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"The Uncharted Area"— Commercial Speech and the First Amendment

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In 1976, the United States Supreme Court first held that commercial speech itself was entitled to limited first amendment protection. During the intervening four years, courts have struggled to define the proper nature and scope of this protection. This article explores courts' initial attempts to assimilate commercial speech into traditional first amendment theory and discusses the many problems and unresolved issues such attempts have entailed.

INTRODUCTION

In 1973, the Supreme Court unanimously upheld a state statute requiring registered pharmacists to own the majority of the outstanding stock of a corporation operating a pharmacy.[1] The Court said that the question whether the limitation was sufficiently related to protecting the health of the public to justify the restraint on competition in the business of selling drugs was one for the legislature. It refused to utilize the due process clause as a basis for reexamining the legislative choice. This holding was consistent with earlier decisions in which the Court rejected due process objections to statutes forbidding advertising of the prices of dental services[2] and eye glasses.[3] These cases rested on the

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[1] North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973).

[2] Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608 (1935). The Court also rejected an equal protection claim.

[3] Williamson v. Lee Optical Co., 348 U.S. 483 (1955). The Court said: "We

ground that states reasonably could conclude that such bans would protect consumers by ensuring higher ethical standards by dentists and optometrists. The first amendment was not discussed in them because of the then settled rule that commercial speech was not protected by that amendment.[4]

In 1976 in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[5] however, the Court invalidated a state statute forbidding pharmacists to advertise the price of prescription drugs. The Court held that speech which does no more than propose a commercial transaction—speech with a purpose no more lofty than the sale of a product—is protected by the first amendment.[6] This holding led the Court to examine carefully the

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see no constitutional reason why a State may not treat all who deal with the human eye as members of a profession who should use no merchandising methods for obtaining customers." *Id.* at 490. In a later case the Court summarily rejected a due process objection to a statute banning advertising of eyeglasses. Head v. Mexico Board, 374 U.S. 424 (1963). The principal issue in that case was whether, as applied, the statute conflicted with the commerce clause. An attempt to raise a first amendment issue was rejected because it had not been argued in the courts below.

[4] In Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) the Court held that while the first amendment protected persons communicating ideas and disseminating information on the public streets, it imposed "no such restraint on government as respects purely commercial advertising." While there were not many cases in which the Supreme Court actually relied on this doctrine for decision, it became deeply imbedded in the law. In Breard v. Alexandria, 341 U.S. 622, 650 n.1 (1951), *e.g.*, Justice Black in dissent urged that the first amendment should be applied to invalidate a law regulating door-to-door selling as applied to magazine sellers but relied on *Valentine* for the assertion that the ordinance "could constitutionally be applied to a 'merchant' who goes from door to door 'selling pots.'" The most recent case in which the Court relied on the doctrine was Pittsburgh Press Co. v. Human Relations Commission, 413 U.S. 376 (1973). The Court upheld a ban on listing help-wanted ads under "Male" and "Female" headings relying on its conclusion that help-wanted ads in a newspaper were classic examples of commercial speech. It refused to reconsider the commercial speech exception because it found that the ads were in aid of an illegal activity—sex discrimination in employment.

For a discussion of the history and development of the commercial speech exception to first amendment protection, *see* De Vore & Nelson, *Commercial Speech and Paid Access to the Press*, 26 HAST. L. J. 745 (1975).

[5] 425 U.S. 748 (1976).

[6] This conclusion had been foreshadowed the previous year in Bigelow v. Virginia, 421 U.S. 809 (1975). The Court there held a ban on advertising of abortions invalid under the first amendment. The Court indicated doubts about the commercial speech doctrine but said that in any event it did not apply in the case at bar because the advertisement contained information of general interest beyond the simple proposal of a commercial transaction.

justifications offered for the ban on advertising. It concluded that the state had not established a sufficient relationship between the ban and the goal of protecting the health of consumers to justify the restraint on speech. The Court emphasized the alternative methods for guaranteeing high professional standards by pharmacists which were available to the state. The state "is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways."[7] It cannot, however, do so by restricting the flow of price information to the public.

The Court justified its extension of first amendment protection to commercial speech primarily by noting the interests of individual consumers and of society generally in the free flow of commercial information.[8] For the individual, price advertising makes possible the most efficient allocation of resources by facilitating the comparison of prices when shopping. For society, a free flow of price information is essential to the proper allocation of resources in a free enterprise system. It is also indispensable to the formation of intelligent opinions as to how business should be regulated and hence serves the goal of enlightening public decisionmaking. In short, the Court held that the marketplace of ideas protected by the first amendment includes commercial as well as political and cultural information.

In part, the reasoning in *Virginia Board* was inconsistent with the historical basis upon which the Court had justified a larger role for the judiciary in reviewing legislation impinging on civil and political liberties than in reviewing legislation altering economic arrangements.[9] If, as the Court noted, the individual consumer's interest in the free flow of commercial information "may

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[7] 425 U.S. at 770.

[8] The Court devoted a paragraph to the interests of the advertiser and said that the fact the interests were economic did not disqualify them from protection under the first amendment. The emphasis, however, was on the interests of the recipients of the information who were the plaintiffs in the litigation.

[9] *See, e.g.*, Friedman v. Rogers, 440 U.S. 1, 17 (1979); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976); Griswold v. Connecticut, 381 U.S. 479, 481-82 (1965); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 564-575 (1978). For an argument similar to that made in the text, *see* Farber, *Commercial Speech and First Amendment Theory*, 74 NW. L. REV. 372, 379-381 (1979). *See also* Jackson & Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment* 65 VA. L. REV. 1, 25-40 (1979), expressing the concern that the Court may be extending judicial review in the economic area under the guise of the first amendment.

be as keen, if not keener by far, than his interest in the day's most urgent political debate,"[10] why is not that interest equally great in maintaining open entry into businesses in order to facilitate competition, foster variety, and lower prices?

Does not that justification for extending first amendment protection tend to undermine such cases as *Williamson v. Lee Optical Co.*[11] in which the Court held that states could restrict the provision of various optical services to licensed optometrists or ophthalmologists even though the restrictions were needless and wasteful additions to the costs of services rendered to consumers? Of course, the Court was right in its insight that the average person has a much keener interest in economic arrangements which impact on daily life than in the "soap-box" liberties. But that insight has never been recognized as a justification either for lowering the standard of review of legislation impinging on even the most esoteric political speech or for increasing the standard of review of legislation regulating economic activities.

The Court was not, however, oblivious to the logical and practical difficulties involved in isolating the speech component of commercial transactions for review under the first amendment. It took a major step in holding that restrictions on commercial speech must be specially justified by the state while regulations of commercial activity continue to have an almost conclusive presumption of validity. But it stopped short of saying that burdens on commercial speech can be justified only under circumstances similar to those justifying burdens on non-commercial speech. Instead, the Court said that it was not holding that commercial speech "is wholly undifferentiable from other forms."[12] While commercial speech is not "valueless, and thus subject to complete suppression by the State," it is accorded "a different degree of protection" by the first amendment.[13]

The Court's approach when applying the first amendment to commercial speech, as elaborated on in subsequent cases,[14] raises innumerable questions as to the scope of the protection accorded commercial speech. The Court says that its decisions dealing with

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[10] 425 U.S. at 763.

[11] 348 U.S. 483 (1955).

[12] 425 U.S. at 771 n.24.

[13] *Id.*

[14] Friedman v. Rogers, 440 U.S. 1 (1979); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); Bates v. State Bar of Ariz. 433 U.S. 350 (1977); Carey v. Population Services Int'l, 431 U.S. 678 (1977); Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977).

traditional first amendment problems "do not extend automatically to this as yet uncharted area."[15] It says that false advertising may be forbidden and that the normal first amendment rules forbidding prior restraints and permitting facial challenges to overly broad regulations do not apply to commercial speech.[16] The court applies traditional first amendment principles to commercial speech in some situations but applies quite different principles in others. It appears that a substantial number of new constitutional doctrines are being developed to accommodate this commercial outsider which has just been admitted to the first amendment tent.

The Court's approach also raises difficult problems of definition. If commercial speech enjoys more constitutional protection than commercial activity but less than non-commercial speech, it becomes necessary to define commercial speech. Two lines must be drawn—that between commercial activity and commercial speech and that between commercial speech and non-commercial speech. These lines are not self-evident, yet each new case demands that they be drawn because the scope of review depends on how the particular activity is characterized.

The purpose of this article is to examine in some detail the problems which must be resolved as the courts attempt to apply the first amendment to various types of state regulations impinging on commercial speech. These problems are, of course, relevant to the more general debate over the wisdom of according first amendment protection to commercial speech. However, the focus here is not on that debate—a substantial literature is already in print[17]— but on determining the scope of the protection the Court appears to be according commercial speech.

