Toward a General Theory of Commercial Speech and the First Amendment

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I. INTRODUCTION

The recent United States Supreme Court decisions[1] terminating the tumultuous existence of the commercial speech doctrine have stimulated a host of learned commentaries.[2] The vast majority of these articles contend that all distinctions between commercial speech and other varieties of speech should be obliterated;[3] while on the other hand, a small but resolute minority continue to maintain that the commercial speech doctrinal dichotomy is apposite.[4] Neither of these positions, however, proffers the appropriate format by which to handle commercial speech. The intermediate course pursued by the Supreme Court in recent cases, establishing commercial speech as entitled to some "lesser degree" of first amendment protection, offers the proper approach.

This pragmatic solution to the commercial speech problem recognizes that although such speech is less valuable and less vulnerable than noncommercial speech, it nevertheless merits some constitutional protection. The gravest difficulty lies not in the application of this new doctrine to commercial speech but in its possible wrongful extension to other "nonfavored" constitutionally protected areas of speech. Already it appears that several members of the Court have invoked the doctrine as precedent for attacking "non-obscene erotic speech,"[5] thereby thrusting this new doctrine into the eye of the half-century-old controversy

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1. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); Bates v. State Bar of Ariz., 433 U.S. 350 (1977); Linmark Assocs. v. Willingboro, 431 U.S. 85 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); Bigelow v. Virginia, 421 U.S. 809 (1975).

2. *See, e.g.*, Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976); D. Meiklejohn, *Commercial Speech and the First Amendment*, 13 CAL. W. L. REV. 430 (1977); Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661 (1977); Schiro, *Commercial Speech: The Demise of a Chimera*, 1976 SUP. CT. REV. 45; *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 198 (1977); *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 196 (1976); *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 116 (1975); Note, *Yes, FTC, There is a* Virginia: *The Impact of* Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. *on the Federal Trade Commission's Regulation of Misleading Advertising*, 57 B.U.L. REV. 833 (1977) [hereinafter cited as Note, *Yes, FTC*]; Note, *Commercial Speech: The Supreme Court Sends Another Valentine to Advertisers*, 25 BUFFALO L. REV. 737 (1976) [hereinafter cited as Note, *Commercial Speech*]; Note, *Prohibition of Abortion Referral Service Advertising Held Unconstitutional*, 61 CORNELL L. REV. 640 (1976) [hereinafter cited as Note, *Prohibition of Abortion*]; Note, *The Constitutional Status of Commercial Expression*, 3 HASTINGS CONST. L. Q. 761 (1976) [hereinafter cited as Note, *Constitutional Status*].

3. *See, e.g.*, D. Meiklejohn, *supra* note 2; *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 142 (1976); Note, *Prohibition of Abortion*, *supra* note 2; Note, *Constitutional Status*, *supra* note 2.

4. *See, e.g.*, Baker, *supra* note 2.

5. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50, 61, 69-70 (1976), discussed at notes 181-95 *infra*. The complex intertwining within the case of several other significant issues resulted in an

surrounding the meaning of the words "Congress shall make no law . . . abridging the freedom of speech."[6] This article initially will review the old commercial speech doctrine and then proceed to analyze, explain, and justify the new commercial speech doctrine. Once this is accomplished, the article will demonstrate why this new "lesser degree of protection" principle should not be extended to other areas of speech and, finally, outline some additional parameters and guidelines for the new doctrine.

II. THE ENIGMATIC COMMERCIAL SPEECH DOCTRINE:[7] A HISTORICAL BACKGROUND

The exact nature and extent of the commercial speech doctrine is unclear due to its "casual, almost offhand"[8] inception in *Valentine v. Chrestensen*.[9] The Supreme Court, confronted with a case that concerned the constitutional right to distribute commercial handbills in violation of New York's antilitter ordinance,[10] stated—without citation or analysis—the following rule:

> This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.[11]

Whether the Court fully intended to establish a new category of

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opinion that does not precisely define what the plurality actually intended, but it is highly likely that they meant to extend the reasoning of the commercial speech doctrine to this other area of speech. *Id.* The term "non-obscene erotic speech" is defined as sexually explicit expression that is not classified as obscene, *i.e.*, it is constitutionally protected speech. *See* notes 54, 55, 64 and accompanying text *infra*.

