COMMERCIAL SPEECH AND FIRST AMENDMENT THEORY

Daniel A. Farber*

For the past forty years, commercial speech\(^1\) has occupied an awkward position in first amendment theory. Until recently, government was given a free hand in regulating advertising. Although this anomalous gap\(^2\) in first amendment theory was finally closed in 1976,\(^3\) commercial speech stubbornly declines to fit comfortably within our general rules for free speech. The Supreme Court still refuses to give commercial speech the full measure of protection enjoyed by other forms of speech,\(^4\) insisting instead that the "common sense distinction"\(^5\)

\(^*\) Assistant Professor of Law, University of Illinois, B.A. 1971, M.A. 1972, J.D. 1975, University of Illinois.

\(^1\) Although a variety of speech takes place in other commercial contexts such as labor disputes, the term is used here to refer to only "speech of any form that advertises a product or service for profit or for business purpose." See J. NOWAK, R. ROTUNDA, & N. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 767 (1978) [hereinafter cited as NOWAK, ROTUNDA, & YOUNG]. The NOWAK, ROTUNDA, & YOUNG text's discussion of commercial speech is drawn primarily from The Commercial Speech Doctrine in the Supreme Court, 1976 U. ILL. L.F. 1080.


\(^4\) The difference between the treatment given commercial speech and that given other forms of speech is illustrated by the contrasting results in In re Primus, 436 U.S. 412 (1978), and Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978). In Primus, the Court reversed disciplinary sanctions against an American Civil Liberties Union (ACLU) lawyer for soliciting a client, whereas in Ohralik a more severe sanction against a personal injury lawyer was upheld. The difference in results was said to be justified because, unlike Primus, Ohralik "was not engaged in associational activity for the advancement of beliefs and ideas; his purpose was the advancement of his own commercial interests." In re Primus, 436 U.S. at 438 n.32. The Court conceded that "[t]he line . . . will not always be easy to draw." Id. For further discussion of these cases, see text accompanying notes 156-64 infra.

\(^5\) Recognizing that distinction, the Court in Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) stated:

Expression concerning purely commercial transactions has come within the ambit of the Amendment's protection only recently. In rejecting the notion that such speech "is wholly
between commercial speech and other speech justifies a variety of differences in treatment. Nagging questions remain about this treatment of commercial speech. If a political candidate can lie without fear of legal intervention, why can't a used car dealer? Why should a cigarette manufacturer be required to publicize disagreeable facts about his product when a newspaper commentator cannot be penalized for incomplete disclosure?

Once confronted, these questions cannot be easily dismissed because they appeal to the basic first amendment principle of content outside the protection of the First Amendment," Virginia Pharmacy, ... we were careful not to hold "that it is wholly undifferentiable from other forms" of speech. ... We have not discarded the "commonsense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. ... To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with the latter kind of speech. For further discussion of the verifiability and durability of commercial speech, see text accompanying notes 54-64 infra.

The differences in treatment include denial of protection to misleading commercial speech and a refusal to apply the overbreadth doctrine in the commercial speech area. Bates v. State Bar Ass'n, 433 U.S. 350, 380-81 (1977). The overbreadth doctrine is an exception to the rule that constitutional rights are personal and may not be asserted vicariously. The theory is that a statute which is written too broadly and intrudes on first amendment rights will deter many people from attempting to exercise these rights. Since these people will be unable or unwilling to present their own claims, their rights may only be vindicated by allowing third parties to present them in court. See Note, The First Amendment Overbreadth Doctrine, 83 HARV. L. REV. 844, 852-54 (1970).


The way these questions are answered by current law certainly has common sense appeal. Most people would agree that the government ought to be able to prevent abusive practices by advertisers. Almost no one is in favor of deceptive advertising—the idea of consumer protection is now as American as apple pie. Yet, common sense is not always a reliable guide in the first amendment area. Too often, "common sense" is merely another name for ingrained prejudices. See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 403 (1973) (Stewart, J., concurring). Because one function of the first amendment is to protect against ingrained majority prejudices, the need for principled explanation is especially acute in the first amendment area.
neutrality. In its purest form, this principle is expressed in the statement that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Most regulation of advertising blatantly violates this principle. The content of the advertisement is generally the source of the government's objection, and the commercial subject matter of the advertisement forms the basis of the government's claim to regulatory power. Thus, an obvious tension exists between present commercial speech doctrine and the principle of content neutrality.

In part as a result of this doctrinal tension, the principle of content neutrality has itself come into question. In *FCC v. Pacifica Foundation*, the Supreme Court was sharply divided on the role of content neutrality in first amendment theory. In an earlier case the same term, the Court had attributed the lesser immunity of commercial speech from regulation, in part, to "its subordinate position in the scale of First Amendment values." Justice Stevens, the author of the plurality opinion in *Pacifca*, viewed this treatment of commercial speech as an example of the permissibility of content regulation in general, and

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8 Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1971). Mosley involved a city ordinance that prohibited all picketing in the vicinity of a school unless the school was involved in a labor dispute. The respondent had been convicted of violating the ordinance by engaging in peaceful picketing of a school which was not involved in a labor dispute. The conviction was overturned because the exemption for labor picketing invalidated the entire ordinance: Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone. *Id.* at 96 (citations omitted). Professor Karst sees Mosley as a landmark first amendment decision and views this statement of content neutrality as the "essence" of the first amendment. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 28 (1975).


11 The introductory portion of the opinion, concerning a statutory issue, and the concluding portion, discussing the constitutional implications of the particular facts in *Pacifca*, were joined by five members of the Court. Justice Stevens's discussion of overbreadth and content regulation was joined only by Justice Rehnquist and Chief Justice Burger. The other two members of the majority, although unwilling to join Justice Stevens's discussion of first amendment theory, did join the concluding portion of the opinion in which he applied that theory.

was willing to extend similar treatment to "indecent" speech. Justice Powell's concurrence and Justice Brennan's dissent both purported to reject emphatically content regulation but failed to explain how their views could be reconciled with the earlier commercial speech opinions they had joined. Although the plurality opinion is controversial in other respects, it is surely correct in its perception that the tension between the commercial speech cases and the principle of content neutrality simply cannot be ignored.

13 Justice Stevens was willing to allow such speech to be prohibited in at least some contexts on the basis of its content, and declined to allow use of the overbreadth doctrine to protect such speech. As to overbreadth, Justice Stevens concluded that the overbreadth doctrine is "strong medicine," and refused "to administer that medicine to preserve the vigor of patently offensive sexual and excretory speech." FCC v. Pacifica Foundation, 438 U.S. at 743 (citations omitted). Although assuming arguendo that "this monologue would be protected in other contexts," Justice Stevens concluded that it was subject to civil penalties in the context of a midafternoon radio broadcast. Id. at 746, 750. He summarized his rationale by making an analogy to Justice Sutherland's statement in a zoning case that a "nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard." Id. at 750 (quoting Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926)). A fuller discussion of Justice Stevens's views is found in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), which involved a zoning ordinance covering adult movie theatres. The discussion in Mini Theatres concludes:

Even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . . Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures.

14 Justice Powell merely cites commercial speech as a "limited exception." 438 U.S. at 761 n.3 (Powell, J., concurring). See also id. at 761 n.4. (Powell, J., concurring). Justice Brennan fails to refer to the commercial speech problem at all. Id. at 762-77 (Brennan, J., dissenting).

15 Somewhat as the famous Michelson-Morley experiment became a crucial test of classical physics, see generally The International Dictionary of Physics and Electronics 743, 769-70 (2d ed. 1961), commercial speech doctrine may become a test of the validity of the doctrine of content neutrality. Obviously, the analogy between scientific and legal reasoning is imperfect, but it is suggestive in this context. This type of situation is not an unfamiliar one for scientists. See generally T. Kuhn, The Structure of Scientific Revolutions (1962). We have a general theory (content neutrality) and a specific case (commercial speech) which appears not to fit. There are really only three possible solutions. First, more accurate observation may show that the special case does not exist at all and that the present data is inaccurate. Or, in legal terms, the exception for commercial speech may simply be unjustified. Second, the observation may actually be consistent with the general theory, but correct application of the theory may be more complicated than we supposed. A deviation in a planet's predicted orbit may be due to the attraction of
Can present commercial speech doctrine be justified on the basis of some unique characteristic of commercial speech without impairing the principle of content neutrality? In addition to its theoretical importance, this problem is not altogether lacking in practical significance. If special rules are to govern commercial speech, the immediate practical problems are to define commercial speech, thereby determining the applicability of these rules, and to establish just how these rules differ from the rules applicable to noncommercial speech. Determining what attributes of commercial speech justify special treatment is essential to answering both questions. This article will first review the creation and decline of the doctrine that commercial speech lacks any first amendment protection. The problem of government regulation of false speech will then be discussed along with a proposed analytic framework for reconciling such regulation with the principle of content neutrality. Finally, the more difficult problems posed by government regulation of truthful speech will be considered with reference to this proposed analytic framework.

THE APPLICABILITY OF THE FIRST AMENDMENT TO COMMERCIAL SPEECH

The Chrestensen Doctrine and its Demise

The Supreme Court first encountered the problem of determining the first amendment status of commercial speech in Valentine v. Chrestensen.16 The plaintiff had distributed a handbill advertising a submarine exhibit in violation of a New York City ordinance forbidding commercial leafletting in the streets.17 He brought suit to enjoin enforcement of the ordinance, but lost because the Court found that the first amendment allowed regulation of the commercial use of the

an undiscovered planet rather than a flaw in Newtonian mechanics. A more sophisticated application of the content neutrality theory to the special facts of commercial speech may demonstrate that different results obtain for commercial speech. Or third, and most exciting for the scientist, the theory may be wrong. Once the results of the Michelson-Morley experiment were confirmed and efforts to reconcile the results with classical physics proved unsuccessful, basic modifications of the theory were required which led to the replacement of the absolutes of Newtonian mechanics with the relativism of Einstein's theory. In the same spirit of inquiry, we may ask whether there is anything unique to commercial speech which justifies special treatment. If not, and if full protection for commercial speech remains unacceptable, consistency prohibits granting absolute protection to other types of speech, and requires us to adopt the Stevens theory of relativity.

16 316 U.S. 52 (1942).
17 After being informed of the ordinance, the defendant distributed a leaflet which on one side advertised the commercial submarine exhibition and on the other side protested the city's denial of his request for wharfage facilities for the exhibition. The Court rejected the contention that the "political" content of the leaflet exempted it from the prohibition because the primary purpose of the leaflet was commercial and the political content merely a means of attempting to evade the prohibition on commercial leafletting. 316 U.S. at 55. See Nowak, Rotunda, & Young, supra note 1, at 768-69.
streets.\(^\text{18}\) Relying on this case eight years later, the Court in \textit{Breard v. Alexandria}\(^\text{19}\) held that door-to-door salesmen—"solicitors for gadgets or brushes"—could not claim the protection of the first amendment.\(^\text{20}\) \textit{Chrestensen} and \textit{Breard} were subsequently interpreted to deny first amendment protection to all commercial speech.\(^\text{21}\) The \textit{Chrestensen} doctrine, however, was harshly criticized by commentators,\(^\text{22}\) and the Court never gave a reasoned justification for its denial of first amendment protection to commercial speech. Nor did it define "commercial speech," a term which turned out to be far from self-explanatory.\(^\text{23}\) Nevertheless, the Court virtually ignored the commercial speech problem for some twenty years.