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[15] Friedman v. Rogers, 440 U.S. 1, 10-11 n.9 (1979).

[16] *Id.;* Virginia State Bd. of Pharmacy v. Virginia Consumer Council, 425 U.S. 748, 771 (1976).

[17] *See, e.g.*, Farber, *supra* note 9; Heller, *The End of the "Commercial Speech" Exception—Good Riddance or More Headaches for the Courts?*, 67 KY. L. J. 927 (1978-79); Jackson & Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979); Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971); Schiro, *Commercial Speech: The Demise of a Chimera*, 1976 SUP. CT. REV. 45; Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205 (1976); Comment, *Commercial Speech and the Limits of Legal Advertising*, 58 ORE. L. REV. 193 (1979).

I. What Is the Scope of the Protection Given to Commercial Speech by the First Amendment?

A. In General

One result of the decisions extending first amendment protection to commercial speech is clear and important. The strong presumption of constitutionality which is accorded to regulations of economic activity does not apply to regulations restricting commercial speech. The burden shifts to the government to justify restrictions imposed on such speech. Courts will examine legislation imposing the restrictions and make their own assessments of the relative weights of the governmental interest and the burden on speech.

This shifting of the burden of justification has substantial practical importance. Municipal ordinances regulating the conduct of particular business enterprises, for example, often regulate signs and other forms of advertising as well as the character of the premises and the uses to which they can be put.[18] Previously, those regulations as a whole were immune from successful constitutional attack under the due process or equal protection clauses. Any person seeking to attack them had to bear a literally insuperable burden of persuading the courts that the regulations, including those relating to advertising, were totally arbitrary, that no legislative justification for them could be conceived. Since *Virginia Board,* however, the portions of such ordinances which relate to advertising are singled out for special protection and the attacker can shift the burden of justification to the state merly by showing the existence of the burden on the speech.

This extension of first amendment protection to commercial speech expands the scope of judicial supervision of regulations of some portions of economic activity but not others. The point is

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[18] An example is found in the provisions of the San Diego Municipal Code, §§ 33.0901-33.0904, regulating auto wreckers. The keeping of records is required. The business must be carried on wholly within a building or premises surrounded by a fence or wall at least six feet high. Access gates must swing inward and be kept closed when the premises are not open for business. The height of piles and the use of inflammable liquids are regulated. Reasonable access for official inspection is mandated. And among these regulations is one providing that no sign advertising any product or any business or profession can be placed on the outer face of the fence or wall enclosing the business except that the business conducted within the premises may be advertised by use of a sign of a prescribed size.

illustrated by *Friedman v. Rogers*,[19] the Court's most recent case dealing with commercial speech. Optometrists in Texas had divided themselves into two groups. "Professional" optometrists subscribed to a code of ethics of the American Optometric Association which, among other things, forbade practice under an assumed name. "Commercial" optometrists, on the other hand, practiced under trade names and organized their work more along the lines of business enterprises. The Texas legislature entered into this dispute by, among other things, forbidding optometrists to use trade names and by requiring that four of the six members of the Texas Optometry Board be affiliated with the American Optometric Association—that is, be "professional" optometrists. A commercial optometrist brought suit challenging both the limitation on the use of trade names and the composition of the optometry board. The Supreme Court characterized the ban on trade names as involving a restriction on commercial speech—on the theory that a trade name conveys information about the type, price and quality of services offered—and engaged in a careful review of the justifications offered by the state before it upheld the ban as not violating the first amendment. But it summarily rejected due process and equal protection objections to the rule giving a majority of the positions on the optometry board to "professional" optometrists, saying that it consistently defers to legislative determinations in local economic regulations. Hence, even though both of the state regulations involved were designed to force optometrists into the "professional" as opposed to the "commercial" model of practice—presumably on the theory that the former gave better service to the public—one of them had to be specially justified by the state while the other was presumed valid.

What the cases have not made clear, however, is the extent of the burden shifted to the states to justify restrictions on commercial speech. Is the standard the same as that applied to noncommercial speech? The Court has not attempted any general answer to that question. Most of the cases to date have involved total bans on certain forms of truthful advertising—the most onerous form of state regulation—and give few clues as to the standard of justification which will be required for legislation imposing lesser burdens.

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[19] 440 U.S. 1 (1979).

B. Total Bans on Truthful Commercial Speech

The first four cases decided by the Court in which it applied the first amendment to commercial speech involved total bans on truthful advertising of legitimate products and services. *Virginia Pharmacy* was a ban on advertising the prices of prescription drugs. *Linmark Associates, Inc. v. Willingboro*[20] involved a ban on the placing of "For Sale" or "Sold" signs on realty. *Carey v. Population Services International*[21] dealt with a prohibition against the advertising of contraceptives. *Bates v. Arizona State Bar*[22] invalidated a ban on the advertising of prices of legal services.

In these cases the Court was faced with the most onerous form of restriction on speech—total prohibition. The states attempted to justify the bans as advancing such significant interests as protecting public health, promoting stable, racially integrated housing, avoiding the stimulation of sexual activity by young people, and assuring provision of quality legal services by an ethical, public-service oriented legal profession. In invalidating these restrictions, the Court relied primarily on what it found to be the tenuous quality of the relationship between the regulations and their objectives, pointing to various alternatives by which the objectives could be better served without restraints on speech. While the Court did not directly state that it was applying the same standard of review as it would apply to total bans on noncommercial speech, it did rely to some extent on traditional first amendment cases. In *Linmark,*[23] for example, the Court suggested that restrictions on the free flow of information to the public seldom can be justified, citing Justice Brandeis' statement in *Whitney v. California*[24] that the remedy for evils engendered by speech normally was more speech, not less. And in *Carey*[25] it rejected a state defense based on the offensive and embarrassing quality of the advertising of contraceptives by citing *Cohen v. California*[26] and an argument that it would incite young people to illicit sexual activity by citing *Brandenburg v. Ohio.*[27]

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[20] 431 U.S. 85 (1977).

[21] 431 U.S. 678 (1977).

[22] 433 U.S. 350 (1977).

[23] 431 U.S. 85, 97 (1977).

[24] 274 U.S. 357, 377 (1927)(concurring).

[25] 431 U.S. 678, 701 (1977).

[26] 403 U.S. 15 (1971). In *Cohen* the Court held the state could not punish an individual for wearing in a courthouse corridor a jacket bearing the words "Fuck the Draft."

[27] 395 U.S. 444 (1969). In *Brandenburg* the Court applied the clear-and-

While these cases appear to apply an almost *per se* rule against regulations forbidding the truthful advertising of commercial products, the Court did indicate one exception which may be unique to commercial speech cases. In *Virginia Pharmacy* the Court said that advertisements for products or transactions themselves illegal could be banned.[28] It cited for this proposition *Pittsburgh Press Co. v. Human Relations Commission*[29] in which it had upheld a ban on help-wanted ads in a newspaper under headings indicating illegal sex discrimination in filling the jobs offered. In that case the Court said: "We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes."[30] This approach, suggesting that across-the-board bans on the advertising of illegal products and services are valid, contrasts markedly with the rules applied to noncommercial speech which require a showing that illegal activity is likely to flow immediately from speech urging such activity.[31] The flavor one gets from the language of the commercial speech cases is that a ban on advertising illegal drugs for sale would be sustained with much less examination of the particular circumstances than would be a ban on publications urging violation of the drug laws.

But another issue of considerably more importance has been only touched upon in the cases. Can a state that wishes to discourage the use of a product but not make its use illegal justify a ban on advertising? A recent case suggests, for example, that the Federal Trade Commission is considering imposing a general ban on the advertising of cigarettes.[32] Can such a regulation be justified by a showing (1) that there is considerable evidence that smoking is harmful to health and (2) that advertising tends to increase the number of people who smoke? Or will the courts say that the first amendment means that advertising cannot be for-

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present danger test to invalidate a restriction on political speech.

[28] 425 U.S. 748, 772 (1976).

[29] 413 U.S. 376 (1973).

[30] *Id.* at 388. For an application of this dictum *see* Goldin v. Public Util. Comm'n, 23 Cal. 3d 638, 592 P.2d 289, 153 Cal. Rptr. 802 (1979) (upholding ban on telephone service used to solicit prostitution.)

[31] *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969): "[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

[32] Federal Trade Comm'n v. Carter, 464 F. Supp. 633 (D.D.C. 1979).

bidden as long as the sale of the product is not itself made illegal? What is the standard of review which will be applied in such cases?

