

2004

The Antipaternalism Principle in the First Amendment

Dale Carpenter
Southern Methodist University, Dedman School of Law

Recommended Citation

Dale Carpenter, The Antipaternalism Principle in the First Amendment, 37 Creighton L. Rev. 579 (2004)

This document is brought to you for free and open access by the Faculty Scholarship at SMU Scholar. It has been accepted for inclusion in Faculty Journal Articles and Book Chapters by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

THE ANTIPATERNALISM PRINCIPLE IN THE FIRST AMENDMENT

DALE CARPENTER†

The First Amendment expresses the idea that government should not be able to tell citizens what to speak, hear, write, or read. Yet this simple idea is riddled with exceptions so common they are barely contested. These exceptions do not ordinarily depend on the quality or value of the speech being offered but on the reason why the government wants to restrict it. So, the federal government may not punish draft-card burning because it encourages draft-resistance, but it may do so because it hinders the administration of the selective service system. The police may not shut down a Ku Klux Klan rally because it is racist, but they may do so because it threatens an immediate riot. The city may not forbid the use of a loudspeaker because it is used to criticize the police chief, but it may do so because it disrupts the peace and tranquility of a neighborhood. The zoning board may not refuse to license an adult theater because it is immoral, but it may do so because the presence of the theater contributes to crime in the area. Under the First Amendment, the justifications the government offers for suppressing speech often make the difference between validity and invalidity. Reasons matter.

May government restrict speech because it believes that speech is not good for us? More to the point, may it do so because it doubts the ability of an audience to evaluate the information and arguments in the speech? This justification for regulation is a species of legal paternalism. It is based on the fear that people will not be able to use their freedom properly. It raises the fundamental question whether the state may treat adults like children, substituting its judgment of their best interests for their own.

There is widespread liberal revulsion against paternalism.¹ In the words of John Stuart Mill: “[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either

† Associate Professor of Law, University of Minnesota Law School. I want to thank Larry Alexander, Guy Charles, Jim Chen, Carol Chomsky, Dan Farber, Brett McDonnell, David McGowan, Michael Paulsen, Adam Samaha and participants in a University of Minnesota Law School faculty workshop for helpful comments.

1. David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 519 (1988). I mean “liberal” here in the classical Millian sense, not in the modern political sense.

physical or moral, is not a sufficient warrant."² This famous passage, often taken principally to state Mill's harm principle, also states an antipaternalist corollary to that principle. The state cannot regulate a person for his own good.

Yet, disfavored as it is in theory, paternalism pervades the law. Examples of paternalism include: laws requiring people to wear helmets while operating a motorcycle; laws requiring the use of seatbelts in cars; laws forbidding gambling; laws against usury; laws forbidding swimming when no lifeguard is present; laws against dueling; limitations on the legal rights and capacity of minors and mentally disabled people; restrictions on the use of recreational drugs; the Social Security system, which compels individual investment in retirement; the prohibition against suicide; and compulsory education laws.³

The law of contract alone, usually seen as a fortress of individual autonomy, is rife with paternalism. Contract law prohibits, among other things, self-enslavement and contracts by those deemed incompetent to make them. It also prevents contractual waiver of a host of rights, including: a tenant's right to refuse to pay rent if the leasehold is uninhabitable, a promisor's right to sue for divorce or to seek relief in bankruptcy, the right of either party to seek specific enforcement, and the right to a "cooling-off" period in many consumer transactions. In each case, it is thought, the government restrains individuals because it has concluded it knows better than they what is good for them. Few question the need for at least some paternalistic restrictions on freedom.

The Constitution is not now understood generally to prohibit government paternalism. That was not always so. In the *Lochner* era, the Court invalidated numerous economic regulations, like minimum-wage and maximum-hours laws, that were thought to be needed to protect people from their own willingness to work under difficult conditions or for very low wages. The Court thought these restrictions violated a person's right to bargain for his own wages and hours, under his own estimation of what was best for him. In *Walters v. Nat'l Ass'n of Radiation Survivors*,⁴ which upheld a limit of a \$10 fee to lawyers who represent veterans seeking benefits for service-related disability, the Court noted the demise of *Lochner v. New York*,⁵ invalidating state economic regulation because it interfered with the liberty

2. JOHN STUART MILL, ON LIBERTY 13 (Curran V. Shields ed., The Bobbs-Merrill Company, Inc. 1956) (1859).

3. Gerald Dworkin, *Paternalism*, in PATERNALISM 19, 20 (Rolf Sartorius ed., 1983); Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229, 230 (1998), Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 763-64 (1983).

4. 473 U.S. 305 (1985).

5. 198 U.S. 45 (1905).

of contract, observing: "That day is fortunately long gone, and with it the condemnation of rational paternalism as a legitimate legislative goal."⁶

By contrast, in the law of free speech, and perhaps in this area of the law alone, paternalism has been largely rejected. While the rest of the Constitution contains no general prohibition on paternalism as a justification for state regulation, the First Amendment is hostile to it.⁷ Indeed, deep concern about paternalism in speech regulation transcends the usual left-right divide on the Court.⁸ Commentators generally agree the First Amendment is hostile to paternalism.⁹ Yet, most analysts invoke the idea of free speech antipaternalism without examining its roots, explaining what it means, or discussing what it entails. There has been no attempt to identify and to explain what I call the

6. *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 307, 323 (1985). *But see Walters*, 473 U.S. at 367 (Stevens, J., dissenting) ("It is rather misleading to imply that a rejection of the *Lochner* holding is an endorsement of rational paternalism as a legitimate legislative goal.").

7. The Court may be crafting a form of antipaternalism in the regulation of sexual conduct, where it has emphasized the importance of securing individual autonomy against the state. *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down Texas anti-sodomy law).

8. Two passionate First Amendment antipaternalists currently on the Court are Justice Stevens and Justice Scalia. *See United States v. Edge Broadcasting Co.*, 509 U.S. 418, 439 (1993) (Stevens, J., dissenting); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 517 (1996) (Scalia, J., concurring).

9. Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 557-58 (1991) ("Government regulation of speech is often based on the premise that people respond irrationally to certain ideas or types of information. Skepticism regarding this premise is central to modern First Amendment doctrine. The First Amendment is based on the belief that people will make better decisions if they are more fully informed . . . [T]raditional First Amendment jurisprudence . . . assumes that people are ordinarily the best judges of their own interests and of the methods necessary for satisfying those interests."), Geoffrey R. Stone, *Content Regulation and The First Amendment*, 25 WM. & MARY L. REV. 189, 212 (1983) ("The Court has long embraced an 'anti-paternalistic' understanding of the first amendment."), Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 473 (1985) ("Familiar first amendment principles include the prohibitions [] against . . . regulatory justifications grounded in the paternalistic claim that audiences will act contrary to their own best interests if exposed to certain arguments or information."); Rodney A. Smolla, *The Culture of Regulation*, 5 COMMON L. CONCEPTUS 193, 202 ("When the First Amendment is implicated, paternalism is the exception, not the rule."); Gary Goodpaster, *Equality and Free Speech: The Case Against Substantive Equality*, 82 IOWA L. REV. 645, 672 (1997) ("The Court has also found an antipaternalism principle in the First Amendment because paternalism obviously offends autonomy."); Wojciech Sadurski, *Does the Subject Matter? Viewpoint Neutrality and Freedom of Speech*, 15 CARDOZO ARTS & ENT. L.J. 315, 366 (1997) ("[P]aternalism, in general terms, is an attitude essentially foreign to the core values of freedom of speech."). On the other hand, some commentators suggest that, as a motivation for speech regulation, paternalism may be less objectionable than intolerance of dissenting or unorthodox ideas. Sadurski, 15 CARDOZO ARTS & ENT. L.J. at 368.

antipaternalism principle across a variety of free speech domains.¹⁰ This Article examines the nature and reach of this particular brand of First Amendment exceptionalism.

The Supreme Court has never upheld a speech regulation it deemed either paternalistic or justified by the government on a paternalistic rationale. Just as a finding of "protectionism" is invariably fatal to a state law burdening interstate commerce,¹¹ a finding of "paternalism" is invariably fatal to a federal or state law regulating speech. But this fact may not be as significant as it sounds. It might be that paternalism is little more than a rhetorical bogeyman, invoked when the Court has decided for independent reasons to strike down a statute, and disregarded when the Court has for independent reasons decided to uphold the law.¹²

The Court has not been entirely consistent in its application of the antipaternalism principle. But occasional inconsistency in application of the antipaternalism principle does not mean the underlying idea is incoherent or that some general understanding cannot be derived from its use. Still, that underlying idea must be identified. Is there a discernible principle or set of principles behind First Amendment antipaternalism that explains many of the results in past cases and usefully predicts results in future ones?

Answering this question involves, first, settling on a First Amendment definition of paternalism and, second, deciding what antipaternalism commits us to in the realm of speech regulation. As to the first question, the Court has never defined paternalism. It has simply used the word in circumstances that implicitly suggest a definition. That definition is a specialized one that differs in important ways from the definition of paternalism that might be offered by economists, political scientists, or philosophers. In the First Amendment, paternalism means: *a restriction on otherwise protected speech justi-*

10. David Shapiro has made the most serious effort to do so to date, devoting several paragraphs to the issue in a much longer piece defending antipaternalism in the law generally. Shapiro, 74 VA. L. REV. at 542-44 (noting the explicit or implicit hostility to paternalism in the Court's First Amendment jurisprudence relating to commercial speech and pornography). There have been noteworthy efforts to catalogue and explain the Court's concern with preserving listener autonomy, a closely related but distinct First Amendment principle. David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 334-371 (1991).

11. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) ("Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.")

12. "Paternalism is something we often *accuse* people of. It suggests the view that the state stands to its citizens as a parent . . . stands to his children This sounds so outrageous that we would expect hardly anyone to confess to even paternalistic tendencies, much less boldly affirm the paternalistic principle and wave the paternalistic banner." JOEL FEINBERG, *HARM TO SELF* 4 (1986).

fied by the government's belief that speaking or receiving the information in the speech is not in citizens' own best interests.¹³ The antipaternalism principle disfavors such justifications.

Second, as I see it, the antipaternalism principle entails six core commitments. First, it prevents the state from adopting what I call an *information-denying* strategy to achieve what it thinks are citizens' best interests. Second, it restrains the state's role as a central decision-maker, disabling the state from restricting the flow of speech as a method of discouraging choices made by individuals in their own best interests because the state believes those decisions will harm the collective welfare. Third, it forbids information-denying speech regulation even if the speech restriction will actually accomplish its aim of manipulating citizens' decision-making in a direction the state believes is in citizens' best interests. Fourth, it invalidates speech regulation that restricts the flow of information to the recipient of the information, regardless of whether the regulation takes the form of a restraint on the speaker or the recipient. Fifth, it prevents the state from justifying speech regulation based on the primary effect the speech will have on recipients. Finally, it prevents the state from justifying speech regulation based on the presumed offense the speech will cause recipients.

The choice of the word "principle" to identify this antipaternalist phenomenon in the First Amendment is deliberate. I use it in the sense that Vincent Blasi has used it to mean "a value proposition of sufficient generality and thrust that for a fair number of particular cases acceptance or rejection of the proposition constitutes a major variable in determining how the case is resolved."¹⁴ Notice that the commitment to antipaternalism in free speech doctrine is not an absolute. It could conceivably be overcome by a particularly weighty governmental interest that could only be justified by a paternalistic rationale. The Court does this by avoiding the label "paternalism" to describe the government's justification for a speech restriction, even where that justification is plainly paternalistic. Rather than being an

13. I leave aside the question of whether certain categories of speech should be completely unprotected, and the question of what might justify leaving them unprotected. For example, some categories of speech seem to be unprotected because they have little or no value as contributions to public debate. Fighting words and perjury may fit that description. I do believe, but leave unaddressed here, that if certain categories of speech are to remain unprotected the reason for declining to protect them should not be a paternalistic one. That is, categories of speech should not be left unprotected simply because we believe receiving the information in the speech is not in citizens' own best interests. Obscenity, in my view, could conceivably be left unprotected on the grounds that it is low-value, but not on the grounds that citizens' own personal morals would be polluted by it.

14. Blasi, COLUM. L. REV. at 473.

unyielding rule that determines results in every case, it is more akin to the strong background music of the First Amendment — ever present, sometimes unheard in the cacophony of events, but often brought to the fore of consciousness.

Part I reviews First Amendment jurisprudence where the Court evinces, either explicitly or implicitly, some aversion to paternalism. This review covers several free speech frontiers, including commercial speech, lawyer solicitation and advertising, political parties, sexual speech and related zoning laws, charitable fundraising, campaign finance, and corporate speech. Part II identifies the contours of the antipaternalism principle. Part III examines the relationship of the antipaternalism principle to prominent negative and positive theories of the First Amendment, including the self-government, autonomy, and marketplace rationales for the protection of free speech. Part IV anticipates, and seeks to rebut, criticisms of the antipaternalism principle.

A note of caution is necessary. I do not claim here that the antipaternalism principle supplies an all-encompassing theory of the First Amendment or that it answers all questions related to First Amendment doctrine. Indeed, though it is an important part of First Amendment doctrine, it is only a small part. All of the usual questions that vex First Amendment theorists — distinctions between content-neutral and content-based restrictions, the vagaries of the public forum doctrine, what is protected speech and what is not, and whether there ought to be a distinction between low-value and high-value speech, among many others — remain to be applied and debated in the context of many controversies. The antipaternalism principle helps to answer only one kind of question — what sort of justification for speech regulation is proper?

I. THE ORIGIN AND DEVELOPMENT OF THE ANTIPATERNALISM PRINCIPLE

Even in the short history of First Amendment jurisprudence,¹⁵ the Supreme Court's explicit concern with paternalism is a recent phenomenon. There has long been generalized aversion to attempts by the state to command citizens' speech and thoughts for purposes the state thinks worthwhile. In the memorable words of Justice Jackson: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens

15. The Supreme Court did not begin seriously considering First Amendment challenges to speech restrictions until World War I.

to confess by word or act their faith therein.”¹⁶ This has been coupled with a concern that citizens should be able to have and to express their own views about public affairs, free of state coercion. Taken together, these principles form a barrier to state efforts to regulate the content of citizens’ informational environment for their own good.

Prior to 1976, the Court occasionally struck down speech regulations on grounds that resemble antipaternalism,¹⁷ but not explicitly for that reason. Often, the Court has couched this attitude in terms of the First Amendment right to “receive information and ideas” that outweighs various asserted state interests in keeping people from receiving information and ideas for their own benefit.¹⁸ The Court has repeatedly affirmed it is the role of the people, not the state, to judge for themselves the worth of ideas in their informational environment. An antipaternalist impulse has thus been at the root of the Court’s protection of political speech.¹⁹

However, the Court did not explicitly reject paternalism as a justification for speech regulation until *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,²⁰ the 1976 decision that introduced commercial speech as a class enjoying some degree of constitutional protection.²¹ Since then, antipaternalist sentiment has percolated in most of the Court’s commercial speech cases.²² At the

16. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 624, 642 (1943) (invalidating state flag-salute requirement for schoolchildren). See also *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) (“The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion.”).

17. *Stanley v. Georgia*, 394 U.S. 557 (1969).

18. *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972).

19. Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 612 (1996).

20. 425 U.S. 748 (1976).

21. I am hardly the first to note the strong antipaternalist strain in the Court’s commercial speech cases. See Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court’s First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159, 185 (1997) (“[A]ntipathy toward State paternalism has been a central focus of the Court’s commercial speech decisions.”); Blasi, 85 COLUM. L. REV. at 487 (“In striking down state prohibitions on accurate price advertising by pharmacists and lawyers, the Court explicitly inveighed against the paternalistic premises of the restrictions, thus giving the antipaternalism principle a position of new prominence in first amendment doctrine.”). But, noting the Court’s somewhat inconsistent application of the principle, Vincent Blasi questions whether the Court has perhaps undermined the antipaternalism principle rather than strengthened it. *Id.*

22. I am hardly the first to note the strong antipaternalist strain in the Court’s commercial speech cases. See Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court’s First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159, 185 (1997) (“[A]ntipathy toward State paternalism has been a central focus of the Court’s commercial speech decisions.”); Blasi, 85 COLUM. L. REV. at 487 (“In striking down state prohibitions on accurate price advertising by pharmacists and lawyers, the Court explicitly inveighed against the paternalistic premises of the restrictions, thus giving the antipaternalism principle a position of new prominence in

same time, it has seeped into other areas of First Amendment law, often through direct invocation of the lessons of the commercial speech doctrine.

A puzzle is why it took the Court so long to come to its current antipaternalist view. From 1918, the dawn of the Court's modern First Amendment jurisprudence, until 1976 the Court never explicitly struck down a speech regulation as impermissibly "paternalist." It is not that the word was foreign to the Court; Justice Holmes first used the word "paternalist" in his famous *Lochner* dissent.²³

The answer, I think, is that free speech antipaternalism was really nothing new in 1976. The basic antipaternalist impulse had been there all along, immanent though unarticulated in the Court's basic approach to free speech. The Court had long been a guardian against letting the state assume the role of guardian over the minds of the people. In a sense, every time the Court struck down a speech regulation it was saying the same thing. *Of course government could not tell citizens what to speak, hear, read, or write on the grounds that it knew what was best for them.* Denouncing paternalism as such would have been akin to observing that the sun rises in the east. The proposition was a truism.

The question of what to do about commercial speech, on this view, only brought the Court back to first principles. If the state could not otherwise restrict what citizens read or hear for paternalistic reasons, why would such a justification be acceptable where the speech was commercial in nature rather than political? A possible answer to this is that government has free reign to regulate economic transactions, even for paternalistic reasons, and commercial speech is but a step toward those fully regulable transactions.²⁴ Yet the fact that government can regulate or prohibit the underlying activity proposed or contemplated by speech has not generally been sufficient reason to prohibit the speech. Whatever the merits of these arguments about protecting commercial speech, it is the case that the rise of the commercial speech doctrine gave birth to a self-conscious, articulated antipaternalism in the realm of free speech.

first amendment doctrine." But, noting the Court's somewhat inconsistent application of the principle, Vincent Blasi questions whether the Court has perhaps undermined the antipaternalism principle rather than strengthened it. *Id.*

23. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("[A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*.").

24. Farber, 105 HARV. L. REV. at 557-58.

A. COMMERCIAL SPEECH

Nowhere is the asymmetry in the Constitution's treatment of paternalism more transparent than in commercial regulation. Since the demise of *Lochner v. New York*²⁵ the Constitution has erected no serious barrier to economic regulation. The only requirement is that the regulation be rational,²⁶ which turns out to be nothing at all. When it comes to production, the state can regulate the manufacture of a good, determine the prices and conditions of its sale, and even ban it from the marketplace.²⁷ When it comes to employment, the government can restrict access to an occupation, set wages, hours, and other conditions, and even outlaw certain professions.²⁸ The state can create a monopoly, erect barriers to entry in the market, and subsidize chosen special interests and industries.²⁹ Government may regulate commerce in all these ways and many more.