The Court returned to the commercial speech area in \textit{Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations}\(^\text{24}\) in which a newspaper had been enjoined from placing job advertisements in gender-designated columns. The Court seemed unwilling to rely exclusively on the \textit{Chrestensen} doctrine to uphold the injunction. Instead, the Court reasoned that classifying want ads by gender was comparable to running "a want ad proposing a sale of narcotics or soliciting prostitutes."\(^\text{25}\) The Court's analogy is not especially helpful; the narcotics ad

\(^{18}\) The Court explained:

\begin{quote}
This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment. The question is not whether the legislative body may interfere with the harmless pursuit of a lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of, or interference with, the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated.
\end{quote}

\(^{19}\) 341 U.S. 622 (1951).

\(^{20}\) \textit{Id.} at 641 (1951). Although Justices Black and Douglas dissented from the application of the ordinance to magazine sellers, they agreed that "[o]f course [the ordinance] could constitutionally be applied to a 'merchant' who goes from door to door 'selling pots.'" 341 U.S. at 650.

\(^{21}\) See \textsc{Nowak, Rotunda, \\& Young, supra} note 1, at 767; \textsc{L. Tribe, American Constitutional Law} 653 n.16 (1978).

\(^{22}\) See note 2 supra.

\(^{23}\) \textit{Chrestensen} appeared to focus on commercial motivation as the critical factor in defining commercial speech, 316 U.S. at 55, but later cases made it clear that otherwise protected speech was not to be denied protection on the basis of the speaker's commercial motivation. Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943) (sale of literature by Jehovah's Witnesses); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952) (commercial movie exhibitions); New York Times Co. v. Sullivan, 376 U.S. 254, 265-66 (1964) (paid political advertisements). For a fuller discussion of the definitional problem, see text accompanying notes 75-77 infra.


\(^{25}\) 413 U.S. at 388. Because the validity of the advertising ban as applied to the employers
is prohibited as the prelude to illegal conduct by the advertiser, whereas the basis for prohibiting gender designation in want ads is that the ads themselves cause harm without any further action by the advertiser. Perhaps because the *Chrestensen* doctrine offered an alternative ground for its holding, the Court did not find it necessary to clarify its reliance on this analogy.26

The next case in the series further evidenced the Court's uneasiness with the *Chrestensen* doctrine. In *Bigelow v. Virginia*,27 the appellant was a Virginia newspaper that had been convicted of publishing an advertisement for a New York abortion referral service. The referral service was legal in New York but illegal in Virginia. The Court began with the premises that Virginia could not prevent its residents from traveling to New York to obtain the referral service, could not prosecute them for going there, and could not regulate the services provided in New York.28 Given these premises, which the Court apparently derived from the "right to travel,"29 *Bigelow* was easy to resolve. Virginia had no conceivable interest in preventing its residents from learning about an activity which they had a constitutional right to undertake: travel to New York for a lawful purpose. A state surely has no legitimate interest in keeping people ignorant of their constitutional rights or in preventing them from exercising those rights intelligently.30 Quite apart from the first amendment itself, the very existence of a constitutional right seems to imply the right to exercise that right knowledgeably.

Rather than rest its decision on this narrow ground, the *Bigelow* Court launched into a broad discussion of the first amendment values involved in commercial speech.31 The Court found that the rather themselves was unchallenged, *id.* at 378, the Court may have intended this analogy only to show that a newspaper which carries an advertisement is not immune from sanctions in cases where the advertiser itself can be properly sanctioned.

26 The dissenters in *Pittsburgh Press* were primarily concerned with the fact that the defendant was the newspaper rather than an employer and therefore did not offer the sort of criticism of this analogy that could have led to clarification of the Court's reasoning. *Id.* at 393-97 (Burger, C.J., dissenting); *id.* at 397-99 (Douglas, J., dissenting); *id.* at 400-04 (Stewart, J., dissenting); *id.* at 404 (Blackmun, J., dissenting).


28 421 U.S. at 822-24. Justice Rehnquist was sharply critical of this premise. 421 U.S. at 834-36 (Rehnquist, J., dissenting). For further discussion, see CHICAGO Comment, supra note 6, at 214 n.61.


30 Recognition of the existence of a right generally implies that the individual's interest in freely deciding whether to exercise that right outweighs any countervailing interests, otherwise the right would not be protected. Hence, the state cannot justify a regulation on the basis of the regulation's inhibition on the exercise of the right. See generally Schneckloth v. Bustamonte, 412 U.S. 218, 248 & n.37 (1973); *id.* at 277 (Marshall, J., dissenting); Shapiro v. Thompson, 394 U.S. 618, 631 (1969).

mundane advertisement involved in the case conveyed newsworthy information to a wide variety of readers with no personal involvement, including those interested in law reform.\textsuperscript{32} It did not take an acute observer to realize that the old commercial speech doctrine was in serious trouble.\textsuperscript{33}

\textit{The Birth of the New Doctrine: Virginia Board}

The end of the old doctrine was not long in coming. A year after \textit{Bigelow}, the Supreme Court decided \textit{Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.},\textsuperscript{34} in which it unequivocally held that the first amendment applies to purely commercial speech. The case arose from a suit by a consumer group challenging a ban on advertising of prescription drug prices by pharmacists. The primary issue before the Court in \textit{Virginia Board} was whether the content of commercial speech placed it outside the protection of the first amendment. The Court’s analysis of this issue is the foundation of current commercial speech doctrine.

After concluding that the advertiser’s economic motive did not disqualify it from first amendment coverage,\textsuperscript{35} the Court examined the interest of the individual consumer in receiving product information. The Court found this interest to be quite strong. While there is undoubtedly some truth to this assessment, the Court somewhat overstated its conclusion: “[a]s to the particular consumer’s interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.”\textsuperscript{36} At first sight, the Court’s remark is nothing more than common sense; many people are more concerned with their immediate economic interests than with the fate of the nation. But judicial acceptance of such a value choice is fundamentally inconsistent with the

\textsuperscript{32} The existence of the New York referral service was considered “not unnewsworthy” by the Court. \textit{Id.} at 822. Of course, the existence of employment discrimination in the \textit{Pittsburgh Press} case was also “not unnewsworthy”; indeed, the activity’s illegality in the forum state in both cases enhanced its newsworthiness.

\textsuperscript{33} The Court expressly rejected the view that the commercial aspect of the speech “negate[d] all First Amendment guarantees.” \textit{421 U.S.} at 818. Some hope for the old commercial speech doctrine was left by the Court’s express reservation of the question whether a state could ban advertising of an activity when the state had the power to ban the activity itself. \textit{Id.} at 825.

\textsuperscript{34} \textit{425 U.S.} 748 (1976).

\textsuperscript{35} \textit{Id.} at 762-63 (comparing advertising to the employer’s speech in a labor dispute).

\textsuperscript{36} \textit{425 U.S.} at 763 (emphasis added). This sentence echoes commentators who argue that commercial speech is as significant as political speech. R. Posner, \textit{Economic Analysis of Law} \S 28.4, at 548-50 (1973); Coase, \textit{supra} note 2, at 14-15 (arguing that preferred position of speech over economic activity is due to self-interest of intellectuals); Schiro, \textit{supra} note 6, at 98 (“central importance” of commercial speech “to the life of the democratic polity”); Boston Comment, \textit{supra} note 13, at 847. Accord, \textit{Dun & Bradstreet, Inc. v. Grove}, \textit{404 U.S.} 898, 905 (1971) (Douglas, \textit{J.}, dissenting from denial of certiorari) (speech on commercial topics “[c]ertainly . . . could not be regarded as less important than political expression”).
scheme of values inherent in modern first amendment doctrine. If the interest in political freedom were given parity with purely economic interests, no rationale could exist for requiring a compelling state interest in order to justify direct infringements on speech. Rather, given the interchangeability of economic and political interests embodied in this assumption of parity, infringements on the speech of a few individuals could be justified simply by showing a small increase in the economic welfare of the members of a larger group.\(^7\) Little would be left of the first amendment under such a scheme.\(^9\) Moreover, the Court's assessment of the parity of commercial and political speech does not appear to reflect the general consensus of opinion regarding the value of commercial speech. Most people do not regard the interest in receiving commercial speech as equal to the interest in receiving political speech. For example, unlike a country which jails dissidents, a country which suppresses commercial advertising is not generally regarded as guilty of a human rights violation.

After considering the interest of the individual consumer, the Court went on to consider the public interest in commercial speech. The State of Virginia apparently believed that the public interest favored restrictions on advertising, but the Supreme Court had a different view of the best means of attaining the public interest:

\(^7\) See L. Tribe, supra note 21, at 722-23.

\(^8\) Without such a choice of values, for instance, it is hard to understand why a single individual's interest in displaying the slogan "Fuck the Draft" should outweigh the combined interest of the rest of the population in avoiding involuntary confrontation with distasteful language. The requirement that such speech can only be suppressed if "substantial privacy interests are being invaded in an essentially intolerable manner," Cohen v. California, 403 U.S. 15, 21 (1971), is necessarily based on an assumption that the interest in free speech is entitled to greater weight than other, countervailing interests.

\(^9\) Indeed, under such a scheme it would not be meaningful to speak of a "right" to free speech:

I said that in the United States citizens are supposed to have certain fundamental rights against their Government, certain moral rights made into legal rights by the Constitution. If this idea is significant, and worth bragging about, then these rights must be rights in the strong sense I just described. The claim that citizens have a right to free speech must imply that it would be wrong for the Government to stop them from speaking, even when the Government believes that what they will say will cause more harm than good. The claim cannot mean, on the prisoner-of-war analogy, only that citizens do no wrong in speaking their minds, though the Government reserves the right to prevent them from doing so.

This is a crucial point, and I want to labour it. Of course a responsible government must be ready to justify anything it does, particularly when it limits the liberty of its citizens. But normally it is a sufficient justification, even for an act that limits liberty, that the act is calculated to increase what the philosophers call general utility—that it is calculated to produce more over-all benefit than harm. So, though the New York City government needs a justification for forbidding motorists to drive up Lexington Avenue, it is sufficient justification if the proper officials believe, on sound evidence, that the gain to the many will outweigh the inconvenience to the few. When individual citizens are said to have rights against the Government, however, like the right of free speech, that must mean that this sort of justification is not enough. Otherwise the claim would not argue that individuals have special protection against the law when their rights are in play, and that is just the point of the claim.

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public importance that those decisions, in the aggregate, be intelligent and well informed. To this end the free flow of commercial information is indispensable.\(^{(40)}\)

Countervailing interests suggested by the state were found to be implausible.\(^{(41)}\) There was little sign of the Court's traditional reluctance to assess the economic merits of legislation. Instead, it did not hesitate in giving constitutional status to its own view of economics. This willingness to pass economic judgment may conceivably presage an increased willingness on the part of the Court to reenter the area of economic legislation which it abandoned in the 1930s.\(^{(42)}\)

The problems raised by the language of the *Virginia Board* opinion inevitably cast some doubt on the validity of its conclusions. Consequently, it is worthwhile to consider whether the Court's ultimate conclusion, that speech should not be denied first amendment protection because of its commercial content, can be supported without reliance on these questionable arguments.