To date the Court has given conflicting signals as to how it might deal with such a problem. In a case arising several years before *Virginia Pharmacy* the Court summarily affirmed a decision upholding a Federal Communications Commission ban on cigarette advertising on radio and television.[33] In *Virginia Pharmacy* the Court raised a question whether it would uphold such a regulation generalized to include other forms of advertising by distinguishing the earlier case as involving "the special problems of the electronic broadcast media."[34] However, language in *Friedman* suggests that the Court might be receptive to a desire to discourage use of a product as a justification for a ban on advertising. In listing justifications for the ban on the use of trade names by optometrists the Court said: "The 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."[35]

One aspect of this problem is before the Court during the present term. It has noted probable jurisdiction of an appeal from a holding of the Court of Appeals of New York that a state may validly ban promotional advertising of electric service by public utilities.[36] The New York court indicated that the consumers did not have a strong interest in the free flow of such information since the service was provided by a monopoly and consumers had no choice either as to the provider of the service or its price. The court also argued that the statute could be justified as aiding the

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[33] Capitol Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971), *aff'd sub nom* Capitol Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000 (1972).

[34] 425 U.S. at 773. For an exhaustive discussion of the regulation of broadcast advertising, *see* Comment, *The New Commercial Speech Doctrine and Broadcast Advertising*, 14 HARV. C.R.-C.L. L. REV. 385 (1979). For a discussion of the question whether the FTC can ban television advertising directed at young children, *see* Note, *Can't Get Enough of that Sugar Crisp: The First Amendment Right to Advertise to Children*, 54 N.Y.U. L. REV. 561 (1979).

[35] 440 U.S. 1, 13 (1979); *cf.* Burger v. Board of Trustees, 58 Ohio Misc. 21, 389 N.E.2d 866 (1978), upholding a zoning ordinance forbidding a person licensed to carry on an occupation in the home from advertising such home occupation in the press or on radio or television.

[36] Consolidated Edison Co. v. Public Service Comm'n, 47 N.Y.2d 94, 390 N.E.2d 749, 417 N.Y.S.2d 30 (1979), *prob. juris. noted*, 100 S. Ct. 41 (1979).

public need to conserve electric power in times of energy shortages. If the Supreme Court chooses to address this last reason for supporting the statute, it should give us further clues as to how far the state can go in banning advertising of products the use of which it desires to discourage but not to prohibit.

C. Regulation of False Advertising

In cases involving non-commercial speech the Court has said: "Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth, whether administered by judges, juries, or administrative officials. . . . "[37] The Court asserts that while there is no constitutional value in false statements of facts, punishment of error runs the risk of self-censorship, of inducing a cautious exercise of guaranteed freedoms of speech and press.[38] Hence, some falsehood is protected in order to protect speech that matters. Only in cases involving libel and invasion of privacy has the Court been willing to permit the imposition of penalties for the making of false statements.[39] But in those cases the Court has required public officials and public figures seeking damages to prove that the false statements were made intentionally or recklessly, and other plaintiffs to show as a minimum that the defendant was negligent in failing to ascertain the falsity of the statements. Furthermore, the Court has not permitted preventive orders designed to forestall the making of false defamatory statements.[40]

In *Virginia Pharmacy*, however, the Court indicated that the first amendment is not a barrier to effective governmental regulation of false commercial speech. It said that in such cases it is less necessary than with respect to other speech to tolerate false statements for fear of silencing the speaker. Truth is more easily verifiable by the disseminator because normally he knows more about the product than anyone else. Also the advertiser is less likely to be chilled by regulation since advertising is the *sine qua non* of commercial profits. The Court's emphasis upon the need of the public to receive the information contained in advertising as justifying first amendment protection led it to recognize a role for government regulation of false or misleading advertising in order

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[37] New York Times v. Sullivan, 376 U.S. 254, 271 (1964).

[38] See, *e.g.*, Gertz v. Robert Welch, Inc. 418 U.S. 323, 339-341 (1974).

[39] The relevant cases are discussed in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

[40] Near v. Minnesota, 283 U.S. 697 (1931).

to insure "that the stream of commercial information flows cleanly as well as freely."[41] In *Bates*, the Court added: "Indeed, the public and private benefits from commercial speech derive from confidence in its accuracy and reliability. Thus, the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial area."[42] References in *Virginia Pharmacy* suggest that the Court approves of the general scope of Federal Trade Commission regulation of false advertising. In fact it went so far as to suggest that it would uphold a requirement "that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive."[43] If this dictum is translated into Court holdings, the differing levels of protection between commercial and noncommercial speech become dramatic. It is hard to conceive of the Court pausing even a moment before holding unconstitutional any regulation outside the area of commercial advertising telling speakers what they must say or newspapers what they must print.[44]

While there is substantial experience with the subject in the lower courts,[45] most of the details of the application of the first

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[41] 425 U.S. at 771-727 n.24. In a concurring opinion Justice Stewart discussed at length the reasons supporting regulation of false commercial speech. *Id.* at 775.

[42] 433 U.S. 350, 383 (1977).

[43] 425 U.S. at 771-727 n.24; *cf.* Pittsburgh Press Co. v. Human Relations Comm, 413 U.S. 376 (1973). The courts of appeal have had a number of cases before them recently involving affirmative disclosure requirements. *See, e.g.*, Standard Oil Co. v. FTC, 577 F.2d 653 (9th Cir. 1978); Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978); Beneficial Corp. v. FTC, 542 F.2d 611 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977); Encyclopedia Britannica, Inc. v. FTC, 605 F.2d 694 (7th Cir. 1979), *cert. denied*, 48 U.S.L.W. 3602 (Mar. 17, 1980). Note, *Corrective Advertising and the Limits of* Virginia Pharmacy, 32 STAN. L. REV. 121 (1979).

[44] *See* Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974) in which the Court held invalid a statute granting a political candidate a right to equal space to reply to criticisms published in a newspaper. A different rule is applied with respect to the electronic media, however. Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

[45] For exhaustive surveys of the cases and discussions of the possible impact of extending first amendment protection to commercial speech on existing regulations of false advertising, *see* Knapp, *Commercial Speech, The Federal Trade Commission and the First Amendment*, 9 MEM. ST. U. L. REV. 1 (1978); Comment, *Deceptive Advertising and the Federal Trade Commission: A Perspective*, 6 PEPPERDINE L. REV. 439 (1979).

amendment to the regulation of false advertising remain to be worked out by the Court. Its most recent case, however, dealt with a portion of the problem and may give some indication of the Court's approach.

In *Friedman v. Rogers*[46] the Court had before it a regulation forbidding the practice of optometry under an assumed, trade, or corporate name. The trial court had held the regulation invalid under the first amendment. In reversing the Court noted that a trade name, once it has been used for some time, may convey information about the type, price, and quality of services offered. It is used only as part of a proposal of a commercial transaction and hence it is a form of commercial speech and nothing more.

On the other hand, the Court noted that trade names were different from the kinds of advertising involved in *Virginia Pharmacy* and *Bates*. The advertisements in those cases "were self-contained and self-explanatory."[47] Trade names have no intrinsic meaning and convey information about price and nature of services only over a period of time. "Because these ill-defined associations of trade names with price and quality information can be manipulated by the users of trade names, there is a significant possibility that trade names will be used to mislead the public."[48] The Court went on to describe the ways in which trade names could be used to mislead the public and also certain litigation in which actual deception had been shown in Texas. It then said that the state interest "in protecting the public from the deceptive and misleading use of optometrical trade names is substantial and well-demonstrated" and that the impact on speech was only incidental, especially since optometrists were constitutionally protected in their ability to advertise prices and describe their modes of practice.[49] Hence, the ban could be seen as in the interest of providing consumers fuller and more accurate information than they received from trade names.

Friedman differed dramatically from the *Gertz* line of cases in its willingness to permit the state to ban all use of trade names on a showing that the possibilities for deception are numerous. The Court examined the evidence and determined that the state's interest in protecting the public from the deceptive and mislead-

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[46] 440 U.S. 1 (1979). A ban on the use of trade names by lawyers was upheld in Matter of Oldtowne Legal Clinic, P.A., 400 A.2d 1111 (Md. Ct. App. 1979).

[47] 440 U.S. at 12.

[48] *Id.* at 12-13.

[49] *Id.* at 15-16.

ing use of optometrical trade names was substantial and well-demonstrated. It found that this interest was sufficient to outweigh the limited effect the ban on the use of trade names would have on commercial speech by optometrists. Therefore, the ban could be applied to all optometrists using trade names without the need for proof that the use of the trade name by the particular optometrist involved was in fact false or misleading. This approach contrasts with the requirements of individualized proof of intentional, reckless, or, at least, negligent publication of false statements necessary before damages can be imposed for defamation. It suggests how the Court may resolve a question specifically left open in *Bates*:[50] whether a state may forbid lawyers from advertising the quality of services they provide. *Friedman* appears to mean that such legislation will be upheld if the state can show the existence of substantial risks that such advertising would mislead the public. It does not indicate, however, what burden of proof the state may have. Will it be enough to show merely a rational basis for the belief that advertisements of quality of legal services are deceptive or misleading? Or must the state demonstrate some greater likelihood of deception?