It makes no difference to the constitutionality of these regulations of commercial *acts* that the justification for them is paternalistic. But let the government attempt to regulate commercial *speech* and, since 1976, suddenly paternalism is the dirtiest word in the constitutional lexicon. It is possible to imagine a set of "constitutional values" under which "price supports, minimum wage laws, and advertising bans are utterly indistinguishable"³⁰ and equally permissible, but as we shall see it is not the scheme we have now.

For most of the Court's history a frankly paternalistic rationale for a ban on commercial speech would not have fazed the justices. In

25. 198 U.S. 45 (1905), *overruled by* *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

26. So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied" *Nebbia v. New York*, 291 U.S. 502, 537 (1934).

27. Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 32-33 (1979).

28. Jackson, 65 VA. L. REV. at 32-33.

29. *Id.* In a decision striking down Virginia's ban on price advertising by pharmacists that the state said was necessary to protect pharmacists from destructive price competition that would ultimately hurt consumers by degrading the pharmacy profession, the Court advised: "Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 748, 770 (1976). The state's *goal* of protecting pharmacists from competition and thus protecting consumers from the allegedly harmful consequences of that competition was not in question; the state's *means* of achieving that goal — restricting the flow of information to consumers — were problematically paternalistic.

30. Jackson, 65 VA. L. REV. at 33.

Ex Parte Jackson,³¹ the Court upheld a ban on circulars promoting lotteries because "lotteries . . . are supposed to have a demoralizing influence upon the people."³² Until 1976, justifications of that sort were sufficient to sustain a commercial speech regulation, because commercial speech received no First Amendment protection.³³ Beginning with its heightened protection of advertising, however, the Court has charted a somewhat meandering and inconsistent path toward applying the antipaternalism of its political speech cases to commercial speech.³⁴

1. *The antipaternalism principle is born: Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*

The Supreme Court's first foray into explicit constitutional protection for commercial speech — and also its first explicit rejection of paternalism — illustrates this asymmetry. In *Virginia Pharmacy*, the Court invalidated Virginia's ban on prescription-drug price advertising by pharmacists. The measure was designed in part to protect pharmacists from what the state regarded as the destructive consequences to pharmacists' professionalism that would result from price competition. At the same time, the Court was clear that "Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways."³⁵

A noteworthy feature of the *Virginia Pharmacy* litigation — and surely a factor influencing the Court's ultimate rationale — is the challengers to Virginia's ban were not the pharmacists upon whom the restriction directly fell but the very consumers the law was supposed to benefit by keeping pharmacy standards high. The consumers' interests were clear: advertising would foster price competition for prescription drugs, which would drive down the prices of the drugs, and make them more affordable to consumers. The absence of regulation had led to widely divergent prices for drugs even within the same lo-

31. 96 U.S. 727 (1878).

32. *Ex parte Jackson*, 96 U.S. 727, 736 (1878).

33. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

34. Martin Redish has split the Court's decisions in the commercial speech area into "anti-paternalism" and "pro-paternalism" decisions. Redish, 81 *IOWA L. REV.* at 611-19. Redish concludes this has left a "state of doctrinal confusion." *Id.* at 618. Although I agree, as discussed below, that the Court's decisionmaking has been less than consistent, it has never explicitly accepted government paternalism as a basis for speech regulation. More importantly, its decisions in the commercial speech area since the publication of Redish's commentary have seemed to move more uniformly in the direction of antipaternalism.

35. *Virginia Pharmacy*, 425 U.S. at 770.

cale, causing some people to overpay for their drugs or to waste time investigating prices by calling or visiting local pharmacies.³⁶

The Court's analysis began by affirming the First Amendment protects listeners' — not simply speakers' — interest in receiving information and ideas. "[W]here a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both," wrote Justice Blackmun.³⁷

The question in *Virginia Pharmacy* was whether this interest could extend to the information contained in commercial speech, "which does 'no more than propose a commercial transaction.'"³⁸ The consumer-listeners did not ask for the right to hear the pharmacists' views on abortion, or on U.S. foreign policy, or even on whether the state should restrict price advertising. They wanted only to know, via advertising, what price the pharmacists charged for their prescription drugs. This was not exactly a classic concern of the First Amendment, but it was enough for the Court to find the communication worthy of protection.

For our purpose, however, the most significant aspect of the Court's opinion is its rejection of the state's rationale for the advertising ban. The Court stated, "[T]he State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance."³⁹ The advertising ban "affects [professional standards] only through the reactions it is assumed people will have to the free flow of drug price information."⁴⁰ The Court recounted the state's parade of horrors that might arise if pharmacists were permitted to advertise:

It appears to be feared that if the pharmacist who wishes to provide low cost, and assertedly low quality, services is permitted to advertise, he will be taken up on his offer by too many unwitting customers. They will choose the low-cost, low-quality service and drive the "professional" pharmacist out of business. They will respond only to costly and excessive advertising, and end up paying the price. They will go from one pharmacist to another, following the discount, and destroy the pharmacist-customer relationship. They will lose respect for the profession because it advertises. *All this is not in their best interests*, and all this can be avoided if they are not permitted to know who is charging what.⁴¹

36. *Id.* at 754, 763-64.

37. *Id.* at 749, 756.

38. *Id.* at 762 (citing *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973)).

39. *Id.* at 769.

40. *Id.*

41. *Id.* at 769-70 (emphasis added).

All of the asserted harms would arise only because, according to the state, consumers would behave badly in response to more price information. The harmful response would work along two related dimensions. First, consumers would make choices to maximize their short-term interest (obtaining drugs at low cost) at the expense of their long-term interest (quality pharmacy services). Second, individuals would react rationally to maximize their own individual interests (lower cost) even as the competition thus generated would, over time, hurt the collective interests of all prescription drug consumers by degrading pharmacy service and professionalism.

Whether any of this would actually come about because of price competition for prescription drugs is doubtful. Virginia heavily regulated the professional credentials and service standards of pharmacists. The Court's decision left those regulations untouched. To the extent any pharmacist failed to meet those standards, he risked having disciplinary action taken, including possible revocation of his license, by the state pharmacy board. Further, it is at least conceivable that some pharmacists would advertise their superior service as an advantage and that some consumers would prefer better service to lower price. It seems plausible that price competition might result in both lower average service quality and lower prices. But the tradeoff might well be worth it. For example, fierce price competition in the grocery market has not eliminated stores that market their superior service, selection, and cleanliness; at the same time, it has not led to a plague of food-borne disease in stores that emphasize low cost.

The point is the state of Virginia predicted harmful consumer choices arising from the greater availability of price information. The remedy was to deny information to consumers in order to protect them from themselves. In what would become one of the most quoted passages in recent Supreme Court history, and would set the tone for a quarter-century of antipaternalist doctrine, the Justices rejected the state's remedy:

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.⁴²

Faced with a choice between Virginia's "highly paternalistic approach" of denying information to people for their own good and trusting them with that same information, a reasonable person might demand empirical data about the actual effects of price advertising on

42. *Id.* at 770 (emphasis added).

prices and professionalism. She might conclude either paternalism or its opposite would serve the individual and collective good better. But for the Court this kind of inquiry need not be performed, because the freedom of speech guaranteed by the Constitution eliminated one of the options:

It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. [citation omitted] *But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering.*⁴³

These two passages, which have turned up in numerous First Amendment contexts, set up three themes in the Court's antipaternalism jurisprudence. The first is an implicit distrust of the state's actual purpose in enacting the law at issue. Note that the Court here refers to Virginia's effort to "subsidize" *pharmacies* and to "protect *them* from competition," *not* to its stated goal to protect *consumers* from the individually or collectively harmful consequences of their own choices. One wonders whether the Court suspected that Virginia's stated paternalistic concern for consumers may have been pretextual. In other words, Virginia's legislators may have simply surrendered to the will of the pharmacy industry as represented by established pharmacies, which preferred to avoid strong intra-industry competition. On this point, it is notable that no *pharmacy* challenged a speech restriction that was, in the first instance, a direct restriction on pharmacies. It is plausible that pharmacies, acting collectively in their own interests, lobbied to have the freedom to advertise prices taken away from them. The restriction helped keep the cartel going strong. What was formally a speech restriction may really have been intended as a disguised subsidy to pharmacies extracted from Virginia's consumers in the form of higher prescription drug prices.

A second theme apparent here is the Court's disdain for "keeping the public in ignorance" about important issues. This suggests the Court's strong preference for a "more is better" approach to the availability of information. Where the state takes a "less is better" approach to information availability, by restricting its dissemination, the Court is quick to see impermissible paternalism.

A third theme is the Court's generally non-consequentialist approach to antipaternalism. Antipaternalism is not justified on the

43. *Id.* (emphasis added).

grounds that it necessarily produces better social or individual results in every case. It may or may not. We hope it does and we think it does, but we do not really know. This agnosticism about the actual consequences of the free flow of information and ideas is familiar in First Amendment jurisprudence. Justice Holmes wrote the First Amendment presupposes that:

the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market *That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon some imperfect knowledge.*⁴⁴

For Holmes, free speech was an uncertain wager. For the Court in *Virginia Pharmacy*, trusting citizens with information was a similarly uncertain wager. The wager could not be justified based on the probability that it would turn out right. Rather, antipaternalism is justified because it is better in itself. It is better as a matter of principle, without regard to the consequences it produces in particular cases. It respects the dignity and autonomy of adults, who have a right granted by the First Amendment not to be “kept in ignorance” by the state.

Importantly, the Court did identify some limits on its new recognition of the constitutional status of commercial speech. The Court carefully noted the First Amendment does not protect false, deceptive, or misleading commercial speech.⁴⁵ The Court stated, “We foresee no obstacle to a State’s dealing effectively with this problem.”⁴⁶ The State was free to ensure “that the stream of commercial information flow cleanly as well as freely.”⁴⁷ Much of the Court’s post-*Virginia Pharmacy* commercial speech jurisprudence has, not surprisingly, involved assertions by the state that the advertising it seeks to prohibit is deceptive or misleading.

The Court also noted the transactions proposed in the advertising (purchasing prescription drugs) were not illegal, and that “special problems” might arise in applying the doctrine to the broadcast media.⁴⁸ Finally, the Court suggested special attention to the possibility of consumer confusion and deception might arise for advertising by certain kinds of professionals, like doctors and lawyers, who do not

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

45. *Virginia Pharmacy*, 425 U.S. at 771.

46. *Id.*

47. *Id.* at 772.

48. *Id.* at 772-73.

dispense standardized products.⁴⁹ I will address the line of cases emerging from this qualification in a separate section.

The Court's willingness to entertain these exceptions and limitations to the commercial speech doctrine is puzzling because the Court seems to allow room for paternalistic regulation of speech in the interests of consumers. The Court suggests consumers should be given only truthful, non-misleading information about products and services that are largely standardized and entirely legal. In other words, consumers can be trusted to react appropriately only where the information is straightforward and the decisions relatively mechanical. This may not seem like a very robust antipaternalism. I will assess these difficulties for the antipaternalism principle below.

2. *The antipaternalism principle after Virginia Pharmacy: rise*

In the quarter-century since *Virginia Pharmacy* the Court's commercial speech doctrine has taken a sometimes unpredictable path. This has included validating state regulation of speech that closely resembled in purpose the law invalidated in *Virginia Pharmacy*. But the Court has never backed away, at least rhetorically, from antipaternalism. And recent decisions have called into question the vitality of earlier cases accepting arguable paternalistic justifications for speech restrictions.

The Court strongly and unanimously reiterated its rejection of paternalism in *Linmark Associates, Inc. v. Willingboro*,⁵⁰ its first post-*Virginia Pharmacy* treatment of the commercial speech doctrine. In an effort to stem a tide of "white flight," Willingboro, New Jersey, enacted an ordinance barring the posting of "For Sale" or "Sold" signs on real property.⁵¹ In the 1970s, the proportion of Willingboro residents who were white began to decline. The proportion of nonwhites rose from 11.7% of the town's population in the 1960's to 18.2% in 1973. The decline in the white population was attributed to "panic selling" by whites who feared the town was becoming all black. One real estate agent reported "the reason 80% of the sellers gave for their decision to sell was that 'the whole town was for sale, and they didn't want to be caught in any bind.'"⁵²

Whites were afraid an influx of black residents would cause a decline in their property values. To avoid getting left behind as their home values declined, many decided to sell. Their decisions, of course,

49. *Id.* at 773 n.25.

50. 431 U.S. 85 (1977). Then, Justice Rehnquist did not participate in the consideration or decision of the case.

51. *Linmark Assoc., Inc. v. Willingboro*, 431 U.S. 85, 86 (1977).

52. *Linmark Assoc.*, 431 U.S. at 88.

contributed further to an atmosphere of panic selling and declining residential property values, a cycle that fed on its own momentum. When several real estate agents told the town council that 30–35% of buyers came to them after seeing an agent's "For Sale" or "Sold" sign, the council decided to act by banning use of the signs.⁵³ Surveys in two areas of the town showed strong popular support for the restriction.⁵⁴

The Court determined Willingboro had banned the signs "because it fears their 'primary' effect — that they will cause those receiving the information to act upon it."⁵⁵ The Court agreed racial integration in housing was an important national goal, but doubted the ordinance would actually preserve integration.⁵⁶

Beyond this practical failing in the ordinance, the Court found a deeper flaw in the law's paternalism:

The constitutional defect in this ordinance, however, is far more basic The Council has sought to restrict the free flow of these data because it fears that otherwise homeowners will make decisions inimical to what the Council views as the homeowners' self-interest and the corporate interest of the township: they will choose to leave town.⁵⁷

The Court worried about the consequences of allowing the town to withhold information so important to buyers and sellers, based on citizens' presumed inability to deal rationally with it:

If dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that disclosure would cause the recipients of the information to act "irrationally."⁵⁸

The Court's characterization of the town's ordinance as an effort to curb individual irrationality says a great deal about the Court's hostility to speech regulation designed to protect individuals from themselves.

But as a characterization of the town's rationale for the ban on "For Sale" signs, it is incorrect. As to each individual citizen, "panic selling" may be entirely rational in that it attempts to capture as much of the falling value of the individual's home as possible in a declining market. The irrationality of panic selling is collective, not individual. Willingboro's ordinance was an attempt to deal with the

53. *Id.*

54. *Id.* at 90.

55. *Id.* at 94.

56. *Id.* at 94-95.

57. *Id.* at 96.

58. *Id.*

collectively irrational consequences of a series of individually rational decisions.⁵⁹ The same was true of the price advertising restriction in *Virginia Pharmacy*. What motivated the restriction in each instance was not a paternalistic fear that individuals would fail to act in their rational best interests but that, in fact, they *would* act in their own individual best interests to the detriment of the collective. That is, the state's concern was almost the opposite of a paternalistic one as to each individual citizen.

The Court was concerned, however, that the government was being paternalistic as to the collective. The constitutional infirmity was that Willingboro's (and Virginia's) method of solving the problem (restricting the information readily available to citizens) was an impermissible means of dealing with the problem under the antipaternalism principle because it limited information in the *collective's* best interests, not that it was an attempt to deal with individual irrationality. As it was in *Virginia Pharmacy*, the *Linmark* Court noted the state could not "enable its citizens to find their self-interest [by] deny[ing] them information that is neither false nor misleading."⁶⁰

Much of *Linmark Associates* seems a replay of the issues at work in *Virginia Pharmacy*. There is the same implicit distrust of the underlying motive of the regulation, which was arguably more about preserving racial homogeneity than about promoting racial integration. After all, at the time the ordinance passed, the town was still more than four-fifths white. There is the same disdain for the idea of keeping citizens ignorant for their own good. And there is the same disregard for the actual consequences of antipaternalism: the Court offered no prediction about what might happen to racial integration or home prices if citizens were once again allowed to display "For Sale" signs on their lawns.

But *Linmark Associates* adds two important wrinkles to the antipaternalism principle. First, the Court suggested that restricting public access to information was impermissible *where counter-speech*

59. A similar rationale will underlie every case where the state attempts to deal with collective problems by controlling information that reaches individuals. As then Justice Rehnquist noted in a case involving a state's attempt to curb energy consumption by restricting a public energy provider's advertising:

With respect to governmental policies that do not offer immediate tangible benefits and the success of which depends on incremental contributions by all members of society, such as would seem to be the case with energy conservation, a strong argument can be made that while a policy may be in the longrun interest of all members of society, some rational individuals will perceive it to their own shortrun advantage to not act in accordance with that policy.

Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 594 n.5 (1980) (Rehnquist, J., dissenting).

60. *Linmark Assoc.*, 431 U.S. 97.

would be available to inform citizens' decision-making. Thus, the Court quoted Justice Brandeis' famous concurrence in *Whitney v. California*,⁶¹ emphasizing the utility of counter-speech, as a safeguard underlying the antipaternalism principle: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression."⁶² Implicit in this is the idea that where counter-speech will be unavailable, or untimely, even paternalistic speech regulation is permissible.

A second qualification on the antipaternalism principle that arises from *Linmark Associates* is that while government may not *reduce* the amount of information available to the public it may take steps to *increase* the amount of information available. I will call the former an *information-denying* strategy and the latter an *information-providing* strategy. The Court was careful to note Willingboro was not "defenseless" in its effort to end white flight. "The township obviously remains free to continue 'the process of education' it has already begun."⁶³ The town could, for example, "give widespread publicity — through 'Not for Sale' signs or other methods — to the number of whites remaining in Willingboro."⁶⁴ Thus, the town itself could furnish the counter-speech necessary to curb the evil of panic selling.

The Court's willingness not simply to tolerate — but to propose — such an alternative in *Linmark Associates* suggests that while the antipaternalism principle forbids an information-denying strategy to promote citizens' best interests, it does not forbid an information-providing strategy to accomplish the same end.

In some tension with *Virginia Pharmacy* and *Linmark Associates* is the Court's decision in *Friedman v. Rogers*,⁶⁵ which upheld a state's ban on the use of a trade name in connection with an optometry practice.⁶⁶ The state defended the law on what looks like a paternalistic ground: trade names will be used to mislead the public by, for example, attracting consumers to a trade name reflecting the reputation of a particular optometrist no longer associated with the practice.⁶⁷

The Court was careful not to rest its decision solely on this arguably paternalistic rationale. Rather, it held trade names have "no intrinsic meaning," that is, they "convey . . . no information about the

61. 274 U.S. 357 (1927).

62. *Id.* at 97 (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

63. *Id.*

64. *Id.*

65. 440 U.S. 1 (1979).

66. *Friedman v. Rogers*, 440 U.S. 1, 11-16 (1979).

67. *Friedman*, 440 U.S. at 13.

price and nature of the services offered by an optometrist”⁶⁸ This distinguished the *Friedman* from *Virginia Pharmacy*, where consumers sought factual and truthful information about prices. On the other hand, the optometrists’ effort to convey “factual information associated with trade names may be communicated freely and explicitly to the public.”⁶⁹

The Court’s next consideration of the commercial speech doctrine came in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,⁷⁰ the opinion which settled on a four-pronged test for the protection of commercial speech.⁷¹ At issue was a regulation of the New York Public Service Commission banning all promotional advertising by an electric utility.⁷² The regulation was designed to conserve energy by dampening the demand for it. Promotional advertising, argued the Commission, would have the effect of increasing demand.⁷³

The energy conservation problem addressed by the Commission’s speech regulation was identical in form to the destructive competition problem the state legislature faced in *Virginia Pharmacy* and the panic selling problem Willingboro faced in *Linmark Associates*: rational behavior by individuals in response to advertising would work to the community’s collective detriment. And the Commission’s response to the problem was identical in form to the state legislature’s

68. *Id.* at 12. On this point, the Court probably understated the informational value of trade names to consumers. Over time, consumers familiarize themselves with trade names and the goods, prices, and quality of services associated with the names. This substantially reduces their search costs for goods and services. *Id.* at 22-23 (Blackmun, J., concurring in part and dissenting in part) (quoting the deposition testimony of professor and economist Lee Kenneth Benham).