### A Reexamination of the First Amendment Status of Commercial Speech

The natural starting point for analyzing the constitutional status of commercial speech is to ask whether the subject matter of the speech places it outside the boundaries of the first amendment. The subject matter of commercial speech is invariably some commercial product or service about whose existence, price, or qualities the speaker wishes to communicate. If product information were outside the pale of the first amendment, the consumer advocate as well as the commercial speaker would be left unprotected. General Motors could constitutionally enjoin Ralph Nader from revealing unfavorable facts about its cars, and

\(^{(40)}\) 425 U.S. at 765. Justice Rehnquist, in dissent, responded:

> While there is again much to be said for the Court's observance as a matter of desirable public policy, there is certainly nothing in the United States Constitution which requires the Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession.

*Id.* at 784. See generally *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 198, 207 (1977); *The Supreme Court, 1975 Term*, 90 Harv. L. Rev. 142, 145 n.23 (1976); *Chicago Comment*, supra note 6, at 216 n.75.

\(^{(41)}\) 425 U.S. at 766-70.

magazines like *Consumer Reports* could be freely suppressed. These results are simply unacceptable. Millions of people may buy a single product, and the safety of that product is certainly a matter of public concern. Moreover, information about the quality and price of some products may relate to important political issues. For example, a belief that American cars are overpriced influences views on foreign car import restrictions, on inflationary price increases for domestic cars, and on the effects of oligopoly. Knowledge of product safety and reliability relates to consumer protection legislation. In short, product information is clearly entitled to constitutional protection in at least some contexts.

Suppose that a company publishes an exhaustive and entirely truthful survey of the products of its industry. To make the point clear, assume that the survey was taken by *Consumer Reports* and enjoyed constitutional protection when it was published in that magazine. Distribution by the company could strip the survey of its constitutional protection only if profit motivation were a disqualifying factor. The *Virginia Board* Court was clearly correct in rejecting this approach. Economic motivation could not be made a disqualifying factor without enormous damage to the first amendment. Little purpose would be

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43 For these reasons, it seems incorrect to assert that speech on commercial topics is “so far removed from the context of political debate that the public's keen interest in the messages is totally irrelevant to first amendment values.” BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance of and Limits of Principle*, 30 STAN. L. REV. 299, 353 (1978). With respect to the relevance of the speech to the political process, the only distinction between a consumer magazine and an advertisement is completeness of information. Only if we assume that voters base their decisions solely on campaign rhetoric could we conclude that commercial speech is necessarily irrelevant to the political decisionmaking process.

44 Allowing such use by the company would be contrary to the magazine's actual policy. “Reproduction in whole or in part is forbidden without prior written permission (and is *never* permitted for commercial purposes).” *33 CONSUMER REP. 62* (1978) (emphasis in original).

45 It can be assumed that the industry member is an entity which is capable of having first amendment rights, so that its political speech would be protected. See First Nat'l Bank v. Bellotti, 435 U.S. 765, 784 (1978). The reader who disagrees with the *Bellotti* holding that corporations have first amendment rights is free to assume that the industry member in the hypothetical discussed in the text is a small, unincorporated family business. The dissenters in *Bellotti* apparently would be willing to extend first amendment protection to a corporation's speech on subjects relating to its business, including commercial advertising. *Id.* at 807-08 (White, J., dissenting); *id.* at 828 (Rehnquist, J., dissenting).


47 Professor Baker argues that commercial speech is dictated by the external pressure to earn profits, rather than by internally generated drives toward self-fulfillment, and that commercial speech is therefore not deserving of first amendment protection. Baker, *supra* note 6, at 12-18. One problem with this argument is that the picture it presents of commercial speech applies only to some commercial speech, and consequently fails to justify a blanket rule excluding commercial speech from the protection of the first amendment. For example, an attorney advertising low prices for routine legal services may be motivated not only by a desire for profits, but also by a real belief in the need to extend the availability of legal services to additional segments of the public. Indeed, Baker concedes that in some areas, such as labor organizing, economic motivation
served by a first amendment which failed to protect newspapers,\textsuperscript{48} paid public speakers, political candidates with partially economic motives, and professional authors. Furthermore, the economically motivated speaker is often the most likely to raise important issues,\textsuperscript{49} since disinterestedness is less common than apathy.

Eliminating economic motive as a disqualifying factor seems to leave no basis for excluding commercial speech, as a class, from first amendment protection. There may, however, be an argument for denying first amendment protection to certain types of commercial speech. Advertisements frequently contain little information and instead are intended to create irrational product preferences.\textsuperscript{50} It might be tenable to treat commercial speech like pornography and require some minimal level of "redeeming social value" as a prerequisite for first amendment protection.\textsuperscript{51} Indeed, a social critic might suggest that the analogy is fairly close, that, in a sense, advertising is the pornography of capitalism, intended to arouse desire for objects rather than for does not prevent speech from being constitutionally protected. Application of this theory would therefore require a court to decide whether speech manifests "substantive, although often self-interested, values" of the speaker, in which case it is protected, or whether it is "rooted in the profit-oriented requirements of the enterprise," in which case it is not. \textit{Id.} at 40. Similarly, Baker is led to distinguish between publication of drug prices by pharmacists, which he would allow to be banned, and quotation of prices over the telephone by the same pharmacist, which he would find constitutionally protected (at least if the other party to the conversation may intend to publish the information). \textit{Id.} at 52-53. These distinctions are not entirely lacking in intuitive appeal—in some sense, preventing the pharmacist from even quoting drug prices seems somewhat more obnoxious than banning advertising—but the distinctions he proposes seem far too slippery to be acceptable in delimiting the boundaries of the first amendment.

\textsuperscript{48} Professor Baker's response to this argument is to invoke the press clause as providing special protection for newspapers beyond what they receive from the speech clause. Baker, \textit{supra} note 6, at 30-32. \textit{But see First Nat'l Bank v. Bellotti, 435 U.S. 765, 798-802 (1978) (Burger, C.J., concurring). In order to exclude advertisers from his definition of the press, he defines the press to include only those enterprises whose primary product is speech or print. Baker, \textit{supra} note 6, at 32. Under this definition, advertising agencies would appear to be part of the press; a newspaper owned by a conglomerate might not be. In addition, his definition has the anomalous result of giving greater protection to the professional writer or speaker than to the amateur who gives a single paid speech. Despite the professional's greater involvement with profit motivation, which should lessen his protection under Baker's general approach, he receives greater protection than the amateur, who unlike the professional fails to qualify as a member of the press.}


\textsuperscript{50} The extent to which advertising serves persuasive rather than informative purposes and the economic effect of persuasive advertising are matters still in dispute. \textit{See Coase, \textit{supra} note 2, at 8-10; Pitofsky, \textit{Beyond Nader: Consumer Protection and the Regulation of Advertising}, 90 Harv. L. Rev. 661, 663-69 (1977); The Supreme Court, 1976 Term, supra note 40, at 205-06 & n.53; Developments in the Law—Deceptive Advertising, 80 Harv. L. Rev. 1005, 1010-15 (1967) [hereinafter cited as \textit{Harvard Developments}. In a recent opinion, the Court has given some indication that it intends to protect only "informational advertising." \textit{See Friedman v. Rogers, 99 S. Ct. 887, 897 (1979).}}

\textsuperscript{51} \textit{See Miller v. California, 413 U.S. 15, 21-25 (1973).}
persons. Several problems would arise, however, from adopting a re-
requirement of redeeming social value for advertisements, the fore-
most being that such a scheme has not succeeded in the obscenity area. In
addition, advertising may have social value other than its informa-
tion content, such as its artistic significance. Moreover, pornography reg-
ulation derives from a unique historical tradition concerning sexual
conduct and expression. Doctrines based on these traditions are un-
likely to transplant well to unrelated areas. Finally, the practical effect
of a "redeeming value" requirement would simply be to encourage an
increase in the information content of advertising, which can be done
more directly through affirmative disclosure requirements. In short, ad-
vertising enjoys constitutional protection because of its capacity to con-
vey significant information, combined with the practical difficulty of
excluding less useful advertising from the protected class. This is the
basic significance of the holding in Virginia Board. The critical ques-
tion is how the protection given advertising differs or should differ from
that afforded noncommercial speech.

REGULATION OF FALSE AND DECEPTIVE SPEECH

Present Doctrine

Once commercial speech was brought within the first amendment,
the problem of regulating false speech immediately presented itself.
In the Virginia Board case, this problem was addressed by Justice Stewart,
who was troubled by the implications of the Court's holding for
established consumer protection legislation. In light of the "cardinal
principle" of content neutrality, Justice Stewart believed that the deci-
sion "call[ed] into immediate question the constitutional legitimacy of

52 There is, of course, voluminous literature on obscenity law. A cogent statement of the fail-
ure of the present approach can be found in Justice Stevens's dissent in Smith v. United States,
(Brennan, J., dissenting); Symposium—An Empirical Inquiry into the Effects of Miller v. California

53 Art nouveau posters are a good example. In his seminal article on commercial speech,
Professor Redish argued that although informational advertising could reasonably be distin-
guished from persuasive advertising, the presence of the artistic element in advertising made it
unfeasible to attempt to define a subclass of commercial speech consisting of advertising which
entirely lacks social value. Redish, supra note 2, at 446-47.

54 Some commentators have argued vigorously that false commercial speech should not be
subject to greater restrictions than would be allowed if the same statements were made by third
parties. For example, Professor Redish believes that it is indefensible to distinguish between false
claims concerning the health attributes of products made by the seller and similar claims made in
pamphlets by misguided, self-appointed "experts." Id. at 458-64. Similarly, Professor Coase finds
the existing difference in the treatment of the two situations "paradoxical in the extreme." Coase,
supra note 2, at 29. See also Meiklejohn, supra note 6, at 447-50.

55 Justice Stewart was not alone in this concern. See The Supreme Court, 1976 Term, supra
note 40, at 208 n.60 (perceiving "a danger that the first amendment protections accorded commer-
cial speech will swallow a large portion of advertising regulatory schemes").
every state and federal law regulating false or deceptive advertising." His concurring opinion attempted to explain how control of false advertising could survive *Virginia Board*.

Justice Stewart's argument in concurrence was based on the libel cases, particularly on *Gertz v. Robert Welch, Inc.* The Court in *Gertz* said that false statements of fact do not enjoy constitutional protection for their own sake. Nevertheless, libel is given a limited strategic protection because the existence of penalties for libel may deter truthful speech. Applying the same reasoning, but in reverse, Justice Stewart found little reason to grant false advertising any strategic protection. According to Justice Stewart, regulation of false advertising will not deter truthful advertising because advertisers can generally verify their statements, and will therefore know in advance whether their statements are likely to be found false or misleading. In a footnote, the Court itself appeared to accept much of Justice Stewart's argument and even added a supporting argument: that the financial incentive to advertise would overcome any deterrent effect. In short, the verifiability and durability of commercial speech were said to be its distinguishing features.

Unfortunately, these ingenious arguments do not survive close examination. First, most deceptive speech consists not of false statements but of half-truths and misleading, yet literally correct, assertions. Such speech may not fall within the class of "false statements of fact" which *Gertz* found entirely lacking in first amendment value. Second, commercial speech is not necessarily more verifiable than other speech. There may well be uncertainty about some quality of a product, such as the health effects of eggs. Moreover, although an advertisement may

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56 425 U.S. at 776 (Stewart, J., concurring).
58 "There is no constitutional value in false statements of fact." *Id.* at 340.
59 As Justice Powell explained:

> Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate... Our decisions recognize that a rule of strict liability... may lead to intolerable self-censorship... The First Amendment requires that we protect some falsehood in order to protect speech that matters.

