the result that critical reporting becomes unlikely or even impossible.¹²⁸

Advertising pressure does more than influence content; it sometimes dictates it. Indeed, when advertisers wield their financial clout, they may enforce private economic censorship with as heavy a hand as that of the government. Such private censorship may be either direct or indirect. One telling example of direct censorship was the ultimatum of America's leading advertiser, Procter & Gamble,¹²⁹ that its products could not appear in any print medium which included "any material on gun control, abortion, the occult, cults, or the disparagement of religion."¹³⁰ An

mentary copy" in these terms:

Food advertisers have always demanded that women's magazines publish recipes and articles on entertaining (preferably ones that name their products) in return for their ads; clothing advertisers expect to be surrounded by fashion spreads (especially ones that credit their designers); and shampoo, fragrance, and beauty products in general usually insist on positive editorial coverage of beauty subjects, plus photo credits besides. That's why women's magazines look the way they do.

Gloria Steinem, *Sex, Lies & Advertising*, MS., July-Aug. 1990, at 18, 19; see Ronald K.L. Collins, *Dictating Content: How Advertising Pressure Can Corrupt a Free Press* 32-49 (1992) (report published by the Center for the Study of Commercialism, Washington, D.C.) (documenting instances of advertising pressure on editorial content); Gloria Cooper, *Darts and Laurels*, COLUM. JOURNALISM REV., Mar.-Apr. 1992, at 17 (detailing a Southern California newspaper's "reporting" of the opening of a major department store that prominently featured eleven pieces and twenty-two photos on the company's policies and prices, "loudly accessorized with info boxes, time lines, and a floor-by-floor guide to its restaurants, beauty services, and ready-to-wear departments—some 400 column-inches in all. In the September 5 edition, the coverage was complemented by twenty full pages, including five . . . in color," of the store's ads).

127. Farhi, *supra* note 122, at H1.

128. *Id.*

129. See R. Craig Endicott, *Where Those Ad Dollars Go*, ADVERTISING AGE, Aug. 20, 1987, at 134 (describing Procter & Gamble as "the nation's biggest network TV advertiser, with expenditures of \$456.3 million").

130. Steinem, *supra* note 126, at 26 (the language quoted in the text is from Ms. Steinem's account). Procter & Gamble once maintained an equally rigid editorial policy for the electronic media in which it advertised:

There will be no material that may give offense either directly or by inference to any commercial organization of any sort. There will be no material on any of our programs which could in any way further the concept of business as cold, ruthless and lacking all

equally telling example of indirect or self-censorship is revealed in the editorial policy of the *Arkansas Democrat* (now the *Democrat-Gazette*): editorial content must not be critical of advertisers. In a blunt and unusually candid explanation of the paper's policy, managing editor John Robert Starr said: "Our policy is no different from every other paper I know about: People hired as columnists by the paper do not trash the advertisers."¹³¹ Other examples of direct and indirect economic censorship¹³² involve reporters' attempts to cover topics ranging from prescription drugs¹³³ to tobacco¹³⁴ and alcohol,¹³⁵ from car dealers¹³⁶ to real-estate agencies,¹³⁷ and from cosmetics¹³⁸ to fast foods.¹³⁹ Even

sentimental or spiritual motivation.

MICHAEL PARENTI, *MAKE-BELIEVE MEDIA* 186 (1992).

131. Howard Kurtz, *Media Notes: Treading Lightly on Advertisers*, WASH. POST, July 10, 1991, at F1, F10 (quoting Starr).

132. For additional examples beyond those mentioned in this Essay, see generally Collins, *supra* note 126; Bruce Horowitz, *Advertisers Influence Media More, Report Says*, L.A. TIMES, Mar. 12, 1992, at D2 (discussing examples of news organizations revising or killing stories for fear of upsetting advertisers); Karen Riley, *Media Back Down From Advertisers, Critics Say*, WASH. TIMES, Mar. 12, 1992, at C1 (providing examples of economic censorship and recommendations for curbing abuse); G. Pascal Zachery, *Many Journalists See a Growing Reluctance to Criticize Advertisers*, WALL ST. J., Feb. 6, 1992, at A1 (describing editors' responses to advertiser complaints).

133. See Andee Beck, *A Bigger Chill—The Terrifying Trend to Clamp Down on Advertiser-Sensitive Reporting in Television*, IRE J., Fall 1990, at 17 (reporting that a consumer correspondent, after investigating prescription drug prices, was instructed by station management to "withhold information that might antagonize advertisers"). For a criticism of government interference in drug advertising, see *BAD PRESCRIPTION FOR THE FIRST AMENDMENT: FDA CENSORSHIP OF DRUG ADVERTISING AND PROMOTION* (Richard T. Kaplar ed., 1993) (arguing against federal regulatory agency restrictions on prescription drug advertising in order to promote public safety and health interests).

134. See Kenneth Warner, *Cigarette Advertising and Magazine Coverage of the Hazards of Smoking—A Statistical Analysis*, NEW ENG. J. MED., Jan. 30, 1992, at 305, 307; Deirdre Carmody, *Coverage of Smoking Linked to Tobacco Ads*, N.Y. TIMES, Jan. 30, 1992, at D22; David Owen, *A Final Word on The New Republic and Those Cigarette Ads*, WASH. MONTHLY, June 1985, at 51; Eleanor Randolph, *Media Notes—Perez: Burned Up*, WASH. POST, Apr. 2, 1985, at B2; James Warren, *Is Media a Smokescreen for Tobacco Industry Ills?*, CHI. TRIB., Mar. 20, 1985, § 5, at 4.

135. See GEORGE A. HACKER, RONALD COLLINS & MICHAEL JACOBSEN, CENTER FOR SCI. IN THE PUB. INTEREST, *MARKETING BOOZE TO BLACKS* 17 (1987) (declaring that the African-American media is reluctant to tackle alcohol and tobacco problems because magazines and radio stations catering to black audiences rely on these industry ads for survival).

136. See Adam Platt, *Hit and Run: How the Automobile Industry Intimidates the News Media & Smashes Good Consumer and Safety Reporting*, TWIN CITIES READER, Feb. 20-26, 1991, at 8 (giving examples of television investigative reporters who have lost their jobs, have had dealers' names edited out of stories, and have been reassigned to other departments because they reported material harmful to local car dealerships); Herb Weisbaum, *Advertisers Fight Back*, IRE J., Fall 1990, at 18 (complaining that consumer reporters' efforts are often chilled by pressure from advertisers and explaining the lack of investigative reports as a result of the auto industry on the importance of auto ads to TV stations' revenues).

137. See Elizabeth Lesly, *Realtors and Builders Demand Happy News . . . and Often Get It*, WASH. JOURNALISM REV., Nov. 1991, at 22 (discussing the "gutless nature" of some mainstream real estate coverage).

138. See Steinem, *supra* note 126, at 26-27 (noting that some women's magazines go so far as to

nonlibelous political dissent, when critical of advertisers, is subject to outright suppression.¹⁴⁰

Commercial speech represents commercial power. That is, advertisers can influence and dictate the content of communication because mass media rely heavily upon advertising revenues. Competition for the marketing dollar is rife. With the multitude of media options¹⁴¹ and the tightening of recessionary advertising budgets,¹⁴² media managers elect increasingly to please advertisers at almost any cost. This coddling of advertisers' interests is turning the fourth estate into the corporate estate.

4. *Communication in the Service of Waste.*—The dictionary definition of "consumer" discloses much about the nature of commercial communication. The consumer is the one who destroys or expends by use, the one who devours all.¹⁴³ In a highly advanced capitalist world, with seemingly endless supplies of goods and services and a communication network to promote them, this definition takes on an unexpected and even darker meaning. Whatever earlier connotation there may have been, today's idea of consumption refers more to gratifying countless impulses than to meeting central needs. "[L]uxury is a necessity of life" reads the full-page

mention cosmetic products' names in stories about successful women).

139. See Collins, *supra* note 126, at 53 (reporting that a national fast-food restaurant removed its advertising from a local station for three months after a consumer advocate was allowed to criticize the company's product).