69. *Friedman*, 440 U.S. at 16.

70. 447 U.S. 557 (1980).

71. *Central Hudson*, 447 U.S. at 566. The Court outlined the test as follows:

At the outset, we must determine whether the expression . . . concern[s] lawful activity and [is not] misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. There has been grumbling on the Court about this test, especially from those inclined to give stronger protection to commercial speech. See *Greater New Orleans Broadcasting Ass’n, Inc. v. United States*, 527 U.S. 173, 197 (1999) (Thomas, J., concurring in the judgment); *44 Liquormart*, 517 U.S. at 510-14 (joint opinion of Stevens, Kennedy, and Ginsburg); *Id.* at 517 (Scalia, J., concurring in part and concurring in the judgment); *Id.* at 518 (Thomas, J., concurring in part and concurring in the judgment). There have also been hints that the test might one day be abandoned. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 539-40 (2001). However, it remains good law.

72. *Central Hudson*, 447 U.S. at 558.

73. *Id.* at 568 (“The Commission argues . . . that the State’s interest in conserving energy is sufficient to support suppression of advertising designed to increase consumption of electricity.”).

in *Virginia Pharmacy* and the town's in *Linmark Associates*: the Commission took on the role of central decisionmaker to preserve the collective interest by restricting speech.

The Court's response to this solution echoed its earlier responses: "In applying the First Amendment to this area, we have rejected the 'highly paternalistic' view that government has complete power to suppress or regulate commercial speech."⁷⁴ The Court added: "Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes some accurate information is better than no information at all."⁷⁵

As it had in *Linmark Associates*, the Court suggested an information-providing strategy as a means by which the government might achieve its goals. The Commission could seek to influence energy consumption by "requir[ing] that the advertisements include information about the relative efficiency and expense of the offered service, both under current conditions and for the foreseeable future."⁷⁶ Other methods presumably included direct controls on energy consumption and added taxes for overuse of electricity. The Court's response suggests an approach under which the state may regulate directly to solve the collective detriment problem but not indirectly through the control of information. The first is permissible paternalism; the second is impermissible paternalism. In short, the Court held the total advertising ban unconstitutional as a "suppression of speech."⁷⁷

While superficially another victory for the antipaternalism principle, *Central Hudson* contained the seed of a brief retreat. Instead of dismissing out of hand the Commission's attempt to dampen electricity demand by restricting information, the Court concluded only that the proposed advertising in fact "would cause no net increase in total energy use" and that the Commission had not proved "a more limited restriction on the content of promotional advertising would not serve adequately the State's interests."⁷⁸ The negative implication was that a restriction on advertising might be approved as a method of dampening demand if in some future case the government could prove such a connection.⁷⁹ But the fact the connection could be proved would not relieve the paternalism of such a regulatory approach.

74. *Id.* at 562.

75. *Id.* at 570.

76. *Id.* at 571-72.

77. *Id.*

78. *Id.* at 570.

79. Martin H. Redish, *First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy*, 24 N. KY. L. REV. 553, 560 (1997) (noting the court's dictum in *Central Hudson* suggests "the propriety of a paternalistic and manipulative rationale for regulating commercial expression").

In *Metromedia, Inc. v. City of San Diego*,⁸⁰ the Court upheld the city's ban on billboards displaying commercial messages;⁸¹ however, the Court struck down the ban as applied to billboards displaying non-commercial messages.⁸² The city's purpose for the ban was "to eliminate hazards to pedestrians and motorists brought about by distracting sign displays' and 'to preserve and improve the appearance of the City"⁸³ The plurality opinion reaffirmed the antipaternalism principle born in *Virginia Pharmacy*: "A State may not completely suppress the dissemination of truthful information about an entirely lawful activity merely because it is fearful of that information's effect upon its disseminators and its recipients."⁸⁴

But one of the city's stated goals — traffic safety — might seem impermissibly paternalistic in that it justifies speech regulation because the government is fearful of the effect the speech will have on recipients. It will distract drivers and pedestrians, causing traffic accidents. Yet, the Court was careful to say San Diego was "regulating the *noncommunicative* aspects of a medium of expression," not the information the billboard advertisers sought to transmit.⁸⁵ Billboards are large and contain, by design, eye-catching advertisements quite apart from any substantive message they express.

The antipaternalism principle, as refined in *Metromedia*, prohibits restriction only on the communicative aspects of speech. It is the communicative aspect of speech that provides information to the recipient necessary for decision-making. San Diego's justifications for the billboard ban — traffic safety and aesthetics — were unrelated to the suppression of *information*, and thus did not represent an impermissible information-denying strategy under the antipaternalism principle. A different case would have been presented if the city of San Diego had attempted to ban advertising about a subject — say, ads for the sale of beer — because it feared the contents of such ads would encourage liquor consumption.

*Bolger v. Youngs Drugs Products Corp.*⁸⁶ was the Court's last significant commercial speech decision in the initial post-*Virginia Phar-*

80. 453 U.S. 490 (1981).

81. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512 (1981).

82. *Metromedia, Inc.*, 453 U.S. at 520-21. This distinction would not survive full First Amendment protection for commercial speech.

83. *Metromedia, Inc.*, 453 U.S. at 493.

84. *Id.* at 492, 505.

85. *Id.* at 517 (emphasis added). See also *Id.* at 554 (Stevens, J., dissenting in part) ("I can find no suggestion on the face of the ordinance that San Diego is attempting to influence public opinion or to limit debate on particular issues."); *Id.* at 562 (Burger, C. J., dissenting) ("The city has not undertaken to determine, paternalistically, 'what information is relevant to self-government.'").

86. 463 U.S. 60 (1983).

macy period. In *Youngs Drugs*, the Court struck down a federal statute that forbade the unsolicited mailing of advertisements for contraceptives. The government offered two justifications for the law. One was that the statute aided parents' efforts to control their children's access to sensitive sexual materials.⁸⁷ This justification was not paternalistic, but the Court found the law was not sufficiently tailored to serve it.

The second justification, shielding recipients from material that are likely to find offensive, was paternalistic.⁸⁸ The fact that speech may be offensiveness to some people does not, by itself, justify its suppression. Thus, the government could not regulate speech based on the recipients' own presumed interest in avoiding offense. It is up to adults, not the government, to decide what offends them and if necessary to take "the short, though regular, journey from mail box to trash can . . ."⁸⁹ *Youngs Drugs* stands for the proposition, therefore, that government may not regulate speech because of its *primary effect* on recipients.⁹⁰

3. *The antipaternalism principle after Virginia Pharmacy: retreat*

By the time the Court decided *Posadas de Puerto Rico Associates v. Tourism Co. of P.R.*,⁹¹ it seemed the antipaternalism principle was on solid ground. Yet in *Posadas*, the Court upheld a ban on advertising by gambling casinos justified by the state as a way to reduce demand for casino gambling in Puerto Rico, along with the attendant evils of excessive gambling like crime.

Justice Rehnquist's opinion for the 5-4 majority reasoned that the state had the greater power to ban the underlying activity (gambling), even though it had not chosen to do so; thus, it must possess the lesser power to ban advertising about that activity. The Court stated that "[I]t is precisely *because* the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but *reducing the demand through restrictions on advertising.*"⁹² This reasoning was squarely at odds with antipaternalism principle developed by the Court since *Virginia Pharmacy*, forbidding precisely this information-denying strategy as a means to accomplish the state's end of

87. *Bolger v. Young Drug Prods. Corp.*, 463 U.S. 60, 73 (1983).

88. *Bolger*, 463 U.S. at 71.

89. *Id.* at 72 (quoting *Lamont v. Comm'r of Motor Vehicles*, 269 F. Supp. 880, 883 (S.D.N.Y.), *aff'd* 386 F.2d 449 (2d Cir. 1967), *cert. denied*, 391 U.S. 915 (1968)).

90. See also *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217-18 (1975).

91. 478 U.S. 328 (1986).

92. *Posados de Puerto Rico Assocs. v. Tourism of Puerto Rico*, 478 U.S. 328, 346 (1986) (emphasis added).

changing individual decision-making. Moreover, because the state has the power to ban almost all commercial transactions, except those with some independent constitutional protection (e.g., abortion, selling rosaries), it threatened to undo the entire commercial speech doctrine.

The majority also rejected the view, earlier embraced by the Court in cases like *Linmark Associates*, that the state could deal with the problem of excessive gambling by promoting counter-speech to discourage it.⁹³

The Court continued its retreat from protection for commercial speech — and its commitment to the antipaternalism principle — in *United States v. Edge Broadcasting Co.*⁹⁴ In *Edge Broadcasting*, the Court upheld a federal law banning broadcasted lottery advertisements except by television stations licensed to states that conduct lotteries.

The Court accepted Congress's paternalistic rationale for the law: that it would have the effect of decreasing demand for lotteries in states that prohibited them. "If there is an immediate connection between advertising and demand," declared the Court, "and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced."⁹⁵ This reasoning ignored the dictate of the antipaternalism principle that the efficacy of an information-denying strategy is irrelevant to its constitutionality under the First Amendment.

Justice Stevens had had enough. In dissent, he rejected the Court's easy acceptance of paternalism. Congress had not chosen to regulate lottery advertisements to eliminate misleading statements, nor had it opted to promote "more speech, such as warnings or educational information about gambling."

Rather, the United States has selected the most intrusive, and dangerous, form of regulation possible — a ban on truthful information regarding a lawful activity imposed for the purpose of manipulating, through ignorance, the consumer choices of some of its citizens. Unless justified by a truly substantial governmental interest, this extreme, and extremely paternalistic, measure surely cannot withstand scrutiny under the First Amendment.⁹⁶

93. *Tourism Co. of Puerto Rico*, 478 U.S. at 346.

94. 509 U.S. 418 (1993).

95. *Edge Broadcasting Co.*, 509 U.S. at 434 (1993).

96. *Id.* at 439 (Stevens, J., dissenting). Justice Stevens also relied on *Bigelow v. Virginia*, 421 U.S. 809 (1975), a pre-*Virginia Pharmacy* decision, in which the Court struck down a state's ban on advertisements for abortion services. Justice Stevens stated:

Within three years the Court would return to the antipaternalism principle with a vengeance.

4. *The antipaternalism principle after Virginia Pharmacy: reaffirmation*

Two years after *Edge Broadcasting*, the Court struck down a commercial speech regulation in *Rubin v. Coors Brewing Co.*⁹⁷ The federal law at issue prohibited beer labels from displaying alcohol content, a regulation justified as an effort to prevent consumer-driven "strength wars."

The Court did not question the government's avowedly paternalistic rationale, clearly at odds with the Court's early commercial speech decisions, that "restricting disclosure of information regarding a particular product characteristic will decrease the extent to which consumers will select the product on the basis of that characteristic."⁹⁸ Congress legitimately feared such strength wars "could lead to greater alcoholism and its attendant social costs."⁹⁹ However, the Court concluded Congress' regulatory scheme to forestall strength wars was so riddled with exceptions and loopholes that it suffered an "overall irrationality."¹⁰⁰

At the same time, the Court recommended less intrusive alternative regulations that were both paternalistic and non-paternalistic. Congress could, for example, directly regulate the alcohol content of beer.⁹¹⁰¹ Such a regulation would not offend First Amendment antipaternalism. More troubling to the antipaternalism principle, the Court suggested Congress could "prohibit[] marketing efforts emphasizing high alcohol strength."¹⁰² Most troubling of all, the Court suggested Congress could completely ban displays of alcohol content on malt liquors, "the segment of the market that allegedly is threatened with a strength war."¹⁰³

Justice Stevens, concurring only in the judgment, once again chided the Court for tolerating the government's paternalistic justification for the labeling ban. "Although some regulations of statements

Bigelow is not about a woman's constitutionally protected right to terminate a pregnancy. It is about paternalism, and informational protectionism. It is about one state's interference with its citizens' fundamental constitutional right to travel in a state of enlightenment, not government-induced ignorance.

Edge Broadcasting, 509 U.S. at 439 (Stevens, J., dissenting).

97. 514 U.S. 476 (1995).

98. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 484 (1995).

99. *Rubin*, 514 U.S. at 485.

100. *Id.* at 488.

101. *Id.* at 490.

102. *Id.* at 490-91.

103. *Id.* at 491.

about alcohol content that *increase* consumer awareness would be entirely proper," Justice Stevens noted, affirming the constitutionality of an information-providing strategy, "this statutory provision is nothing more than an attempt to blindfold the public."¹⁰⁴ *Rubin* was thus a transitional decision on the way from the Court's seeming retreat from the antipaternalism principle in *Posadas* and *Edge Broadcasting* to its reaffirmation of the principle in *44 Liquormart, Inc. v. Rhode Island*,¹⁰⁵ a year later.

In *44 Liquormart*, the Court struck down a Rhode Island law banning advertisements of retail liquor prices. The state's aim in implementing the ban was to reduce alcohol consumption.¹⁰⁶ The ban would discourage consumption, according to the state, by indirectly elevating the cost of alcohol to consumers (by suppressing price competition and raising consumers' search costs).¹⁰⁷

Justice Stevens' plurality opinion canvassed the Court's commercial speech decisions, which rejected "a State's paternalistic assumption the public will use truthful, nonmisleading commercial information unwisely . . ." ¹⁰⁸ Bans on truthful and non-deceptive advertising usually rest solely on the offensive assumption the public will respond 'irrationally' to the truth,"¹⁰⁹ wrote Justice Stevens. "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."¹¹⁰

The plurality opinion identified two related harms arising from the state's paternalistic ban. The first is that it deprives consumers of information important to them. The second is that it "shield[s] the State's anti-gambling policy from the public scrutiny that more direct, nonspeech regulation would draw."¹¹¹ Thus, paternalistic speech regulations obscure the government's real interest — manipulating the public and at the same time undermining democratic accountability. Simply put, "a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes the *Posadas* majority was willing to tolerate."¹¹²

104. *Id.* at 498 (Stevens, J., concurring in judgment).

105. 517 U.S. 484 (1996).

106. *44 Liquormart, Inc.*, 517 U.S. at 504, 504 n.14 (Stevens, J., plurality opinion).

107. *Id.* at 524 (Thomas, J., concurring in part and concurring in judgment).

108. *Id.* at 484, 497.

109. *Id.* at 484, 503 (citing *Linmark Assoc.*, 431 U.S. at 96).

110. *Id.* at 503.

111. *Id.* at 509 (citing *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 351 (Brennan, J., dissenting)).

112. *Id.* at 510. The plurality expressly rejected the "greater-includes-the-lesser" argument advanced in *Posadas* on the grounds that Abanning speech may sometimes prove far more intrusive than banning conduct." *Id.* at 511. "As the entire Court apparently now agrees, the statements in the *Posadas* opinion [relying on the greater-in-

As strongly antipaternalist as this was, the majority was still willing to indulge the possibility that a price advertising ban might be constitutional if it would “*significantly* reduce alcohol consumption.”¹¹³ Justice Thomas, in a concurring opinion, indicated he would go farther in the direction of antipaternalism. Rejecting the *Central Hudson* test where the state’s interest “is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace,” Justice Thomas would have preferred to declare such a justification “*per se* illegitimate.”¹¹⁴ He offered the most full-throated defense of the antipaternalism principle yet from a member of the Court:

In case after case following *Virginia Bd. Of Pharmacy*, the Court, and individual Members of the Court, have continued to stress the importance of free dissemination of information about commercial choices in a market economy; the antipaternalistic premises of the First Amendment; the impropriety of manipulating consumer choices or public opinion through the suppression of accurate ‘commercial’ information; the near impossibility of severing ‘commercial’ speech from speech necessary to democratic decisionmaking; and the dangers of permitting the government to do covertly what it might not have been able to muster the political support to do openly.¹¹⁵

In *Greater New Orleans Broadcasting Association, Inc. v. United States*,¹¹⁶ the Court unanimously struck down a federal ban on broadcast advertising for casino gambling in Louisiana and Mississippi, where casino gambling is legal. The government advanced two interests in support of the law: (1) reducing the social costs connected with casino gambling, and (2) assisting states that have banned gambling within their own borders.¹¹⁷ As to the first interest, the government asserted “‘promotional’ broadcast advertising concerning casino gambling increases demand for such gambling, which in turn increases the amount of casino gambling that produces those social costs.”¹¹⁸ The

cludes-the-lesser argument] on which Rhode Island relies are no longer persuasive.” *Id.* at 513.

113. *44 Liquormart, Inc.*, 517 U.S. at 505. Justice Thomas criticized this approach since it “seems to imply that if the State had been *more successful* at keeping consumers ignorant and thereby decreasing their consumption, then the restriction might have been upheld.” *Id.* at 523 (Thomas, J., concurring in part and concurring in judgment).

114. *44 Liquormart, Inc.*, 517 U.S. at 518 (Thomas, J., concurring in part and concurring in judgment) (citing numerous decisions and opinions of individual justices).

115. *Id.* at 520 (Thomas, J., concurring in part and concurring in judgment).

116. 527 U.S. 173 (1999).

117. *Greater New Orleans Broadcasting Ass’n*, 527 U.S. at 185.

118. *Id.* at 189.

government argued compulsive gamblers were especially vulnerable to such broadcast advertising.¹¹⁹

This reasoning was plainly paternalistic since it justified a restriction on speech as a means of manipulating consumer choice. A citation to *Virginia Pharmacy*, *Linmark Associates*, and *44 Liquormart* — all of which rejected as paternalistic identical reasoning for speech restrictions — would have disposed of the issue. Instead, the Court faulted the government's advertising regulatory scheme for being "so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it."¹²⁰ The problem the Court identified was not the law's paternalism, but its failure to be comprehensive. The decision thus echoed the fact-bound holding in *Rubin*, which struck down a ban on alcohol content on beer labels not because the regulation was paternalistic but because of its "overall irrationality."¹²¹

The Court ended its opinion, however, on a familiar antipaternalist note: The government "cannot overcome the presumption that the speaker and the audience, not the Government, should be left to assess the value of accurate and nonmisleading information about lawful conduct."¹²² Additionally, at least six of the eight justices firmly rejected the reasoning of *Posadas* that because the government had the unexercised power to ban the activity it necessarily had the power to ban advertising about the activity.¹²³

In *Lorillard Tobacco Co. v. Reilly*,¹²⁴ the Court struck down federal restrictions on tobacco advertising designed to reduce underage use of tobacco. One of the regulations prohibited outdoor tobacco advertising within 1,000 feet of a school or playground, which effectively meant no such advertising would be allowed in 87% to 91% of the community.¹²⁵ The Court held this regulation had the effect of unduly interfering with right of adults to receive truthful information about a legal product. "[T]he governmental interest in protecting children from harmful materials does not justify an unnecessarily broad suppression of speech addressed to adults."¹²⁶ In short, "a speech regulation cannot unduly impinge on the speaker's ability to propose a

119. *Id.*

120. *Id.* at 190.