*Id.* at 340-41.

60 *Virginia Board*, 425 U.S. at 775-81 (Stewart, J., concurring). Justice Stewart also suggested that disregard of truth may be a legitimate rhetorical device in political debate, *id.* at 780-81, a position somewhat at odds with his reliance on the libel cases.

61 *Id.* at 771-72 n.24.

62 This theory seems to have become the generally accepted explanation for the validity of bans on deceptive advertising. See, e.g., Nowak, Rotunda, & Young, *supra* note 1, at 777 & n.25; L. Tribe, *supra* note 21, at 655-56 (1978) (admitting, however, that "none of these generalizations is airtight"); Chicago Comment, *supra* note 6, at 238-40.

63 *See The Supreme Court, 1975 Term,* supra note 40, at 150-51.

64 *See* National Comm'n on Egg Nutrition v. FTC, 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978). Indeed, the Court itself noted that where services are involved, advertising is less subject to verification; hence, the possibility of "confusion and deception" is increased. *Vir-
actually be true, the risk of an incorrect governmental finding may deter the advertiser. On the other hand, political speech is often quite verifiable by the speaker. A political candidate knows the truth about his own past and his present intentions, yet misrepresentations on these subjects are immune from state regulation. Third, the greater durability of commercial speech is also questionable. The existence of a chilling effect depends as much on the potential penalty as on the motivation for the speech. A five dollar fine in a political speech case is probably less of a deterrent than a jail sentence—or disbarment—in a commercial speech case. Advertisers are not always large corporations which can view legal sanctions as a normal, almost insurable, risk of doing business. Furthermore, powerful incentives of self-interest in noncommercial speech are not uncommon. Salacious slander can sell newspapers; lies can lead to lucrative political office. Quite apart from these rather unpleasant examples, it is not at all clear that greed is more effective than idealism in motivating people to risk government sanctions. One would at least hope that the contrary would be true.

In short, despite its superficial plausibility, the currently accepted argument for allowing regulation of misleading commercial speech, as articulated by Justice Stewart in *Virginia Board*, must be rejected. It fails to identify any essential distinction between commercial speech and speech immune from such regulation.

*A Proposed Analytic Framework*

The problem is to determine whether some justification exists for treating commercial speech differently than other forms of speech. In other words, we are looking for some distinctive attribute of commercial speech which explains its special treatment. If such a distinction is found, we must then determine what differences in constitutional protection it justifies.

Economic motivation and subject matter have already been eliminated as distinguishing factors. How else does commercial speech differ from noncommercial speech? One obvious distinction is that the commercial speaker not only talks about a product, but also sells it. The sale itself is subject to broad state regulation. May such regulation include the attachment of liability to the use of language in connection with a sales transaction?

To ask this question is very nearly to answer it. Contract law consists almost entirely of rules attaching liability to various uses of language. For example, the constitutional status of an advertisement describing a product may be unclear, but a seller is obviously liable for

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65 See text and accompanying notes 43-53 supra.
Commercial Speech

damages for failure to deliver a product corresponding to the contract description. No first amendment problem exists. Yet contract liability is imposed under rules which would not be tolerated even in areas which traditionally have been subject to state regulation, such as libel. For instance, statements in the contract are frequently construed against the draftsman. In addition, liability may be imposed even though experts disagree about whether the product fits the description. The seller is usually held strictly liable, without any showing of malice, scienter, or even negligence. Despite all this, the state's power to impose liability is beyond any dispute. Not even the strongest partisans of content neutrality would argue that contractual liability cannot be validly imposed on the basis of the content of the language used in the contract. The reason appears to be that the use of language to form contracts is not the sort of "speech" to which the first amendment applies. Regulation aimed at this use of language does not demand the sort of justification which is required when the state regulates first amendment "speech."

Similar to the language of a written contract, the language in advertising can be seen as constituting part of the seller's commitment to the buyer. Thus, advertising can function as part of the contractual arrangement between the buyer and seller. Of course, in addition to serving this contractual function, advertisements also serve an informative function to which the first amendment applies. The critical factor seems to be whether a state rule is based on the informative function or the contractual function of the language. So long as a regulation relates to the contractual function of the utterance, the regulation should not be subjected to the intensive scrutiny required when a regulation directly implicates the first amendment function of language. Thus, the problem is to devise a test which will distinguish between regulations involving the first amendment, informative aspect of advertising and those involving its non-first amendment, contractual aspect. The appropriate test would appear to be that articulated by the Supreme

68 Commentators have noted that a substantially lower level of proof of falsity is required in commercial speech cases. See Schauer, Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter, 64 Va. L. Rev. 263, 294-300 (1978). This difference in treatment becomes understandable once the link to contractual liability is established.
70 Actually, the same point could have been made about the use of language in a written contract. Contract language serves an informative function for the consumer who reads it before deciding to buy. A statute which prohibited showing the contract to consumers in advance might raise first amendment problems not unlike those raised by a ban on advertising.
Court in *United States v. O'Brien*\textsuperscript{71} for cases in which "'speech' and 'nonspeech' elements are combined in the same course of conduct:"

[a] government regulation is sufficiently justified if it . . . furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.\textsuperscript{72}

This line of analysis leads to a bifurcated approach to commercial speech cases, corresponding to the dual nature of the speech itself. If the interests asserted to justify a restriction relate to the contractual aspect of the speech, the validity of the restriction should be judged under the *O'Brien* test.\textsuperscript{73} On the other hand, if the asserted justifications do not relate to the distinctively contractual nature of commercial speech, there is no reason to deviate from the tests used for other kinds of speech, presumably including the principle of content neutrality. In practice, distinguishing between these two kinds of state interests is not difficult. A justification for regulating the seller's speech relates to the contractual function of the speech if, and only if, the state interest disappears when the same statements are made by a third person with no

\textsuperscript{71} 391 U.S. 367 (1968). The suggestion that commercial speech might be treated as "speech mixed with conduct" is made in passing in *N. DORSEN, P. BENDER & B. NEUBORNE, EMERSON, HABER & DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 564 (4th ed. 1976). In a recent decision, the United States Court of Appeals for the First Circuit distinguished between regulations aimed at commercial conduct and those aimed at expressive conduct, and applied the *O'Brien* test to the first category of regulations. *Olitsky v. O'Malley*, 597 F.2d 295, 301-03 (1st Cir. 1979).

\textsuperscript{72} 391 U.S. at 377.

\textsuperscript{73} Professor Ely has elaborated the *O'Brien* test into a general theory of the first amendment. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975). He argues for a two-track system of review for regulations impinging on speech. The first track is applied to cases in which the purpose of the regulation is unrelated to the content of the messages which it affects. In these cases a balancing approach is to be used. The second track applies to cases in which the state interest is related to the content of the message. Here, a categorizing approach is used, under which the speech is protected unless it falls into some narrow category of unprotected speech. *Id.* at 1484, 1491-92. The test for distinguishing the two tracks is a simple one: whether the values the state seeks to promote by the regulation would be equally threatened by similar conduct with absolutely no communicative component. *Id.* at 1499. Under this test, regulation of deceptive advertising would be judged under the more demanding of the two tracks, since the state's interest would not be implicated apart from the meaning of the language used in the advertising; or, as Ely puts it, "had his audience been unable to read English, there would have been no occasion for the regulation." *Id.* at 1498. In the context of commercial speech, however, Ely's test seems unduly restrictive. Because the first amendment value of commercial speech is based primarily on its informative function (and perhaps secondarily on artistic value), a state regulation which relates solely to its contractual function does not implicate Ely's concern that "where messages are proscribed because they are dangerous, balancing tests inevitably become intertwined with the ideological predispositions of those doing the balancing . . . ." *Id.* at 1501. It is difficult to see how a state's interest in enforcing an express warranty made in an advertisement is "related to the suppression of free expression," in the words of the *O'Brien* Court. See note 79 infra.
relation to the transaction. If the same interest is implicated by the third party's speech, the interest obviously cannot relate to any contractual aspect of the speech, since the third party is not involved in the contract.

Before considering how this approach can be applied to various situations, its general merits should be considered. First, it explains the intuitive belief that commercial speech is somehow more akin to conduct than are other forms of speech. The unique aspect of commercial speech is that it is a prelude to, and therefore becomes integrated into, a contract, the essence of which is the presence of a promise. Because a promise is an undertaking to ensure that a certain state of affairs takes place, promises obviously have a closer connection with conduct than with self-expression. Second, this approach focuses on the distinctive and powerful state interests implicated by the process of contract formation. In a fundamentally market economy, the government understandably is given particular deference in its enforcement of contractual expectations. Indeed, the Constitution itself gives special protection to contractual expectations in the contract clause. Finally, this approach connects a rather nebulous area of first amendment law with the commonplaces of contract law of which every lawyer has knowledge. Obviously, the technicalities of contract law, with its doctrines of privity, consideration, and the like, should not be blindly translated into first amendment jurisprudence. The basic doctrines of contract law, however, provide a helpful guide in considering commercial speech problems.

One byproduct of this approach is a solution to the vexing problem of defining commercial speech. In addition to being a means of conveying information, commercial speech is also a means of forming commitments which are potentially part of the contract of sale. This trait serves to identify commercial speech.

A recent case concerning misrepresentations of the effect of egg

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74 Of course, promises can also be made in the political sphere, yet such promises are not customarily thought to be subject to government regulation. The analysis presented in the text indicates that these promises are more akin to conduct than to speech. Classifying something as "economic conduct" leaves it subject to a great deal of regulation, but classifying it as "political conduct" does not have the same effect. Even if a politician signed a contract undertaking to perform certain actions in office, the contract obviously could not be enforced. Determining whether a breach has occurred could be said to be a "political question" in both the technical and common meanings of the phrase. See notes 123 & 164 infra.

75 A good discussion of this problem is found in CHICAGO Comment, supra note 6, at 222-34 (1976). The student author considers three possible definitions: (1) speech that does no more than propose a commercial transaction, (2) speech of interest to a nondiverse consumer audience, and (3) speech about a brand name product or service. The author concludes, however, that each approach is inadequate. Under the approach advocated in this article, these three factors would not be part of the definition, but might be useful as factual indicia of the applicability of the definition.
consumption on health\textsuperscript{76} illustrates the application of this definition. The case involved advertisements by an association of egg producers falsely stating that no scientific evidence existed that the cholesterol in eggs was harmful to health. The advertisement did not contain any direct offer of sale. Moreover, it related to an important public health issue. Nevertheless, the advertisement can properly be subjected to regulation as commercial speech. The misrepresentation can reasonably be seen as affecting the contract of sale, giving consumers a possible cause of action for breach of express warranty. Because of this nexus between the advertisement and the later commercial transaction, the advertisement must be considered commercial speech. On the other hand, if the egg producers had made the same statement in a Federal Drug Administration proceeding, a consumer could not plausibly claim that the statement was a warranty to him of the qualities of the eggs. Thus, such a statement would not be considered commercial speech, even though its content was identical to the advertisement.\textsuperscript{77}

\textit{Application of the Contractual Analysis to False Advertising.}—The analytic framework just proposed can readily be applied to false advertising. In this respect, false advertisements are indistinguishable from unfulfilled contractual promises. An advertisement and a contract term can both be viewed as undertakings to deliver goods meeting the description given by the seller. Surely the absence of express words of promise or warranty from the advertisement cannot be of any constitutional significance. The first amendment cannot very well turn on the archaic formalities of ancient common law. Nor can it be plausibly argued that the Constitution embodies a kind of parol evidence rule requiring that the misrepresentation appear in the written contract itself.