6. U.S. CONST. amend. I. *See generally* note 64 *infra*.

7. For a comprehensive analysis of this area, see Schiro, *supra* note 2.

8. Cammarano v. United States, 358 U.S. 498, 514 (1959) (Douglas, J., concurring). *See also* Lehman v. City of Shaker Heights, 418 U.S. 298, 314 n.6 (1974) (Brennan, J., joined by Stewart, Marshall, and Powell, JJ., dissenting); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 393 (1973) (Burger, C.J., dissenting); *id.* at 398 (Douglas, J., dissenting); *Id.* at 401 (Stewart, J., dissenting).

9. 316 U.S. 52 (1942).

10. The New York ordinance provided:

> *Handbills, cards and circulars.*—No person shall throw, cast or distribute, or cause or permit to be thrown, cast or distributed, any handbill, circular, card, booklet, placard or other advertising matter whatsoever in or upon any street or public place, or in a front yard or court yard, or on any stoop, or in the vestibule or any hall of any building, or in a letterbox therein; provided that nothing herein contained shall be deemed to prohibit or otherwise regulate the delivery of any such matter by the United States postal service, or prohibit the distribution of sample copies of newspapers regularly sold by the copy or by annual subscription. This section is not intended to prevent the lawful distribution of anything other than commercial and business advertising matter.

Id. at 53 n.1.

11. *Id.* at 54.

unprotected speech[12] or whether it was imprecisely and hastily balancing the countervailing interests is debatable.[13] Nevertheless, it is generally regarded that the former position is correct[14] and that the Court relied upon the primary purpose or motive of the speech to arrive at its commercial nature.[15]

Over the next two decades the doctrine lay relatively dormant. The few relevant cases that were decided by the Court substantiated the primary purpose test as the appropriate standard and suggested a possible religious/secular dichotomy.[16] Solicitations on behalf of religious organizations were not considered commercial ventures and were protected by the first amendment,[17] while door-to-door solicitations for secular endeavors remained unprotected[18]—a distinction arguably inconsistent with the establishment clause[19] of the United States Constitution.

The next significant opportunity for the Supreme Court to review the commercial speech doctrine was *New York Times Co. v. Sullivan*.[20] Before

12. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), discussed at notes 54, 55, 64 and accompanying text *infra*.

13. Immediately following the above quoted portion of the opinion, the Court stated that the question was whether the legislative body must permit the pursuit of lawful business "by what it deems an undesirable invasion of, or interference with, the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated." 316 U.S. at 54-55. This suggests that if a balancing test were, in fact, employed, the scales would undoubtedly be tipped in favor of governmental regulation. The Court would grant little, if any, protection to commercial advertising and there would, therefore, be no need to carry out an elaborate balancing under the circumstances. *See also* Bigelow v. Virginia, 421 U.S. 809 (1975). For the purposes of this article, the categorization of commercial speech as fully unprotected will be accepted as the true holding of the opinion. *See* note 14 and accompanying text *infra*.

14. Linmark Assocs. v. Willingboro, 431 U.S. 85 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); Breard v. City of Alexandria, 341 U.S. 622 (1951); Martin v. City of Struthers, 319 U.S. 141 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Jamison v. Texas, 318 U.S. 413 (1943); United States v. Hunter, 459 F.2d 205 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972); Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

15. Plaintiff-respondent, when informed by the New York Police Commissioner that he could not distribute his commercial handbill upon the streets of New York but that noncommercial or business literature was permissible, printed on the back of his commercial handbill a message of public concern. The Court, however, determined that Chrestensen's attachment of his statement of public concern was a mere attempt to circumvent the law and would not be permitted. The primary purpose of Chrestensen's handbill was deemed commercial and not related to the public interest. 316 U.S. at 55.

16. *See* Breard v. City of Alexandria, 341 U.S. 622 (1951) (upholding a city ordinance prohibiting door-to-door solicitation as applied to a seller of secular magazine subscriptions); Martin v. City of Struthers, 319 U.S. 141 (1943) (striking down a local ordinance that prohibited door-to-door distribution of advertisements as applied to a Jehovah's Witness who circulated information about future meetings); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (striking down an ordinance that required religious peddlers to pay a licensing fee prior to undertaking their activity); Jamison v. Texas, 318 U.S. 413 (1943) (protecting a distributor of religious handbills that invited the purchase of religious books from a local ordinance prohibiting the distribution of handbills).