121. *Rubin*, 514 U.S. at 488.

122. *Greater New Orleans Broadcasting Ass'n*, 527 U.S. at 195.

123. *Id.* at 193. This followed a similar rejection of the greater-power-includes-the-lesser-power logic of *Posadas* in *44 Liquormart*, 517 U.S. at 509-11 (Stevens, J., plurality opinion), *Id.* at 531-32 (O'Connor, J., concurring).

124. 533 U.S. 525 (2001).

125. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561-62 (2001).

126. *Id.* at 564 (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 875 (1997)).

commercial transaction and the *adult* listener's opportunity to obtain information about products."¹²⁷

Finally, in *Thompson v. Western States Medical Center*,¹²⁸ the Court struck down a provision of the Food and Drug Administration Modernization Act of 1997 that exempted compounded drugs from the FDA's standard drug approval requirements as long as the drug-providers refrained from advertising or promoting particular compounded drugs. Defending its law, the government by now had learned the antipaternalist lesson taught by the preceding commercial speech cases. It did not offer the frankly paternalist rationale that the advertising restriction was necessary to prevent patients from demanding and obtaining drugs they do not need. However, Justice Breyer's dissent did conjecture such a rationale could support the restriction.¹²⁹

The Court found this hypothetical justification paternalistic and forcefully rejected it:

Aside from the fact that this concern rests on the questionable assumption that doctors would prescribe unnecessary medications . . . , this concern amounts to a fear that people would make bad decisions if given truthful information about compounded drugs. We have previously rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information.¹³⁰

The Court then quoted, in full, the antipaternalism passage from its *Virginia Pharmacy* decision.¹³¹ Thus, the majority appears in its most recent commercial speech decision to have returned to the antipaternalist roots of the doctrine.

C. PROFESSIONAL ADVERTISING AND SOLICITATION

In the commercial-speech contexts of professional advertising and solicitation, antipaternalism has also been a common if somewhat inconsistent theme. In *Bates v. State Bar of Arizona*,¹³² a decision that extended the reach of *Virginia Pharmacy*, the Court struck down a ban on an attorney advertisement containing truthful information about routine legal services. A claimed state interest in the case was

127. *Id.* at 565 (emphasis added).

128. 2002 WL 737506, 122 S. Ct. 1497 (2002).

129. *Thompson v. Western States Medical Center*, 122 S. Ct. 1497, 1512 (2002) ("There is considerable evidence that consumer oriented advertising will create strong consumer-driven demand for a particular drug.")

130. *Thompson*, 122 S. Ct. at 1507.

131. *Id.* at 1503.

132. 433 U.S. 350 (1977).

to prevent public confusion about attorneys' prices and services. Quoting the antipaternalism passage from *Virginia Pharmacy*, the Court advised the state's concern could be met by non-paternalistic means, rather than by "[keeping] the public in ignorance."¹³³

The state's argument that attorneys would provide only incomplete information to consumers, said the Court, "assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information."¹³⁴ To the extent the ads will contain omissions, "the preferred remedy is more disclosure, rather than less."¹³⁵ Specifically, the state bar should assume the role of informing a naive public about how to "place advertising in its proper perspective."¹³⁶ As in the commercial speech context, the Court was urging the more-is-better approach to information available to the public.

In *Peel v. Attorney Registration and Disciplinary Commission of Illinois*,¹³⁷ the Court reversed a judgment of censure against an attorney for noting a trial attorney certification on his letterhead. A plurality of the Court rejected the state's argument some consumers might be misled by the use of the certification: "We reject the paternalistic assumption that the recipients of petitioner's letterhead are no more discriminating than the audience for children's television."¹³⁸ Even if some consumers may be misled, the Court held, that does not justify keeping all consumers in the dark. And it certainly does not justify treating adults like children when it comes to deciding what information they may receive.

In response to Justice O'Connor's dissenting argument consumers lack "sophistication concerning legal services,"¹³⁹ and would confuse a national certification for state certification, the Court gave a familiar antipaternalist reply: "We prefer to assume that the average consumer, with or without knowledge of the legal profession, can understand a statement that certification by a *national* organization is not certification by the *State*, and can decide what, if any, value to accord this information."¹⁴⁰ As in its many antipaternalist commercial speech decisions emphasizing information-providing strategies, the Court replied the appropriate First Amendment way to reduce the

133. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 365 (1977).

134. *Bates*, 433 U.S. at 374-75.

135. *Id.* at 375.

136. *Id.*

137. 496 U.S. 91 (1990).

138. *Peel v. Attorney Registration and Disciplinary Comm'n of Ill.*, 496 U.S. 91, 105 (1990).

139. *Peel*, 496 U.S. at 124 (O'Connor, J., dissenting).

140. *Id.* at 106 n.13.

chance of confusion would be for the state to require that additional disclosures be made. The antipaternalist cast of *Peel*, in both rhetoric and substance, is clear.¹⁴¹

The Court arguably took a step back from the implications of its antipaternalism principle in *Florida Bar v. Went For It, Inc.*,¹⁴² even as it explicitly denied doing so. The Court upheld a state bar rule prohibiting personal injury lawyers from sending targeted, direct-mail solicitation to victims for 30 days after an accident.¹⁴³ The state bar was concerned victims would be offended by such appeals and thus think less of the legal profession.¹⁴⁴

The majority held the rule was primarily a way of protecting the legal profession's reputation, not of avoiding recipient's offense in the abstract. The Court took pains to point out this was not the paternalistic rationale of protecting citizens from the primary effect of the speech, distinguishing *Youngs Drugs* on the grounds it involved a paternalistic primary-effect rationale.¹⁴⁵ The state's concern was not with the offense to recipients of solicitation, "but with the demonstrable detrimental effects that such 'offense' has on the profession it regulates."¹⁴⁶ According to the majority: "There is an obvious difference between situations in which the government acts in its own interests, or on behalf of entities it regulates, and situations in which the government is motivated primarily by paternalism."¹⁴⁷

The *Florida Bar* Court introduces a puzzle for the antipaternalism principle. It is inescapable that the harm to be prevented through speech regulation — damage to the reputation of the legal profession — would come about only through the negative reaction of those who received the prohibited solicitations ("listeners"). The mechanism for the harm, then, is listener reaction. But the difference between *Florida Bar* and, say, *Virginia Pharmacy* (where listener response might also lead to harms the state sought to prevent) is that the state regulates speech in what it regards as the best interests of a regulated entity (the legal profession), not in listeners' best interests.

As long as the state can characterize its ultimate concern as being about something other than listeners' best interests, it may under *Florida Bar* regulate speech to prevent harm that comes about because of listeners' reaction to the speech. The problem is that, if *Florida Bar* is taken seriously, it would allow the state to claim in almost

141. Redish, 81 IOWA L. REV. at 612.

142. 515 U.S. 618 (1995).

143. Fla. Bar v. Went For It, Inc., 515 U.S. 618, 620 (1995).

144. Fla. Bar, 515 U.S. at 625.

145. Id. at 630-31.

146. Id. at 631.

147. Id. at 631 n.2.

every case it was regulating speech only in the interest of preventing some downstream harm that starts with a negative listener reaction. This is a problem, I think, for free speech doctrine generally. But it is not a problem for the antipaternalism principle, which only rules out a certain form of state rationale for speech regulation — that is, one that offers speech regulation as a way of serving the citizen's own best interests. Ruling out that rationale, even if the state ultimately comes up with a different justification for the same regulation, at least has the advantage of forcing the state to establish some link between the ultimate harm and the negative listener reaction. This will not always be easy to prove. On the other hand, if the state were free to argue in every case a speech regulation served listeners' own interests, the connection between the state's justification and its regulation would always be a tight one, surviving close scrutiny.

Florida Bar, in any event, may be a case that can be written off as dealing with a subject near and dear to the justices' hearts — the legal profession — and thus having little force outside that particular context. In *Edenfield v. Fane*,¹⁴⁸ on the other hand, the Court held unconstitutional a state ban on in-person solicitation by certified public accountants. The rationale for doing so was classically antipaternalist: "The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented."¹⁴⁹

D. POLITICAL PARTIES

In *Eu v. San Francisco County Democratic Central Committee*,¹⁵⁰ the Court struck down a state law barring political parties from endorsing candidates in party primaries; dictating the organization of a party's governing body; limiting a party chair's term; and requiring the chair to rotate between northern and southern California. The state supported its restrictions as a method of preventing internal party dissension and factionalism.¹⁵¹ Thus, the state justified its speech restrictions on the party by reference to the best interests of the party itself.

148. 507 U.S. 761 (1993).

149. *Edenfield v. Fane*, 507 U.S. 761, 767 (1993). This statement undermines the claim, sometimes made, that the Court classifies some speech as low-value and some as high-value for purposes of protecting it.

150. 489 U.S. 214 (1989).

151. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 214-15 (1989).

The Court called this a "highly paternalistic approach limiting what people may hear" akin to the restriction in *Virginia Pharmacy*.¹⁵² Indeed, the regulation was worse because it involved state censorship of "the political speech a political party shares with its members."¹⁵³ Regarding the state's reasoning that, without the restriction on party endorsements, the party would endanger its own general election prospects by contributing to intraparty friction, the Court was decidedly opposed to such paternalism. "[E]ven if a ban on endorsements saves a political party from pursuing self-destructive acts," reasoned the Court, "that would not justify a State substituting its judgment for that of the party."¹⁵⁴ The Court also rejected a second, paternalistic justification that the regulations were necessary to protect voters from confusion and undue influence. The Court proclaimed a state's argument it was "enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism."¹⁵⁵

Two other cases involving the regulation of political parties have raised serious antipaternalism concerns. In *Renne v. Geary*,¹⁵⁶ the Court dismissed as nonjusticiable a challenge to a state prohibition on party endorsements of candidates in non-partisan races. The Court noted, however, the free speech issues raised in the parties' briefs had "fundamental and far-reaching import."¹⁵⁷ Justice Marshall, in dissent, called the law paternalistic because it was justified by the state as an attempt to prevent voters from being confused and from being influenced by the parties in making their choices.¹⁵⁸

In *Timmons v. Twin Cities Area New Party*,¹⁵⁹ the Court upheld a state ban on multi-party, "fusion" candidates from appearing on the ballot as the candidate of more than one party. The majority upheld the regulation as supported by the states' "strong interest in the stability of their political systems."¹⁶⁰ This stability would be threatened by "the destabilizing effects of party splintering and excessive factionalism."¹⁶¹ As such, this state interest was distinct from a "paternalis-

152. *Eu*, 489 U.S. at 223.

153. *Id.* at 224.

154. *Id.* at 227-28.

155. *Id.* at 228 (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 221 (1986)). The state could, however, justify restrictions on internal party organization where "necessary to ensure an election that is orderly and fair." *Id.* at 233. This would be a non-paternalist rationale for regulation in that it would not arise from the state's judgment about what was in the best interests of the regulated party.

156. 501 U.S. 312 (1991).

157. *Renne v. Geary*, 501 U.S. 312, 324 (1991).

158. *Renne*, 501 U.S. at 334, 347 (Marshall, J., dissenting).

159. 520 U.S. 351 (1997).

160. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 366 (1997).

161. *Timmons*, 520 U.S. at 367.

tic license for States to protect political parties from the consequences of their own internal disagreements.”¹⁶² Here again, the regulation was acceptable because the justification advanced had nothing to do with the speakers’ or the listeners’ own best interests. The interests protected — according to the state’s proclaimed justification — were external to the listeners (the overall stability of the political system).

E. SEXUAL SPEECH AND MATERIALS

In cases involving sexual materials, the Court’s decisions have also tracked the antipaternalism principle. In a series of decisions the Court has struck down regulations aimed at sparing listeners from the effects, such as being offended, of hearing the speech. This regulation of the “primary effect” of speech is a species of paternalism because it seeks to bar citizens access to protected speech for their own good. The challenge for the state in these cases, as before, is to articulate its interest as safeguarding something other than the listeners’ best interests.

In *Erznoznik v. City of Jacksonville*,¹⁶³ for example, the Court struck down a city ordinance prohibiting drive-in theaters visible to the street from displaying nudity. The city justified its regulation as a way to spare viewers from offense.¹⁶⁴ “[T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.”¹⁶⁵ To allow the government to regulate speech on this basis would be to allow it to regulate based on the primary effect of the speech on recipients.

In *Young v. American Mini Theaters*,¹⁶⁶ however, the Court upheld an adult-theater zoning ordinance. The city justified the ordinance as a means to avoid the secondary effects of the speech, such as higher crime in the vicinity of adult theaters. This justification is non-paternalistic because it is indifferent to the effects of the speech on the listener.¹⁶⁷

162. *Id.* In dissent, Justice Stevens decried the paternalism of another of the state’s asserted interests: protecting voters from the confusion that might be created by fusion candidacies. “[T]he argument that the burden on First Amendment interests is justified by this concern is meritless and severely underestimates the intelligence of the typical voter.” *Id.* at 375-76 (Stevens, J., dissenting). The state could not improve its citizens’ decisionmaking by denying them information. *Id.*

163. 422 U.S. 205 (1975).

164. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208 (1975).

165. *Erznoznik*, 422 U.S. at 210. See also *Cohen v. California*, 403 U.S. 15, 21 (1971).

166. 427 U.S. 50 (1976).

167. See also *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986) (upholding a zoning ordinance aimed at controlling secondary effects of adult theaters).

Stanley v. Georgia,¹⁶⁸ which struck down a state law criminalizing the possession of obscene materials in the home, contains some of the most striking antipaternalist rhetoric in any of the Court's free speech cases. The Court noted the "right to receive information and ideas, regardless of their social worth;" a right redolent with antipaternalism.¹⁶⁹ The state had sought "to protect the individual's mind from the effects of obscenity."¹⁷⁰ The Court's response to this asserted mind-control interest is powerfully antipaternalist:

We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment.¹⁷¹

Although it upheld a law criminalizing the possession of child pornography in *Osborne v. Ohio*,¹⁷² the Court was careful to note the state was not offering a paternalistic justification for the statute. Unlike in *Stanley*, the Court declared, "The State here does not rely on a paternalistic interest in regulating Osborne's mind. Rather, [Ohio seeks] . . . to protect the victims of child pornography; it hopes to destroy a market for the exploitive use of children."¹⁷³ The antipaternalist implication of *Osborne* is clear.¹⁷⁴

Compare *Osborne* with *Ashcroft v. Free Speech Coalition*,¹⁷⁵ in which the Court struck down a federal law banning virtual child pornography produced, not with real children, but with computers or other simulators. The government offered several justifications for the regulation. The government argued the regulation was needed to make easier prosecutions of actual child pornography, in which real children are used in production.¹⁷⁶ It also argued the regulation was needed to eliminate materials that could be used to entice children into sexual activity.¹⁷⁷ And it argued banning virtual child pornography was necessary to eliminate the market for actual child pornography.¹⁷⁸ None of these justifications run afoul of the antipaternalism principle, although the Court found other problems with each of them.

168. 394 U.S. 557 (1969).

169. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

170. *Stanley*, 394 U.S. at 565.

171. *Id.* at 565-66.

172. 495 U.S. 103 (1990).

173. *Osborne v. Ohio*, 495 U.S. 103, 109 (1990).

174. Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 991 (2001).

175. 535 U.S. 234 (2002).

176. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 254 (2002).

177. *Ashcroft*, 535 U.S. at 251.

178. *Id.* at 254.

One of the government's justifications for the ban on virtual child pornography, however, was paternalistic. The state argued virtual child pornography "whets the appetites of pedophiles," leading them to illegal conduct.¹⁷⁹ To the Court, this justification amounted to mind-control, just as the ban on the possession of obscenity in *Stanley* did. In fact, the Court cited both *Stanley* and *Kingsley Pictures* as anti-mind-control precedents.¹⁸⁰

First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.¹⁸¹

As in *Stanley*, the government in *Osborne* had sought to justify its speech regulation on the grounds the speech would poison the mind of the speech consumer, leading to evil consequences somewhere down the road. This justification could be cast in non-paternalistic terms, i.e., as aimed at protecting children from molestation. But there was no mistaking the initial paternalistic, step: protecting the mind of the speech consumer from deformity caused by the speech.

F. CHARITABLE SOLICITATION

In *Riley v. National Federation of the Blind*,¹⁸² the Court struck down restrictions on fees that professional fundraisers may charge to raise money for charities, and struck down disclosure requirements. After dismissing several possible justifications for the restrictions, the Court dealt with a final one:

The State's remaining justification — the paternalistic premise that charities' speech must be regulated for their own benefit — is equally unsound. The First Amendment mandates that we presume that speakers, not the government, know best what they want to say and how to say it "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." To this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government.¹⁸³

179. *Id.* at 253.

180. *Id.*

181. *Id.*

182. 487 U.S. 781 (1988).

183. *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 790-91 (1988) (quoting *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring)).

The Court thus made clear the antipaternalism principle reaches beyond listener autonomy. It also shields speakers from speech regulations designed to protect speakers in their own best interests.

Justice Scalia, concurring, noted "our traditional understanding, embodied in the First Amendment, that where the dissemination of ideas is concerned, it is safer to assume that the people are smart enough to get the information they need than to assume that the government is wise or impartial enough to make the judgment for them."¹⁸⁴

G. CORPORATE SPEECH

In *First National Bank of Boston v. Bellotti*,¹⁸⁵ the Court struck down a state law forbidding certain campaign expenditures by corporations. The state argued corporate spending on referenda would "exert an undue influence on the outcome."¹⁸⁶ Citing *Virginia Pharmacy*, the Court called this a "highly paternalistic" approach" because it rested on the idea the government should decide for listeners what voices should be heard.¹⁸⁷ Voters themselves should be trusted to sift the information they receive during a campaign.

H. OTHER CASES

In *Meese v. Keene*,¹⁸⁸ the Court upheld registration, reporting, and disclosure requirements on persons engaged in propaganda on behalf of foreign powers. The majority and dissent traded charges of paternalism, with the majority relying on *Virginia Pharmacy* and reasoning it would be paternalistic to deny the public the information required by the disclosure requirements.¹⁸⁹

II. THE PROMISE AND LIMITS OF THE ANTIPATERNALISM PRINCIPLE

A number of important implications of the antipaternalism principle may be derived from these cases. This Section explores what those implications are.

184. *Riley*, 487 U.S. at 804 (Scalia, J., concurring).

185. 435 U.S. 765 (1978).

186. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 789 (1978).

187. *Bellotti*, 435 U.S. at 791 n.31 (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976)).

188. 481 U.S. 465 (1987).

189. *Meese v. Keene*, 481 U.S. 465, 480-85 (1987).