For example, a regulation which prohibits sellers from misrepresenting the qualities of their products in advertising clearly satisfies the first prong of the \textit{O'Brien} test. It furthers the government interest in enforcing the seller's contractual undertaking to deliver products corresponding to the advertisement. In a market economy, this government interest is inevitably "substantial," and in many cases, such as those involving unsafe products, it is reinforced by other state interests. Turning to the second prong of the \textit{O'Brien} test, the state interest in upholding contractual expectations is unrelated to the suppression of free expression because the contractual function of language is not an

\textsuperscript{76} National Comm'n on Egg Nutrition v. FTC, 570 F.2d 157, 163 (7th Cir. 1977), \textit{cert. denied}, 439 U.S. 821 (1978) (concluding that the advertisements were commercial speech because they had "the purpose of persuading members of the reading public to buy the product").

aspect of communication that the first amendment was designed to protect. Regarding the third prong of the O'Brien test, experience has shown that the simple remedy of allowing suits for breach of warranty is insufficient. That remedy comes too late, after the damage is already done, and may never come at all for those consumers who need it most: the poor, the gullible, and the unintelligent. Some form of active state regulation is necessary for the protection of these consumers, a legitimate state interest unrelated to speech.

This analysis is consistent with the Supreme Court's treatment of false advertising. In Bates v. State Bar of Arizona, which involved a ban on advertising by lawyers, one of the primary justifications for the ban was that legal advertising is inherently deceptive because the quality of service varies greatly. Under the preceding analysis, this is a substantial interest unrelated to the suppression of free expression, since it is directed at the contractual nature of the advertisements. The Court found, however, that advertisements of routine legal services were not inherently deceptive. Thus, in suppressing deceptive advertising the state was in fact impinging on the right to communicate truthful information. The advertising ban therefore violated the third prong of the O'Brien test, since it was broader than necessary to further the state interest in suppressing false advertising.

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79 In a discussion of this problem, which unfortunately seems to have been overlooked by later writers, Professor DuVal argued that the first amendment allows suppression of false advertising because such regulation does not conflict with the "obligation not to suppress the free communication of any idea," since "the regulation is designed not to limit the modification of beliefs but to curtail the taking of money under false pretenses." DuVal, Free Communication of Ideas and the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication, 41 Geo. Wash. L. Rev. 161, 235-36 (1972). Although it contains many useful suggestions, DuVal's formulation is obviously incomplete. He does not explain why "taking money under false pretenses" can be freely regulated in the economic sphere, but not when political candidates engage in similar conduct. Moreover, as O'Brien demonstrates, first amendment analysis does not terminate with a finding that a statute serves some objective which is not in itself impermissible under the first amendment.


81 Id. at 372-75. The Court also rejected the argument that problems of enforcement justified a prophylactic rule. Id. at 379.

82 As Professor Ely points out, the term "essential" in the O'Brien test actually calls for a balancing test. It is generally true that the existing regulation will be somewhat more effective in reaching the state's goals than would some less restrictive alternative. The issue is whether the incremental increase in effectiveness attained by the existing regulation is outweighed by the increased impact on speech. See Ely, supra note 73, at 1484-87. A balancing test of some kind seems inevitable. Id. at 1500-01. There is simply no substitute when a regulation which has a valid purpose incidentally affects speech. Short of making any incidental impact on speech fatal to the regulation, on the one hand, or allowing any regulation that is not purposefully directed at suppressing expression, on the other, there is no choice but to balance.
The Mechanics of Regulation

Knowing that false and deceptive speech can be regulated solves only part of the problem. The remaining questions concern the form of the regulatory scheme. Three issues are particularly important: whether the statute must focus on deceptive speech, whether it may require affirmative disclosures, and whether it may involve prior restraints.

Focus on Deceptive Speech.—The first of these questions, whether the regulation must focus on deceptive speech, involves the overbreadth doctrine, under which a statute invading protected speech may be held facially invalid. Based on this doctrine, a purveyor of false advertisements may claim that a statute is invalid on its face if the statute also prohibits truthful advertising. In Bates, the Court squarely rejected this argument and refused to invalidate the advertising ban on its face, even though the ban covered nondeceptive protected advertising.83 Instead, the Court required the appellants to show that their own speech was protected.84 The Court reasoned that overbreadth analysis is justified only because an overbroad statute deters protected speech. Truthful commercial speech, as a result of its supposedly greater durability and verifiability, was held not to require protection from this form of chill.85 This theory suffers from the same problems as Justice Stewart's explanation, in his Virginia Board concurrence, for the validity of restrictions on deceptive advertising. Both are based on questionable generalizations about commercial speech.86 Thus, the Bates theory is unsatisfactory as the sole basis for a rejection of the overbreadth doctrine in the area of commercial speech.

The Bates theory can, however, be bolstered by additional arguments. First, the Court has been reluctant to apply overbreadth analysis when the defendant's conduct, even though expressive, also implicates legitimate state interests unrelated to its expressive content.87 This rationale has some application to deceptive commercial speech, which implicates the state interest in enforcing contractual obligations.88 Second, in a sense, the existence of a deterrent effect is not necessarily undesirable in the commercial area. The speech most likely

83 433 U.S. at 379-81. Oddly enough, the Court had taken just the opposite approach in Virginia Board by affirming an injunction barring any enforcement of the state advertising ban, even against individuals whose speech was deceptive or otherwise subject to legitimate state regulation. 425 U.S. at 750, 773. Apparently, the Virginia Board Court did not consider the possibility of narrowing the injunction.
84 The term "protected" is an ambiguous one. The Bates Court seemingly meant that the speaker must show that no state regulation, however drawn, could validly penalize his conduct. 85 433 U.S. at 379-81. See also Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 462 n.20 (1978).
86 See text accompanying notes 54-64 supra.
88 See text accompanying notes 66-74 supra.
to be deterred is that verging on the prohibited category of deceptiveness. The primary first amendment interest which the Court has sought to protect is that of the consumer in receiving truthful information. That interest is served by channeling speech away from the borderline of deception. Third, if the statute does deter truthful advertising, the economic benefits of advertising may well be sufficient to induce the filing of a suit for injunctive relief either by a seller, as in Linmark Associates, Inc. v. Township of Willingboro, or by a group of consumers, as in Virginia Board. The court can then stake out and insulate a clearly protected area of speech from the statute's application. Even combined with the argument made in Bates, however, these arguments fall short of demonstrating that the overbreadth doctrine should be totally inapplicable to commercial speech. They do, however, strongly support the conclusion that overbreadth is likely to be applicable, if at all, only in extremely rare cases.

Affirmative Disclosure Requirements.—The second major issue concerning the form of regulation is the validity of affirmative disclosure requirements, such as those found in the securities laws. These requirements do not seem to raise fundamental problems in the commercial speech context. Disclosure requirements are clearly focused on the contractual aspect of the seller's conduct. Generally, affirmative disclosure is a means of combating those forms of deception that arise from concealment or incomplete disclosure. In function, disclosure requirements are analogous to the implied warranty of merchantability in the sale of goods. Absent any disclaimer, the implied warranty entity

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89 See Virginia Board, 425 U.S. at 761-65. Only passing mention is given to the seller's interest in self-expression in Virginia Board, and then only in the context of asserting that the speaker's economic motive is not a disqualifying factor. Id. at 761-62. Vigorous regulation of misleading advertising may also decrease consumer's information costs, see Pitošky, supra note 50, at 670-73, thereby furthering the societal interest in the functioning of the market which the Court identified in Virginia Board.

90 As Justice Stewart noted in his Virginia Board concurrence: "Indeed, the elimination of false and deceptive claims serves to promote the one facet of commercial price and product advertising that warrants First Amendment protection—its contribution to the flow of accurate and reliable information relevant to public and private decisionmaking." 425 U.S. at 781. The same goal is served by discouraging advertising that verges on the false or deceptive, and instead encouraging frank and complete disclosure.

Arguably, as a "hard core" violator of the rule, the deceptive advertiser may lack standing to assert overbreadth. Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 908 (1970).

91 431 U.S. 85, 86-87 n.1 (1977) (suit brought by landowner and real estate agency to challenge ban on "for sale" signs).

92 See Virginia Board, 425 U.S. at 753-56 (noting that a previous suit, Patterson Drug Co. v. Kingery, 305 F. Supp. 821 (W.D. Va. 1969), had been brought by pharmacists).

93 The Court has intimated that these requirements are valid. Virginia Board, 425 U.S. at 771 n.24.
tles the buyer to assume that no hidden defects exist. The seller who wishes to avoid the warranty is, in a sense, compelled to engage in speech by making an affirmative statement of disclaimer, just as a seller who wishes to avoid the Uniform Commercial Code's implied delivery term is "compelled" to include a delivery term of his own. In effect, disclosure requirements like those in the securities acts create a warranty that the seller knows of no hidden defects. Although useful, private damage actions cannot be the sole means of enforcement, just as breach of contract actions do not suffice to control consumer fraud.

Disclosure requirements also arise in the context of corrective advertising orders. The Federal Trade Commission (FTC) has recently ordered corrective advertising in which the advertiser reveals its deception as a remedy for misleading advertising. The argument for this remedy is that consumers may continue to rely on the misinformation contained in the past advertising even if the actual deception is discontinued. In a sense, a deceptive advertisement, like an offer, remains effective until it is revoked, either voluntarily or by government order.

The counterarguments are unpersuasive. First, it might be argued that a corrective advertising order violates a first amendment right to silence. Although such a right exists with respect to forced recital of ideological slogans, this right clearly does not extend to disclosures of factual matters. Otherwise, the government could hardly force anyone to fill out a form, answer a census questionnaire, or testify in a civil proceeding. Second, any such right to silence would be forfeited by the seller's past unlawful conduct, for the rights of lawbreakers are sub-

94 See U.C.C. § 2-314. Official comment 3 is also instructive. See also U.C.C. § 2-316(3)(a).
95 See U.C.C. § 2-308 (defining delivery terms "unless otherwise agreed").
96 Since any statement made by the seller can be said to carry an implied representation that the seller has a reasonable basis for making the statement, the FTC's ad substantiation program can be upheld on grounds similar to those supporting disclosure requirements. See Pitofsky, supra note 50, at 681-83.
100 The disclosures in these examples conceivably could give rise to objections based on the right to privacy, see Whalen v. Roe, 429 U.S. 589 (1977), but disclosures about commercial matters presumably do not implicate the interest in avoiding disclosure of "personal matters." Id. at 598-600.
ject to whatever restrictions are necessary to restore the status quo.\textsuperscript{101} Third, the possibility of a corrective advertising order, with its attendant bad publicity, might arguably have a chilling effect on advertising.\textsuperscript{102} Essentially, this argument is a plea for the suppression of information about the seller because of a fear that the public will react unfavorably to the truth. In addition to being highly speculative, such a plea does not sit well when made by one whose own claim to first amendment protection rests largely on the right of consumers to be fully informed.