17. Murdock v. Pennsylvania, 319 U.S. 105 (1943).

18. Breard v. City of Alexandria, 341 U.S. 622 (1951) (the homeowner's interest in privacy outweighed any first amendment consideration).

19. U.S. CONST. amend. I. This argument was put forth in Note, *Yes, FTC*, *supra* note 2.

20. 376 U.S. 254 (1964). A civil libel action was brought against the *New York Times* and several other defendants for the *New York Times*' publication of a paid advertisement, seeking monetary support for the NAACP, that contained erroneous statements concerning police conduct.

reaching the fundamental libel question, the Court had to resolve whether the first amendment freedoms of speech and press were applicable "because the allegedly libelous statements were published as part of a paid, 'commercial' advertisement."[21] In deciding this preliminary question in favor of the newspaper, the Court carefully distinguished *Chrestensen* on the basis that the handbill distributed therein was a purely commercial advertisement while

> [t]he publication here [in the *New York Times*] was not a "commercial" advertisement in the sense in which the word was used in *Chrestensen*. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.[22]

Thus, the Court abandoned its primary purpose or motive test in favor of a content analysis. Since the questioned advertisement contained important public interest information, it was entitled to constitutional protection despite the fact that it was a paid advertisement soliciting monetary support.[23] The Court, in an excellent and revealing discussion of the first amendment's freedom of expression provision, noted that false remarks were inevitable in free, open, and robust political debate and that these must be accepted so as not to chill comment.[24] The constitutional guarantee of free speech "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection."[25] Such a fundamental constitutional principle cannot be permitted to turn upon its "truthfulness."[26] Therefore, the Court, employing a system of definitional balancing,[27] concluded that a

21. *Id.* at 265.

22. *Id.* at 266.

23. This holding enabled the Court to reach the ultimate question of newspaper libel of public officials and to alter the applicable standard of liability to instances when the public official can prove actual malice—*i.e.*, the making of a statement with knowledge of its falsity or with a reckless indifference to its truth.

24. 376 U.S. at 271. *See generally* notes 165-70 and accompanying text *infra*. "Under the First Amendment there is no such thing as a false idea." Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974); *but see* Part III *infra* concerning commercial speech and deceptive advertising.

25. 376 U.S. at 270 (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (*per* L. Hand, J.)).

26. *Id.*

27. Melvin Nimmer has been one of the foremost advocates of this approach (modern day absolutism, also referred to as "categorization") which he defines as the

> balancing process on the definitional rather than the litigation or ad hoc level. That is, the Court employs balancing not for the purpose of determining which litigant deserves to prevail in the particular case, but only for the purpose of defining which forms of speech are to be regarded as "speech" within the meaning of the first amendment.

Nimmer, *The Right to Speak From* Times *to* Time: *First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 942 (1968) (footnote omitted) [hereinafter cited as Nimmer, *The Right to Speak*]. *See also* T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1966); Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960). Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 STAN. L. REV. 311 (1974); Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A. L. REV. 29 (1973) [hereinafter cited as Nimmer, *Symbolic Speech*].

public official must demonstrate actual malice[28] upon the part of the defendant in order to prevail in a libel suit arising out of his official conduct.

A second important commercial speech decision concerning a newspaper was *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations.*[29] In *Pittsburgh Press* the Court was confronted with the issue whether a newspaper could constitutionally be prohibited from publishing any reference to sex in its employment advertising column headings.[30] The newspaper argued that such a restriction violated the freedoms of press and speech by interfering with its editorial discretion.[31] The Commission, distinguishing *New York Times*, successfully countered that under *Chrestensen* this purely commercial expression was unprotected speech.[32] The Court[33] held further that even assuming, *arguendo*, that the commercial speech doctrine should be abrogated it would not be decisive in this situation since "[d]iscrimination in employment is not only commercial activity, it is *illegal* commercial activity . . . ."[34]

The significance of this decision[35] is attenuated by the fact that the Court was not merely balancing the governmental interest in regulating expression against the freedom of speech, but was also confronted by the important values of freedom of the press and equal employment opportunities.[36] The majority was swayed by the argument that the sex-designated columns aided employers in their discriminatory hiring practices,[37] while the dissenters, with the exception of Justice Douglas, seemed more impressed by the freedom of the press issue.[38] Thus, analysts

28. *See* note 23 *supra.*

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

30. *Id.* at 380-81.