A. A FIRST AMENDMENT DEFINITION OF PATERNALISM

What does the Court mean by the word paternalism? The Court has not explicitly defined it, either inside or outside the First Amendment context. It has simply used the word in circumstances that implicitly suggest a definition. I offer the following definition as the best understanding of what the Court generally means by paternalism in its free speech cases. I do not suggest the Court has always used the word in precisely the way I suggest here, but only that this definition is the best description of what the Court generally means across a broad range of cases.

In the First Amendment, paternalism means: *a restriction on otherwise protected speech justified by the government's belief that speaking or listening to the information in the speech is not in citizens' own best interests.* As we will see, the antipaternalism principle does not bar all paternalism in speech regulation.¹⁹⁰

This definition is a specialized one that differs in important ways from the definition of paternalism commonly offered by economists, political scientists, or philosophers. Gerald Dworkin's classic definition of paternalism in moral philosophy, for example, is this: "By paternalism I shall understand roughly the interference with a person's liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests, or values of the person being coerced."¹⁹¹

This definition differs in several key respects from the one used by the Court. First, paternalism in the speech context involves interference with speech, not with a person's "liberty of action," understood to mean non-expressive conduct.

Second, and more importantly for my purposes, the Court's use of the word is broader than Dworkin's (and most others') in that the restriction need not be justified by reference to the interests of "the person being coerced." In *Virginia Pharmacy*, for example, the state assembly did not justify its restriction on pharmacists by reference to the interests of *pharmacists*.¹⁹² Rather, the restriction on pharmacists was justified as a way of protecting *the public*, who were not directly subject to the advertising restriction, from the consequences of

190. See *infra* notes 208-30 (noting exceptions for children, government speech, cases where counter-speech is unavailable or untimely, and false, misleading, or overreaching commercial speech).

191. Gerald Dworkin, *Paternalism*, in *MORALITY AND THE LAW* 107, 108 (R. Wasserstrom ed., 1971).

192. Though increasing the income of pharmacists may well have been a large part of the assembly's reason for adopting the restriction. Daniel Hays Lowenstein, "Too Much Puff": *Persuasion, Paternalism, and Commercial Speech*, 56 U. CIN. L. REV. 1205, 1238 (1988).

their own choices. For the First Amendment, in other words, a restriction on speaker "may be paternalistic if it is justified by reference to the best interests of speaker or listener(s)."¹⁹³ This use of paternalism corresponds to the definition offered by Joel Feinberg of "two-party" paternalism¹⁹⁴ and by Dworkin himself as "impure" paternalism.¹⁹⁵

On the other hand, the Court's use of the term is in one sense consistent with the classic definition in moral philosophy. In cases like *Virginia Pharmacy* the Court conceptualizes the person being restrained by the law not only as the party prevented from speaking, but also as the party being prevented from hearing the speech by virtue of the restraint on the speaker. Coercion is used not only to prevent the speaker from speaking but the listener from listening. And because the regulation of the speaker is justified by reference to the listener's best interests, it is paternalistic as to the potential listener.

There are additional differences between the Court's use of the word paternalism and others'. In the view of some, paternalism does not require coercion under threat of criminal penalty at all, but might also involve giving powerful financial incentives to individuals to conform to the state's conception of their best interests. This is sometimes called incentive paternalism. This would not be paternalism for the Court, or if it is, it would not be impermissible paternalism.

Some would argue that regulation of a person for the benefit of society as a whole or for the benefit of specific third parties is not paternalistic. A law against murder is not paternalistic because it is designed to protect someone other than the murderer herself from harm. This common-sense idea is inapplicable to regulations of speech, however, where a restriction on A's speech for the supposed good of lis-

193. *But see* Sadurski, *Does the Subject Matter? Viewpoint Neutrality and Freedom of Speech*, 15 CARDOZO ARTS & ENT. L.J. 315, 337 (1997). Sadurski argues that "[p]aternalism is typically involved when someone's liberty is restricted on the basis of an argument about *this agent's own good*." Sadurski, 15 CARDOZO ARTS. & ENT. L.J. at 337. (emphasis added). On the basis of this definition, which is similar to Dworkin's classic definition, Sadurski concludes that paternalism is commonly a motive behind content-based, but not viewpoint-based, discrimination in government speech regulation "because it *might* be claimed (as a possible argument for a content restriction) that discussing certain matters is bad for the discussants themselves . . ." *Id.* In cases of viewpoint discrimination, by contrast, the government commonly seeks to restrict the *speaker* to prevent some harm (like offense) to the *listener*. *Id.* Whatever the merits of Sadurski's distinction for purposes of content-based and viewpoint-based speech regulation, it takes no account of the Court's own peculiar, and oft-repeated, use of the term "paternalism" to include regulations undertaken to protect *listeners* from some message for their own good. Sadurski's work does not review the Court's use of the term, especially in the commercial speech cases. The Court's use of the term suggests a broader understanding of it than the classic definition Sadurski relies upon.

194. JOEL FEINBERG, *HARM TO SELF* 172-76 (1986).

195. Gerald Dworkin, *Paternalism*, in *PATERNALISM* 19, 22 (Rolf Sartorius ed., 1983).

tener – may well be paternalistic as to – (that is, if the restriction is aimed at the communicative aspect of the speech).

One point on which the Court and most commentators seem to converge about the definition of paternalism relates to consent. Is a restriction paternalistic if the person agrees to the restriction? In some cases, the person will agree with the judgment the regulation is for his own good or for the good of others; in many cases he will not agree. The pharmacy profession largely (though probably not unanimously) concurred with the Virginia Assembly's restriction on pharmacists' freedom to advertise their prices for prescription drugs. But the pharmacists (the "speakers") were not free to agree to a speech restriction that was paternalistic as to consumers (the "listeners"). And it is doubtful they would be permitted to agree to a speech restriction that was paternalistic as to themselves, because First Amendment rights are non-waivable. A regulation is no less paternalistic for its happy congruence with the preferences of the regulated person, who may not even be consulted about the regulation. If the person's preferences change, by hypothesis, the paternalistic regulation may remain.

B. WHAT THE ANTIPATERNALISM PRINCIPLE FORBIDS

The discussion in Part I has, I hope, demonstrated several features of the antipaternalism principle. Here is a summary of what the principle forbids.

(1) *The antipaternalism principle prevents the state from adopting an information-denying strategy to achieve what it thinks are citizens' best interests.*

The antipaternalism principle invalidates speech regulation that keeps truthful information from citizens — that is, keeps them "in the dark" — for their own good. This is what I have called an information-denying strategy. The Court has explicitly rejected information-denying strategies in most of its cases applying the antipaternalism principle: *Virginia Pharmacy*, *Linmark Associates*, *Central Hudson*, *44 Liquormart*, *Lorillard Tobacco*, *Western States Medical Center*, *Bates*, *Peel*, *Eu*, *Stanley*, *Osborne*, *Free Speech Coalition*, *Riley*, and *Belotti*. The reason for the rejection of information-denying speech regulation is not hard to fathom. One goal of antipaternalism is informed self-determination, which depends on allowing citizens to assess for themselves the weight to be given the information they receive.

Note an important limitation on this aspect of the antipaternalism principle. A restriction on the *noncommunicative* aspects of

speech (e.g., the size or placement of a billboard¹⁹⁶) would not be an impermissible information-denying strategy. The key is identifying "information" in the speech sought to be regulated in citizens' best interests. If the regulation is not aimed at denying information to citizens, it does not implicate the antipaternalism principle.

(2) *The antipaternalism principle restrains the state's role as a central decision-maker, disabling the state from restricting the flow of speech as a method of discouraging choices made by individuals in their own best interests because the state believes those decisions will harm the collective welfare.*

The antipaternalism principle is hostile to attempts by government to restrict speech on the grounds that, after receiving speech, citizens will make decisions based on that speech which in the aggregate harm the collective welfare. Several of the Court's decisions, especially in the commercial speech cases, highlight this controversial aspect of the antipaternalism principle. These decisions include: *Virginia Pharmacy*, *Linmark Associates*, *Central Hudson*, and *44 Liquormart*.

If the state's actions in restricting speech in these cases are paternalism, it is of a different kind from that usually associated with the word.¹⁹⁷ Here, the state constrains individual action to achieve a collective good (e.g., high-quality pharmaceuticals¹⁹⁸) or to avoid collective harm (e.g., panic selling of homes¹⁹⁹). As one commentator put it, "it consists of a foreclosure of certain individual actions which, if taken generally, would make everybody or nearly everybody worse off, but which people have an incentive to take unless assured others will also abstain."²⁰⁰ Such a restriction is paternalistic in the sense that it restricts the choices open to individuals for their own long-term good, as opposed to their short-term good. It does not operate under the classic paternalistic assumption that the person constrained cannot appreciate what is good for him, at least in the short-term.²⁰¹ But it may reflect a judgment that the citizen cannot appreciate what is in the best interests of the entire community, and therefore perhaps ultimately his own long-term best interests.

196. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 520 (1981).

197. Sadurski, 15 *CARDOZO ARTS & ENT. L.J.* at 368; Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 *U. CHI. L. REV.* 1129, 1140-45 (1986).

198. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 743, 766-68 (1976).

199. *Linmark Assoc., Inc. v. Willingboro*, 431 U.S. 85, 95 (1977).

200. Sadurski, 15 *CARDOZO ARTS & ENT. L.J.* at 368.

201. *Id.*

(3) *The antipaternalism principle forbids information-denying speech regulation even if the speech restriction will actually accomplish its aim of manipulating citizens' decision-making in a direction the state believes is in citizens' best interests.*

The antipaternalism principle is non-consequentialist. It recognizes that protecting speech will sometimes entail costs (or at least the risk of costs) that simply must be borne by society. Free speech is not free. It usually does not matter to the validity of an otherwise impermissible paternalistic justification that the regulation will be successful, as by dampening alcohol consumption. This aspect of the antipaternalism principle can be seen in cases like *Virginia Pharmacy*, *Linmark Associates*, and *Western States Medical Center*, where the issue was consumption-inducing advertisements. But non-consequentialism is also on display in *Eu*, where the Court held even if a ban on endorsements would save a party from self-destruction, it would be impermissible paternalism.²⁰²

However, the Court has been wobbly on this point. In *Central Hudson*, the Court implied a restriction on advertising might be acceptable if the government could show it would actually dampen energy consumption.²⁰³ Similarly, in *Edge Broadcasting*, the Court suggested a speech regulation would pass muster if there were an immediate connection shown between advertising and demand.²⁰⁴ Even *Rubin* and *44 Liquormart*, both victories for free speech claimants, leave open the door to speech restrictions as a means to manipulate consumers' consumption choices.

(4) *The antipaternalism principle invalidates speech regulation that restricts the flow of information to the receiver of the information, regardless of whether the regulation directly restrains the speaker or the recipient.*

Most of the impermissible speech regulations invalidated under the antipaternalism principle have involved restraints on the speaker. These include, for example, *Virginia Pharmacy*, *Linmark Associates*, *Central Hudson*, *44 Liquormart*, *Greater New Orleans Broadcasting*, *Lorillard*, *Western States Medical Center*, *Bates*, *Peel*, and *Edenfield*. Some paternalistic restrictions, however, have also been placed on the receivers of information. These have included bans on the possession of certain materials thought to harm the speech consumer in some manner, as in *Stanley* and *Free Speech Coalition*.

202. *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 227-28 (1989).

203. *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 570 (1980).

204. *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 434 (1993).

There are always alternative, and usually more direct, methods by which the government can accomplish its aims, even its paternalistic ones. Restricting speech cannot be one of them.

(5) *The antipaternalism principle prevents the state from justifying speech regulation based on the primary effect the speech will have on recipients.*²⁰⁵

The Court has been careful to distinguish speech regulations aimed at preventing the secondary effects of speech (e.g., too much crime in neighborhoods around adult theaters) from those aimed at the primary effects of speech (e.g., the likelihood the listener will be influenced by the speech to act in a way the government wants to prevent). The First Amendment permits the former regulation²⁰⁶ but forbids the latter.²⁰⁷ As Geoffrey Stone, explaining the different constitutional treatment of content-neutral and content-based restrictions, has pointed out:

Unlike content-neutral restrictions, content-based restrictions usually are designed to restrict speech because of its 'communicative impact' — that is, because of 'a fear of how people will react to what the speaker is saying' [G]overnmental efforts to restrict speech because of its communicative impact usually rest upon constitutionally disfavored justifications. That is, either the government does not trust its citizens to make wise decisions if they are exposed to the speech or it fears that the speech will offend others and perhaps provoke a hostile audience response. Justifications for the suppression of particular messages that, like these, are based on paternalism or intolerance, are incompatible with the basic premises of the first amendment.²⁰⁸

On the other hand, speech regulations aimed at the *secondary* effects of speech do not offend the antipaternalism principle because they are justified by reference to interests unconnected to the information in the speech (e.g., home values in neighborhoods where an adult theater is present), not by reference to the best interests of speakers or listeners whose interest in the speech the antipaternalism principle protects. Speech regulations aimed at the primary effect of speech on listeners — whether they take the form of restriction on the speaker or the listener — offend the antipaternalism principle because they reflect a judgment by the state that the listener is incapable of assess-

205. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 62-63 (1976).

206. *Young*, 427 U.S. at 62-63.

207. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209-10 (1975).

208. Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 56-57 (1987). See also Vincent Blasi, *The Pathological Perspective in the First Amendment*, 85 COLUM. L. REV. 449, 473 (1985).

ing the value of the speech and whether he can responsibly hear the speech.

Especially hard questions arise in the context of pornography. If the state regulates some kinds of pornography on the grounds that "substantial exposure to sexually violent materials . . . bears a causal relationship to antisocial acts of sexual violence and, for some subgroups, to unlawful acts of sexual violence,"²⁰⁹ is it acting paternalistically toward the consumers ("listeners") of pornography? I am inclined to answer yes, because the regulation would be justified by the primary effect the pornography has on listeners: they react to their consumption in socially irresponsible and harmful ways. In fact, this justification for regulating pornography is strikingly akin to one justification for regulating virtual child pornography in *Free Speech Coalition*: that consuming child pornography will lead consumers to molest children.

The pro-regulatory response to this conclusion would be that anti-pornography laws are justified not by a paternalistic desire to prevent some abstract corruption of the morals of pornography consumers but by the very real and non-paternalistic need to reduce the social harm of sexual violence to third parties. As such, on this view, anti-pornography laws are concerned primarily with those harmed by the availability of pornography (principally women or perhaps children, who are disproportionately targeted for sexual violence). Anti-pornography laws are concerned only incidentally or instrumentally with the "speakers" (pornography producers) or "listeners" (pornography consumers) whom the antipaternalism principle is designed to protect.

This response has appeal but it is difficult to see how it survives *Virginia Pharmacy*, *Linmark*, *Free Speech Coalition* and other cases employing the antipaternalism principle. If the response is right, in every case the state could seek to justify its speech regulation by reference to the predicted ultimate harms arising from the listener's inability to react appropriately to the regulated speech. Allowing this justification for speech regulation would swallow the antipaternalism principle. The question instead must be: do the harmful effects the state seeks to prevent depend on the effect the speech will have on the mind of the listener? If so, the regulation is impermissibly paternalistic as to the listener. That seems to be the case with pornography regulations justified by the need to prevent acts of sexual violence. So, such speech regulations violate the antipaternalism principle.

209. United States Department of Justice, Final Report: Attorney General's Commission on Pornography (Washington: United States Government Printing Office, 1986).

(6) *The antipaternalism principle prevents the state from justifying speech regulation based on the presumed offense the speech will cause recipients.*

The antipaternalism principle not only shuns speech regulations justified by the state's presumption the listener will not be able properly to handle or to react to the speech, but also those speech regulations justified by the state's presumption the listener will be offended by the speech. This much should be clear from *Erznoznik*, *Youngs Drugs*, and the attorney-solicitation cases discussed above.

Under the antipaternalism principle, while it is perfectly acceptable to shield children from offensive materials, the state may not treat adults like children. Adults' informational environment may not be sanitized to a degree suitable for children. Indeed, even in its effort to protect children from material that may harm them, like sexually explicit material, the state's regulation must take care not to restrict the flow of information to adults.²¹⁰

C. WHAT THE ANTIPATERNALISM PRINCIPLE DOES NOT FORBID

Despite this substantial list of the ways in which the antipaternalism principle limits government's power to regulate speech, much room for speech regulation remains. The reach of the antipaternalism principle, while significant, is not unlimited. Government may, consistent with the Court's conception of the antipaternalism principle, employ a variety of strategies to limit the flow of speech.

(1) *The antipaternalism principle does not prevent the state from adopting an information-providing strategy to achieve what it thinks are citizens' best interests.*

In several of its antipaternalism decisions, the Court has made clear that government may advance its paternalistic aims in ways other than restricting speech. It may regulate conduct. It may also take a more-is-better approach to speech by, in effect, providing the public its own counter-speech. Decisions affirming the state's power to adopt such an information-providing strategy include: *Linmark Associates*, *Central Hudson*, *Bates*, *Peel*, and *Meese*.²¹¹

In the context of commercial speech this information-providing strategy may even take an *information-forcing* form, permitting the

210. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997).

211. *Posadas* is the only case I found in which the Court explicitly rejected an information-providing strategy as an adequate substitute for a paternalistic information-denying strategy. *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341-43 (1986).

state to require that certain additional information relevant to citizens' rational decision-making be included in the speech.²¹² This information-forcing strategy may even be pursued where the proposed speech is not, by itself, false or misleading.

This compulsory strategy is more questionable, on the other hand, outside the commercial context.²¹³ Outside the commercial context, the state's information-providing strategy must ordinarily be accomplished through the government's own speech (as in public-service advertisements) or through incentives given to private speakers to include the additional information the government wants communicated to citizens.

Note that, in supplying citizens additional information, the state's underlying paternalistic motivation would remain. It would still be manipulating the citizens' informational environment in the belief that their best interests would be served by resisting, say, panic selling of their homes. A completely non-paternalistic alternative to such a policy would be to allow citizens to determine the information they believe relevant to their decisions on whether to sell their homes and ferret out for themselves any additional information they feel necessary to make good decisions.

(2) *The antipaternalism principle does not prevent the state, in the limited context of commercial speech, from aiding citizens' informed self-determination by prohibiting falsity, deception, or overreaching.*

In the commercial speech area, the state may restrict the flow of information that is false, deceptive, or misleading.²¹⁴ It may also prevent overreaching by professionals in a position of special trust.²¹⁵ These exceptions are rooted in the idea that a goal of antipaternalism is *informed self-determination*.

Is it impermissibly paternalistic for government to regulate commercial speech in such a way as to encourage rational deliberation by consumers, e.g., by requiring accurate labeling and advertising of products? Chief Justice Rehnquist has argued it should make no difference.²¹⁶

212. *Peel v. Attorney Registration and Disciplinary Comm'n of Ill.*, 496 U.S. 91, 109 (1980) (noting that the appropriate means to reduce risk of consumer confusion would be to require *additional* disclosures by the attorney).

213. *Compare* *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 798 (1988) (striking down disclosure requirement in charitable solicitation), *with* *Meese v. Keene*, 481 U.S. 465, 484-85 (1987) (upholding foreign agent disclosure requirements). In the event the Court accords full First Amendment protection to commercial speech, as it may yet, an information-forcing strategy would also be more questionable in advertising.