**Prior Restraints.—**The third major problem concerning the form of regulation of false and deceptive speech is the availability of prior restraints, such as an FTC cease and desist order.\textsuperscript{103} As a general rule, prior restraints on speech are highly disfavored, but the Supreme Court has indicated that commercial speech may be an exception.\textsuperscript{104} Obviously, these orders raise problems not entirely distinct from those raised by corrective advertising orders. Again, one powerful rationale is the theory that, like convicted criminals, those guilty of unlawful practices must expect some diminution of their future rights.\textsuperscript{105} Also, prior restraints on commercial speech are subject to a unique inherent limitation on their effect. When a seller is enjoined from misrepresenting the qualities of its goods, it can either remain silent, withdraw from the market, or conform the goods to the representations.\textsuperscript{106} Thus, a cease and desist order falls short of being simply a gag order. In contrast, if a newspaper is enjoined from publishing a libel, its only choice is silence, for it obviously cannot rearrange the victim's past to correspond to the misrepresentations. The existence of alternatives to si-

\textsuperscript{101} National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 698 (1978). The standard adopted by the Court is "whether the relief represents a reasonable method of eliminating the consequences of the illegal conduct." Id.

In Beneficial Corp. v. FTC, 542 F.2d 611, 619-20 (3d Cir. 1976), cert. denied, 430 U.S. 983 (1977), the court appears to have required a much closer tailoring of the remedy than the Supreme Court found appropriate in *Professional Engineers*. The Third Circuit's view that fuller disclosure must be preferred as a remedy over excision is also doubtful after Friedman v. Rogers, 99 S. Ct. 887, 895 n.11 (1979). See text accompanying notes 107-22 infra. Thus, the present viability of *Beneficial Corp.* is dubious.

\textsuperscript{102} This argument was considered and rejected in Warner-Lambert Co. v. FTC, 562 F.2d 749, 769-71 (D.C. Cir. 1977), noted in NORTHWESTERN Note, supra note 97.

\textsuperscript{103} The Commission's practice is discussed in HARVARD Developments, supra note 50, at 1079-82.

\textsuperscript{104} *Virginia Board*, 425 U.S. at 772 n.24.

\textsuperscript{105} National Soc'y of Professional Eng'rs v. United States, 435 U.S. at 698 (upholding an anti-trust injunction prohibiting a professional group from adopting any official opinion, policy statement, or guideline stating or implying that competitive bidding is unethical). See also Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 390 (1973).

\textsuperscript{106} A somewhat similar argument, though without reference to the prior restraint doctrine, is found in DuVal, supra note 79, at 236.
lence marks a fundamental distinction between the impact of prior restraints in the commercial context and their impact elsewhere.

**Recent Expansion of the Deception Rationale to Limit Commercial Speech**

Advertising often attempts to create a favorable image of the product rather than to convey specific information. The Supreme Court’s most recent decision on commercial speech, *Friedman v. Rogers*, suggests a willingness to allow expansive use of the deception rationale to limit this kind of advertising. *Friedman* involved a ban on the use of trade names by optometrists. The Court began by stressing that this form of speech is significantly different from “the type of informational advertising held to be protected in *Virginia Pharmacy* and *Bates.*” Unlike the price information involved in those cases, a trade name merely forms the basis for “ill-defined associations” in the mind of the public. The Court found that trade names offer significant possibilities for deception because they do not reveal the optometrist’s identity. This part of the Court’s analysis is consistent with the approach suggested in this article. Deception about the identity of a party to the transaction relates directly to the contractual nature of the transaction and is a classical ground for avoiding a contract. The obvious solution to the problem, forcefully presented in Justice Blackmun’s dissent, is to require full disclosure of ownership when a trade name is used. The Court rejected this approach on the theory that the state need not tolerate misleading speech simply because additional information could remove its deceptive implications.

The Court’s theory is clearly valid in some circumstances. Affirmative disclosures may fail to remove a misleading impression. Cigarette advertisers, for instance, have become expert in deactivating health warnings. Furthermore, when the only apparent purpose of part of an advertisement is to create a misleading impression, the advertiser should not be heard to say that its effort to mislead was futile. In *Friedman*, however, the use of trade names was not inherently misleading, and the Court offered no reason to doubt that further disclosure would cure any misleading effect.

Consequently, the Court’s conclusion seems justifiable only on the

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109 Id. at 897.
110 Id. at 895.
112 99 S. Ct. at 902 (Blackmun, J., dissenting).
113 Id. at 895 n.11. Cf. Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations, 413 U.S. 376, 381 n.7 (1973) (disclaimer does not cure discriminatory format).
assumption that use of trade names has relatively little first amendment value. Given this premise, there is no reason to grant a first amendment preference to the alternative of allowing use of the trademark combined with affirmative disclosures. This reading of the opinion is supported by the Court's characterization of the ban on trademarks as having "only the most incidental effect" on content\(^{114}\) and as merely preventing a deceptive manner of presentation.\(^{115}\)

_Friedman_ seems to indicate that the Court may draw a sharp distinction between informational content and the manner of presentation, with much closer judicial scrutiny being given to direct restrictions on informational content. Such an approach is consistent with the Court's rationale for extending constitutional protection to commercial speech. The consumer interest stressed in _Virginia Board_\(^{116}\) is obviously tied to the receipt of information rather than the persuasive manner of presentation. A consumer might pay for product information, but no one would willingly pay in advance for the "service" of being persuaded to buy a product not previously desired. Similarly, although the _Virginia Board_ Court identified a societal interest in the free flow of commercial information, this interest may not extend to the noninformational content of advertising, which is less closely linked with economic efficiency.\(^{117}\)

If _Friedman_ does herald a more lenient approach to regulations which do not directly affect informational content, it will have a broad impact on control of advertising. For instance, commentators have argued that the statutory ban on broadcast advertising of cigarettes is invalid.\(^{118}\) After _Friedman_, however, advertisers can arguably be restricted to reciting tar and nicotine content and price, with no attempt to create a desirable image for cigarettes. A health warning might still be required to eliminate any implication of product safety. Advertising on these restrictive terms is not likely to prove highly attractive to the industry, with the exception of a few producers of low tar and nicotine

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\(^{114}\) 99 S. Ct. at 897.

\(^{115}\) The Court attempted to portray the state regulation as merely a restriction on the manner of presenting information:

Rather than stifling commercial speech, § 5.13(d) ensures that information regarding optometrical services will be communicated more fully and accurately to consumers than it had been in the past when optometrists were allowed to convey the information through unstated and ambiguous associations with a trade name. In sum, Texas has done no more than require that commercial information about optometrical services "appear in such a form . . . as [is] necessary to prevent its being deceptive."

_\textit{Id.}_ (citations and footnotes omitted).

\(^{116}\) See text accompanying notes 35-39 _supra_.

\(^{117}\) See note 50 _supra_.

\(^{118}\) NOWAK, ROTUNDA, & YOUNG, _supra_ note 1, at 774, 778; HARVARD Developments, _supra_ note 50, at 1146-51. Since the overbreadth doctrine does not apply to commercial speech, the ban could not be held unconstitutional on its face.
cigarettes. Thus, as a practical matter, cigarette advertising may be subject to almost complete suppression as a result of Friedman.

As noted earlier in this article, there are substantial problems with attempts, like that in Friedman, to use the absence of informational content as the dividing line between advertisements covered by the first amendment and those subject to plenary state regulation. Even apart from informational content, advertising may not be utterly lacking in first amendment value, since it may have minimal artistic value or may reflect attitudes on important issues. A test based on information content may also be difficult to apply with any degree of consistency and objectivity. Some of these problems are lessened if information content is used to determine only the degree of first amendment protection rather than whether speech receives any protection at all. On the other hand, establishing degrees of protected speech raises problems of its own. Presumably, a court examining an advertisement would weigh the amount, specificity, significance, and perhaps also aesthetic qualities of the information provided. Principled valuation of speech will not be an easy undertaking. Finally, if courts are to embark on a program of giving varying degrees of protection to speech based on the degree of first amendment value, it is hard to see

119 See text accompanying notes 50-53 supra.

It would be difficult to argue that there are many who mourn for the Marlboro Man or miss the ungrammatical Winston jingles. Most television viewers no doubt agree that cigarette advertising represents the carping hucksterism of Madison Avenue at its very worst. Moreover, overwhelming scientific evidence makes plain that the Salem girl was in fact a seductive merchant of death—that the real "Marlboro Country" is the graveyard. But the First Amendment does not protect only speech that is healthy or harmless. The Court of Appeals in this circuit has approved the view that "cigarette advertising implicitly states a position on a matter of public controversy." Banzhaf v. F.C.C., 132 U.S. App. D.C. 14, 34, 405 F.2d 1082, 1102 (1968), cert. denied, 396 U.S. 842, 90 S. Ct. 50, 24 L.Ed.2d 93 (1969). For me, that finding is enough to place such advertising within the core protection of the First Amendment.

Id. at 587 (Wright, J., dissenting) (footnotes omitted).
121 See generally Smith v. United States, 431 U.S. 291, 317-21 (1977) (Stevens, J., dissenting). There are some indications that the Court is moving toward the creation of a hierarchy of different forms of commercial speech. In Friedman, besides distinguishing the use of a trademark from price advertising, the Court also distinguished Bigelow as involving more than a simple proposal of a commercial transaction. 99 S. Ct. at 895 n.10, citing Bigelow v. Virginia, 421 U.S. at 822. The cited portion of Bigelow states that the abortion advertisement in that case "did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.'" Perhaps the Court is indicating a hierarchy in which trademarks are at the bottom, followed by in-person solicitation, Ohrailik v. Ohio State Bar Ass'n, 436 U.S. 447, 455 (1978), followed by price advertising, followed by "public interest" advertising.

Moreover, although the level of scrutiny given the regulation in Friedman seems to be less than that given the advertising bans in previous cases, the Court appears to require a greater justification than the minimal rationality required in nonfirst amendment cases. Thus, the Friedman Court appears to have treated trademarks as being entitled to some first amendment protection, but less than that given to price advertising.
how this approach can be limited to a single category of speech.122

Because of the problems raised by a broad reading of Friedman, the Court may choose to give the Friedman opinion a more limited reading in the future. A strong argument can be made that trademarks are a distinctive form of speech requiring special treatment. The first time a trademark is used, it has no content at all, since it is typically an arbitrary sign or word coinage. In other contexts, a trademark might have aesthetic value; a framed version of the trademark might be exhibited at an art museum. But such an aesthetic response seems far removed from the function of the trademark in its commercial context. With repetition, trademarks obviously gain additional significance. If an advertiser may be banned from using a trademark the first time, however, he can hardly gain additional rights by continued use. One does not gain first amendment rights by adverse possession. These attributes may justify considering trademarks to be a uniquely limited form of commercial speech.123 Only time will tell whether the Court will limit Friedman in this manner or use it as the foundation for new restrictions on commercial speech.