D. Time, Place, and Manner Rules

In *Virginia Pharmacy* the Court noted that there was no claim that the regulation was a mere time, place, and manner regulation. It said, citing noncommercial speech cases, that it had approved restrictions of that kind "provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information."[51] But the Court did not explore the issue further since the statute before it singled out speech of a particular content and forbade its dissemination completely.

The extent to which the time, place, and manner rules for ordinary speech apply to commercial speech is a question of substantial practical importance since a wide variety of state and local regulations are involved. Unfortunately, the Court's decisions so far have done little more than confuse the issue.

In *Linmark Associates, Inc. v. Willingboro*[52] the Court invalida-

[50] 433 U.S. at 366.
[51] 425 U.S. at 771.
[52] 431 U.S. 85 (1977).

ted an ordinance forbidding the placing of "For Sale" signs or "Sold" signs on realty. The city argued that since the ordinance forbade only one method of advertising realty it should be judged as a time, place, and manner rule. The Court rejected this contention. First, it said there are doubts as to whether the ordinance leaves open alternative channels of communication. Citing only noncommercial speech cases, the Court said that newspaper advertisements and listings with agents cost more and involved less autonomy and did not as easily reach people not deliberately seeking sales information. It implied that the same "alternative channels" rule would apply here as with respect to noncommercial speech. Second, the Court said that the ordinance was really a content regulation and not a time, place, and manner regulation because it did not forbid all use of advertising signs on lawns but only those conveying a particular message. Again the Court cited noncommercial speech cases and appeared to require the state to demonstrate the same close relationship between the regulation and its concededly compelling objective—promoting stable, racially integrated housing—as would be required if other forms of speech had been involved.

In *Bates v. Arizona State Bar*[53] the Court by dictum again seemed to say that the same rules apply to commercial as to noncommercial speech: "As with other varieties of speech, it follows as well that there may be reasonable restrictions on the time, place, and manner of advertising."

In *Ohralik v. Ohio State Bar Association*[54] and *In re Primus*,[55] however, the Court indicated that it was applying lower standards to time, place and manner regulations relating to commercial speech than to noncommercial speech. In each case the basic thrust of the regulations involved was against direct solicitation of legal employment by lawyers. The Court held in *Primus* that the lawyer could not be disciplined for writing a letter soliciting employment because the purpose of the employment was advancing a cause rather than economic gain. In *Ohralik* the Court held that a state could discipline a lawyer for an in-person solicitation of a client where the purpose was economic gain. The two opinions and their interrelationship are complex, however, leaving many uncertainties.

In *Ohralik* the Court's approach was fairly straightforward. It

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[53] 433 U.S. 350, 384 (1977).
[54] 436 U.S. 477 (1978).
[55] 436 U.S. 412 (1978).

said that the in-person solicitation presented a different first amendment problem than did the price and availability advertising by lawyers involved in *Bates*. "In-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component. While this does not remove the speech from the protection of the First Amendment, as was held in *Bates* and *Virginia Pharmacy*, it lowers the level of appropriate judicial scrutiny."[56] In this sentence the Court appears to have been suggesting that the state can more easily justify regulations of commercial speech brigaded with conduct than of commercial speech not entwined with conduct normally within the state's regulatory power.

The Court went on to recognize that the in-person solicitation served the same function as the advertising in *Bates*—it gave information as to availability of the lawyer and the price of his services. But it noted differences in that the immediacy of the solicitation tended to exert pressure and seek an immediate response without opportunity for further counsel or price comparisons. It then seemed almost to discard the speech elements: "A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the state's proper sphere of economic and professional regulation."[57] At that point it sounded as though the Court was about to apply the standards used to regulate economic affairs. But in the next sentence it said: "While entitled to some constitutional protection, appellant's conduct is subject to regulation in furtherance of important state interests."[58] And in the remainder of the opinion the Court appeared to place on the state the burden of establishing both an important state interest and a substantial relationship between the regulation and that interest.

After considering the state interests such as avoiding stirring up of litigation, overreaching and undue influence on lay persons, and invasion of privacy, the Court responded to the lawyer's argument that the state had not established that his acts of solicitation involved those evils. It said that in this kind of case the state

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[56] 436 U.S. 447, 457 (1978).

[57] *Id.* at 459. The California Supreme Court has recently upheld a rule forbidding solicitation by lawyers, Kitsis v. California State Bar, 23 Cal.3d 857, 592 P.2d 323, 153 Cal. Rptr. 836 (1979). *See also* Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 393 A.2d 1175 (Pa. 1978) (upholding injunction against lawyers leaving a firm from specifically soliciting active clients of the firm.)

[58] 436 U.S. 447, 459 (1978).

could have prophylactic rules. It was enough to show that these evils often accompanied in-person solicitation and then they could apply them to everyone with no necessity for showing that the evils in fact existed in the particular case.[59]

In *Primus* the Court's approach was dramatically different. Primus had been disciplined for writing a letter as an ACLU lawyer to a woman which contained an offer by the ACLU to represent her in a suit against a doctor who had performed a sterilization operation. The Court first found that this was a case in which ordinary first amendment principles applied rather than those involving commercial speech. The motivation and interests of the ACLU were to advance certain causes and interests, not to make money. In addition, the individual lawyer involved was not paid for her services. It rejected the suggestion "that the level of constitutional scrutiny in this case should be lowered" because the ACLU might be awarded attorneys fees if it won the suit.[60] So the Court concluded that the state regulation must withstand the exacting scrutiny which is applicable to limitations on core first amendment rights.

Applying this approach the Court held that the state could not utilize prophylactic rules and had to establish that the act of solicitation in this case in fact involved fraud or overreaching. The Court made it clear that it was applying different rules than it had in *Ohralik:* "Where political expression or association is at issue, this Court has not tolerated the degree of imprecision that often characterizes government regulation of the conduct of commercial affairs. The approach we adopt today in *Ohralik* . . . that the State may proscribe in-person solicitation for pecuniary gain under circumstances likely to result in adverse consequences, cannot be applied to appellant's activity on behalf of the ACLU. Although a showing of potential danger may suffice in the former context, appellant may not be disciplined unless her activity in fact involved the type of misconduct at which South Carolina's

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[59] The Court took a similar position in Friedman v. Rogers, 440 U.S. 1 (1979), holding that the state could justify a ban on all uses of trade names by optometrists on a showing of a substantial likelihood that such names would often mislead the public. The case involved a request for a judgment declaring the statute unconstitutional rather than a prosecution for its violation but the Court's opinion clearly implied that a state could prevent all uses of trade names even though in particular cases they would not convey false or misleading information.

[60] 436 U.S. 412, 428 (1978).

broad prohibition is said to be directed."[61]

Interestingly, while the Court purported to apply vastly different standards to the two cases, it did not definitively determine that the regulation as applied in *Primus* would have been valid with reference to *Ohralik* or vice versa. In *Ohralik* the Court constantly emphasized the fact that in-person solicitation was involved and did not discuss whether the state's prophylactic rule could also be applied to a mere letter from the attorney to a prospective client soliciting employment for a specific case. And in *Primus* the Court did not address directly the question whether the state could have forbidden Primus from engaging in in-person solicitation on behalf of the ACLU's cause—though the Court did indicate that it could do so only if some of the actual evils were shown in the particular case.

These cases leave unanswered a host of time, place, and manner issues which are of considerable practical concern. Among the most important are those raising the question whether limitations placed on commercial advertising on public property must meet the same standards as that for noncommercial speech. Do the cases which limit the power of municipalities to forbid the distribution of handbills on the streets,[62] or to use soundtrucks on the streets,[63] or to use the streets for parades or processions[64] apply to commercial advertising? Can a city, in the interests of preventing littering and interference with vehicular and pedestrian movement, ban all commercial advertising on the streets?[65] Can they prevent commercial advertising in city parks or public schools?[66] Does the ordinary first amendment rule that once the community opens up a public building for meetings and speeches by some groups that it must do so for all[67] apply to commercial speech?

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[61] *Id.* at 434.

[62] *E.g.*, Schneider v. New Jersey (Town of Irvington), 308 U.S. 147 (1939).

[63] *E.g.*, Kovacs v. Cooper, 336 U.S. 77 (1949).

[64] *E.g.*, Cox v. Louisiana, 379 U.S. 536 (1965).