214. *Virginia Pharmacy*, 425 U.S. at 771.

215. *Id.* at 773 n.25.

216. *Central Hudson*, 447 U.S. at 592-93.

On the other hand, if the constitutional problem with paternalism is that it fails to respect the capacity for rationality in individuals, then regulating to maximize the exercise of that rational deliberation may not be problematic. It is true that much advertising, protected by the commercial speech doctrine, conveys little real information and seems designed to "create irrational product preferences."²¹⁷ Yet if advertising is speech, as the Court has held, this by itself is not sufficient to permit free reign to regulate it. The same could be said of much political speech: it conveys little useful information about the product (either a candidate or a policy) and seems designed to appeal to sub-rational or subconscious prejudices. We would think it odd and even dangerous to permit the regulation of political speech because it is deemed "misleading" or because it is thought to appeal to emotion rather than to reason.

The prohibition on *false* advertising is most easily justifiable on a theory of informed self-determination. An individual's informed self-determination does not depend on preserving the right of others to tell her outright lies. It depends on preserving the right of others to convey information that will aid, not detract from, her decision-making process.

However, the exception to the commercial speech doctrine allowing the state to ban *deceptive* or *misleading* advertising²¹⁸ presents special challenges to a theory of First Amendment anti-paternalism. If the exception is anything more than a very narrow one, it seriously threatens to undermine the information-providing function of the antipaternalism principle.

The decision about what kind of information may "mislead" or "deceive" citizens is itself a paternalistic one because it suggests citizens are incapable, at least in some instances, of assessing the quality of information they receive. It assumes further the state is better positioned than the citizen herself to determine what information is so misleading or deceptive she should not even consider it. As noted above, the First Amendment would not tolerate a restriction on political speech on the grounds it is misleading.

The distinction between commercial and political speech here is based on the plausible supposition that commercial speech is often provably correct or incorrect, whereas political speech is not. There are either fifty pieces of candy in a bag, as advertised, or there are not.

217. Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 Nw. U. L. REV. 372, 387-89 (1979) (supporting the application of traditional speech scrutiny to commercial speech where the justification for the regulation is related to the informative nature of commercial speech, but supporting lesser scrutiny where the justification for the regulation is related only to the contractual nature of commercial speech).

218. *Virginia Pharmacy*, 425 U.S. at 771.

But who could say with equal certainty whether the expenditure of an additional \$50 million on domestic anti-terrorism efforts will protect the country from attack or that, even if it would, it is better than an expenditure of an additional \$50 million on education or foreign aid?

For very technical information, such as a listing of ingredients on a can of food or claims about the curative powers of a drug, the accuracy requirement in advertising seems a reasonable and fairly limited intrusion on the antipaternalism principle. Further, at least where false or misleading information may endanger citizens' health, counter-speech may be futile because it comes too late. As noted below, speech regulation does not offend the antipaternalism principle where counter-speech is unavailable or will be untimely.

The harder cases arise where the allegedly misleading restricted speech is not technical in nature and presents no immediate hazard. In such cases, it is hard to square the restriction with the Court's general presumption that citizens should make decisions for themselves based on information they assess for themselves. The further we get away from technical information, the more likely it is that the determination about what is "misleading" to the public is itself paternalistic.

*Friedman v. Rogers*²¹⁹ seems in some tension with this idea. A trade name conveys no technical information about optometry services, presents no immediate danger to the health of consumers, and to the extent it is misleading about the quality of services provided it may be countered by a quick look at the list of optometrists associated with the practice operating under the trade name. The Court should reconsider *Friedman* in light of the antipaternalism principle as it has developed in the more than two decades that have elapsed since it was decided.

(3) *The antipaternalism principle does not prevent the state from restricting speech in what it thinks are the best interests of citizens where counter-speech is unavailable or will be futile because it comes too late.*

The antipaternalism principle is not a restatement of the baleful maxim: "Let justice be done, tho' the heavens may fall."²²⁰ In an emergency, where there will be no time or opportunity for counter-speech to prevent some evil, the antipaternalism principle will not stand in the way of government speech restrictions designed to avoid it. This is an important, but limited, qualification on the antipaternalism principle.

219. 440 U.S. 1 (1979).

220. AESCHYLUS, *THE ORESTEA* 75 (David Grene et al. eds., 2004).

Paternalistic restrictions on public access to information are permissible only if counter-speech is unavailable to inform citizens' decision-making. It will rarely be the case that counter-speech is unavailable. Circumstances will ordinarily permit citizens the time to seek out, and to consider, alternative views and information. Emergent situations, however, call for more paternalism to prevent harm. The classic example is the circumstance where a person falsely shouts "Fire!" in a crowded theater. There is not sufficient time, prior to the onset of panic, to inform people there is no fire. Counter-speech in cases like that is unavailing, because it will come too late to prevent injury. In such cases, paternalistic speech regulation to prevent harm to listeners is permissible.

Commercial speech is a realm where counter-speech may often be unavailing. Commercial speech often occurs at the point of sale, so "consumers may respond to the falsehood before there is time for more speech and considered reflection to minimize the risks of being misled."²²¹

(4) *The antipaternalism principle does not prevent the state from providing or withholding information where the state itself is the speaker, even if the reason for doing so is itself paternalistic.*

The state is generally freer to determine the content of speech, and to justify the inclusion or exclusion of information on any grounds it deems fit, when the state itself is the speaker. The theory here is the state in such cases is not acting as speech regulator, but as speaker. In a public advertising campaign to warn citizens about the dangers of smoking, for example, the state does not have to include both pro-tobacco and anti-tobacco viewpoints. Moreover, when the state is the speaker it can exclude some views solely because it thinks it is not in the best interests of citizens to hear them.

The result in *Rust v. Sullivan*,²²² which upheld a restriction on what federally funded doctors could tell their patients about abortion, might be justified under this view. If the doctor is nothing more than the mouthpiece of the state, the state may command her to say what it wants her to say, even for paternalistic reasons.

On the other hand, there is a powerful argument, which I am inclined to accept, that the doctor-patient relationship entails significant interests independent of the state's, even though the state is funding it.²²³ If that is true, then the state is not the only relevant

221. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 496 (1995).

222. 500 U.S. 173 (1991).

223. Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1109-37 (1993).

“speaker” in the exchange between doctor and patient. And if *that* is true, the restriction on information about abortion-related services under the HHS regulations at issue in *Rust* may be an information-denying strategy impermissible under the antipaternalism principle. In that case, the government would have to justify the restriction by some rationale other than protecting the woman-patient from the information or from the consequence of making a bad choice upon receiving it. *Rust*, on this view, might look very much like *Linmark Associates* and the other antipaternalist commercial speech cases in that it reflects an impermissible judgment by the state that citizens will behave badly upon receiving some information the government would rather they not receive.

(5) *The antipaternalism principle does not prevent the state from providing or withholding information in what it thinks are the best interests of children, those confined for mental disability, or others whom it can be presumed lack the capacity for rational choice.*

The antipaternalism principle does not prevent the state from acting *in loco parentis* when it comes to those who are presumed to need extraordinary protection from certain kinds of information by reason of their presumed inability to handle that information. As the Court itself demonstrated in *Lorillard Tobacco*, it is perfectly willing to countenance paternalistic speech regulation aimed at protecting children from the harm of receiving information they are presumed too immature to weigh.²²⁴ John Garvey has ably summed up the Court’s approach to speech regulation restricting what children may see and read:

Over nearly the whole range of “speech” activities, the courts have imposed paternalistic restraints on the free speech of children in order to advance their health, education, and morals. A minor’s freedom to peddle even religious ideas may be limited in order to avoid “emotional excitement and psychological or physical injury.” The child’s right of access to ideas at least those that are vulgar or pornographic, can be specially limited because a state might rationally conclude that such matter impairs the child’s “ethical and moral development.” Such cases permit states to “protect” children by preventing them from doing things adults have a constitutional right to do.²²⁵

Similarly:

224. *Lorillard Tobacco v. Reilly*, 533 U.S. 525, 561 (2001).

225. John H. Garvey, *Freedom and Choice in Constitutional Law*, 94 HARV. L. REV. 1756, 1768-69 (1981).

Parallel paternalistic limitations on freedom of expression exist in the institutional mental health system. Although the logistics of running a large institution obviously necessitate some restrictions, in many cases the restraint is justified primarily in terms of the patient's own interests. Statutes frequently permit censorship of incoming mail to promote the patient's welfare Similarly paternalistic reasons are given for permitting qualification of visitation privileges²²⁶

What supports these extraordinary restrictions on free speech is the fact the citizen at issue lacks the capacity for rational choice. Constitutional freedoms "presuppose that the claimant can make rational decisions that will not result in significant social or individual harm."²²⁷ Individual autonomy is respected "only for persons within a certain range, a range identified by the ability to make rational choices about how one's self ought to be expressed, realized, and fulfilled."²²⁸

(6) *The antipaternalism principle does not prevent the state from restricting speech in what it believes are the best interests of citizens if the restriction is unrelated to the information in the speech.*

The antipaternalism principle overlaps the content-based/content-neutral analysis the Court has adopted for reviewing speech restrictions generally. A city could ban billboards in a residential neighborhood because it wants to protect citizens' property values or because it wants to preserve the general aesthetic environment in the city.²²⁹ But it could not do so because it wants to protect citizens, in their own best interests, from the messages those billboards bear. The first is a regulation on speech justified by the best interests of citizens (property values, good taste), and thus might be thought in some general sense paternalistic. But it does not become the kind of paternalism that concerns the First Amendment until it restricts speech because the government believes receiving the content is harmful to citizens' best interests, either because it is harmful *per se* or because they will react inappropriately to it.

This much can be seen in the Court's decision in *Metromedia*, where the Court upheld the ban on billboards as applied to commercial messages because the regulation aimed at the noncommunicative aspects of the speech (i.e., the eye-catching nature of commercial

226. Garvey, 94 HARV. L. REV. at 1769.

227. *Id.* at 1758.

228. *Id.* at 1759.

229. *Metromedia*, 453 U.S. at 507-11.

messages).²³⁰ It can also be seen in the Court's decision in *Friedman*, where the Court upheld a ban on the use of optometrists' trade names only after concluding such trade names convey no information to consumers.²³¹

(7) *The antipaternalism principle does not prevent the state from restricting speech in what it believes are the best interests of citizens if the state has an acceptable non-paternalistic justification for the regulation.*

The antipaternalism principle does not invalidate paternalistic speech regulations. It discounts paternalistic *reasons* given for speech regulations. A regulation may have both paternalistic and non-paternalistic justifications, as may well be the case with the examples cited in the introduction.²³² A given regulation may be justified entirely on paternalistic grounds, primarily on paternalistic grounds and secondarily on non-paternalistic grounds, secondarily on paternalistic grounds and primarily on non-paternalistic grounds, or entirely on non-paternalistic grounds. This is as true in the speech context as in any other. The government often throws up as many justifications for a speech regulation as it can, hoping that one grabs the Court's fancy. The antipaternalism principle makes one kind of justification invalid; it does not require that a law arguably infected with paternalism must be invalidated if it has another justification that is acceptable.

For example, a law forbidding the possession of obscene materials may be justified on the grounds that it both protects the mind of the possessor from moral degradation and that it assists the state's efforts to suppress the production of obscene pornography.²³³ The first justification is paternalistic; impermissible under the antipaternalism principle. The second justification is not paternalistic and so is permissible under the antipaternalism principle. If the second justification satisfies other First Amendment concerns, the speech regulation is constitutional — even though the state offered one explanation for its law that is paternalistic.

230. *Id.* at 512.

231. *Friedman v. Rogers*, 440 U.S. 1, 12 (1978). I think the Court was wrong to conclude that trade names convey no information to the public.

232. For example, the helmet requirement for motorcyclists might be thought to save society the costs imposed generally by higher injury and death rates for riders who do not wear helmets. These costs might include the social disruption from serious head injuries and death, the loss of a provider to surviving family members, the lost productivity of the injured or killed worker, and the burden placed on the public health care and/or welfare system by higher injury and death rates. In a socially and economically interdependent society, collective stakes are plausibly present to some degree in almost any individual behavior.

233. *Stanley v. Georgia*, 394 U.S. 557, 565-68 (1969).

Of what use, then, is the antipaternalism principle? If a given rationale is deemed paternalistic, the state may always offer up a non-paternalistic one and save the law from invalidation. The value of the antipaternalism principle is this: when the state seeks to regulate speech for essentially paternalistic reasons, it will have to find non-paternalistic rationales for doing so. It will have to cloak its regulation in acceptable garb. But the more the state tries to justify paternalistic speech regulation on grounds other than the true interest it seeks to serve (the paternalistic one) the more its rationales will seem attenuated and even pretextual. The non-paternalistic rationale(s) will often be unconvincing for the very reason that they are makeshift. Thus, the additional non-paternalistic rationales will be vulnerable to attack on other grounds, such as the idea that they poorly fit the actual regulation.

A good example of this phenomenon is the child pornography cases, where the government may offer both paternalistic and non-paternalistic justifications for the laws. The antipaternalism principle forces the government to articulate a non-paternalistic rationale, such as preventing the enticement of children, that exposes how poorly drawn the law is to match the claimed interest. If there were no antipaternalism principle, the government could always claim the regulation is perfectly tailored to serving its legitimate interest in protecting the mind of the pornography consumer.

III. THE ANTIPATERNALISM PRINCIPLE AND THEORIES OF THE FIRST AMENDMENT

As an approach to freedom of expression, the antipaternalism principle has both a negative and a positive dimension. This section explores both dimensions, explaining how the principle fits with prominent theories of the meaning and reach of the First Amendment's free speech guarantee.

A. THE NEGATIVE ANTIPATERNALISM PRINCIPLE

One conceivable view of the First Amendment is that it is entirely negative.²³⁴ It guarantees nothing affirmative: not deliberative democracy,²³⁵ not individual autonomy,²³⁶ not a free market of ideas,²³⁷

234. Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405 (1987) ("Substantive constraints on federal power were not the product of general beliefs in liberty, but of more focused fears about its unjustified infringement. This limited, reactive, negative approach characterized the promulgation of all the substantive limitations on government, including freedom of speech."). Cass, 34 UCLA L. REV. at 1405.

235. CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 119 (1993).

not truth.²³⁸ Instead, it operates only to restrict what the state can do in the realm of speech.

This negative view is supported by the famous text and by original intent. The text focuses on restricting the power of government: "Congress shall make no law . . . abridging the freedom of speech." The phrase "Congress shall make no law" restrains the state; it has no "values" independent of that, according to this view.²³⁹ The First Amendment does not say: "Free speech is guaranteed to enhance democracy," or "Free speech is guaranteed to preserve individual autonomy." The negative view may also be justified as a matter of original intent because the Framers placed limitations on government power, including the free-speech limitation, in response "to specific perceived abuses of government power."²⁴⁰

Of course, in restraining the state the First Amendment may well allow room for individuals to develop their faculties, may well shield a political environment in which citizens may rationally consider matters of public importance, may protect a market of ideas the product of which may be the "good" of truth. But these are by-products, not purposes, of the First Amendment.

One might also say against the negative view that the phrase "freedom of speech" itself embodies some value, a value perhaps given content by one or more of the positive theories mentioned. But, the negative conception responds, if that phrase does have substantive content it operates only as a way to gauge when government is "making a law" the Constitution forbids. This is an important point but it is important to note what it does not show: it does not demonstrate the First Amendment guarantees a republic of reasons, or that it mandates individual development, or a well-functioning market of ideas. Under this view, the First Amendment is all shield and no sword.²⁴¹

The antipaternalism principle is in part a negative one, focusing as it does on the reasons offered by government to justify speech regulation. One type of reason for speech regulation — a paternalistic one — is inadmissible. The "anti" in antipaternalism emphasizes the negative dimension. It is, importantly, not the "pro-autonomy principle"

236. Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593-96 (1982).

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

238. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970).

239. SUNSTEIN, *supra* note 235, at 1441-42.

240. *Id.* at 1441.

241. This view is hotly contested. Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 274 (1992) (case law "reveal[s] that the First Amendment, even as currently conceived, is no mere negative right. It has positive dimensions . . . It is incorrect to say that the First Amendment creates merely a right to fend off government censorship as conventionally understood.").

or the "pro-democracy" principle. Its aims are much less ambitious than these positive views would be.

The antipaternalism principle is not alone in being a negative approach to the First Amendment. Frederick Schauer has argued heightened protection for speech is warranted by "governmental incompetence," the inability of government "to make the necessary distinctions, a distrust of governmental determination of truth and falsity, an appreciation of the fallibility of political leaders, and of somewhat deeper distrust of governmental power in a more general sense." The history of speech regulation is rife "with what we now see to be fairly plain errors" such as "the banning of numerous admittedly great works of art because someone thought them obscene."²⁴²

The negative antipaternalism principle is a safeguard against three distinct evils of government speech regulation: incompetence, entrenchment, and intolerance. The antipaternalism principle guards against *government incompetence*. It involves a skepticism of government competence, doubting the state's ability to discover and implement the best informational environment for citizens, its ability to discover and implement what is true and what is false with respect to their best interests in the content of information they receive, and certainly it involves an appreciation of the fallibility of political leaders in displacing citizens themselves as the best judges of their own interests.

Besides government incompetence, the antipaternalism principle guards against *government entrenchment*. A fear embedded in much of our free speech jurisprudence is that what will drive government speech regulation, even where government is competent to discover some objective best interests of citizens' informational environment, is a desire of incumbents to entrench themselves and the policies they favor.²⁴³ Thus, where the state has adopted an anti-tobacco or anti-gambling public policy, it will not only seek to advance those policies by regulating conduct but will seek to do so through preventing contrary information from reaching the public. Restrictions on speech will insulate the substantive conduct regulations from criticism and democratic debate. Or, speech restrictions will substitute for conduct regulation, advancing the state's policy through the especially sinister means of controlling information rather than conduct itself.²⁴⁴

242. FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982).

243. Free speech keeps clear the "channels of political change." JOHN HART ELY, *DEMOCRACY AND DISTRUST* 105-107 (1980).

244. Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 *IOWA L. REV.* 589, 601-602 (1996).

Finally, the antipaternalism principle guards against *government intolerance*. When the government acts paternalistically, it will likely do so to disfavor unpopular ideas. For example, it would be easy enough for the state — under the guise of saving voters from confusion — to regulate political parties in a way that benefits the dominant ones and disfavors the small, unpopular ones.

All of these problems with speech-regulation paternalism — government incompetence, government entrenchment, and government intolerance — are addressed by the negative antipaternalism principle.

B. THE POSITIVE ANTIPATERNALISM PRINCIPLE

Yet the antipaternalism principle has a positive dimension as well. It conceives of the citizen as the gatekeeper of the information he receives, of the ideas he considers. It treats the adult citizen as an adult, presuming his competence rather than his gullibility. It makes the citizen sovereign over the life of his own mind. In allowing the citizen to assess the value and soundness of the information he receives it also exercises his capacity for self-government, that is, the government of self. This capacity can atrophy when it goes unused or under-used, as when an external decisionmaker makes the relevant informational choices.