31. *Id.* at 384-86.

32. The Court recognized that under the *New York Times* rationale, "speech is not rendered commercial by the mere fact that it relates to an advertisement," 413 U.S. at 384, but further stated that the publications in question, classified job advertisements, were "classic examples of commercial speech." *Id.* at 385. They proposed nothing beyond the invitation to apply for employment.

33. Mr. Justice Powell authored the opinion and was joined by Justices Brennan, White, Marshall, and Rehnquist. The Chief Justice filed a dissenting opinion, as did Justices Douglas, Stewart, and Blackmun.

34. 413 U.S. at 388 (emphasis in original). The Court believed that the division of job advertisements into "Jobs-Male Interest," "Jobs-Female Interest," and "Male-Female" assisted employers in carrying out illegal discriminatory hiring practices and was therefore not protected by the first amendment. *See also* Pittsburgh Press Co. v. Commonwealth *ex rel.* Pennsylvania Human Relations Comm'n, 31 Pa. Commonw. Ct. 218, 376 A.2d 263 (1977) (an interesting turn of events).

35. It should be kept in mind that this article focuses upon *Pittsburgh Press* for purposes of the commercial speech doctrine.

36. Donald Meiklejohn, in reference to this decision, observed that "[t]he close decision in *Pittsburgh Press* rested upon a complex balance of the constitutional status of commercial speech, the urgency of the job equality cause, the dangers of governmental interference, and the values of unfettered publishing." D. Meiklejohn, *supra* note 2, at 435-36.

37. *See* note 34 *supra.*

38. The Chief Justice felt that this decision was a "disturbing enlargement of the 'commercial speech' doctrine . . . and a serious encroachment on the freedom of the press" in that it reached "the layout and organizational decisions of a newspaper." 413 U.S. at 393 (Burger, C.J., dissenting).

Mr. Justice Stewart, who was joined in this section of his opinion by Justices Douglas and Blackmun, disagreed with the Court's decision because "[i]t approves a government order dictating to

of the Court's position on freedom of speech must discount the impact of this particular decision.[39]

The final case that should be considered is *Lehman v. City of Shaker Heights*,[40] an extremely interesting decision that runs contrary to the fundamental principles of the first amendment by favoring commercial speech over political speech. A plurality[41] of the Court, with Mr. Justice Douglas concurring in the result, permitted the city's transit system to exclude all political advertisements from its carriers, although it accepted commercial advertisements. The plurality reasoned that because there was no public forum the question of freedom of expression need not be reached:

> In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles.[42]

This decision, the plurality felt, was reasonable because the transit system was protecting a captive audience[43] from irritating advertisements, shielding itself from the charge of political favoritism, and employing an equitable standard in forbidding all political advertisements.[44]

Lehman, however, is highly questionable; once a public transit system freely opens its doors to commercial advertisements it should not constitutionally be permitted to reject the more important political messages.[45] To permit this type of "reverse discrimination" cuts at the very heart of fundamental first amendment guarantees.[46] Furthermore, the Court's contention that this type of regulation is permissible because it is designed to protect a captive audience is untenable. As appropriately

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a publisher in advance how he must arrange the layout of pages in his newspaper." *Id.* at 401 (Stewart, J., dissenting). Moreover, this dissent expressed doubt concerning the validity of the *Chrestensen* decision, presaging events to come. *See* Part III *infra*.

Mr. Justice Douglas, who joined in Mr. Justice Stewart's dissent, also took the opportunity to advocate an absolutist interpretation of the first amendment. Mr. Justice Douglas argued that there can be no law curtailing the freedoms of the press and expression, except "when speech and action are so closely brigaded that they are really one." 413 U.S. at 398 (Douglas, J., dissenting).