[65] New York and Tennessee courts have held invalid bans on the distribution of commercial handbills in public places. People v. Remeny, 40 N.Y. 2d 527, 355 N.E.2d 375 (1976); H & L Messengers, Inc. v. Brentwood, 577 S.W.2d 444 (Tenn. Sup. Ct. 1979).

[66] A ban on commercial solicitation on public college campus was upheld in American Future Systems, Inc. v. Pennsylvania State Univ., 464 F. Supp. 1252 (M.D. Pa. 1979). A ban on distribution of commercial literature on public school grounds was held invalid in Hernandez v. Hanson, 430 F. Supp. 1154 (D. Neb. 1977).

[67] Danskin v. San Diego Unified School Dist., 28 Cal.2d 536, 171 P.2d 885 (1946); *cf.* Niemotko v. Maryland, 340 U.S. 268 (1951) (selective exclusion from

May a school district declare a school auditorium to be a civic center and permit various community groups to utilize it but refuse to permit its use for the purpose of selling commercial products? Can it permit the ACLU to hold a public meeting but refuse to permit the Volkswagen dealer to hold a meeting to introduce his new models? One hopes that the Court will permit the community to have wide latitude in restricting the use of public property for purely commercial uses—including commercial advertising.

A similar problem arises with respect to advertising on private premises. In *Linmark*[68] the Court invalidated a law forbidding "For Sale" signs on real estate. But what about an ordinance of a type fairly common in cities today forbidding all off-site outdoor advertising display signs—signs advertising products or services not available at the site of the sign? Can such an ordinance be applied to political and religious and similar signs? If not, can it be applied as limited to commercial signs? Such ordinances have been involved in a substantial number of cases and generally upheld.[69] The Court avoided two recent opportunities to explore the issue, dismissing appeals for want of a substantial federal question in *Suffolk Outdoor Advertising Co., Inc. v. Hulse,*[70] and *State v. Lotz.*[71] In *Suffolk* the New York Court of Appeals upheld a general ban on billboards advertising off-site products and services as applied to commercial advertising. The court applied a rational basis standard of review and did not discuss the possible application of the ordinance to noncommercial speech. In *Lotz*

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a park). *See generally* Stone, *Fora Americana: Speech in Public Places,* 1974 SUP. CT. REV. 233, 272-280.

[68] 431 U.S. 85 (1977).

[69] *See, e.g.,* John Donnelly & Sons v. Mallar, 453 F. Supp. 1272 (D. Maine 1978); Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848 (1980); Newman Signs, Inc. v. Hjelle, 268 N.W.2d 741 (N.D. Sup. Ct. 1978); Note, *City-wide Prohibition of Billboards: Police Power and the Freedom of Speech,* 30 HAST. L. J. 1597 (1979). Of course, an ordinance restricting the use of commercial signs because they also convey social or political messages will be tested as noncommercial speech. *See, e.g.,* Sambo's of Ohio v. Toledo City Council, 466 F. Supp. 177 (N.D. Ohio 1979), invalidating an ordinance forbidding a restaurant from using the name Sambo's in signs and advertisements because it was regarded as racially offensive.

[70] 43 N.Y. 2d 483, 373 N.E.2d 363, 402 N.Y.S.2d 368 (1977), *appeal dismissed,* 439 U.S. 808 (1978).

[71] 92 Wash. 2d 52, 593 P.2d 811 (1979), *appeal dismissed sub. nom.* Lotze v. Washington, 100 S. Ct. 257 (1979).

the Washington Supreme Court upheld a statute forbidding the placing of signs visible from the primary highway system, with exceptions for signs advertising the sale or lease of the property on which they were located and signs advertising on-site activities. The statute was challenged by property owners who displayed political signs on their property. The Court determined that the state had met its normal first amendment burden of establishing that the regulation was closely related to a compelling state interest. It also rejected the claims that the statute was invalid as discriminating against noncommercial speech since the exceptions permitted on-site commercial signs. It is hard to interpret the Court's summary dispositions in these cases. Presumably they can be read as support for upholding general bans on off-site advertising. But can one infer from the discrimination in favor of commercial speech upheld in *Lotz* that a statute excepting noncommercial speech from an otherwise general ban on off-site advertising would be valid?[72]

E. Discriminatory Regulations and Commercial Speech

In *Police Department v. Mosley*[73] the Court held invalid a statute regulating picketing adjacent to schools because it exempted peaceful labor picketing from the ban. Such a classification was held to violate the equal protection clause and the first amendment because it was a content regulation akin to censorship. "[G]overnment 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."[74] The Court added that these principles had caused it to condemn discrimination among different uses of the same medium for expression.

Do these principles apply with similar vigor to commercial speech? Two distinct problems are involved here. First, will governmental regulations placing burdens on commercial speech

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[72] In Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848 (1980), the California Supreme Court appeared to take some constitutional comfort from the fact that the sign ordinance involved exempted political signs from its ban. ordinance involved exempted political signs from its ban.

[73] 408 U.S. 92 (1972).

[74] *Id.* at 96.

that are not placed on noncommercial speech be held invalid because they discriminate among types of speakers? Second, will governmental regulations placing burdens on some kinds of commercial speech but not other kinds be held invalid because of the discrimination?

The first problem should be a relatively easy one to dispose of. To the extent that the Court holds that commercial speech can be regulated in circumstances that noncommercial speech would be protected, discrimination between the two is not only permitted, it is compelled. Thus regulations forbidding false and misleading advertising of commercial products are not invalid because they do not ban false and misleading noncommercial advertising.[75] Is the question different, however, in cases where a regulation could constitutionally be applied to all types of speech but an exemption is made for noncommercial speech? The Supreme Court of Tennessee, at least, thinks so. It recently held invalid an ordinance preventing the throwing or depositing of any handbill on any sidewalk, street, or other public place (a regulation which presumably would be valid even as applied to political handbills) because it exempted religious or political handbills.[76] The Court said that the exemption destroyed content neutrality and required the invalidation of the statute under the principles of the *Mosley* case. One hopes, however, that the Supreme Court takes the opposite approach. The policies which support making a constitutional distinction between commercial and noncommercial speech should support classifications between the two even when the result is to give noncommercial speech more freedom than the first amendment requires.

The second problem is not so clearly answered. It is of substantial practical importance since much regulation of commercial speech is limited to particular businesses or professions. In each of the commercial speech cases decided by the Court from *Virginia Pharmacy* to *Friedman* the underlying regulation did not apply across the board to all commercial speech. Many municipal

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[75] The distinctions drawn in *Ohralik* and *Primus,* discussed in the text at notes 54-61 *supra*, make sense only if discriminations between commercial and noncommercial speech are permissible.

[76] H & L Messengers, Inc. v. City of Brentwood, 577 S.W. 2d 444, 453 (Tenn. Sup. Ct. 1979). For a contrary view, *see* New Jersey v. J. & J. Painting, 167 N.J. Super. 384, 400 A.2d 1204 (1979) (upholding ordinance forbidding posting of signs in residential districts with exceptions for temporary political signs and for-sale signs). *See also* the discussion of the problem in connection with billboard laws in the text at notes 68-72 *supra*.

regulations deal with advertising by specific businesses.[77] By what standard of review are such classifications to be judged?

Again, the Court's decisions do not give clear signals as to how it will resolve this problem. In cases like *Virginia Pharmacy* and *Bates* the Court focused on the general justifications for banning price advertising and then looked at the question whether such advertising by optometrists or lawyers presented special evils sufficient to validate the regulation. The Court did not suggest that the legislation might be invalid without regard to the particular justification simply because it singled out pharmacists or lawyers for the ban. In *Linmark,* however, the Court said that the fact that the regulation forbidding placing "For Sale" signs on realty did not prohibit all kinds of signs on realty indicated that the regulation was one of content rather than place and had to be justified on the basis of an interest in regulating content. In that connection the Court cited *Mosley* as a relevant decision.[78]

In *Friedman* the Court suggested a more lenient standard would govern classifications among forms of commercial speech. It upheld legislation which prohibited the use of trade names by optometrists without requiring the state to show that it imposed similar restrictions on other professional groups. More significantly, the Court rejected an argument that the state was not really concerned with deception when it banned trade names because it did not regulate similar forms of deceptions by pharmacists practicing in groups but not using trade names. The Court said that "there is no requirement that the State legislate more broadly than required by the problem it seeks to remedy"[79] and cited *Williamson v. Lee Optical,*[80] a case applying the strongest presumption of validity to state regulations of economic affairs.

Here, too, wise policy supports giving government considerable latitude in making discriminations among types of noncommercial speech in imposing time, place, and manner regulations. Why should a city have the burden of justifying in court its decision to regulate the placement of advertising signs on the premises of car wrecking establishments and not to impose similar

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[77] The San Diego Municipal Code, *e.g.*, contains special limitations on advertising by auto wreckers (§ 33.0903.3), by those conducting closing-out sales (§ 33.1006.3), by junk dealers (§ 33.1105), and by used car dealers (§ 33.1307) which are not applied to other businesses.