140. See, e.g., Nick Coleman, *Stations Give In to Big Advertiser*, ST. PAUL PIONEER PRESS, Dec. 5, 1991, at D1 (describing how members of a Sioux Indian tribe were denied any opportunity to place a paid anti-nuclear-waste spot on three local television stations that regularly run commercials of a power company that plans to build a nuclear waste dump near the tribe's reservation); Ronald K.L. Collins, *Truth in Advertising: The Censors' Control*, BALTIMORE SUN, May 21, 1990, at A5 (noting that television network affiliates in six cities rejected a paid political commercial urging boycott of a coffee manufacturer). But cf. John Carroll, *All the News That's Fit to Advertise*, BOSTON SUNDAY GLOBE, Jan. 31, 1993, at 65, 66 ("What seems to be developing is a two-tiered system of journalism: small-town papers, fashion magazines and television programs that feel free to play footsie with their advertisers, and 'serious' news sources that remain solvent enough to draw the line between advertising and editorial."). Joann Lublin, *TV Networks Gingerly Lift Prohibition on 'Issue Ads'*, WALL ST. J., Oct. 15, 1990, at B1 (reporting that television networks claim to accept issue advertising).

141. The general advertising categories include network and cable television, weekly and daily newspapers, magazines, radio, outdoor billboards, transit posters, industrial and trade publications, direct mail, Yellow Pages, handbills and leaflets, window displays, logos and brand names shown on products, home videos, commercial tie-ins, placement ads situated in movies and television shows, and various forms of sales promotional techniques like rebates and coupons. For an excellent discussion of the opportunities and advantages associated with the spectrum of advertising media, see BOGART, *supra* note 40, at 121-50.

142. See generally Collins, *supra* note 126, at 13 (noting newspaper, magazine, and network drops in advertising revenues).

143. See RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 437 (Stuart B. Flexner ed., 2d ed. 1987).

department store ad.¹⁴⁴ This idea is legitimated by an advertising system that feeds the voracious mass appetite with the promise of delights in “new and improved” ways of life.

“New and improved” and “distinction with a difference” have become the maxims for an economic regime that relies upon the replacement of products to stimulate its markets. Since World War II, America often has practiced a “dynamic obsolescence” that goads consumers to reject today what was satisfactory yesterday.¹⁴⁵ That goods are often substituted today for yesterday’s functional equivalents is of little concern to a commercial system governed by disposability. The primary concern is that the consumer not seriously doubt “the live-for-the-moment ideology that primes the market and avoids the question of the future, except insofar as that future is defined by new, improved items for purchase.”¹⁴⁶ Advertising’s “live-for-the-moment” mindset may temporarily be confined and subdued during periods of economic, political, ecological, and natural disasters.¹⁴⁷ Yet, even in hard times, the marketing message remains largely unchanged. Says retail consultant Carol Farmer, “The marketing challenge of the 90’s will be to sell more in an era of less.”¹⁴⁸ Visions of yachts, penthouses, and high fashion that once graced the settings for advertising products may yield to more commonplace pictures of public transit, the family home, and rugged outdoor wear; the stress on value may replace the earlier message of luxury; and advertisers may wrap themselves more in the environmental “green” flag than in overt images of waste.¹⁴⁹ Still, in the end, the rule is not conservation, but continuous consumption.

Mass advertising both reflects and fuels the process of dynamic obsolescence as it prods consumers to define and redefine their desires. The only constant in mass advertising is the message to change products

144. N.Y. TIMES, Apr. 28, 1991, at A53 (advertisement).

145. HENRY, *supra* note 21, at 22.

146. EWEN, *supra* note 75, at 245 (emphasis omitted).

147. See generally DAVID E. SHI, *THE SIMPLE LIFE: PLAIN LIVING AND HIGH THINKING IN AMERICAN CULTURE* 249-76 (1985) (detailing cycles of consumptive behavior from the Great Depression of the 1930s to the Reagan era); Stuart Elliot, *Themes of 80's Excesses Yield to the Basics of the 90's*, N.Y. TIMES, Oct. 21, 1991, at D10 (noting that advertisers “reshape attitudes” during recessionary cycles to emphasize “more emotional, human and personal” dimensions of consumption rather than just “the acquisition of material things”).

148. Stuart Elliot, *Strategies for Selling More When Shoppers Want Less*, N.Y. TIMES, Jan. 16, 1992, at D18 (quoting Carol Farmer, president of a private consulting firm in Boca Raton, Florida); see also Stuart Elliot, *Helping Marketers Adjust to Mood Swings of Consumers*, N.Y. TIMES, Nov. 10, 1992, at D21 (analyzing the efforts of advertisers to anticipate the “bungee-like” mood shifts of consumers that are “an overreaction to short-term changes in statistical measures covering important areas like the economy, the environment, health care and crime”).

149. See Alan T. Durning, . . . *And Too Many Shoppers: What Malls and Materialism Are Doing to the Planet*, WASH. POST, Aug. 23, 1992, at C3 (“Consumerism, no matter how tastefully trimmed with green, is a recipe for ecological decline.”).

and services constantly. "Beyond encouraging us to dispose of that which we have and replace it with that which they are selling, 'the commercial message' itself . . . embodies the ideal of conspicuous consumption."¹⁵⁰ This is not the discourse of conservation; rather, it is discourse in the service of waste.

5. *The Decline of Citizen-Democracy and the Rise of Consumer-Democracy.*—On the eve of the twenty-first century, much of America's discourse is commodity-fixated—communication about and through commodities. "[A] significant portion of our daily public 'talk' and action is about objects (consumer goods), and about what they can do or should mean for us."¹⁵¹ The commercialization of discourse not only affects our self-identity but also our identity in the American polity. That is, talking about and consuming commodities are now among our most significant "political" acts.

One of the pillars of our ideal of a republican form of government is an informed and active citizenry. Essential to this paragon of democracy is vigorous participation in the processes of representative government, reasoned decisionmaking, equal responsibility to the community, competent exercise of the franchise, and, when needed, meaningful dissent. Candidly, this eighteenth-century revolutionary notion of democracy ultimately cannot exist with a self-indulgent polity and a highly commercialized political state. Broadly speaking, today the "general will" has become the will to buy; the common good has become common goods; liberty from monarchical tyranny has become liberty for market choices; and the public forum has become the shopping mall. Civic republican norms of equality anchored in notions of mutual obligation run adrift in a sea of commercialism that equates equality with "keeping up with the Joneses." In short, our citizen-democracy has become, in Stuart Ewen's words, a "consumer democracy."¹⁵²

In our consumer democracy, consumption is the *raison d'être*. It is the "premise for 'human liberation,' to be attained in lieu of, and despite the failures of, social and political liberation."¹⁵³ Indeed, the ethic of consumption now acts as the intermediary between the state and the individual. Consumption is "institutionalized, not as a right or enjoyment, but as the citizen's *duty*."¹⁵⁴ Whatever is made of this insight, it animates the daily workings of much of our advertising. When one of the citizen's

150. EWEN, *supra* note 75, at 241.

151. LEISS ET AL., *supra* note 12, at 1.

152. EWEN, *supra* note 75, at 32.

153. BAUDRILLARD, *supra* note 69, at 53.

154. *Id.* at 48 (emphasis in original).

highest duties is consumption, the traditional values of political discourse can plummet to their lowest level.

6. *Commercialization of Politics.*—The concept of the voter as consumer necessarily leads to the concept of the politician as seller. “The fact that election campaigns are indistinguishable in form (and often in content) from product marketing campaigns is the single most dramatic instance of the triumph of the advertising model of persuasive communication in modern society.”¹⁵⁵ As early as the Eisenhower-Stevenson presidential contest of 1956, *Nation’s Business* magazine predicted that Democrats and Republicans alike would market candidates using the same techniques that advertisers employ to market products.¹⁵⁶ Over thirty years later, the 1988 Bush-Dukakis election fulfilled the prediction. Forklifts, flag factories, tanks, harbor rides, and convict turnstiles were integral images in the candidates’ political plugs.¹⁵⁷

Advertising agency professionals serve as “media consultants” to the candidates and orchestrate elections as if they were mass marketing campaigns. All three of the major candidates in the 1992 presidential election race turned to Madison Avenue gurus. George Bush,¹⁵⁸ Bill Clinton,¹⁵⁹ and even Ross Perot¹⁶⁰ came to realize that “[t]he second most visible part of a campaign, after the candidate, is the advertising.”¹⁶¹ Voter attitudes are studied and the electorate segmented by the same research strategies employed for selling pretzels and beer. By the

155. LEISS ET AL., *supra* note 12, at 389.

156. Robert B. Westbrook, *Politics as Consumption: Managing the Modern American Election, in THE CULTURE OF CONSUMPTION: CRITICAL ESSAYS IN AMERICAN HISTORY, 1880-1980, supra* note 27, at 143, 155.