39. In Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 759 (1976), the Supreme Court stated that the holding in *Pittsburgh Press* was premised upon the illegality issue and not the commercial speech aspect.

40. 418 U.S. 298 (1974).

41. Mr. Justice Blackmun wrote the short and unilluminating opinion. He was joined by the Chief Justice and Justices White and Rehnquist.

42. 418 U.S. at 303.

43. The Court held that viewers of billboards and streetcar signs had no choice but to perceive the advertisement. *See also* Public Utils. Comm'n v. Pollack, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting); Packer Corp. v. Utah, 285 U.S. 105 (1932).

44. 418 U.S. at 302-04. Mr. Justice Douglas reached his conclusion on similar grounds. *Id.* at 306-08 (concurring opinion).

45. *Id.* at 310-11 (Brennan, J., dissenting, joined by Justices Stewart, Marshall, and Powell).

46. *Id.*

pointed out by Mr. Justice Brennan in his dissenting opinion, the rider is not compelled to read the advertisement and surely any minor inconvenience caused the passenger "is a small price to pay for the continual preservation of such precious a liberty as free speech."[47] Moreover, it is inconceivable that the Court could find a rational distinction between the respective inconvenience caused by political and commercial advertisements. Nevertheless, the dissent in *Lehman* served clearly to augur the demise of the *Chrestensen* commercial speech doctrine[48] and the possible creation of a new, less potent, replacement doctrine. It was the dissenters' belief that commercial speech did come within the guarantees of the first amendment, although it might "be accorded *less* . . . protection than speech concerning political and social issues of public importance."[49]

III. THE *Lehman* DISSENTERS' PROPHECY COMES TO FRUITION: THE DEMISE OF THE UNPROTECTED COMMERCIAL SPEECH DOCTRINE AND THE RISE OF A LESS PROTECTED COMMERCIAL SPEECH DOCTRINE

A. Bigelow v. Virginia: *The Initiation of a Substantive Attack on the Old Doctrine and the Inception of a New Ad Hoc Balancing Doctrine*

In *Bigelow v. Virginia*[50] the Supreme Court[51] recognized that commercial speech is not "stripped of *all* First Amendment protection. The relationship of speech to the marketplace of products or of services does not make it *valueless* in the marketplace of ideas."[52] The Court, however, was not prepared to confront the *Chrestensen* doctrine head on, and in circumventing the issue "inadvertently" created two intriguing quandaries.

Jeffrey Bigelow, the editor of a Virginia newspaper, was criminally prosecuted for printing an advertisement for a New York abortion referral service, in violation of a Virginia statute that prohibited advertisements encouraging abortions. The Virginia Supreme Court affirmed Bigelow's

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47. *Id.* at 321.

48. *Id.* at 314 n.6. *See also* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 393 (1973) (Burger, C.J., dissenting) (majority opinion termed a "disturbing enlargement" of the commercial speech doctrine); *id.* at 398 (Douglas, J., dissenting); *id.* at 401 n.6 (Stewart, J., dissenting); Cammarano v. United States, 358 U.S. 498, 514 (1959) (Douglas, J., concurring).

49. 418 U.S. at 314 (emphasis in original).

50. 421 U.S. 809 (1975).

51. The *Bigelow* opinion was delivered by Mr. Justice Blackmun and joined by the Chief Justice and Justices Douglas, Brennan, Stewart, Marshall, and Powell. Mr. Justice Rehnquist filed a dissenting opinion in which Mr. Justice White joined.

52. 421 U.S. at 826 (emphasis added). Here, the Court measured importance of commercial speech in relation to the standard set by Mr. Justice Holmes in Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

conviction on the basis that it was commercial speech and therefore not protected by the first amendment and because the advertisement affected health, which the state has a legitimate and compelling interest in regulating.