The relationship of the antipaternalism principle to various positive conceptions of the First Amendment is complicated. When it finds the regulation justified by a paternalistic rationale, and no other acceptable rationale is offered or available, the antipaternalism principle invalidates the regulation even if the paternalism is said to serve some positive purpose like the promotion of deliberative democracy.

I briefly consider below the relationship of the antipaternalism principle to the three major positive theories of the First Amendment.²⁴⁵ These are: the marketplace-of-ideas, individual autonomy, and democratic self-government.

1. *The antipaternalism principle and the marketplace of ideas*

In his dissent in *Abrams v. United States*,²⁴⁶ Justice Holmes articulated the marketplace-of-ideas rationale for the First Amendment:

245. This is not to suggest that we must choose one value, and one value alone, protected by the First Amendment. "Instead, we have a web of values, collectively comprising our understanding of how people should live." Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1641 (1987).

246. 250 U.S. 616 (1919).

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market²⁴⁷

Justice Holmes was, of course, only echoing ideas about the role of free expression already articulated by John Milton²⁴⁸ and Stuart Mill.²⁴⁹ The relationship between the marketplace rationale for free speech and the antipaternalism principle is fairly obvious: because it acts as a brake on attempts by the state to restrict the flow of idea-product into the marketplace of ideas, the antipaternalism principle complements this conception of the role of the First Amendment. The antipaternalism principle has the effect of insuring that more ideas enter the marketplace than would otherwise be allowed to enter it. In the absence of the antipaternalism principle, the state could always justify idea-suppression as a means to protect people from the corrosive effects of the ideas. But the antipaternalism principle internalizes Holmes' observation that what the state today regards as corrosive to individuals' minds may be just another "fighting faith" that time has upset.

There may well be, as some critics of the marketplace conception have charged, imperfections in the market for speech.²⁵⁰ But whatever imperfections exist in the marketplace of information, the antipaternalism principle insists they cannot be corrected by speech regulation justified by the state's distrust of citizens' capacity to assess information.²⁵¹ The insight of the antipaternalism principle is

247. *Abrams*, 250 U. S. at 630 (Holmes, J., dissenting).

248. John Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing* (1644) (AAnd though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worst, in a free and open encounter?").

249. JOHN STUART MILL, ON LIBERTY 21-22 (Currin V. Shields ed., The Bobbs-Merrill Company, Inc. 1956) (1859) ("First, the opinion which it is attempted to suppress by authority may possibly be true. Those who desire to suppress it, of course, deny its truth: but they are not infallible . . ."). The marketplace rationale has also been criticized, largely by commentators concerned with imperfections in the speech market analogous to imperfections in the market for goods and services. Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 5 (1984) (government regulation of speech needed Ato correct failures in the economic market caused by real world conditions"); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 978 (1978) (arguing that "[t]he marketplace of ideas appears improperly biased in favor of presently dominant groups. . ."). See also Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 UCLA L. REV. 949, 964-65 (1995).

250. Ingber, 1984 DUKE L.J. at 5; Baker, 25 UCLA L. REV. at 978.

251. In the case of political speech, the antipaternalism principle the Court has adopted protects the citizen's right to receive true as well as false information. In the

that, in acting to “correct” the marketplace of ideas through speech regulation, the government is likely to fall prey to the problems of incompetence, entrenchment, and intolerance identified above.²⁵²

2. *The antipaternalism principle and autonomy*

A second, powerful rationale for protecting the freedom of speech emphasizes its role in enhancing individual autonomy.²⁵³ According to Martin Redish, an impassioned and consistent defender of this view, “the constitutional guarantee of free speech ultimately serves only one true value, which I have labeled ‘individual self-realization.’”²⁵⁴ Individual self-realization includes both “development of the individual’s powers and abilities — an individual ‘realizes’ his or her full potential — [and] to the individual’s control of his or her own destiny through making life-affecting decisions — an individual ‘realizes’ the goals in life that he or she has set.”²⁵⁵

Redish acknowledges the importance of antipaternalism to the autonomy rationale, casting doubt on the idea that “an arm of the state should have the authority to decide for the individual that certain means of mental development are better than others.”²⁵⁶ Thomas Scanlon, who also saw an autonomy rationale for speech protection, saw this antipaternalist impulse in the First Amendment as well: “The harm of coming to have false beliefs is not one that an au-

case of commercial speech, the information must be true and non-misleading in order to receive protection. *Virginia Pharmacy*, 425 U.S. 748, 771 (1976).

252. See *supra* Section III. A.

253. Individual autonomy is a famously complicated and problematic concept. Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 *STAN. L. REV.* 875, 876 (1994) (criticizing autonomy-based arguments for First Amendment speech rights because “the value of autonomy is much more complex than most theorists have imagined”); Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court’s First Amendment Jurisprudence*, 32 *HARV. C.R.-C.L. L. REV.* 159, 160-61 (1997) (rejecting the “impoverished notion of autonomy that dominates the debate” over free speech and suggesting that the Court’s use of autonomy is a “far richer and more complex” Kantian idea).

254. Martin H. Redish, *The Value of Free Speech*, 130 *U. PA. L. REV.* 591, 593 (1982). See also MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* (1984) (advancing the view that self-realization is the ultimate value underlying the First Amendment). Many other commentators have emphasized the autonomy rationale. See THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6 (1970) (speech advances individual self-fulfillment); David A. Strauss, 91 *COLUM. L. REV.* 334, 353-55 (the “persuasion principle” is based on autonomy). But see Geoffrey R. Stone, *Autonomy and Distrust*, 64 *U. COLO. L. REV.* 1171, 1172 (1993) (free speech jurisprudence “is much richer and more complex than the autonomy model would suggest”). Redish eschews the “autonomy” label as too narrow. Redish, *supra*, at 620. I will use it here because I think it is useful and common shorthand that captures much of the idea.

255. Redish, 130 *PA. L. REV.* at 593.

256. *Id.* at 627.

tonomous man could allow the state to protect him against through restrictions on expression."²⁵⁷

Here, too, the relationship to the antipaternalism principle is close: because it seeks to prevent an outside force (the state) from molding the individual through choices it makes for the individual in what it believes are the best interests of the individual, the antipaternalism principle removes the one obstacle from the individual's ability to develop his own capacities according to what he judges to be his own best interests.

On the other hand, the antipaternalism principle taken by itself is much less ambitious than the autonomy rationale for free speech. The antipaternalism principle disables one kind of justification for speech regulation. But, taken alone, it would allow other justifications for the same speech regulation that might well have the effect of intruding on individual autonomy in the name of some non-paternalistic good the state sought to achieve. There are important social values beyond individual autonomy, like public health and equality. A system of freedom of expression that exalted autonomy above all else, no matter the cost, seems extreme. A full explication of an autonomy-based First Amendment theory needs the antipaternalism principle as one leg, to be sure, but it cannot stop there. The antipaternalism principle seems a necessary but not sufficient basis for claiming the First Amendment protects individual autonomy.

3. *The antipaternalism principle and democratic self-government*

The antipaternalism principle seems largely at home with the marketplace rationale and supports, though incompletely, an autonomy rationale. But its relationship to a third rationale for protecting free speech, democratic self-government theory, is more complicated.

Many commentators have emphasized the importance of free speech to the process of democratic self-government,²⁵⁸ with some suggesting the First Amendment protects little more than political speech.²⁵⁹ A branch of self-government theory has emphasized the need for the state to regulate speech in the interests of making citizens better democrats. The state would do this by, for example, en-

257. Thomas Scanlon, *A Theory of Freedom of Expression*, 1 Phil. & Pub. Aff. 204 (1972). Scanlon later retreated from his sweeping embrace of autonomy and the extreme antipaternalism it entailed. T. M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. Pitt. L. Rev. 519, 532 (1979).

258. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 63 (1948); Sunstein, 59 U. Chi. L. Rev. at 301; Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987).

259. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971).

couraging greater diversity of opinion and more attention to public affairs in broadcasting.²⁶⁰ This view emphasizes the need to elevate public discourse above salacious entertainment, violence, and sex, in order to enhance the functioning of democracy. The purpose of the First Amendment, in this view, is to enhance public deliberation and self-government. According to the democratic self-government rationale, an informational environment characterized by greater attention to serious matters will bring the freedom of speech more in line with the public-purpose role envisioned for it by James Madison and the other founders.

On the one hand, the antipaternalism principle seems consistent with democratic rationales for free speech. It enhances the capacity for self-government by forcing public policy to be more transparent. Under the antipaternalism principle, the state cannot seek to manipulate citizens' decisions indirectly through speech regulation, masking its purposes and therefore shielding them from democratic accountability. Instead, it must regulate their lives directly, if at all, under circumstances where the political process will check the regulation or at least allow an honest debate about it. That is, government must regulate citizens' behavior *directly*, not regulate what information they hear in order to mold their behavior *indirectly*.

Additionally, to the extent self-government theorists advocate more public-affairs programming sponsored or subsidized by the state, the antipaternalism principle does not stand in the way. As we have seen, the state is free to adopt an information-providing strategy, even if the reason it does so is the paternalistic one of thinking it knows best what information citizens ought to be exposed to.²⁶¹

On the other hand, to the extent self-government theory calls on government to restrict the information citizens receive in order to make them better Madisonian citizens,²⁶² it is at odds with the antipaternalism principle, which insists that citizens must make their own choices about the content of their informational environment in what they judge to be their best interests.²⁶³

260. Sunstein, 59 U. CHI. L. REV. at xix (“[G]overnment controls on the broadcast media, designed to ensure diversity of view and attention to public affairs, would help the system of free expression. Such controls could promote both political deliberation and political equality.”); Fiss, 100 HARV. L. REV. at 787-88.

261. See *supra* Section II. B.

262. Sunstein, 59 U. CHI. L. REV. at 138. Sunstein notes that in European countries, government regularly intervenes in the speech market to improve the quality of citizens' informational environment. *Id.* at 77-88.

263. Others have noticed the tension between the Madisonian/self-government theory of free speech and the antipaternalist premises of the First Amendment. Richard J. Vangelisti, *Cass Sunstein's "New Deal" for Free Speech: Is it an "Un-American" Theory for Free Speech?*, 85 KY. L.J. 97, 134-36 (1996). General criticism of “Madisonian” theo-

Cass Sunstein rejects the idea paternalism is a convincing criticism of government regulation trying to produce a better informational environment. This is because, in his view, private preferences (e.g., a personal preference for watching entertainment instead of public-affairs programming on television) themselves reflect current legal and social practices, rather than a free, informed choice.²⁶⁴

Yet there are serious problems with government's paternalistic regulation of citizens' informational environment as a method to "improve" the choices they make. These problems combine the dangers of government incompetence, government entrenchment, and government intolerance identified earlier.²⁶⁵ First, paternalistic speech regulation assumes that government can identify what ought properly be included in citizens' informational environment. But why should we trust the decisions of legislators and administrators in this regard? They operate under their own biases and preferences, after all, which may only substitute the state's own flawed conception for the citizen's. Second, paternalistic speech regulation assumes that once the proper content has been chosen, the government will be able to impose it in a way that helps, rather than hinders, democratic self-government. Yet, once again, that imposition will reflect regulators' own flawed preferences and be hostage to their incompetence.²⁶⁶

It might be possible to accept state intervention to improve the informational environment on grounds that look less paternalistic. The argument would go something like this: Degraded media product, consumed by individual citizens, may impose costs on the collective if it leads people to be less informed, less likely to vote, and less likely to be involved generally in politics. The negative externality produced can be measured in stupid decision-making about important public policy decisions on welfare, war, the medical care system, taxes, and other issues.²⁶⁷ On this view, by intervening to improve the quality of public discourse, the state would not be acting paternalistically as to individual citizens. It would simply be acting to reduce the perceived social harm of unfettered, poor-quality speech.

The problem with this second justification for state regulation to improve public debate is that it, too, is paternalism as the Court has defined it. Instead of aiming to improve the quality of the speech envi-

ries of free speech have also been offered. Ronald W. Adelman, *The First Amendment and the Metaphor of Free Trade*, 38 ARIZ. L. REV. 1125, 1131-33 (1996).

264. Sunstein, 59 U. CHI. L. REV. at 74.

265. See *supra* Section III. A.

266. See *infra* Section IV.

267. C. Edwin Baker, *Giving the Audience What it Wants*, 58 OHIO ST. L.J. 311, 352 (1997) (emphasizing the unaccounted-for political externalities produced by a free market in speech).

ronment for the individual citizen, here the state would do so in the best interests of the citizens as a whole in order to check the harmful consequences of their cumulative individual choices. But, as the Court suggested in cases like *Linmark Associates*, this is just speech-regulation paternalism applied to the collective.²⁶⁸ The dangers presented by collective paternalism are similar to the dangers presented by the more frankly paternalistic rationales mentioned above: incompetence, entrenchment, and intolerance.

IV. CRITICISMS OF THE ANTIPATERNALISM PRINCIPLE

I want to anticipate and to respond to several possible criticisms of the antipaternalism principle. The first possible criticism is that, in fact, there is no antipaternalism principle animating the Court's free-speech cases. The second criticism is the antipaternalism principle is simply a restatement of other, familiar free-speech doctrines. It adds nothing new to our understanding of what the Court has been doing in the area of free speech. The third criticism is that recognizing an antipaternalism principle in free speech jurisprudence creates an asymmetry with other important parts of the Constitution, where no such principle is recognized. The final criticism I consider is the most fundamental one, and I devote the most attention to it. It argues paternalism is justifiable, even in speech regulation.

A. FREE SPEECH DOES NOT REALLY EMBRACE ANTIPATERNALISM

One commentator, Daniel Lowenstein, has canvassed the Court's commercial speech cases and concluded they establish no general bar to paternalistic speech regulation, the Court's frequent protestations notwithstanding.²⁶⁹ Lowenstein's argument is based on a definition of paternalism that excludes speech regulation enacted for the benefit of the collective, as opposed to the individual. According to Lowenstein, paternalism means "speech restrictions intended to protect the consumer against his or her own imprudent action."²⁷⁰ He claims to derive this definition from the Court's commercial speech cases. Thus, on this view, the regulation in *Virginia Pharmacy* was not paternalistic because it was enacted to protect consumers *as a whole*, not to protect the *individual* consumer.

Lowenstein misapprehends the Court's use of the concept of paternalism. Even in the limited realm of the commercial speech cases, it seems clear the Court means something more than regulations de-

268. *Linmark Assoc., Inc. v. Willingboro*, 431 U.S. 85, 93-94 (1977).

269. Daniel Hays Lowenstein, "Too Much Puff": *Persuasion, Paternalism, and Commercial Speech*, 56 U. CIN. L. REV. 1205, 1237-47 (1988).

270. Lowenstein, 56 U. CIN. L. REV. at 1238.

signed to protect the individual consumer against his own foolishness. It also means regulations designed to protect citizens collectively from their foolishness. These cases include: *Virginia Pharmacy*, *Linmark Associates*, *Central Hudson*, and *44 Liquormart*.²⁷¹ Outside the commercial speech context, which Lowenstein did not examine, this broader meaning is even more plain.²⁷²

The Court's use of the word "paternalism" is so common in its free speech cases, as opposed to its constitutional decisions not involving free speech, that it would be odd to think the Court meant nothing important by it. We can, of course, debate precisely what the Court means, or how far it is willing to extend the principle, but *something* significant is animating the Court's frequent invocation of the concept in this area of constitutional law.

B. THE ANTIPATERNALISM PRINCIPLE IS JUST A RESTATEMENT OF FAMILIAR FREE SPEECH DOCTRINES

The second criticism of the antipaternalism principle — that it is just a restatement of familiar free-speech doctrines — contradicts the first, because it suggests antipaternalism is so well-established that articulating it is redundant. Indeed, an appealing feature of the antipaternalism principle is that it is consistent with so many existing doctrines in free speech jurisprudence. The Court's distrust of content-based speech restrictions reflects a suspicion of government's ability to choose the content of speech citizens ought to hear for their own good. The autonomy rationale for the First Amendment — which seeks room for individual self-determination and actualization — emphasizes the need to protect citizens from do-gooder intervention by legislators who assert they know better than individuals themselves what is required for healthy development. The prohibition on regulating speech because of its primary effects — that is, the impact it has directly on listeners — reveals the Court's hostility to the state's estimation of what citizens can bear to hear before it harms them.

More than a few commentators have referred to the First Amendment's antipaternalism in passing, without further argument or explanation, as if the point were so obvious it needed little or no argument.²⁷³ The question, then, is whether the antipaternalism

271. See *supra* Section II.

272. See *supra* Section I.

273. See Geoffrey R. Stone, *The Rules of Evidence and the Rules of Public Debate*, 1993 U. CHI. LEGAL F. 127, 145 n.39 ("paternalistic justifications for the suppression of information in public debate are incompatible with the basic premises of First Amendment theory, and are thus constitutionally disfavored"); Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 UCLA L. REV. 949, 950 (1995) ("redistribution and paternalism are theoretically forbidden grounds for the regulation of speech"). *But see*

principle as such adds anything useful to our understanding of the First Amendment.

I think it does. To the extent it provides support for several established doctrines (like the familiar primary-secondary effects distinction or the hostility to content-based speech regulation), it helps to explain and rationalize them. It shows why they are justified or important as ways to circumscribe the state's power to regulate speech. It also shows how they might be connected to one another, rather than having them pop up as isolated points in the cases.

But it also adds to some of these existing themes. Take the antipaternalism principle's closest cousin, listener autonomy, which insists that listeners must be given information so they can exercise their autonomy and develop their individual capacities as they direct that development. Though there is considerable overlap, the listener autonomy value is both broader and narrower than the antipaternalism principle. Although antipaternalism is often justified on listener autonomy grounds, its focus is not on the value of speech to listeners but on limiting the range of justifications available to the state. Antipaternalism is state-focused, not listener-focused, and thus has an arguably stronger basis in the negative wording of the text of the First Amendment, which focuses on what government may *not* do rather than what individuals *may* do.

The antipaternalism principle in First Amendment cases is sometimes present where listener autonomy is, at most, a secondary concern, or may not be served at all by striking down the regulation. On the other hand, a regulation intruding on listener autonomy may be justified if the state has a non-paternalistic justification for its action. The fact a speech regulation invades listener autonomy is often, but not invariably, fatal under the First Amendment; the fact that it is "paternalistic" (at least as to competent adults) is always fatal.

Another closely related free-speech idea is what David Strauss calls the "persuasion principle."²⁷⁴ As Strauss articulates it, under the persuasion principle, "the government may not suppress speech on the ground that the speech is likely to persuade people to do something the government considers harmful."²⁷⁵ I agree the persuasion principle "is a version of the First Amendment's 'widely shared hostil-

Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CAL. L. REV. 761, 788 (1986) ("Perhaps it is time to face up to the paternalism of the first amendment, and maybe much of the rest of the constitution as well.").

274. David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991).

275. Strauss, 91 COLUM. L. REV. at 334.

ity to paternalism”²⁷⁶ However, although perhaps “a version” of the antipaternalism principle, the persuasion principle — like listener autonomy — is not the same thing. The antipaternalism principle is indifferent to whether the government believes listeners will be persuaded by speech. Its concern is somewhat broader: it disfavors government justifications for regulation of speech the government believes is not in the citizen’s best interests to receive, regardless of whether the government believes the citizen will actually be persuaded by it. The government concern invalidated by the antipaternalism principle is in the citizen’s very exposure to the idea or information, not the citizen’s acceptance of it.