157. See John A. Farrell, *The Electronic Election*, BOSTON GLOBE, Nov. 13, 1988, available in LEXIS, Nexis Library, BGLOBE File (discussing the use of imagery in the Reagan and Bush campaigns).

158. See Michael Wines, *Bush’s Campaign Tries Madison Ave.*, N.Y. TIMES, May 27, 1992, at A18 (“President Bush’s re-election campaign is handing control of its \$40 million-plus advertising program to two Madison Avenue executives with scant political experience.”).

159. See Dan Balz, *New Clinton Ad Team Combines Political, Commercial Veterans*, WASH. POST, July 4, 1992, at A8 (“Clinton has tapped the firm of Deutsch Inc., a New York company best known for its ads in behalf of IKEA, the Swedish home products retailer.”).

160. See Steven W. Colford, *Perot Talks to Riney About Campaign Ads*, ADVERTISING AGE, June 22, 1992, at 1 (reporting speculation as to advertising executive Hal Riney’s involvement in the Perot campaign). In fact, the *New York Times* went so far as to ask advertising executives how they would have structured Ross Perot’s independent presidential campaign. *If You Won the Perot Account . . .*, N.Y. TIMES, May 4, 1992, at A17. The editors of *Advertising Age* presented a similar question to marketing experts regarding their views on the Clinton and Bush campaigns. See Steven W. Colford, *Bill vs. Bush: How Experts Would Position Each for Victory in Fall*, ADVERTISING AGE, May 18, 1992, at S1 (Special Report).

161. Balz, *supra* note 159, at 8 (quoting Mandy Grunewald, media consultant to the 1992 Clinton presidential campaign).

grace of audience demographics and psychographics, the candidate becomes a "package put together by pollsters, image-makers, pulsetakers, and speech writers."¹⁶²

All throughout, candidate *image* governs, and reason-why information is too easily disregarded. That is, a candidate is contextualized in some peculiar but sympathetic environment, while concrete and detailed discussion of important issues of the day is largely forsaken. Both advertisers and politicians appreciate the force of repetitive and concise slogans. In the 1992 presidential election campaigns, for example, Bill Clinton rarely spoke without invoking the pitch: "courage to change"; meanwhile, the incumbent George Bush asked again and again: "Who do you trust?" As politicians master the strategies of advertising, the line between important political discourse and mass marketing becomes increasingly blurred.¹⁶³ Citizen-consumers "buy an argument" with the same pecuniary logic by which they buy products and services. Indeed, presidential aspirant Walter Mondale counseled voters in 1984 to approach politics in the same way they buy burgers—"Where's the beef?"¹⁶⁴

* * * *

All of these consequences of commercial communication might prompt us to reconsider the structure of traditional First Amendment analysis. Is the central question, as typically thought, whether commercial expression should receive constitutional protection? Or is it whether the government should act affirmatively to fortify the First Amendment wall against the battering ram of mass commercial advertising? Historically, it was thought that the sole or primary enemy of free expression was the State. Today, the consequences of commercial communication reveal that the private

162. Westbrook, *supra* note 156, at 145.

163. Not surprisingly, the marriage of politics to marketing has produced something of a reversal in influence: drawing inspiration from Bill Clinton's successful campaign for change, advertisers are associating consumer products with the concept of change. See, e.g., Stuart Elliot, *Turning the Issue Around: How Politics Has an Effect*, N.Y. TIMES, Nov. 16, 1992, at D7 (reporting that marketers are studying political campaign techniques for building coalitions, consensus, and constituencies); Eben Shapiro, *In Light of Election Results, Companies Stress "Change"*, N.Y. TIMES, Nov. 9, 1992, at D7 (quoting Ron Berger, a partner in an agency that has employed the "time for change" theme in its advertisements: "Any good agency will always look to magnify an idea by capturing a larger, societal trend").

164. "Where's the beef?" was a popular advertising slogan for a major fast-food hamburger chain. See Lee Comegys, *Catch, Catch Can*, Oct. 30, 1984; available in LEXIS, Nexis Library, WIRES File; Martin Schram, *Media Feed Floridians Debate in Morsels*, WASH. POST, Mar. 13, 1984, at A8. On a related front, another prominent hamburger chain ran an advertisement "supporting traditional American values on television, especially the importance of the family." WASH. POST, Nov. 4, 1990, at A27 (advertisement).

captains of the advertising empire may prove to be an enemy of equal stature. In this light, Justice Hugo Black's 1945 commentary on First Amendment press freedoms takes on a bolder and broader meaning:

It would be strange indeed . . . if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. . . . Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. . . . Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.¹⁶⁵

To restructure the First Amendment so as to permit some governmental regulation of corporate advertising messages is to set the legal guarantee against the commercial culture. This point, however, ought not be discussed without first considering what category of commercial communication might buttress, rather than damage, the *traditional* edifice of the First Amendment.

D. *Classified Communication*

The *ideal* of commercial speech is most fully realized on the daily pages of the classified advertisements.¹⁶⁶ Justice Harry Blackmun's assurance that commercial expression will serve the high purpose of intelligent and well-informed decisionmaking¹⁶⁷ is best exemplified by the following kind of advertisements:

FORD—'76 1/2 Ton. 390 w/CJ heads.
New exhaust C6, new S. Swampers
\$2300/OBO. 703-[123-4567].¹⁶⁸

Similar informational advertising often appears in the Yellow Pages, in commercial flyers, and on store-front signs. To say that such forms of advertising typify the First Amendment ideal strikes us as comic, as well

165. *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (reasoning that application of the Sherman Act to "a combination to restrain trade in news and views" would enhance, rather than constrict, press freedoms).

166. To some extent, what is written here about the classifieds could hold true for information-based advertising in trade and industry journals.

167. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976); see *supra* text accompanying note 1.

168. WASH. POST, July 13, 1991, at D32 (advertisement listed under "Trucks" classification; correct phone number omitted). Incredibly, such important forms of commercial speech have not yet found their way to computerized legal database services.

it should. These holdovers from the era of mercuries, broadsides, and leaflets do not represent the overpowering side of commercial communication as we experience it daily. What, then, are the differences between the classifieds and modern imagistic mass advertising? How do these differences explain the special affinity between the classifieds and Justice Blackmun's First Amendment?

There is an old-fashioned and romanticized quality about classified communication. We expect the seller and the advertiser to be the same person. We assume that the classified ad is directed to individuals searching to buy a particular good. We envision a simple message inviting one-on-one dealing to sell a single item. We look for text that explains the product and identifies the price. Above all, the classifieds represent the world of individualized exchange of commercial facts.

Today's advertising industry stands in stark contrast to the romanticized world of classified communication. Advertising and marketing agencies broker the commercial relationship by coming between seller and buyer. Rather than soliciting ready customers, modern advertising cultivates an overall spirit of buying among the ready and unready.¹⁶⁹ Mass advertising by definition depersonalizes commercial communication. Simple text about product and price is easily overshadowed by metaphorical images and lifestyle messages. Above all, much of today's mass advertising can be classified as fantasy more than fact.

Thus, individual consumers communicate with each other through the classifieds quite differently than marketers communicate with consumers through mass media. This suggests why classified communication resonates more with Justice Blackmun's First Amendment ideal than modern mass advertising can. The ideal derives its staying power from two key values: the worth of the individual and the worth of informed decisionmaking. In principle, if the traditional First Amendment were ever to embrace commercial speech, it would find classified communication the most deserving of constitutional protection.

II. Commerce, Communication, and the Constitution

Two centuries after Patrick Henry of Virginia uttered the celebrated words "but as for me, give me liberty, or give me death!",¹⁷⁰ the keepers

169. See BOGART, *supra* note 40, at 107 ("[Advertising's] importance lies not in having elicited a specific purchase response to a specific ad. The real significance of advertising is its total cumulative weight as part of the culture—in the way in which it contributes to the popular lore of ideas and attitudes toward consumer products."); SCHUDSON, *supra* note 20, at 238 (arguing that advertising fosters "a consumer way of life").