[78] 431 U.S. 85, 94 (1977).

[79] 440 U.S. 1, 15 n.14 (1979).

[80] 348 U.S. 483 (1955).

restrictions on other forms of businesses? Should not such classifications be viewed much like those in nuisance and zoning statutes rather than as content regulations designed to favor one type of speech over another? If the first amendment focus in commercial speech cases is upon the interests of the listener rather than those of the speaker, the Courts should not be concerned with selective time, place and manner regulations, so long as they leave adequate opportunities for the public to receive the information it needs.

F. Overbreadth and Vagueness

In *Bates* the Court said that in commercial speech cases it would not apply the first amendment doctrine which permits attacks on overly broad statutes without requiring that the person making the attack demonstrate that in fact the specific conduct in question was protected. Hence, the Court held it was not enough for Bates to demonstrate that the broad preclusion of advertising by lawyers violated the first amendment. He also had to show that his particular advertisements were not false and misleading and so constitutionally subject to control. The Court said that the economic interests of advertisers were strong and not subject to chilling in the same way as noncommercial speech.[81]

The Court has not, however, addressed the related void-for-vagueness question. Will statutes regulating commercial speech have to meet the same vagueness standards as those regulating noncommercial speech[82] or must they meet only the general due process standards applicable to all regulations? If, as indicated in *Bates,* the Court is not concerned that an overly broad statute will chill commercial advertisers, it should be equally unconcerned that they will be chilled by a vague statute. The following language in *Bates* could be applied to vague as well as to overly-broad statutes: "[C]oncerns for uncertainty in determining the scope of protection are reduced: the advertiser seeks to disseminate information about a product or service that he provides, and

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[81] 433 U.S. 350, 380-81 (1977). The Court reiterated the *Bates* dictum in Village of Schaumburg v. Citizens for a Better Environment, 100 S. Ct. 826 (1980).

[82] For a typical assertion that higher standards are applied with respect to vagueness claims when speech and the first amendment are involved than in other types of regulations, see Hynes v. Mayor of Oradell, 425 U.S. 610, 620 (1976).

presumably he can determine more readily than others whether his speech is truthful and protected."[83]

G. Prior Restraints and Licensing

In *Virginia Pharmacy* the Court said in a dictum that the special attributes of commercial speech "may also make inapplicable the prohibition against prior restraints."[84] It repeated the dictum in Friedman[85] but has had no occasion to apply it or to elaborate on it. What are the implications? What kinds of restraints which would be invalid as applied to noncommercial speech may be valid as applied to commercial speech?

The citations which accompanied the *Virginia Pharmacy* dictum suggest that the court may be willing to uphold injunctions and prohibitions of the use of the mails to prevent the dissemination of false advertising. Compare, the Court said, *New York Times Co. v. United States*[86] (the Pentagon Papers case) with *Donaldson v. Read Magazine*,[87] *Federal Trade Commission v. Standard Education Society*,[88] and *E.F. Drew & Co. v. Federal Trade Commission*.[89] *Donaldson* was a case in which the Court upheld over a first amendment challenge an order of the Postmaster General. He had found certain advertisements for a puzzle contest to be fraudulent and misleading and directed that all mail sent to the operator of the contest be marked "fraudulent" and returned to the senders. The Court said that the first amendment cases do not "provide the slightest support for a contention that the constitutional guarantees of freedom of speech and freedom of the press include complete freedom, uncontrollable by Congress, to use the mails for perpetration of swindling schemes."[90]

In *Standard Education* the Court upheld (without reference to the first amendment) a Federal Trade Commission cease and desist order against various sales tactics in marketing encyclopedias. *Drew* was a court of appeals case in which the Supreme Court denied certiorari. An FTC order directed a company to cease and desist from using certain phrases in advertising its

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[83] 433 U.S. at 381.
[84] 425 U.S. at 771-72 n.24.
[85] 440 U.S. at 10.
[86] 403 U.S. 713 (1971).
[87] 333 U.S. 178 (1948).
[88] 302 U.S. 112 (1937).
[89] 235 F.2d 735 (2d Cir. 1956), *cert. denied*, 352 U.S. 969 (1957).
[90] 333 U.S. at 191.

oleomargarine on the ground that the phrases were false and misleading. The court of appeals rejected a first amendment objection to the order.

Lower courts are reading the *Virginia Pharmacy* dictum and cases cited with it as support for the general conclusion that the new doctrines bringing commercial speech within the first amendment do not cast doubt on the general power of government, through its control of the mails or through administrative cease and desist orders, to impose prior restraints on false and misleading advertising.[91] It has been held in some cases, however, that the first amendment applies to prevent the issuance of cease and desist orders which go further than is necessary for the elimination of the deception proved.[92] Whether the Supreme Court will adopt this "least-restrictive-alternative" standard for reviewing administrative restraints upon commercial speech remains to be seen. The Court upon prior occasions has used a similar approach as a matter of statutory interpretation[93] and it would not be surprising if it should now become constitutionally compelled, at least where administrative discretion is being reviewed.

Several other major issues must be addressed before we will understand the full implications of the Court's suggestion that the prior restraint doctrine does not apply to commercial speech. One important question is whether the procedural safeguards required by the Court in cases involving prior restraints on the dissemination of obscenity apply to false advertising cases. In a series of cases involving motion picture licensing,[94] seizures of imported materials by customs agents,[95] restrictions on the use of

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[91] *See, e.g.*, National Comm'n on Egg Nutrition v. Federal Trade Comm'n, 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978); Warner-Lambert Co. v. Federal Trade Comm'n, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978); Original Cosmetics Products, Inc. v. Strachan, 459 F. Supp. 496 (S.D.N.Y. 1978); United States v. Reader's Digest Ass'n, Inc., 464 F. Supp. 1037 (D. Del. 1978); A & M Records, Inc. v. Heilman, 75 Cal. App. 3d 554 (2nd Dist. 1977); People v. Columbia Research Corp., 71 Cal. App. 3d 607 (1st Dist. 1977).

[92] Porter & Dietsch, Inc. v. Federal Trade Comm'n, 605 F.2d 294 (7th Cir. 1979); Standard Oil Co. v. Federal Trade Comm'n, 577 F.2d 653 (9th Cir. 1978); Beneficial Corp. v. Federal Trade Comm'n, 542 F.2d 611 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

[93] *E.g.*, Jacob Siegel Co. v. Federal Trade Comm'n, 327 U.S. 608 (1946); holding that the F.T.C. could not order deletion of a portion of a name if less drastic means would eliminate the deception.

[94] Freedman v. Maryland, 380 U.S. 51 (1965).

[95] United States v. Thirty-seven Photographs, 402 U.S. 363 (1971).

the mails by postal officials,[96] and restrictions on use of public theaters,[97] the Court has held that the first amendment requires systems of prior restraint against obscenity to provide certain safeguards. The burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. A prompt final judicial determination must be assured.[98] In these cases the Court justified the use of prior restraints because it held obscenity was not protected by the first amendment. It then introduced the procedural safeguards because the key first amendment question became the one of determining whether a particular publication was obscene and subject to restraint or not obscene and fully protected by the first amendment. The false advertising cases are at least superficially similar. If the advertising is false it is unprotected; if true it has the first amendment protections given commercial speech. The crucial issue then is determining truth or falsity. Should that determination enjoy the same procedural safeguards as the obscenity determinations?[99] It seems unlikely that the Court will so hold. Truth or falsity determinations in false advertising cases involve primarily issues of fact rather than value judgments of the type which give rise to first amendment concerns in the obscenity cases. And application of the standards would require a substantial change in present administrative schemes for restricting false advertising, casting a major load on the courts to provide prompt hearings in order to protect the public.[100]

Another unresolved question involves the applicability to commercial speech of the cases which apply the first amendment to invalidate statutes and ordinances requiring permits or licenses which may be granted or withheld in the discretion of administra-

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[96] Blount v. Rizzi, 400 U.S. 410 (1971).

[97] Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

[98] *Id.* at 560.

[99] For a case so holding, see Federal Trade Comm'n v. Simeon Management Corp., 532 F.2d 708 (9th Cir. 1976).