C. THE ASYMMETRY PROBLEM

Paternalism as a justification for regulation of *conduct* is generally constitutionally acceptable.²⁷⁷ One possible, though hardly certain, exception to this general rule is the Court’s treatment of privacy under its substantive due process jurisprudence. The Court’s protection of aspects of personal privacy, such as the right of married, or unmarried people to use contraceptives, or the right of a woman to have an abortion, might be thought to embody an antipaternalist principle barring government regulation for the good of the people being regulated.²⁷⁸ The Court’s decision in *Lawrence v. Texas*,²⁷⁹ striking down a Texas sodomy law, has reinvigorated the idea that individual “liberty” interests invalidate government paternalism in the regulation of sexual conduct. So it may now be the case that antipaternalism has seeped into the Court’s substantive due process doctrine. If that is the case, the Court has not yet been specific about that seepage. It has used “autonomy” to describe the individual interest at stake in the privacy cases.²⁸⁰ It has not yet explicitly announced that “paternalism” is an invalid state interest in the area of sexual conduct regulation.

Even if the regulation of sexual conduct is an area where the Court has implicitly adopted an antipaternalism principle, the general rule is that conduct may be regulated for paternalistic reasons. However, paternalism as a justification for regulation of *speech* may not be

276. Martin H. Redish and Howard M. Wasserman, *What’s Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 267 (1998).

277. See *supra* Introduction.

278. Non-paternalistic interests, such as the state’s interest in protecting unborn human life, are also present in these cases.

279. 539 U.S. 558 (2003).

280. *Lawrence v. Texas*, 539 U.S. 558, 558-59 (2003).

regulated for paternalistic reasons. Why does this asymmetry exist in the constitutional treatment of paternalism?

After all, it does not have to be this way. Three other configurations for the regulation of speech and conduct are possible. One possibility is the Court could reverse the asymmetry it has adopted by allowing paternalistic justifications for regulation in the speech context but disallowing it in the conduct context. Alternatively, the Court could adopt one of two symmetrical approaches. It could accept paternalism as a justification for regulation in both the speech and conduct contexts. Or it could reject paternalism as a justification for regulation in both contexts.

Is the Court's asymmetrical approach — disallowing paternalistic justifications for speech regulation but not for conduct regulation — justifiable? There is both a textual and theoretical-structural justification for the Court's asymmetrical approach to the regulation of speech and conduct.

Consider first the textual basis for the Court's asymmetrical approach. The First Amendment is a rare constitutional provision. It is directed at reining in the state; indeed, its command is aimed entirely at the state ("Congress shall make no law. . ."). For that reason, the text suggests it is the rationale offered by the state that must be examined before the regulation can be allowed. No burden is placed on the individual to show the value of his speech. There is no parallel textual restriction on conduct. There is no provision that says, "Congress shall make no law abridging the freedom of conduct," or "Congress shall make no law abridging liberty."

The text of the First Amendment is also unusual in that its reach is unlimited. There is, of course, a constitutional mandate that government may not deny a person "liberty . . . without due process of law."²⁸¹ On its face, the mandate seems procedural. Liberty may not be denied unless "due process" is accorded the person. If "due process" is accorded, "liberty" may be denied. There is no parallel qualification on the First Amendment's command. It does not say, "Congress shall not deny the freedom of speech without due process of law." The textual burden on the state's justification is both heavier and qualitatively different in the free speech context. Once we have determined the "freedom of speech" is at issue, the text commands that the government shall "make no law" abridging it.²⁸² The Court's asymmetri-

281. U.S. CONST. AMEND. V, XIV § 1.

282. Redish, 130 U. PA. L. REV. at 601 n.56 ("By its terms, the First Amendment right of free expression is unlimited in its reach, while the Fifth Amendment protects other forms of liberty from deprivation only 'without due process of law.'").

cal approach in embracing the antipaternalism principle thus reflects the constitutional text's own partiality toward the freedom of speech.

There is also a theoretical-structural justification for the Court's asymmetrical treatment of speech: it serves the interests of effective democratic decision-making. Indeed, freedom of expression ought properly to be seen as a precondition for the effective functioning of a democracy, the one freedom that allows for self-correction in a democratic polity.

Assume there is error in some government policy regulating markets. If special judicial protection is given to speech, it is left open to citizens to criticize the error in regulation. Citizens are free publicly to describe the effect of the law, its practical consequences, and to argue it should be eliminated. Their fellow citizens are free to receive that message, offer rebuttals, and suggest refinements. The error can then be corrected through democratic deliberation and normal democratic processes.

By contrast, assume there is the same error in market regulation but no special judicial protection is given to speech. The usual method for calling attention to the error, public debate, is unavailable. Thus, the error may remain largely unnoticed and unchallenged. Even if the error is noticed, proposals for eliminating it could be shut off. The normal channel for change simply cannot function as it should.

The same justification for heightened judicial scrutiny of speech regulation in general applies to the asymmetrical application of the antipaternalism principle in particular. If the government adopts a paternalistic conduct regulation — like closing down gambling casinos — citizens are free to criticize the policy and argue for change in the usual democratic manner. By contrast, if the government is free to adopt a paternalistic speech regulation shutting off the supply of information about gambling casinos, criticizing the government's policy in an informed way becomes far more difficult and perhaps impossible. Paternalistic speech regulation may insulate government policy from criticism and democratic change in a way that paternalistic conduct regulation will not.

D. PATERNALISM IS JUSTIFIABLE, EVEN IN SPEECH REGULATION

The most fundamental challenge to the antipaternalism principle is that paternalism is sometimes justified, indeed essential, as a foundation for sound public policy. This point is widely conceded in non-speech regulation. Much paternalistic policy — like the establishment of forced individual retirement investments through the Social Security system — goes almost unchallenged. When pro-paternalism arguments are applied to speech, however, they are harder to justify.

1. *The debate over paternalism generally*

There is a lively debate over whether paternalism can be justified, and if so, under what conditions and on what grounds it might be justified. It is not my purpose to enter this larger debate, but to offer an overview. Some scholars, especially those identified with the law-and-economics movement, attack paternalism as inefficient and counter-productive.²⁸³ A response within the same movement holds the opposite view, that under some circumstances paternalism can be efficient, especially where people's preferences are irrational.²⁸⁴ Still others, pointing to the limits of individual human reason and the frequency of market failure, see broad areas where it is legitimate.²⁸⁵

It is at least conceivable that antipaternalism might be justified on principled grounds that have nothing necessarily to do with the economic analysis of law. It might be thought that "treating people paternalistically deprives them of the opportunity to learn from their own mistakes" and thus retards their development as fully mature, autonomous people.²⁸⁶ Too, the government may abuse its power to regulate paternalistically and regulate in ways that really do not benefit the people subject to regulation, but benefit those in power (government entrenchment) or a select group sympathetic to those in power (government entrenchment and intolerance). In this jumble of perspectives, there is a consensus only that legal paternalism toward children and mental incompetents is justifiable.

2. *The objective-goods theory and preferences*

Paternalistic speech regulation, like paternalistic regulation generally, often rests on a conception that there is an objective good, discoverable by the state, that a person ought to be made to pursue, or to acquiesce to, even when that conception opposes the person's own conception of what is good. This view holds that because individual preferences are a product of fallible human reason, and are often shaped by circumstances beyond the person's control, they should not be taken as a brute fact immune from beneficial refinement and evolution. Under this objective-goods theory, a person's overall happiness

283. See generally RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed. 1992).

284. Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229, 249-54 (1988); Paul Burrows, *Patronizing Paternalism*, 45 OXFORD ECON. PAPERS 542 (1993); David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 526 (1988).

285. George A. Akerlof, *Procrastination and Obedience*, 81 AM. ECON. REV. (Papers and Proc.) 1 (1991); George A. Akerlof & William T. Dickens, *The Economic Consequences of Cognitive Dissonance*, 72 AM. ECON. REV. 307 (1982); Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI-KENT L. REV. 23 (1989); Thomas S. Ulen, *Cognitive Imperfections and the Economic Analysis of Law*, 12 HAMLINE L. REV. 385 (1989).

286. Zamir, 84 VA. L. REV. at 276.

might therefore be maximized by enforcing the state-recognized conception of the good on her, despite the frustration she feels in not being permitted to pursue her own conception of what is good for her.²⁸⁷

The objective-good justification for paternalistic intervention is questionable on several grounds. It asserts, first, that some objective good for an individual exists independent of the person's own assessment of that good. Take state-mandated retirement savings as an example. The government, through the Social Security system, mandates that individuals put aside money earned now, that is, it mandates they make themselves poorer today, for future income security. Some individuals subject to such a system may prefer to live well while young and take the consequence of possible penury when aged. It is possible they will underestimate the level of unhappiness they will feel later in life or that they will underestimate the probability of such poverty.²⁸⁸ On the other hand, at least a few individuals will correctly assess the risks and rewards of deferred enjoyment of their present income, and yet *still* prefer not to save for retirement. The state may conclude that, for a variety of reasons, many more people will misjudge these future consequences than will correctly judge them. For this majority, paternalism may be appropriate because *it only arrives at the very conclusion they themselves would reach given their own preferences if they could properly assess the relative benefits and risks*. Paternalism, for these people, actually serves their end-preferences (ideal preferences) by suppressing their irrational or ill-informed existing preferences (actual preferences).

On the other hand, at least a few people, shown the light by the state, would still prefer to live it up now. How could it be said that, for these people, paternalism maximizes even their ideal preferences and thus is "good" for them? In that case, the state is left to argue the gain in overall social happiness from a system of forced savings for retirement will offset the combined loss in happiness caused by frustrating the actual preferences of the majority and the ideal preferences of the dissenting minority. It must also argue there is no practical or cost-effective way of allowing the true dissenters, with their minority ideal preferences, to opt-out of the system.

287. *Id.* at 237.

288. There is ample empirical evidence for errors of this kind. ROBIN M. HOGARTH, *JUDGMENT AND CHOICE: THE PSYCHOLOGY OF DECISION* (2d ed. 1987). Among the common types of cognitive error to which decisionmaking is prone are: over-optimism regarding low-probability events, succumbing to social pressure, wishful thinking, illusions of control, inability to make complex computations carefully and accurately, influence by the manner of data presentation, and an excessive discount rate of future costs and benefits. Zamir, 84 VA. L. REV. at 268-71.

Paternalism may even be justified as a method of satisfying individuals' actual preferences. Actual preferences may be divided into first- and second-order preferences. In a given individual these may sometimes directly conflict.²⁸⁹ I crave buttermilk pie (my first-order preference) but I want to lose weight (my second-order preference). I prefer sex without a condom (my first-order preference) but I want to avoid sexually-transmitted infection by a potentially fatal virus (my second-order preference). State paternalism may be justified, argues Cass Sunstein, as a method of satisfying second-order preferences.²⁹⁰

A famous example of this division between first- and second-order preferences is the story of Ulysses and the Sirens.²⁹¹ Ulysses' first-order preference, upon hearing the Sirens' alluring song, would be to go to the Sirens, causing his demise. His second-order preference is to survive his encounter with the Sirens. To satisfy his second-order preference, Ulysses has himself tied to the mast of the ship so he cannot escape when the ship sails by the Sirens' sound. Here his second-order preference has clearly frustrated his first-order preference. But it would be odd to say a sailor on the ship who tied Ulysses to the mast, and then refused to untie him despite Ulysses' desperate pleas, had acted for the good of Ulysses against his actual preferences. He has only enabled Ulysses to satisfy his second-order actual preference over his first-order actual preference. If the sailor's action is "paternalism" at all, it is surely the least objectionable form.

One problem with this justification for paternalism is this example starts to look like something other than paternalism: it is really just a pre-commitment strategy concocted by the restrained individual himself.²⁹² In the Ulysses story, Ulysses himself has identified and asked for assistance in the enforcement of his second-order preference. The sailor has not done this for him. When the state, on the other hand, regulates on the basis it is maximizing second-order preferences over first-order preferences it must implicitly claim it can identify and enforce for a very large number of people their second-order preferences independently of the judgment of the individuals being regulated.

Next, the objective-good justification for paternalism assumes the state is a reliable discoverer of the objective good. Whether the democratic state, with all the imperfections of the legislative process and the biases to which regulators may themselves be prone, is systematically a better judge of what's good for individuals than are the individ-

289. Zamir, 84 VA. L. REV. at 242.

290. Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1140-41 (1986).

291. DWORKIN, *supra* note 191, at 29.

292. Zamir, 84 VA. L. REV. at 243-44.

uals themselves is a contestable and controversial proposition. The probability of error by the state in assessing what's best for individuals may be so high that we should presume against paternalism.

Finally, the objective-good theory holds the state is an effective enforcer of the objective good. But this is surely questionable. First, the state will often take blunt instruments to precise problems, sweeping in behavior its paternalistic justifications do not cover. Second, not all people have the same ideal preferences or second-order preferences, although there will often be a strong consensus about certain ideal preferences and second-order preferences. In that case, the state is left to make a consequentialist argument that the overall social good will be served by paternalistically enforcing others' second-order or ideal preferences on dissenters.²⁹³

Whatever persuasive force the objective-good justification for paternalism may have in other areas of life, it seems foreign to the freedom of speech protected by the First Amendment. This conclusion holds both for autonomy-based and democracy-based accounts of the value of free speech. People generally place more importance on making their own decisions about what to say and what to read than they do on many other aspects of their lives, such as whether to wear a seatbelt or to save for retirement. Thus, more is lost, the cost is higher, when speech is regulated paternalistically than when most other aspects of life are regulated paternalistically. Even if some individuals do not place greater importance on producing their own speech or on consuming others' speech than on other matters, the need for democratic accountability necessitates that society do so.

One response to the concern that paternalistic regulation will frustrate individual preferences might be that legal norms themselves influence people's preferences.²⁹⁴ For example, a person who initially resists wearing a car seatbelt in compliance with a paternalistic seatbelt law may, over time, grow to prefer wearing a seatbelt while driving and would do so even if the law requiring it were repealed.²⁹⁵ This is an *adaptive preference* shaped by the law itself.

This preference-shaping effect of law may extend to speech regulation. Legal rules governing broadcast media that allow heavy doses of violence or sex or celebrity gossip to dominate the airwaves may themselves shape preferences to include a strong taste for such material over more educational or civic-minded programming. On this ac-

293. *Id.* at 243.

294. *Id.* at 244.

295. I own up to my own changed preference about car seatbelts. When seatbelt laws were first adopted, I found wearing a seatbelt confining and uncomfortable. Now, years after compliance with seatbelt laws, I feel naked and unsafe if I am *not* wearing a seatbelt.

count, paternalistic intervention to encourage or even to mandate more public-affairs programming may only “correct” the preference-shaping effects of earlier regulation.

This argument rests on the plausible idea that we are “regulating” speech even when we do so through the rules of property, tort, and contract than through direct speech regulation.²⁹⁶ So it is wrong to say speech regulation is entering some pre-political, unregulated realm. Speech regulation may serve the noble goal of enriching and improving public debate.

The problem with this justification for interventionist speech regulation is that, for purposes of the First Amendment, not all “regulation” is created equal. The First Amendment distrusts some types of regulation more than others. Speech regulation that takes a content-neutral form (like a restriction on the time, place or manner of speech) is less troubling than content-based regulation because the former is less likely to be suffused with ideological bias, favoritism, and government entrenchment. “Regulation” by the law of property, contract, and tort is more like content-neutral regulation than like content-based regulation. A direct speech regulation requiring, say, that public news outlets devote a portion of their coverage to what the state deems “public affairs” programming is a form of content-based regulation. Someone will have to decide what constitutes public affairs programming, whether the news outlet has satisfied the requirements, what must be done to meet the requirements, what punishment must be meted out to violators of the speech regulation, and so forth. That “someone” will be a functionary of the state, perhaps an administrative agency which, through institutional bias or through a desire to entrench incumbents or through ideological partisanship will be prone to exercising its power in ways inconsistent with the fundamental premise of the First Amendment that the state must not mandate “what shall be orthodox in politics, nationalism, religion or other matters of opinion”²⁹⁷ The attempt to improve the quality of the informational environment through paternalistic speech regulation will be prone to the usual problems of government incompetence, government entrenchment, and government intolerance that lead us to give speech special protection to begin with.

The problem, then, with the republican vision of speech is not that its description of the regulatory effect of background law is wrong, or that its vision of more informed public debate is repugnant. The problem is that it seeks its end by means deeply at odds with the skepti-

296. CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993).

297. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

cism of state power embodied in the antipaternalism principle at the core of the First Amendment.

CONCLUSION

In this Article, I have noted the anomaly that is free speech antipaternalism. Paternalism is widely derided in theory but embraced in fact. No responsible adult likes to believe he stands in relation to the state as a child to an adult. Every person likes to believe he knows what is best for himself and that it is not the state's business to overrule his choice of ends or means for his own good. Yet, paternalism pervades the law; it is evident in everything from anti-gambling laws to contract law. The Constitution is not understood to bar the paternalism in such laws.

However, in this Article I have argued the First Amendment is hostile to paternalistic justifications for speech regulation. This hostility can be seen across the Court's free-speech jurisprudence, especially its commercial-speech doctrine. It is also evident in free speech cases involving lawyer solicitation and advertising, political parties, sexual speech and related zoning laws, charitable fundraising, campaign finance, and corporate speech.

Based on my review of the Court's antipaternalist decisions, I have offered a working definition of paternalism: *a restriction on otherwise protected speech justified by the government's belief that speaking or receiving the information in the speech is not in citizens' own best interests.* When government offers a paternalistic justification for speech regulation, the *antipaternalism principle* strongly disfavors that justification. To sustain its speech regulation, the government must then come up with some non-paternalist rationale.

I have outlined six commitments of the antipaternalism principle. These are: it prevents the state from adopting an *information-denying* strategy to achieve what it thinks are citizens' best interests; it restrains the state's role as a central decisionmaker; it is non-consequentialist; it invalidates speech regulation no matter whether the regulation takes the form of a restraint on the speaker or the recipient; it disallows speech regulation based on the primary effect the speech will have on recipients; and it prevents the state from justifying speech regulation based on the presumed offense the speech will cause recipients. At the same time, I have noted limitations on the antipaternalism principle.

Further, in this Article I have examined the relationship of the antipaternalism principle to prominent negative and positive theories of the First Amendment, including the self-government, autonomy, and marketplace rationales for the protection of free speech. Finally, I

have anticipated, and attempted to rebut, criticisms of the anti-paternalism principle.

Although the antipaternalism principle is not an all-encompassing principle of free speech law, it does reflect a powerful intuition about the First Amendment. Though it may generally tell us what to do for our own good, government's power ebbs when it tells us what to say or hear for own good. The risk is too great that error in paternalistic speech regulation will arise from government incompetence, government entrenchment, and government intolerance. Paternalistic error in speech regulation risks deforming the entire democratic process. Determining our own informational environment based on our own judgment of what is best is the basis for good government over the rest of our lives.