170. JANE CARSON, *PATRICK HENRY: PROPHET OF THE REVOLUTION* 46 (Edward M. Riley ed., 1979).

of the American Constitution extended that liberty to classified advertising. In 1975, Justice Blackmun's First Amendment was recruited in the service of an advertisement in the *Virginia Weekly*, which read:

**UNWANTED PREGNANCY
LET US HELP YOU**
Abortions are now legal in New York.
There are no residency requirements.
**FOR IMMEDIATE PLACEMENT IN
ACCREDITED HOSPITALS AND
CLINICS AT LOW COST**
Contact
WOMEN'S PAVILION
515 Madison Avenue
New York, N.Y. 10022
or call any time
(212) 371-6670 or (212) 371-6650
AVAILABLE 7 DAYS A WEEK
STRICTLY CONFIDENTIAL. We
will make all arrangements for you
and help you with information and
counseling.¹⁷¹

That the First Amendment should be enlisted to protect such communication is not surprising. Conventional wisdom holds that the link between this advertisement and a woman's right to an abortion explains the Court's ruling. But the conventional wisdom falls short. At stake here was nothing less than the First Amendment ideal embodied in classified communication. This same ideal lies buried in the jumble of the Court's commercial speech opinions and in the clutter of those who defend or criticize those opinions.

A. *A New Age of "Reason"*

Western civilization marked the eighteenth century as its "age of reason." The Enlightenment was a period of faith in human reason, of a confidence in the supreme power of rationality to govern all aspects of life. It was the time of François Voltaire, Denis Diderot, Immanuel Kant, and

171. *Bigelow v. Virginia*, 421 U.S. 809, 812 (1975) (holding that a Virginia statute making it a misdemeanor, by the sale or circulation of any publication, to encourage or prompt the procuring of an abortion could not be applied to the newspaper owner's publication of the advertisement without infringing upon the owner's First Amendment rights).

Sir Isaac Newton—all champions of the mind's capacity to ferret truth out of a universe of information. A similar faith permeates the modern writings on commerce and communication. This faith borrows the rhetoric of its eighteenth century predecessor but applies it to a radically new context—modern mass advertising. From this context emerges a new age of "reason."

Michael Gartner, president of NBC News, echoes the Enlightenment's call for truth through reason in championing the cause of modern advertising. "Commercial speech is protected," he argues, "because it fosters informed decisionmaking among consumers. It maximizes the flow of truthful information to consumers so that they can make realistic choices as to their needs."¹⁷² Beyond the borders of commercial television, a more sophisticated but comparable explanation comes from the legal academy:

When the individual is presented with rational grounds for preferring one product or brand over another, he is encouraged to consider the competing information, weigh it mentally in the light of the goals of personal satisfaction he has set for himself, counter-balance his conclusions with possible price differentials, and in so doing exercise his abilities to reason and think; this aids him towards the intangible goal of rational self-fulfillment.¹⁷³

And, of course, in Justice Blackmun's Court "the free flow of commercial speech" certainly "serves individual and societal interests in assuring informed and reliable decisionmaking."¹⁷⁴

This "informational function"¹⁷⁵ is central to the Court's approval of commercial expression as a form of protected speech. Indeed, of the major commercial speech cases in which governmental regulation has been invalidated, nearly all "involved restrictions on either purely or predominantly informational speech, such as the bans on price advertising."¹⁷⁶ By comparison, governmental regulations were sustained in cases not involving "predominantly informational advertising."¹⁷⁷ The Court's

172. MICHAEL G. GARTNER, *ADVERTISING AND THE FIRST AMENDMENT* 22 (1989).

173. Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 443-44 (1971).

174. *Bates v. State Bar*, 433 U.S. 350, 382 (1977) (holding that lawyers may constitutionally advertise their prices for routine legal services).

175. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980).

176. Daniel H. Lowenstein, *"Too Much Puff": Persuasion, Paternalism and Commercial Speech*, 56 U. CIN. L. REV. 1205, 1229 (1988) (citing *Bates*, 433 U.S. 350 (1977) and *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)) (footnote omitted). None of Lowenstein's characterizations has been affected by the Court's more recent commercial speech decisions.

177. *Id.* at 1229 (citing *Posadas de P.R. Assocs. v. Tourism Co.*, 478 U.S. 328 (1986); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981); *Friedman v. Rogers*, 440 U.S. 1 (1979);

rulings affirming the constitutional importance of commercial expression concerned advertisements akin to the classified communication model as we have described it.¹⁷⁸ (Tellingly, some European laws explicitly draw distinctions between “informational and promotional advertising” with differing standards of legal protection.¹⁷⁹)

Although the Court may be perceived as confining its holdings only to classified communication,¹⁸⁰ Justice Blackmun and his colleagues have never expressly acknowledged this point. Not surprisingly, avid defenders of commercial speech rights interpret this silence as a license to apply the Court’s principles to the full spectrum of modern mass advertising. “We trust individuals to evolve [commercial] preferences in a rational manner . . .,” argues Burt Neuborne.¹⁸¹ Having hoisted the Enlightenment banner, Neuborne and others exhort us to treat all forms of legal advertising as if they were created equal. For First Amendment purposes, a

and *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978)).

178. *See, e.g., Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647-49 (1985) (holding unconstitutional the reprimand of an attorney for soliciting business with truthful and nondeceptive advertisement); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 68 (1983) (protecting birth control advertisements in fliers and informational pamphlets mailed to the public); *In re R.M.J.*, 455 U.S. 191, 206-07 (1982) (allowing an attorney to advertise that he was admitted to practice before the U.S. Supreme Court); *Bates*, 433 U.S. at 383 (holding that a legal clinic’s newspaper advertisement listing services and fees could not be prohibited); *Carey v. Population Servs. Int’l*, 431 U.S. 678, 682 (1977) (prohibiting the suppression of a birth control advertisement that was not limited to adults); *Linmark Assocs. v. Willingboro*, 431 U.S. 85, 86 (1977) (extending First Amendment protection to “for sale” signs posted in residential yards); *Virginia State Bd. of Pharmacy*, 425 U.S. at 773 (protecting prescription drug advertising); *Bigelow v. Virginia*, 421 U.S. 809, 825 (1975) (holding protected an abortion clinic’s newspaper advertisement). In *Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464 (6th Cir. 1991), the United States Court of Appeals for the Sixth Circuit invalidated on First Amendment grounds a local ordinance that banned the distribution of advertising magazines through newsracks on public property and yet permitted newspapers to use the racks. The U.S. Supreme Court has agreed to review the case. *City of Cincinnati v. Discovery Network, Inc.*, 112 S. Ct. 1290 (1992) (granting certiorari). Given the “classified” character of the advertisements in question, the Court could well uphold the First Amendment claim, remaining consistent with its earlier rulings.

The Court, however, has not hesitated to curtail First Amendment protection when the advertisement in question may not fit the classified communication mold. *See, e.g., Posadas*, 478 U.S. at 348 (upholding a Puerto Rico statute restricting casino gambling advertisements aimed at residents of Puerto Rico); *Metromedia*, 453 U.S. at 512 (allowing certain restrictions on outdoor commercial billboards). The kinds of advertising represented in both of these cases tend significantly toward the image, personality, and lifestyle formats typical of modern mass advertising.

179. *See* ERIC BARENDT, *FREEDOM OF SPEECH* 57-58 (1985) (discussing the approach, recommended by the British Monopolies Commission, of removing any limits on informational advertisements but acknowledging that “there might in some circumstances be good reasons for inhibiting advertisements designed to create custom[s]”); *id.* at 60 (noting that European Convention case law distinguishes “between promotional advertising and commercial speech providing information”).

180. *See* Lowenstein, *supra* note 176, at 1226-30 (“[T]he Court’s frequent statements that the protection of commercial speech is based on its informational value might be taken as marking a limit to the constitutional protection.”).

181. NEUBORNE, *supra* note 9, at 22.

"Spuds McKenzie" beer ad¹⁸² presumably delivers as much information necessary to a commercial exchange as did our '76 Ford truck classified ad.¹⁸³ If Neuborne and other commercial speech advocates were to deny this, then their routine justification of "informed" decisionmaking would be merely rhetorical flourish.

Even those who laud constitutional protection for commercial speech freely admit that government may regulate or even ban such expression if it is false or deceptive.¹⁸⁴ This exception derives a good measure of its staying power from the firm commitment to reason in the marketplace: if commercial communication were to patently subvert informed and rational economic decisionmaking, it would frustrate the underlying constitutional objective. Hence, the glorified mission of agencies such as the Federal Trade Commission is to serve as the watchdog of truth in the marketplace, to preserve some quantum of the old reason in the new age of mass advertising.