REGULATION OF TRUTHFUL SPEECH

The problems raised by the regulation of entirely truthful speech do not lend themselves to unified analysis. The topic itself is too amorphous for comprehensive treatment. All that connects the cases is the fact that the claimed justification for regulation is something other than the prevention of deception. Obviously, a state could claim any number of possible justifications, each potentially requiring separate treatment. When the regulation goes to the contractual aspects of the commercial speech, the analysis proposed earlier in this article is applicable. But when the regulation impinges upon the flow of truthful information, the situation should be analyzed under general first amendment theory, whatever that may turn out to be. The best approach to the topic is probably to discuss the problems on a case-by-case basis, just as the Court is forced to confront them.

122 See note 13 and accompanying text supra.

123 This argument is not entirely free of difficulty. It relies essentially on the arbitrary nature of the symbol chosen to be the trademark. Consequently, a similar argument could be made about the use of arbitrarily chosen political symbols. Political symbols such as flags and armbands, however, do enjoy first amendment protection. Tinker v. Des Moines School Dist., 393 U.S. 503, 505-06 (1969). This is not the only context in which political conduct is protected where similar commercial conduct is not. It appears that there is no first amendment right to buy products as a means of expressing approval of them, but there is a right to contribute money to a candidate as a means of expressing support. Buckley v. Valeo, 424 U.S. 1, 21, 25 (1976). Perhaps the difference lies in the fact that in wearing an armband or contributing to a cause people are exercising associational rights by proclaiming their allegiance to other protesters or their allegiance to the candidate. They are in effect "peacefully assembling" to express their views. Freedom of association does not seem to be implicated in purely commercial advertising.
The two modern cases prior to *Virginia Board* are fairly easy to analyze under the contractual analysis proposed by this article in connection with deceptive speech. The first case, *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,124 involved discriminatory want ads.125 If the ads are considered offers, the state could reasonably consider that they effectively restricted the class of offerees to a single gender. Alternatively, if the ads are considered invitations for offers by prospective employees, the ads can be thought to reject in advance any offers made by the other gender. Under either view, the state's goal relates to the contractual function of the ads, rather than to the suppression of the free flow of information. The regulation appears to pass the *O'Brien* test, since the state goal of preventing discrimination is a significant one, and the regulation is an important means of reaching that goal.

The second case, *Bigelow v. Virginia*,126 involved advertisements of an abortion referral service.127 Here again, the state's goal was contractual. It wished to prevent the formation of contracts between its residents and out-of-state referral services. To this end, the state banned offers by the referral services to its residents. The ban met those portions of the *O'Brien* test discussed earlier, but the regulation nevertheless had a fatal flaw. One aspect of the *O'Brien* test, which was not mentioned earlier, is that the state's goal must be within its constitutional power.128 Obviously, an advertising restriction cannot be justified as ancillary to the state's control over contract formation if control of the contract itself is beyond the state's power.129 According to the Court, that was precisely the situation in *Bigelow*. Virginia residents had a constitutional right to travel to New York, and the Court held that Virginia had no legitimate interest in regulating its residents' use of a referral service which was legal in New York. Since no regulatory interest existed, the advertising ban had to fall.

*The Virginia Board-Bates-Linmark Trilogy: Attempts to Restrict the Flow of Information*

After the Court concluded in *Virginia Board* that commercial

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125 See text accompanying notes 24-26 supra.
127 See text accompanying notes 27-33 supra.
129 Similarly, in *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977), once the Court held that the sale of contraceptives was constitutionally protected, a state ban on advertising contraceptives became unsupportable. *Id.* at 700-01.
speech was covered by the first amendment,\textsuperscript{130} it faced the task of evaluating the alleged justifications for the advertising ban in that case. The controversy concerned the dissemination of certain information, rather than the contractual aspects of commercial speech. The state argued that the expense of advertising might actually increase drug prices; that pharmacists might offer shoddy services in order to advertise low prices; and that customers would lose the advantages of a continuing relationship with a single pharmacist. The Court, perhaps correctly, found the state's views implausible.\textsuperscript{131} Not content with disputing the merits of the state's views, however, the Court went on to what it considered a more crucial point. The Court found, underlying the state's arguments, a belief that consumers might respond to price information in ways that were not truly in their self-interest. The Court held that this belief about human behavior, regardless of how well it was documented, would offend the first amendment:

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. . . . [T]he choice among these alternatives is not ours to make or the Virginia General Assembly's. 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.\textsuperscript{132}

This passage from the \textit{Virginia Board} opinion contains three serious flaws. First, it resurrects the discredited view that the Court's role in constitutional adjudication is entirely passive in that the choices are "made for us" by the Constitution.\textsuperscript{133} Situations may exist in which a particular result is compelled by either the language or legislative history of a constitutional provision, but surely this is not such a situation.\textsuperscript{134} Second, just as the Court gave constitutional status to its own economic views earlier in the \textit{Virginia Board} opinion,\textsuperscript{135} here it seems to constitutionalize a psychological theory. Theories of psychology or economics that do not postulate complete human rationality are, according to the Court, apparently inadmissible. This is indeed an ironic commentary on a constitutional amendment that was designed to pro-

\textsuperscript{130} 425 U.S. at 762-63; see text accompanying notes 34-42 supra.

\textsuperscript{131} 425 U.S. at 766-70.

\textsuperscript{132} \textit{Id.} at 770. A similar argument was made by Judge Wright in his dissent in Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 593-94 (D.D.C. 1971), \textit{aff'd}, 405 U.S. 1000 (1972). Recently, it has been argued that this antipaternalistic argument will invalidate regulations aimed at consumer exploitation or unconscionability. Scher, \textit{Recent Federal Trade Commission Developments}, 46 \textit{Antitrust L.J.} 950, 961-63 (1977).

\textsuperscript{133} \textit{See} A. BICKEL, THE LEAST DANGEROUS BRANCH 75-84 (1962).

\textsuperscript{134} The only thing that the history of the first amendment demonstrates clearly is that the framers were opposed to prior censorship. \textit{See} L. LEVY, LEGACY OF SUPPRESSION 176-248 (1960).

\textsuperscript{135} \textit{See} notes 36-40 and accompanying text \textit{supra}. 401
tect the search for truth. One would think that the first amendment leaves no more room for dogmas about human psychology than for those about divine providence. Third, despite the rhetoric of this opinion, even the Court itself does not really believe that the government must always ignore the danger that information will be misused. For example, in its proposed rules of evidence, the Court endorsed much of traditional evidence law, which is based largely on the fear that juries will be misled by truthful and relevant evidence, such as by failing to understand the weakness of hearsay or by reacting emotionally to gruesome photographs. It is somewhat difficult to believe that these evidence rules would be struck down by the Court because of their unacceptable "paternalism." Perhaps the Virginia Board opinion is correct in finding in the first amendment a general presumption in favor of assuming human rationality, but the opinion goes too far in making the presumption irrebuttable.

The next case, Bates v. State Bar of Arizona, is probably the

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As Justice Stevens has pointed out, the Court has also been willing, through use of the pandering doctrine, to suppress truthful advertising of erotic materials. Justice Stevens seems to be correct in finding the pandering doctrine irreconcilable with the rejection of "paternalism" in the commercial speech cases. Splawn v. California, 431 U.S. 595, 603 n.2, 604 n.4 (1977) (Stevens, J., dissenting).

137 As Dean McCormick explains:

There are several counterbalancing factors which may move the court to exclude relevant evidence if they outweigh its probative value. In order of their importance, they are these. First, the danger that the facts offered may unduly arouse the jury's emotions of prejudice, hostility, or sympathy. Second, the probability that the proof and the answering evidence that it provokes may create a side issue that will unduly distract the jury from the main issues.

C. McCormick, Evidence § 185, at 438-39 (2d ed. 1972) (footnotes omitted). If, as Professor Tribe states, "the first and fourteenth amendments . . . preclude regulating an activity on the premise that ignorance is preferable to knowledge," L. Tribe supra note 21, at 654, much of the law of evidence is apparently unconstitutional.

138 Although the Court's primary concern was the deceptive effect of the advertising, the Court's most recent commercial speech opinion, Friedman v. Rogers, 99 S. Ct. 887 (1979), may indicate a waning in the Court's enthusiasm for the "paternalism" theory. Among the Court's justifications for a ban on trademarks by optometrists was that "use of a trade name also facilitates the advertising essential to large-scale commercial practices with numerous branch offices, conduct the state rationally may wish to discourage while not prohibiting commercial optometrical practice altogether." Id. at 896. Justice Blackmun argued strenuously in dissent that this was just the sort of paternalism condemned in previous cases. Id. at 903 (Blackmun, J., dissenting). Although the Court failed to respond to this argument, Justice Blackmun seems to be correct in that the Court's approach in Friedman places far less reliance than did previous cases on the ability of consumers to fend for themselves if given enough information. On the other hand, Friedman cannot be seen as a clear disavowal of the "paternalism" theory, given the Court's failure to address the point expressly, the deceptive aspect of the speech, and the Court's stress on the lesser first amendment value of trademarks as opposed to the type of informational advertising involved in previous cases.

commercial speech case best known to lawyers. This is not surprising, since the case uprooted the firmly established taboo on advertising by lawyers. The Supreme Court found price advertising by lawyers indistinguishable from the advertising by pharmacists considered in *Virginia Board*. It certainly would have created an awkward appearance for a court composed of nine lawyers to announce that lawyers hold a loftier position under the Constitution than other professionals, such as pharmacists. Thus, the result in *Bates* was virtually preordained by *Virginia Board*, despite the suggestion in the earlier opinion that other professions might present different problems.\(^{140}\) Indeed, in the first part of the *Bates* opinion,\(^{141}\) the Court went out of its way to quote the objectionable passages from *Virginia Board*, with specific references to the "far keener" individual interest in commercial speech,\(^{142}\) the "indispensable role" of advertising in a free enterprise system,\(^{143}\) and the choice of approaches "that the First Amendment makes for us."\(^{144}\) In its analysis of the case before it, however, the *Bates* Court was somewhat more cautious about rejecting the state's justifications. Indeed, the arguments in favor of the advertising ban were persuasive enough to lead three members of the *Virginia Board* majority to dissent in *Bates*.

Two of these arguments deserve mention. First, the state argued that price advertising was misleading without information concerning the quality of the services. The Court withheld judgment on the permissibility of advertising claims concerning quality of service\(^ {145}\) but nevertheless rejected the state's argument. The Court believed that it was "peculiar" to deny the consumer relevant information simply because that information was incomplete.\(^ {146}\) It would be even more peculiar, however, to hold that those offering cut-rate, inferior services can advertise, but that more expensive lawyers cannot defend themselves to the public by demonstrating their superior quality. The state also alleged that advertising would increase entry barriers and raise consumer costs. The Court itself had expressed similar concerns about the possible anticompetitive effects of advertising in a different commercial context.\(^ {147}\) This time, however, it found the economic arguments

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\(^{140}\) *Virginia Board*, 425 U.S. at 773 n.25. See also id. at 773-75 (Burger, C.J., concurring).

\(^{141}\) 433 U.S. at 363-65.

\(^{142}\) See text accompanying notes 36-39 *supra.*

\(^{143}\) See text accompanying notes 40-42 *supra.*

\(^{144}\) See text accompanying notes 132-38 *supra.*

\(^{145}\) 433 U.S. at 366. In *Virginia Board*, however, the Court seemed to view quality advertising as proper. 425 U.S. at 770.

\(^{146}\) 433 U.S. at 374.