[100] For a case upholding a post office stop mail order without requiring the procedural safeguards mandated for noncommercial mail in Blount v. Rizzi, 400 U.S. 410 (1971), *see* Original Cosmetics Products, Inc. v. Strachan, 459 F. Supp. 496 (S.D.N.Y. 1978). *But cf.* Federal Trade Comm'n. v. Simeon Management Corp. 532 F.2d 708 (9th Cir. 1976) (holding Court could not issue a temporary injunction against false advertising based on an FTC finding without an independent judicial hearing.)

tive officials. In noncommercial speech cases the Court holds such regulations invalid as unconstitutional censorship or prior restraint and permits persons who have not even applied for licenses or permits to make facial challenges to them.[101] Would such cases apply to invalidate a municipal ordinance which provided: "No person shall advertise or conduct a closing-out sale without first obtaining a license to conduct such closeout sale from the Chief of Police?"[102] If the answer is yes, would the ordinance survive if it required the chief of police to issue the license if he finds "that the advertising to be used is not false, deceptive or misleading in any respect?" Would such standards be sufficient to require the advertiser to seek the permit and, if it is denied, carry the burden of going to court for a review of the determination that the advertising was false or misleading? The logic which led the Court to hold in *Bates* that the overbreadth doctrine would not be applied to commercial speech would appear to lead to upholding local licensing schemes of this type. If the major first amendment concern in commercial speech cases is not preventing advertisers from being "chilled" but rather securing flow of truthful information to the public, it seems appropriate to shift to advertisers the burden of convincing courts of the truthfulness of advertising.

III. What Is Commercial Speech?

The cases defining the extent of first amendment protection for commercial speech have been discussed in Part I. They demonstrate that in general a lower level of protection is afforded commercial than noncommercial speech. As a result problems of definition become important. Commercial speech must be distinguished from commercial activity because the latter has no first amendment protection. How are these lines to be drawn?[103]

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[101] Staub v. City of Baxley, 355 U.S. 313, 321 (1958); *cf.* Hynes v. Mayor of Oradell, 425 U.S. 610 (1976) (recognizing the validity of carefully drawn regulations aimed at door-to-door solicitation, but holding that the particular one before the court was invalid because of vagueness).

[102] For a case invalidating a broad licensing statute of this type as applied to a religious group and raising a question whether a similar rule would apply to commercial speech, *see* People v. Fogelson, 21 Cal. 3d 158, 165 n.7, 577 P.2d 677, 681 n.7, 145 Cal. Rptr. 542, 546 n.7 (1978).

[103] For an early attempt at defining commercial speech, see Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. Chi. L. Rev. 205 (1976).

A. Distinguishing Commercial Speech From Noncommercial Speech

Prior to *Virginia Pharmacy*, it was necessary to draw a line between commercial and noncommercial speech because the first amendment was held to apply only to the latter. The cases during this period developed the rule that commercial speech was speech which did no more than propose a commercial transaction. Under that standard a number of propositions were established:

(1) Speech going beyond the mere advertising of a product or service did not lose its noncommercial character because it was contained in a paid advertisement.[104]

(2) Speech did not lose its noncommercial character because it took a form which was sold for profit—*e.g.*, books, magazines, motion pictures.[105]

(3) Speech which involved a solicitation to purchase goods or contribute money where the objective was the advancement of a point of view or the support of a charity or cause was held to be noncommercial.[106]

(4) Advertisements designed to sell ordinary products but which also contained information of public interest were treated as noncommercial unless the noncommercial content was shown to have been added for the purpose of avoiding a restriction on commercial advertising.[107]

These propositions were established when the result of defining speech as noncommercial was to remove all first amendment protection. Will the Court continue to draw the line at the same

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[104] Buckley v. Valeo, 424 U.S. 1, 16-20 (1976); New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964).

[105] Smith v. California, 361 U.S. 147, 150 (1959) (books); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952) (motion pictures); Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943) (religious literature).

[106] New York Times Co., v. Sullivan, 376 U.S. 254 (1974); NAACP v. Button, 371 U.S. 415, 429 (1963); Jamison v. Texas, 318 U.S. 413, 417 (1943); Cantwell v. Connecticut, 310 U.S. 296, 306-307 (1940).

[107] In Valentine v. Chrestensen, 316 U.S. 52 (1942), the Court held that a handbill advertising the exhibition of a submarine could be banned even though it contained on the reverse side a protest against official conduct in denying wharfage facilties. The Court found that the public interest message was added for the purpose of evading the ordinance. *Id.* at 55. In Bigelow v. Virginia, 421 U.S. 809 (1975), the Court held that an advertisement for abortion services was fully protected under the first amendment because it conveyed the information that abortion was legal in New York and that there were no residency requirements.

point when the distinction is merely between the level of first amendment protection to be provided? No reason appears why the first two propositions should be affected by the change. In fact, the Court has recently underlined the policies involved in those propositions by holding that a business corporation enjoys full first amendment protection when it speaks out on public issues. In *First National Bank v. Bellotti*[108] it invalidated a statute forbidding a corporation from spending money to publicize its views on any question submitted directly to the voters which did not materially affect its business, property, or assets. The Court said that speech which otherwise enjoys full first amendment protection does not lose it simply because its source is a corporation.

The Court has also reaffirmed the cases holding that a solicitation to purchase goods or services is accorded full first amendment protection when the objective of the solicitation is the advancement of a point of view rather than simply financial gain. In *Primus*[109] the Court held a letter from an American Civil Liberties Union lawyer soliciting a client was noncommercial speech because the proposed suit was part of a program of using litigation as a vehicle for political expression and association. In *Ohralik,*[110] by contrast, the Court held that in-person solicitation of a client by a lawyer for personal gain was commercial speech

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[108] 435 U.S. 765 (1978); *see* O'Kelley, *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation After First National Bank v. Bellotti*, 67 GEO. L. J. 1347 (1979).

[109] In re Primus 436 U.S. 412 (1978); *see also* Citizens for a Better Environment v. Village of Schaumburg, 590 F.2d 220 (1978), *aff'd*, 100 S. Ct. 826 (1979). (Challenge to a restriction on solicitation of funds by a charitable organization as applied to one whose solicitors also promoted organizational objectives).

[110] Ohralik v. Ohio St. Bar Ass'n, 436 U.S. 447 (1978). More recently, the Court has held that a city cannot prohibit charities, which do not devote at least 75% of proceeds to their charitable purpose, from soliciting money — at least with respect to those charities which combine some informative or persuasive speech with the solicitation process. Village of Schaumburg v. Citizens for a Better Environment, 100 S. Ct. 826 (1980). The Court suggested that a charity which did nothing more than ask for money in the solicitation process might be subject to such a regulation, but did not indicate whether such activity was to be classified as commercial speech or perhaps as not involving speech at all. The Court also suggested that commercial solicitation—seeking to sell goods by extolling their virtues—would be commercial speech. And in a footnote it said by dictum that "for the purposes of applying the overbreadth doctrine, . . . it remains relevant to distinguish between commercial and noncommercial speech." *Id.* at 834 n.7.

to be accorded only the lower level of protection appropriate to such speech.

The question of whether advertisements designed to sell ordinary products but which also contain information of public interest should continue to be regarded as noncommercial speech is less clear. The crucial question is whether the power to forbid false and misleading statements in commercial advertising extends to advertising which includes information of public interest as part of its inducement to purchase products. In *Virginia Pharmacy* the Court referred to a number of such cases—*e.g.*, an advertisement by a manufacturer of artifical furs promoting his product as an alternative to extinction by his competitors of fur bearing mammals[111]—as illustrations of cases in which entirely commercial advertisements would be in the public interest.[112] It noted that a pharmacist might cast himself as a commentator on store-to-store disparities in drug prices, giving his own and those of a competitor as proof. It said that "no line between publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn."[113] But, because the issue was not before it, the Court did not decide whether such advertisements would be treated as noncommercial or commercial for the purpose of determining whether the state could regulate false statements in them. Could a pharmacist, for example, be forbidden from using false prices in his comments on store-to-store disparities in drug prices?

A recent court of appeals case is illustrative. In *National Commission on Egg Nutrition v. Federal Trade Commission*[114] the seventh circuit was faced with the problem of properly classifying advertisements by an association of egg producers discussing the question whether or not eating eggs contributed to heart disease and circulatory ailments. The FTC had treated the case as a simple false advertising case and required the association to cease making statements deprecating the weight and significance of the medical evidence suggesting a relationship between eggs and heart disease. The association argued that the first amendment applied in its full sense and that a commercial misrepresentation on a controversial public issue could be made actionable only if

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[111] Fur Information & Fashion Council, Inc. v. E.F. Timme & Son, Inc., 364 F. Supp. 16 (S.D.N.Y. 1973).

[112] 425 U.S. 748, 764 (1976).

[113] *Id.* at 765.

[114] 570 F.2d 157 (7th Cir. 1977), *cert. denied,* 439 U.S. 821 (1978).

made deliberately or with reckless disregard for the truth. The court of appeals rejected this argument and specifically held that the advertising involved was to be treated for first amendment purposes as speech that does no more than propose a commercial transaction.