By associating itself with the defenders of the old reason, modern mass advertising claims a high level of constitutional protection. But it does so talismanically. Merely by invoking the norm of informed and rational decisionmaking, imagistic advertising professes to promote it. Exploiting the weighty importance of reason for its own ends, such advertising does precisely what it does best: it appropriates the symbols of informational advertising, reconstructs them in its own image, and returns them to the legal community in the form of constitutional defenses. What is returned, of course, is not the old reason, but the "new and improved" version.

Distancing themselves from the defenders of the old reason, Judge Alex Kozinski and Stuart Banner feel no compunction to draw on Enlightenment rhetoric in making their constitutional case for lifestyle advertising.¹⁸⁵ At the outset, unlike others, they recognize that the Court's pronouncements on commercial speech say little about how mass advertising actually works. Far from promoting a *rational* transaction, imagistic communication like a cola commercial "is not commercial speech at all because it does not even meet the threshold requirement of *proposing* a commercial transaction."¹⁸⁶ For them, our "Spuds McKenzie" beer ad

182. See, e.g., ROLLING STONE, Oct. 20, 1988, at 56 (advertisement).

183. See *supra* text accompanying note 168.

184. See, e.g., Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563-64 (1980) (noting that the government has the power to ban forms of communication likely to deceive the public); Redish, *supra* note 173, at 467 (discussing the propriety of First Amendment protection for advertisements addressing the health effects of smoking, assuming the ads are not deceptive or misleading).

185. Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990).

186. *Id.* at 639 (emphasis added).

apparently invites the consumer to do nothing more than enjoy the dog's antics. Why, then, protect such expression? In large part, Kozinski and Banner believe that commercial expression cannot meaningfully be distinguished from other forms of protected communication; since much advertising appropriates our culture's political, religious, and social symbols, it falls under their constitutional umbrella.¹⁸⁷

Following the Kozinski and Banner line, mass advertising need not don the garb of rationality. It might claim a high level of constitutional protection because it is part and parcel of most discourse, rational or not. Reason-why criteria are no more required in the sphere of commercial communication than they are in that of political communication. Thus, by merging the two spheres, the new "reason" argues that our commercial culture is beyond enlightenment.

B. *The New Age of "Self"*

The Enlightenment was not only the age of reason, but also the era of selfhood. Faith in the individual, the autonomous self, was essential to the eighteenth century credo. The political and moral philosophies of David Hume, Charles Louis Montesquieu, and John Locke portrayed the person as a free, rational, and self-governing agent who was both the source of political authority and the ultimate justification for its exercise. These philosophers established the intellectual constructs that support the current liberal theory of free speech. Grounded in the eighteenth century concept of selfhood, First Amendment theory holds that the preservation of conditions for individual self-realization is an integral objective of, if not the primary purpose for, free speech rights.¹⁸⁸ At its core, the First Amendment exalts the liberty of individual action through self-expression.

In 1886, the same year in which the Statue of Liberty was dedicated in New York Harbor, American liberty was given a new face. Almost a century after the close of the Enlightenment, the liberty that was once

187. *See id.* at 640-48. Kozinski and Banner also offer the following syllogism for justifying First Amendment protection of imagistic advertising: (1) In differentiating commercial from political, artistic, or scientific speech, one cannot inquire into the intent of the speaker according to Supreme Court dictates; (2) lifestyle advertising can be classified as speech proposing a commercial transaction only by inquiring into the intent of the advertiser; (3) therefore, lifestyle advertising cannot categorically be labeled commercial rather than political, artistic, or scientific speech. *See id.* at 639-40. Succinctly put, this argument depends on a highly formalistic interpretation of the Court's criteria for proposing a commercial transaction. Such an approach belies the obvious—consumers are likely to recognize as commercial a lifestyle image ad that eschews all express terms inviting them to buy. And pragmatically, since advertising costs are tax deductible, Treas. Reg. § 1.162-14 (as amended in 1969), an advertiser would already have told the government in its federal tax return that it engaged in commercial speech. In other words, the government need not inquire as to the advertiser's intent since it already knows.

188. *See* EMERSON, *supra* note 11, at 6.

accorded only to individuals was handed over to corporations as well. A unanimous Supreme Court declared that corporations were "persons" under the Fourteenth Amendment and were entitled to the blessings of liberty.¹⁸⁹ "Thus, the Court converted an amendment primarily designed to protect the rights of blacks into an amendment whose major effect, for the next seventy years, was to protect the rights of corporations."¹⁹⁰ Remarkably, historian Howard Zinn reports: "Of the Fourteenth Amendment cases brought before the Supreme Court between 1890 and 1910, nineteen dealt with the Negro, 288 dealt with corporations."¹⁹¹ Once the self had thus been transformed, it was entirely predictable that corporations would eventually seize First Amendment liberties for their own expression as well.

This constitutional transformation of the individual-self to the corporate-self has drawn sharp dissent from traditionalists¹⁹² and progressives¹⁹³ alike, most recently in the commercial speech context. The defenders of the old self cannot tolerate the idea that the free speech values associated with individual autonomy and self-realization should now be affiliated with corporate communication for profit. Similarly, Edwin Baker argues that, unlike other forms of protected communication, corporate speech for profit does not "create or affect the world in a way that has any logical or intrinsic connection to anyone's substantive values or personal wishes. . . . It lacks the crucial connections with individual liberty and self-realization that are central to justifications for the constitutional protection of speech"¹⁹⁴ So viewed, since corporate expression

189. *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394 (1886).

190. Mark Tushnet, *Corporations and Free Speech*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 256 (David Kairys ed., 1982).

191. HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES* 255 (1980), *quoted in* HERBERT I. SCHILLER, *CULTURE, INC.: THE CORPORATE TAKEOVER OF PUBLIC EXPRESSION* 47 (1989).

192. *See, e.g.*, Malcolm P. Sharp, *Foreword to* MEIKLEJOHN, *supra* note 11, at xv-xvi (quoting Meiklejohn as saying that the "unregulated self-seeking of the profit-makers is much more dangerous in its effect upon the morality and intelligence of the citizen" than is regulation for the common good); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 *STAN. L. REV.* 299, 353 (1978) (arguing that commercial advertising is so far removed from the context of political debate that public interest in its messages is irrelevant to First Amendment values); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 26-28 (1971) (maintaining that First Amendment protection "must be cut off when it reaches the outer limits of political speech").

193. *See, e.g.*, SCHILLER, *supra* note 191, at 51-56 (contending that constitutional corporate speech privileges have allowed the corporate sector to dominate the media channels that shape the national economic activity and the national consciousness); Thomas I. Emerson, *First Amendment Doctrine and the Burger Court*, 68 *CAL. L. REV.* 422, 460-61 (1980) (arguing that the Burger Court's reversal of the commercial speech doctrine, which allowed governmental regulation of commercial speech by treating it differently from other expression, was misguided); Tushnet, *supra* note 190, at 260 (arguing that it is improper to treat corporations as persons in the context of constitutional free speech rights).

194. C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 196 (1989).

does not and cannot further the intrinsic values of individual selfhood, it cannot lay claim to First Amendment security.

In the new age of self, not only the corporation but also the individual is given a different identity. Modern commercialism has played a significant role in converting the individual-self and the citizen-self into the consumer-self. The ideology of consumption consists of a value system that equates acquisition with self-realization: "We are living the period of the objects: that is, we live by their rhythm, according to their incessant cycles."¹⁹⁵ Image, personality, and lifestyle advertising nourish the consumer-self as they invite us to "re-create ourselves every day, in accordance with an ideology based on property—where we are defined by our relationship to things, possessions, rather than to each other."¹⁹⁶ In all of this, consumerist ideology insists upon the premise of freedom so critical to the traditional notions of citizenship: that we exercise "free choice" in realizing the consumer-self that we want to be. Hence, "We the People" become a consumer sovereignty.