\(^{147}\) In FTC v. Procter & Gamble Co., 386 U.S. 568, 579 (1967), the Court found a merger to be anticompetitive, in part, due to the ability of the postmerger company to dominate advertising in the field. In his concurrence, Justice Harlan explored the beneficial and adverse effects of advertising. Id. at 603-04 (Harlan, J., concurring).
The third member of this trilogy, *Linmark Associates, Inc. v. Township of Willingboro*, involved a municipal ban on the placement of "for sale" signs in front of homes. The ban was based on the not unreasonable belief that the proliferation of these signs in racially changing neighborhoods stimulated white flight. As the Court pointed out, the record did not clearly establish the need for the ordinance or the adequacy of other methods of advertising house sales. It would have been difficult to quarrel with the opinion if the Court had simply relied on the weakness of the record. But in the Court's view these were mere quibbles: "[t]he constitutional defect in this ordinance . . . is far more basic." This flaw, it seems, was the ordinance's paternalism in assuming that people might react undesirably to information about house sales. Besides the general problems with the Court's "antipaternalism" theory, two additional reasons exist for not applying it in the *Linmark* situation.

First, the paternalism which the Court attacked consists of a belief that giving people information will result in their making irrational choices. The government's concern in *Linmark* was not paternalistic in this sense. Proliferating "for sale" signs can prompt a rational decision to sell immediately, on the well-founded belief that others will do so anyway, thereby depressing future property values. The most rational choice for each individual may be to sell, and the cumulative result of these individually rational decisions may be in no one's best interest. Thus, the "vice" of paternalism is not really present. The ordinance simply implements a community's decision about undesirable conduct, which its members might otherwise be unwillingly forced to pursue in their individual self-interests.

Second, *Linmark* is distinguishable from the previous cases in which the Court had applied its antipaternalism theory. In those cases, the paternalistic justification involved intended recipients of the speech. In *Linmark*, the government's concern was the impact of the speech on neighbors who were not part of the speaker's intended audience of prospective buyers. In fact, the speaker might prefer to keep his neigh-

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148 433 U.S. at 377-79.
151 431 U.S. at 96. In the course of this passage, the Court makes a passing observation which foreshadows the theory developed in this article: "The Council's concern, then, was not with any commercial aspect of 'For Sale' signs—with offerors communicating offers to offerees—but with the substance of the information communicated to Willingboro citizens." *Id.*
152 See text accompanying notes 131-38 supra.
153 This kind of problem has become known as the "tragedy of the commons." See Hardin, *Tragedy of the Commons*, 162 Science 1243 (1968).
154 431 U.S. at 96.
bors ignorant of his decision to sell, since panic selling on their part might diminish the value of his own property. The visible presence of "for sale" signs may have the same kind of impact on a neighborhood as the visible presence of an adult movie theatre has on its neighbors, which the Court has found sufficient to justify zoning restrictions on those theatres.\textsuperscript{155} Attempts to avoid this kind of unintended effect of speech should not be brushed aside as paternalistic.

This trilogy of cases did not, except to the extent that claims of deception were involved, revolve around the peculiarly commercial aspects of the speech. In each case, the primary justifications for banning truthful advertising were unrelated to the contractual function of the speech and would have been equally implicated if the same information had been transmitted by third parties. In each case, the Court simultaneously took two quite different approaches to assessing these justifications for regulating truthful speech. First, it engaged in ad hoc attempts to evaluate realistically the strength of those justifications. At the same time, it adopted a second approach of applying a rigid rule against what it perceived as paternalism, with little regard to the factual support for the advertising regulation. It remains to be seen whether one of these approaches will become dominant or whether the Court will find some middle ground. Since the basic issues in these cases are essentially unrelated to the contractual nature of the speech, the ultimate solutions will depend on developments in general first amendment theory, not on the evolution of distinctive commercial speech doctrines.

**Ohralik and a Final Argument for the Contractual Analysis**

The Court again confronted a restriction on truthful commercial speech in *Ohralik v. Ohio State Bar Association*.\textsuperscript{156} The facts in *Ohralik* left little doubt about the proper result—only the path to the decision was ever in serious question. Mr. Ohralik was an attorney. Upon learning that a casual acquaintance had been injured in an automobile accident, he contacted her parents and then proceeded to the hospital, where she was in traction. He attempted to have her sign an agreement on the spot. She initially refused, but agreed several days later. In the

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\footnote{155} Young v. American Mini Theatres, Inc., 427 U.S. 50, 62-63 (1976). See note 13 supra. See generally L. Tribe, supra note 21, at 672-82. The *Linmark* Court attempted to distinguish *Mini Theatres* on the ground that *Mini Theatres* involved a "secondary" effect of the time or place of speech, while *Linmark* involved the "primary" effect of the information on recipients. 431 U.S. at 94. This rather unclear distinction finds little support in *Mini Theatres* and leads to peculiar results. For instance, it suggests that a complete ban on adult theatres is less suspect than a restriction on marquee advertising intended to make the theatres less obtrusive and less disruptive of the "tone" of the neighborhood. Whereas the total ban would be aimed at the "secondary" effect, the marquee restriction would be aimed at the "primary" effect of the marquee on people in the neighborhood.

\footnote{156} 436 U.S. 447 (1978).
\end{footnotes}
meantime, he contacted another victim and got her to agree to use his services, thoughtfully preserving the oral agreement on a concealed tape recorder. When both women attempted to discharge him, he insisted that they pay him and filed suit against one for lost profits.

The Court’s general uneasiness about the current state of commercial speech doctrine is reflected in the first part of its opinion, which consists of a general essay on the subject. The Court began by adopting Justice Stevens’s view that commercial speech is subject to greater regulation because of its lesser value. The Court then theorized that commercial speech can be seen as part of a course of conduct and that this fact “lowers the level of appropriate judicial scrutiny.” The primary problem with this theory is its vagueness. First amendment theories based on the distinction between speech and conduct have never been very successful. Almost all speech is intended to serve some function and is in that sense part of a larger course of conduct. The day is past when a vague link with conduct would justify repression of political speech; few would agree that otherwise protected speech may be punished if it is part of a long-term effort to overthrow the government.

Perhaps aware of the vagueness of its theory, the Court immediately proceeded to list permissible regulatory schemes, including the securities laws, the antitrust laws, and federal labor laws. Turning to the facts of the case before it, the Court not surprisingly found legitimate state interests behind the antisolicitation rule, including prevention of overreaching by attorneys. The state could properly ban solicitation in cases in which this and other dangers are present without showing that in a particular case the danger materialized.

The Court in Ohralik correctly perceived that the antisolicitation rule was more like a regulation of conduct than a restriction on free expression. The contractual analysis developed earlier in this article gives precise analytic content to the Court’s intuitive perception. Ohralik fits readily into a contractual analysis. Mr. Ohralik’s utter-

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157 Id. at 456. See note 50 supra.
158 436 U.S. at 457.
159 See L. Tribe, supra note 21, at 598-601.
160 The older view can be found in Justice Jackson’s concurrence in Dennis v. United States, 341 U.S. 494, 561-70 (1951), applying less strict scrutiny because the speech in question was part of a long-term, highly organized conspiracy to overthrow the government. The analysis presented in this article is an attempt to give specific content to the Ohralik Court’s assertion that in some sense commercial speech regulation is aimed at conduct rather than speech.
161 436 U.S. at 456. In addition to indicating that these statutes are facially valid, the Court also seemed to endorse at least some applications of the statutes by citing some of the leading cases with approval. For example, the affirmative disclosure requirements applied in SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969), apparently are not subject to constitutional challenge in the Court's view.
162 436 U.S. at 457, 460-62.
163 Id. at 464.
164 In a companion case, In re Primus, 436 U.S. 412 (1978), the Court held that substantially
ances served two functions. They conveyed information, and they constituted an offer to enter into an attorney-client relationship. The state had a strong interest in preventing the making of offers when a strong likelihood of overreaching existed. This interest was directed at the contractual nature of the speech and therefore should not be considered constitutionally suspect. Balanced against this strong interest, the indirect impact of the "no solicitation" rule on the free flow of information was comparatively slight.165

CONCLUSION

This article has focused on what differentiates commercial speech from other forms of speech and the implications of these differences for first amendment theory. We began by noting that neither the speaker's economic motivation nor the subject matter of the speech furnished a relevant distinction. For this reason, the informative function of the speech was found to be protected by the first amendment. On the other hand, commercial speech also serves a contractual function which does not directly implicate first amendment interests. Regulations aimed at this contractual function, though they relate to the meaning of the speech, should not be tested under the stricter scrutiny reserved for "content related" regulation.

Most traditional consumer protection legislation is based on the contractual nature of the speech. Misrepresentation, duress, overreaching, and unconscionability are well-known contract doctrines. When the state attacks these problems with modern regulatory tools, it can stricter scrutiny is required when a state applies antisolicitation rules to solicitation by the ACLU in a civil rights suit. The difference in approaches is consistent with the theory propounded in this article. In Primus, unlike Ohralik, the Court found that the contemplated litigation itself was an expression of first amendment associational activity. Consequently, the formation of agreements to bring suit in Primus was itself subject to some measure of first amendment protection, unlike the typical commercial speech case, in which the state has a free hand in regulating the contractual relationship between the parties. Although the state's interest in Primus focused on what this article has called the contractual aspect of the speech, the state interest nonetheless directly implicates first amendment values and cannot be considered wholly unrelated to the suppression of free expression. In short, Primus is halfway between cases like Bigelow, in which the underlying contract was wholly immune from regulation by the state involved in the case, and Virginia Board, in which the underlying contract was subject to almost plenary state regulation. 165 As the Court in Ohralik noted, rather similar problems are involved in door-to-door solicitation. 436 U.S. at 464-65 n.23. Consequently, the analysis in the text supports the continuing validity of state restrictions on door-to-door solicitation. See Breard v. Alexandria, 341 U.S. 622, 631-32 (1951). See also American Future Sys., Inc. v. Pennsylvania State Univ., 464 F. Supp. 1252 (M.D. Pa. 1979). In Olitsky v. O'Malley, 597 F.2d 295 (1st Cir. 1979), the court upheld a Boston regulation forbidding the solicitation of drinks by nightclub entertainers. The court reasoned that the regulation was aimed at commercial conduct rather than the expressive conduct involved in the entertainers' performances, and therefore was well within the scope of the police power as reinforced by the twenty-first amendment. Id. at 299, 302. This result is consistent with the analysis presented in this article because the regulation clearly was not aimed at restricting the flow of information to the customers, but rather at improper inducements to sell liquor.
legitimately claim an interest quite distinct from the suppression of free expression. The relatively lenient *O'Brien* test is the only restriction on this form of state regulation. Of course, not all state regulations fit this mold. Some are directly aimed at restricting the flow of information. Since these regulations do not relate to the unique contractual function of commercial speech, they should not be given the benefit of any special rules. Our general first amendment tests—whatever they turn out to be—must be applied.

This approach is obviously not a panacea for the commercial speech area. Even where only the contractual function of the speech is involved, there may be difficult factual problems in applying the test. In most cases, however, this theory places consumer protection legislation on a sound footing. Even in cases that do not involve the contractual nature of commercial speech, the theory at least has the virtue of directing attention away from the commercial aspect of the case to more general first amendment problems. The result should be greater clarity, which is ultimately the most any theory can offer.