Where is the line to be drawn? On the one hand, as *Bellotti* makes clear, business entities are to be accorded full first amendment protection when they speak out on public issues, whether or not those issues are closely related to the business engaged in. On the other hand, if false statements regarding items of public interest cannot be regulated when included in an advertisement designed to sell products, the ability of the state to control false advertising will be sharply reduced. The appropriate place to draw the line, then, would seem to be between general public interest advertising (which may be designed to enhance the image of the business and indirectly promote sales) and advertising the purpose of which is to sell particular goods. In the latter case the statements in the advertisement, including those on issues of public interest (e.g., there is no evidence of any relationship between eggs and heart disease), are part of the inducement for customers to purchase. They are an integral part of a proposal for a commercial transaction and the state should have the power to regulate in order to prevent potential customers from being deceived.[115]

B. Distinguishing Commercial Speech From Commercial Activity

Prior to the determination that commercial speech enjoys first amendment protection it was not necessary to distinguish between commercial speech and commercial activity. The state power to regulate commercial advertising, for example, was the same as that of regulating the underlying business.[116] Since *Virginia Pharmacy*, however, this distinction has obvious import-

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[115] For an argument that the principal justification for permitting the state to regulate false advertising is that such advertising "is a prelude to, and therefore becomes integrated into, a contract, the essence of which is the presence of a promise," *see* Farber, *Commercial Speech and First Amendment Theory*, 74 Nw. U. L. Rev. 372, 389 (1979). He adds that in a market economy the state has powerful interests in enforcing contractual expectations which serve to justify regulating commercial advertising.

[116] *See, e.g.*, Railway Express Agency v. New York, 336 U.S. 106 (1949) (upholding a regulation of advertising on delivery trucks).

ance—commercial speech enjoys some level of first amendment protection while commercial activity does not.

The major problem is that of distinguishing between the commercial activity of selling goods and the speech aspects involved in selling. Are regulations forbidding door-to-door selling or personal solicitation of business to be treated as regulations of commercial activity which will be sustained by the courts unless the complainant bears the burden of showing that they are arbitrary and totally unrelated to any legitimate state interest? Or may the complainant by showing the restriction on speech shift to the state an affirmative burden of justification?

The decision in *Orhalik* suggests that in all such cases the speech component will cause the Court to require the state to assume an affirmative burden of justification. The Court characterized in-person solicitation as "a business transaction in which speech is an essential but subordinate component."[117] It then went on to scrutinize the justifications offered by the state to support the ban.

The Court was less clear in *Orhalik* as to the scope of judicial review under the first amendment. It said that since the speech involved in in-person solicitation was a component of commercial activity subject to regulation by the state, in contrast to the general advertising involved in cases like *Bates* and *Virginia Pharmacy,* "it lowers the level of appropriate judicial scrutiny."[118] This statement could be taken as providing two standards of review for commercial speech with the lesser one applying to that speech having a substantial conduct component. However, the Court did not appear to apply a different standard than it had in the earlier cases. The state interests in preventing those aspects

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[117] 436 U.S. 447, 457 (1978). The mere fact that a communication is made privately to single recipient does not remove the speech from first amemdment protection. Givhan v. Western Line Cons. School Dist., 439 U.S. 410 (1971)(private encounter between teacher and school principal protected); In re Primus, 436 U.S. 412 (1978)(letter from lawyer to prospective client protected). However, it may be possible to isolate non-speech elements of person-to-person selling. *See* Detroit Automotive Purchasing Services v. Lee, 463 F. Supp. 954 (D.Md. 1978). The court held that a statute requiring automobile salespersons to be licensed did not involve commercial speech. It said the regulation governed conduct—making arrangements to purchase vehicles—and did not require a license for doing nothing more than giving advice as to the purchase of a vehicle.

[118] 436 U.S. 447, 457 (1978). *Cf.* Olitsky v. O'Malley, 597 F.2d 295 (1st Cir. 1979)(regulation forbidding entertainers from mingling with patrons in a bar primarily involves conduct and is tested by a low standard of review).

of solicitation that involve fraud, undue influence, intimidation, overreaching, and other vexatious conduct were strong—in fact Ohralik conceded that they were "compelling" interests. Hence, the only question was whether a total ban on solicitation, which left open other modes of advertising, was justified by the likelihood of such evils. The Court determined that the dangers involved were sufficient to validate a prophylactic rule banning all such solicitation by lawyers. This reason provides the framework, but not necessarily the answer, within which the Court would respond to a challenge to an ordinance forbidding door-to-door selling of ordinary products.

The analysis in *Orhalik,* then, leads to the conclusion that identification of a speech component in any business transaction will result in the shifting to the state the burden of affirmatively justifying restrictions on that speech. However, the more closely the speech is joined with conduct the more likely it is that the state will be able to meet its burden. Door-to-door selling and other forms of in-person solicitation involve greater risks of fraud and overreaching than do for-sale signs or media advertising. And the difficulties inherent in dealing with such abuses on a case-by-case basis justify a greater use of prohylactic rules.[119]

Conclusion

The Supreme Court asserts that commercial speech is protected by the first amendment. In the foregoing pages the Court has been taken at its word and an attempt made to explore the impact of first amendment review of governmental regulation of commercial speech. This exploration has shown that few issues are settled and a wide range of uncertainties exist. It has also shown that no coherent theory has evolved which can be applied to resolve these uncertainties.

The difficulty may be that the Court, despite its language to

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[119] Lower courts are applying this general mode of analysis to restrictions on forms of commercial communication which do not take the form of advertising and selling. *See, e.g.,* Savage v. Commodity Futures Trading Comm'n., 548 F.2d 192 (7th Cir. 1977) (registration requirement for commodity trading advisor who published newsletter and advised clients through seminars, lectures, letters, and personal contacts); Millstone v. O'Hanlon Reports, 528 F.2d 829 (8th Cir. 1976) (regulation forbidding credit reporting firm from giving false information); Harris v. Beneficial Finance Co., 338 So.2d 196 (Fla. Sup. Ct. 1976) (regulation forbidding creditor from attempting to collect claim by communicating with debtor's employer prior to reducing the claims to judgment).

the contrary, is not applying the first amendment to commercial speech. Perhaps all of these recent commercial speech cases stand for nothing more than heightened due process and equal protection review of regulations of the communicative aspects of commercial transactions.[120]

The central thrust of the first amendment is to protect a wide marketplace of ideas free of governmental censorship. The Court has "refused to recognize an exception for any test of truth, whether administered by judges, juries, or administrative officials."[121] The primary focus has been on protecting the speaker's freedom of expression, relying on the conflict of freely expressed ideas as the best means of informing the public.

How different is the Court's approach in the commercial speech cases! False advertising may be forbidden. The state may not only provide penalties for false advertising but also may impose prior restraints. Administrative agencies may issue cease-and-desist orders. Courts may issue injunctions. Advertisers may even be required to insert affirmative messages in their advertising—to include official versions of the truth. The Court decries as paternalistic a ban on advertising of prices by pharmacists yet it upholds a decision by the state to ban the use of trade names by optometrists because they may mislead the public and indicates it will uphold broad state intervention to keep the public from being misled by false statements in commercial advertising.

In short, the Court does not want to accept the severe restrictions upon governmental efforts to protect the public against false and misleading advertising which would be the result of applying accepted first amendment principles to such advertising. Instead, it is evolving a set of doctrines preserving the governmental power to intervene in the marketplace of commercial ideas in the name of consumer protection while, at the same time, expanding the scope of judicial review of such intervention. The use of the first amendment as the justification for such expanded judicial review creates enormous uncertainties as the courts struggle with the ongoing problem of determining just which aspects of accepted first amendment doctrines apply in this new setting. Hopefully, it will not also serve to diminish the vigor of the first amendment

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[120] For an argument that such heightened review is inappropriate, *see* Jackson & Jeffries, Jr., *supra* note 9, at 25-40.

[121] New York Times v. Sullivan, 376 U.S. 254, 271 (1964); *see* Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191.

in its application to noncommercial speech. But the risks involved in an application of the first amendment which permits official censorship in the name of truth are sufficient to cause one to wish that the Court had used some other constitutional clause to justify increased judicial scrutiny of regulations of commercial speech.[122]

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[122] *Cf.* Jackson & Jeffries, Jr., *supra* note 9, at 39-40: "Nothing could be more hostile to the traditional understanding of the freedom of speech than governmental evaluation of the deceptiveness of political statements. Yet nothing could be more palpably wrongheaded than the extension of this approach to protect deceptive or misleading solicitation of commercial transactions." They add that the Court's compromise position shows that "the freedom of speech has been diverted to serve the entirely unrelated values of individual economic liberty and aggregate economic efficiency."