The defenders of the old self find the development of the consumer-self as objectionable as that of the corporate-self. These defenders maintain that mass advertising in a capitalistic order actively "attempts to *create and manipulate* values"¹⁹⁷ in ways compatible with profit-maximization. When people and their values are dictated in terms of profit, our system of expression moves away from commercial-free self-determination toward commercial-dependent self-determination. As Jean Baudrillard powerfully puts it: "The entire discourse on consumption aims to transform the consumer into the Universal Being, the general, ideal, and final incarnation of the human species."¹⁹⁸ That is why the defenders of the old self view commercial speech as "directly at odds with the aim of the [F]irst [A]mendment. It denigrates rather than affirms human liberty."¹⁹⁹

This condemnation of commercial speech could be leveled evenhandedly against all forms of advertising, whether informational or otherwise, as long as classified ads are placed by profit-seeking corporations.²⁰⁰ In this respect, both proponents and opponents of commer-

195. BAUDRILLARD, *supra* note 69, at 29.

196. WILLIAMSON, *supra* note 83, at 179.

197. BAKER, *supra* note 194, at 203 (emphasis added).

198. BAUDRILLARD, *supra* note 69, at 53.

199. BAKER, *supra* note 194, at 210; *see infra* note 234 (explaining Baker's own view of his argument).

200. *See* BAKER, *supra* note 194, at 218-20. Interestingly, Edwin Baker would deny constitutional status to classified communication by unincorporated individuals and associations as well. *See id.* at 196 ("[P]rofit-motivated, commercial speech should be denied protection." (footnote omitted)); *id.* at 208 ("[T]his value, the desire to make a profit, is qualitatively different from other value commitments. . . . Making a sale in order to make a profit has only instrumental value." (footnote omitted)); *id.* at 340 n.29 ("[Profit-motivation] refers to the purposes or aims analytically attributable to the

cial communication may see no need to distinguish between informational and imagistic advertising, although they arrive at different conclusions. The defenders of the old self, however, would be sympathetic to the model of classified communication, to the extent that it fosters a discourse that is more personalized and less mass-oriented, more direct and less imagistic, and more economical and less extravagant—in short, discourse that is more individualized.

But is there really a place in the age of the new self for individualism divorced from commercialism?

III. Communication and the Capitalist Culture

One need not master *The Wealth of Nations* or *Das Kapital* to discern that the character of discourse in America is largely determined by its capitalistic economic system. The question relevant for an Adam Smith or a Karl Marx—whether the impact of commerce upon communication produces a better or worse society—need not be addressed now. What is more immediately relevant to our inquiry is the question of how the commercial culture of mass advertising affects the key free speech values identified by the Court and commentators.

One thing is absent from most of the learned legal treatments of commercial speech—reality. Few in the law see the need to understand the advertisers' world as the advertisers do. And fewer see the implications of the *actual* workings of advertising on their visions of free speech. Once seen, the connection of commerce to communication radically alters the views of both the defenders and critics of commercial speech.

* * * *

Those who champion the role of reason in the marketplace either do not understand the functioning of today's marketplace or do not understand the function of yesterday's reason. The reality of the mass advertising marketplace is simply:

IMAGE IS ALL.

Image, not information, is the touchstone of much of our commercial discourse. The next time you think of reason-why advertising, look at any popular magazine:

- Liqueur ad with suggestive beach scene: "All over the country, people are enjoying Sex on the Beach."²⁰¹
- Women's blue jeans ad with Matisse-influenced drawings and Picassoesque sketches of women: "Woman Combing Hair" and "Woman With Gold Hoops."²⁰²
- Four-page clothing ad with scenes of a couple hugging and kissing with an American flag waving in the background: "A kiss is still a kiss"/"The Spirit of Today's Generation."²⁰³

The flood of such examples from the print and electronic media alike reveals that "the information model has never had much relevance for national consumer product advertising. The explicit function of spectacular image-based . . . advertising is not so much to inform as it is to persuade."²⁰⁴ Ad man David Martin tells the neophytes in his profession how important it is to capitalize on imagistic and emotional persuasion: "You will . . . have a hard time finding a truly gifted creative [advertising] person who thinks that straightforward, rational persuasion will be noticed in today's media clutter."²⁰⁵ And when students of government, law, and journalism consider Holmes's famous marketplace-of-ideas metaphor in connection with commercial speech, they should take special note of what advertising expert John O'Toole has to say on the matter: "It is not in the nature of advertising to be journalistic, to present both sides, to include information that shows the product negatively in comparison with other entries in the category" ²⁰⁶ Even if it mattered, who in the marketplace would or could challenge, for example, the suggestions that people are enjoying sex on the beach or that women comb hair and wear gold hoops?

Entire categories of commercial communication are essentially bereft of any real informational content. For cosmetics, fragrances, alcohol, tobacco, clothes, and other products, billions of advertising dollars say much about image and little about information. The mass advertiser all too often strives to create a lifestyle environment with "minimal 'logical' connection with the product."²⁰⁷ These efforts give new meaning to the Latin root meaning for advertisement: *advertere*—to direct one's mind

201. See GQ, July 1991, at 54-55 (advertisement with a recipe for the drink "Sex on the Beach").

202. ROLLING STONE, Aug. 8, 1991, at 53, 57 (advertisements); see also Martha Moore, *Jeans Stretching to Fit All in Flat Market*, USA TODAY, Aug. 16, 1991, at B8 (describing the \$12 million jeans advertising campaign using stylish drawings).

203. GLAMOUR, Sept. 1991, at 101-04 (advertisement).

204. LEISS ET AL., *supra* note 12, at 43.

205. MARTIN, *supra* note 2, at 9.

206. O'TOOLE, *supra* note 62, at 20.

207. WHETMORE, *supra* note 59, at 279.

toward.²⁰⁸ Indeed, studies indicate that “the depiction of consumers as rational, problem-solving beings is actually a highly limited description of buyer behaviour.”²⁰⁹

Mass advertisers and their mass consumers have embraced the reality of commercial communication: there is no place for the mind in the marketplace.

* * * *

Those who rely on the criteria of false and deceptive speech to confine the constitutional boundaries of commercial communication²¹⁰ either do not understand the appeal of mass advertising or do not understand its relationship to truth. The reality of the mass advertising marketplace is simply:

TRUTH IS IRRELEVANT.

Trained to scrutinize advertisements for informational and accuracy claims, the public watchdogs (such as the Federal Trade Commission) and their industry counterparts (such as the National Advertising Review Council) have less and less to do in today’s imagistic ad world. For example, how would such oversight groups determine the truth or falsity of the following commercial messages?

- Soft drink commercial depicting a rock singer performing in front of, and mingling with, a teenage audience at a drive-in movie theater: “Don’t care about movie stars who live in Hollywood. Don’t like their attitude; don’t think I ever could. Don’t want the good taste, I know what tastes good. Why is the best thing always misunderstood? Just give me what the doctor ordered. Just what the doctor ordered. Hey, give me a [brand named soda].”²¹¹
- Cigarette ad with a man and two women frolicking in a swim-

208. D.P. SIMPSON, *CASSELL’S NEW LATIN DICTIONARY* 23 (5th ed. 1968) (defining *advertere* literally as “of the senses, thoughts, etc., to direct towards an object” (emphasis omitted)).

209. JOHN C. DRIVER & GORDON R. FOXALL, *ADVERTISING POLICY AND PRACTICE* 87 (1984); see also DYER, *supra* note 13, at 109-10 (discussing studies which conclude that “ads do not act as objective guides to the audience” and that persuasion has a tendency to block rational examination).

210. See generally Alan Howard, *The Constitutionality of Deceptive Speech Regulations: Replacing the Commercial Speech Doctrine with a Tort-Based Relational Framework*, 41 *CASE W. RES. L. REV.* 1093 (1991) (advocating a relational framework that examines the regulatory impact on protected speech, the nature of the speech affected, and the justification for protecting a listener’s reliance on the regulated speech).

211. *Saturday Night Live* (NBC television broadcast, July 27, 1991) (commercial).

ming pool: "Alive with pleasure!"²¹²

- Designer jeans ad with a woman unzipping a man's trousers; opposite page photograph of man raising third finger of right hand in obscene gesture: [Brand name of product].²¹³
- Cologne ad supposedly picturing a father holding his young son: "[Brand name] for Men."²¹⁴

For this and much advertising that is not deliberately and explicitly informational, the dichotomies of truth versus falsity and deceptive versus accurate are purposeless. The hyperbole created by image, personality, and lifestyle advertising cannot be evaluated along the same matrix as empirical claims generally found in product-information advertising. This is what Jules Henry labeled "pecuniary truth," a philosophy contained in three postulates: "Truth is what sells. Truth is what you want people to believe. Truth is that which is not legally false."²¹⁵

In the regime of pecuniary truth, successful advertising techniques use words and images to push expectations beyond their reasonable orbit so that the consumer may yield uncritically to an ad's persuasive force. For example, does anyone *really* believe that smoking a particular brand of cigarettes will make him or her alive with pleasure? Does anyone *really* believe that splashing on a specific cologne will more endear a father to his son? Of course we do not literally believe these messages, but only act as if they could be true. Echoing Henry's argument, Judith Williamson drives home the pointlessness of legal regulation of pecuniary truth: Advertisements are "so uncontrollable, because whatever restrictions are made in terms of their verbal content or 'false claims', there is no way of getting at their use of images and symbols. . . . [I]t is images and not words which ultimately provide the currency in ads."²¹⁶

Holmes notwithstanding, mass advertisers and their mass consumers are well aware of yet another reality of commercial communication: There is no test of truth in the marketplace.

* * * *

Those who laud the public's "right" to know either do not understand what it would really mean for the public to "know" or what it would really mean to impose such a right on America's commercial media. The reality

212. ROLLING STONE, Aug. 8, 1991, at 48 (advertisement).

213. ROLLING STONE, Sept. 5, 1991, inside cover & 1 (advertisement).

214. GQ, July 1991, at 24 (advertisement).

215. HENRY, *supra* note 21, at 49-50.

216. WILLIAMSON, *supra* note 83, at 175.

of the mass advertising marketplace is simply:

**THERE IS NO
RIGHT TO KNOW.**

The right to know is a notion of the public's constitutional guarantee to a full and unfettered measure of information—quantitatively and qualitatively sufficient to promote rational decisionmaking in all matters, political, economic, and otherwise. This right is inextricably tied to both the rationality model of the marketplace of ideas and the political model of participatory governance.²¹⁷ In fact, such a right was collaterally touted as a justification for First Amendment freedom in *Virginia Pharmacy*,²¹⁸ a case championing the informational function of commercial expression.²¹⁹ For these reasons, the right cannot be honored in a highly commercial culture where image is all, where truth is irrelevant, and where citizen-democracy is eclipsed by consumer-democracy. This is but another way of saying that the right to know cannot coexist easily with commercial mass advertising.

Moreover, to impose a public's right to know on the media would challenge the freedoms from governmental interference that the American commercial press has long enjoyed. Charting a direction never followed by the Supreme Court, Justice William O. Douglas perceived a necessary connection between the public's right to know and any First Amendment protection of press liberties: "The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know."²²⁰ Indeed, if the Douglas perspective were given full force, the First Amendment would place a sword in the hands of the public to be used against any commercial media that did not vindicate its right to know. Such a scenario is particularly problematic in the context of America's economic realities: The commercial media, as we know them, would be hard-pressed to survive in our capitalistic society if they could not be

217. See, e.g., Steven Shiffrin, *Listeners' Rights*, in *THE FIRST AMENDMENT* 83 (Leonard W. Levy et al. eds., 1990) (asserting that the classic justification for freedom of speech emphasizes "not that speakers have a right to say what they want to say, but that speakers must be free to speak so that the society can find truth").

218. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976).

219. See *supra* text accompanying notes 153-71. For a thoughtful proposal for a First Amendment theory explicitly recognizing the listeners' right to know, see Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*, 79 CAL. L. REV. 1229, 1244-48 (1991) (arguing that a corporation's right to free speech is derivative from the listener's individual passive right to hear).

220. *Branzburg v. Hayes*, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting).

heavily subsidized by the message-making machine of mass advertising.²²¹

It is no surprise, then, that the Douglas dissent stands as a romantic aberration in a culture captured by commerce. The public's right to know could never be more than what it has become—an idle slogan.²²² Even as a slogan, it is at war ideologically with a system that permits advertisers to influence and dictate editorial content and that allows uninhibited consumer reporting to succumb to advertiser-friendly copy. In such a system, the public hears everything that advertisers want them to hear and relatively little that they don't.

Ultimately, mass advertisers celebrate and their mass consumers tolerate the reality of commercial communication: the right to know has no currency in the marketplace.

* * * *

Those who defend the traditional First Amendment faith in individual autonomy and who therefore oppose the rise of the corporate-self and the consumer-self either do not understand the relationship between commerce and communication or do not understand the futility of attempts to divorce the two in our capitalistic system. The reality of the mass advertising marketplace is simply:

**WE ARE AS
WE CONSUME.**

“[T]he business of America is business,” said “Silent Cal” Coolidge.²²³ This axiom holds as true in our culture generally as it does in

221. For an alternative conception of a “free press” subsidized by public tax monies, see C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097, 2180-88 (1992) (proposing a plan that taxes advertising revenue and returns the tax as circulation revenue, thereby decreasing the media's dependence on advertising).

222. A staunch defender of First Amendment press liberties, Professor Lucas A. Powe, Jr., understandably dismisses the value of the public's right to know:

The right to know is not a right; it's a slogan. Furthermore, it is a dangerous slogan, because it instantly invites inquiry into the actual performance of a newspaper. Instead of giving the press more rights, it runs the risk of denying the press its most sacred possession, its autonomy.

LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA* 257 (1991). Powe concludes:

[A]part from Justice Douglas, and with the exception of some overblown dicta from other justices, the Court never saw the right-to-know model as a viable First Amendment doctrine. . . . In rejecting that theory, however, it never endangered the essential autonomy of a free press.

Id. at 259.

223. MAX LERNER, *AMERICA AS A CIVILIZATION* 8 (1957) (quoting Calvin Coolidge).

our economy. That is, America's highly advanced capitalism thrives on the union of the economic marketplace with the marketplace of ideas. Our identity as Americans is a combination of citizen-self and consumer-self. This identity is molded by a discourse infused with the symbols of commerce. In today's America, it is ever more difficult to detect any form of public expression, including religious speech,²²⁴ that can remain altogether free of commercial taint. Even "noncommercial" public television and radio are becoming increasingly sponsor-dependent.²²⁵ Ultimately, it is impossible to disentangle commerce from communication and preserve America as we know it.

Underlying the progressives' critique of commercial speech is the charge that there can be no individual liberty where the values of the self are manipulated or dictated by the profit system.²²⁶ But a harder look at the mass advertising process reveals that any corruption of the old self is not a one-way phenomenon. It is not simply "them against us," but also "us against us." The commercial system as constituted feeds the inassive appetites of a people charmed by consumption. Advertising spokesman Burt Neuborne puts it squarely: "[N]o evidence at all exists to support the paternalistic notion that commercial speech manipulates hearers into involuntary choices. Quite the contrary, *no form of communication is more sensitive to the wishes and whims of hearers.*"²²⁷

Ironically, in our consumer culture, it is the progressive view that is likely to be seen as manipulative, elitist, and undemocratic.²²⁸ For most Americans, individual autonomy is synonymous with consumer autonomy. Our most cherished freedom is the freedom of choice, the liberty to choose our lifestyle. It is an arresting fact that the modern preoccupation with freedom of choice was popularized in a wartime advertisement for vacuum

224. See, e.g., Barry Brown, *Meditate on This: New Park Would Have Yogi Theme*, ADVERTISING AGE, Mar. 30, 1992, at 1 (reporting on plans for the "Maharishi-Veda Land" theme park); *Veda Land: Theme Park for Ontario*, N.Y. TIMES, Mar. 22, 1992, at A31 (stating that magician Doug Henning and spiritual adviser Maharishi Mahesh Yogi plan to create a theme park on 1400 acres near Niagara Falls, Ontario, "combining recreation with spiritual enlightenment").

225. See Walter Goodman, *Pull the Plug on PBS?*, N.Y. TIMES, Mar. 22, 1992, at H33 (noting that many public television stations are selling commercial spots, euphemistically called "enhanced underwriting," and are broadcasting documentaries on subject matters related to the products sold by corporate promoters who pay for the production of the documentaries).

226. See, e.g., BAKER, *supra* note 194, at 203-04, 208 (discussing the regulation of commercial speech as a means of encouraging the development of personal values and morals through self-determination rather than through advertising).

227. NEUBORNE, *supra* note 9, at 13 (emphasis added).

228. For example, in arguing that much commercial expression cannot further the values most intrinsic to selfhood, Baker subscribes to the proposition that "neither happiness, nor a sense of freedom, nor any other important human goal closely correlates with a maximum satisfaction of market-stimulated desires." BAKER, *supra* note 194, at 203. Even granting Baker's supporting claim that "moderate and radical critics have continually asserted this point," *id.* at 344 n.66, a claim for which scant authority is offered, the claim does not rest on any evidence that the popular will endorses it.

cleaners. Tracking FDR's "Four Freedoms," a 1944 *Saturday Evening Post* advertisement proposed another: "the Fifth Freedom is Freedom of Choice."²²⁹ Predictably, the defenders of commercial speech have seized on the notion of freedom of choice to buttress their constitutional case. "In short . . .," Judge Jacob Fuchsberg instructs us, "political freedom may be so dependent on economic freedom that the pursuit of one cannot be readily divorced from the other, certainly not without drastically circumscribing the freedom of people to exercise a choice among basic competing values."²³⁰

Considering the character of commercial discourse, it is readily apparent why America's self-identity is bound up with commercialism. As we explained earlier, modern mass advertising in our culture seems to be other than what it is—it appears to be individualistic, familial, communal, political, patriotic, egalitarian, artistic, or scientific. Long ago, the advertising industry moved from an easily identifiable commercial posture, represented in the product-information or reason-why format, to a cultural posture most commonly exhibited in the lifestyle format so prevalent today. Speaking from a First Amendment definitional standpoint, it is increasingly difficult to demarcate the realms of the commercial from those of the political and cultural, to distinguish commercial expression from the most preferred forms of democratic speech.²³¹ For example, is a cigarette company's campaign to celebrate the Bill of Rights a commercial or political venture? Is an alcohol company's campaign to publicize the dangers of drinking and driving a commercial or humanistic measure? Is a shopping mall association's campaign to "honor" our soldiers in the Gulf War a commercial or a patriotic gesture? Is a clothing company's campaign to "end racism and the killing of people in the streets" a commercial or a social message?²³²

Assuming workable definitional boundaries could be set, what would be the result of placing mass advertising beyond the limits of constitutionally protected expression? Probably little. Given the enormous political and economic power of corporate advertising interests, such commercial communication would persist largely unencumbered by more than existing governmental regulations. Although allowing advertising restrictions for

229. SATURDAY EVENING POST, Mar. 18, 1944, at 65, *quoted in* Richard W. Fox & T.J. Jackson Lears, *Introduction to THE CULTURE OF CONSUMPTION: CRITICAL ESSAYS IN AMERICAN HISTORY, 1880-1980*, *supra* note 27, at ix.

230. Jacob D. Fuchsberg, *Commercial Speech: Where It's At*, 46 BROOK. L. REV. 389, 393 (1980).

231. See Howard, *supra* note 210, at 1095, 1118 n.84, 1135, 1137-56 (discussing the "murky and shifting definition of commercial speech," especially as it relates to advertisements that increase a company's profits but also address matters of public concern).

232. GLAMOUR, Sept. 1991, at 4-5 (advertisement).

products clearly dangerous to health and safety,²³³ American consumers typically have not seen fit to bite the mass advertising hand that feeds them. Realistically, much of the progressive broadside against commercial speech may prove to be politically meaningless, mere shadowboxing. Indeed, the success of the progressive agenda depends on more than simply withdrawing constitutional protection from commercial speech. A bolder move is required. Some affirmative steps in the form of regulatory controls must also be taken before the progressives can recapture the old self in our new culture. Recall that the defenders of the old self argued that commercial speech "is directly at odds with the aim of the first amendment" and that it "denigrates rather than affirms human liberty."²³⁴ With commercial speech cast as a clear and present danger to free speech values, the constitutional restraint urged by the progressives must be accompanied by political action.²³⁵

In reality, the progressive attack on commercial speech is an attack on our capitalistic culture. With romantic spirit, the progressive hopes to overthrow the latter by undermining the former. And, indeed, given the omnipotence of mass advertising in America, there is some logic in undoing capitalism by assaulting one of its mainstays. Logic notwithstanding, the progressive must confront a perplexing political problem: How can a free speech theory with strong socialist or even neo-Marxist overtones be adopted by a capitalistic culture? Part of being the American capitalistic culture is having the American mass advertising system. Advertising has become an essential thread in the American cloth. Ultimately, the progressives' radical critique is likely to fail because consumerist America would inevitably recognize that one cannot remove

233. Admittedly, government has moved incrementally to restrict advertising of products and services that pose the most egregious threats to public health and safety. For example, with industry approval, Congress outlawed cigarette advertising on radio and television in 1969. See generally Federal Cigarette Labeling and Advertising Act of 1969, 15 U.S.C. § 1335 (1988) (effective Jan. 1, 1971). Yet, national lawmakers have not banned some \$2 billion worth of tobacco advertising and promotions in other media. LARRY C. WHITE, *MERCHANTS OF DEATH: THE AMERICAN TOBACCO INDUSTRY* 22 (1988) (stating that cigarettes are the most advertised product in the United States).

234. BAKER, *supra* note 194, at 210. Ed Baker, our friend and colleague, informed us that his reference to commercial speech in this passage alluded to the commercial speech *doctrine* as announced by the Supreme Court. After re-examining the passage and its context, we are at a loss to understand this gloss on the text. In any event, our point is made for the progressive critique generally, notwithstanding Baker's characterization of it.

235. In his earlier work, Edwin Baker claimed to be arguing "only that commercial speech and other market practices should be subject to democratic control, not that this democracy should choose to regulate." *Id.* Thus, he found no need to "take a position on" political action. *Id.* Recently, Baker appears less deferential and more directive in promoting political action: "[T]argeted policies that reduce objectionable effects of advertising may provide net social benefits even if these policies also marginally reduce its positive contributions." Baker, *supra* note 221, at 2178. Among his specific proposals are laws imposing taxes on advertisers and prohibiting overt forms of advertiser censorship. *Id.* at 2180, 2200-01.

the thread without unraveling the cloth.

* * * *

The same Justice Holmes who introduced the marketplace-of-ideas metaphor in the era of the syndicalists was also the one who warned laissez-faire capitalists that "a constitution is not intended to embody a particular economic theory."²³⁶ Holmes did not foresee, however, a world where the metaphor would override the warning. He did not imagine a nation where the symbol of the marketplace of ideas would itself become the handmaiden of commerce. Just as "[l]ate nineteenth- and twentieth-century financial and industrial moguls went to sleep at night secure in the knowledge that their world turned on the principles of economic laissez-faire,"²³⁷ so late twentieth-century advertisers sleep soundly believing that commercial communication is generally safe in the free speech marketplace.

If commercial communication is safe, it is not because it *actually* furthers the First Amendment's traditional values of rational decision-making and self-realization. Rather, it is because it has effectively co-opted the marketplace metaphor. Meanwhile, Justice Blackmun and his allies have ignored the dissonance between today's commercial expression and the noble purposes of the First Amendment. If they were to be frank, they would concede that the real reason for constitutional protection of modern mass advertising is less ennobling: It is speech in the service of selling.²³⁸

Constitutionally speaking, if the new moguls of commerce are to rest easily, they must perpetuate the lie of the marketplace-of-ideas metaphor. If they cannot, they must convince the Court to explicitly embrace their laissez-faire theories in the law of free speech. Then, the constitutional law of communication might, for the first time, be aligned with the realities of commerce. Constitutional candor might also give rise to the conditions necessary for a more realistic form of progressive resistance. No longer would the critics of capitalism be required to confine their opposition to cramped quarters, namely the terms of traditional free-speech theory. If the Court were to place the real rationale for commercial speech in bold relief, resisters might then attack the resulting constitutional law for what they see it to be—capitalism devouring communication.

236. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

237. LIVA BAKER, *THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES* 415 (1991).

238. For a defense of this proposition, see Ronald Coase, *Advertising and Free Speech*, 6 J. LEG. STUD. 1, 9 (1977) ("Advertising . . . informs the consumer . . . through inducing the consumer to try the product and thus informing him the most direct way.").

Of course, that the resistance can be made more real does not mean that it will be rendered any less futile. For this is a peculiar type of resistance. Unlike the popular defiance of the *Conseil National de la Résistance* in wartime France,²³⁹ the resisters against commercialism may themselves be met by popular defiance as they fight against the business of America. The general populace is not likely to sympathize with the resister's cry, because the ideas and imagination of the populace register closely with the codes of commerce.

* * * *

For now, an ignoble lie endures. And the lie reflects the perplexities of our commercial culture. In this culture, the law of free speech necessarily bends to the demands of commerce. Madisonian ideals are slouching toward Madison Avenue. If the First Amendment can no longer promote its traditional values, it is because the commercial marketplace no longer especially values them.

239. HERBERT LOTTMAN, *ALBERT CAMUS* 260 (1979) (describing the *Conseil* as a resistance group that fought the Gestapo during the French occupation).