After disposing of the threshold overbreadth issue, the United States Supreme Court, speaking through Mr. Justice Blackmun, ruled in favor of Bigelow upon a two-tiered analysis.[53] First, the Court sought to dispel the notion that merely because speech contained a commercial element it lost all first amendment protection. Commercial speech, it reasoned, does not fit into one of the categories of unprotected speech identified in *Chaplinsky v. New Hampshire*[54] or its progeny.[55] Nor did *Chrestensen* establish it as an additional category of nonspeech since "the holding [was] a distinctly limited one: the ordinance was upheld as a reasonable regulation of the manner in which commercial advertising could be distributed."[56] This was a novel redefinition and reinterpretation after thirty years of contradictory holdings.[57]

The Court, however, did not subscribe to its own rhetoric but felt compelled to align the case with *New York Times*. The *Bigelow* advertisement was found to be worthy of some constitutional protection because its *content* provided factual information pertaining to an important issue of public concern.[58] In light of the *Bigelow* reinterpreta-

53. The Court, interestingly, after first indicating its receptiveness to the threshold overbreadth challenge, declined to dispose of the case on that ground because of a recent revision in the pertinent statute and its desire to pursue the commercial speech issue. *See also* Bates v. State Bar of Ariz., 433 U.S. 350 (1977) and notes 139-42 and accompanying text *infra*; Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 462 n.20 (1978). The overbreadth doctrine provides that a state regulation suppressing first amendment freedoms will be invalidated, regardless whether it has been properly applied in the case before the court, if the restriction infringes upon a protected freedom. The doctrine serves to prevent a state regulation from improperly chilling first amendment rights. *See* Gooding v. Wilson, 405 U.S. 518 (1972); Cohen v. California, 403 U.S. 15 (1971). *See generally* Torke, *The Future of First Amendment Overbreadth*, 27 VAND. L. REV. 289 (1974); *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 201 n.24 (1977); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

54. 315 U.S. 568 (1942). *See* note 64 *infra*.

55. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (libel); Rosenfeld v. New Jersey, 408 U.S. 901, 903 (1972) (Powell, J., dissenting) (fighting words); Brandenburg v. Ohio, 395 U.S. 444 (1969) (incitement); Roth v. United States, 354 U.S. 476 (1957) (obscenity).

56. 421 U.S. at 819. The Court proceeded to cite *New York Times* and *Pittsburgh Press* in support of its contention that "any sweeping proposition that advertising is unprotected *per se*" is unsupportable. *Id.* at 820. *But see* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 758 (1976), which acknowledged that *Chrestensen* did in fact give "some indication that commercial speech is unprotected"; *see also* Linmark Assocs. v. Willingboro, 431 U.S. 85 (1977).

Additionally, it should be noted that the Court's reading of *Pittsburgh Press*, that the advertisement would have received some first amendment protection but for its illegality, is misguided. *See* notes 33-34 and accompanying text *supra*. The Court is misinterpreting an alternative conditional ruling as the holding of the case.

57. *But see* note 13 and accompanying text *supra*.

58. The Court, in analogizing the advertisement in *Bigelow* to that in *New York Times*, stated that the advertisement was more than a mere proposal to engage in a commercial transaction. It presented "factual material of clear 'public interest' " such as (1) that abortions are legal in New York, (2) that there is no residency requirement to have an abortion in New York, and (3) that services are offered by groups such as the Women's Pavilion (the advertiser). 421 U.S. at 822. The complete text of the advertisement appears at *id.* at 812.

tion of *Chrestensen*, however, there is no need to comport the *Bigelow* advertisement with *New York Times* or to continually remind the reader that commercial speech is not wholly outside the protection of the first amendment.[59] If *Chrestensen* merely dealt with a reasonable regulation regarding the manner in which information could be disseminated, then there would be no precedent creating a dichotomy between commercial and pure speech. It is well established that all speech can be reasonably restricted with respect to time, place, or manner of expression.[60] Thus, the Court, in an ultimate irony, renders a "Catch-22" decision in which it interprets away a principal doctrine but continues to apply the doctrine's exceptions—an incredibly deft feat.

Another interesting question created by the Court's circumvolutions[61]

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59. "[S]peech is not stripped of First Amendment protection merely because it appears in [commercial] form," *id.* at 818; its commercial aspect does "not negate all First Amendment guarantees," *id.*; there is no "sweeping proposition that advertising is unprotected *per se*," *id.* at 820; "commercial advertising enjoys a degree of First Amendment protection," *id.* at 821; "[w]e conclude, therefore, that the Virginia courts erred in their assumptions that advertising, as such, was entitled to no First Amendment protection," *id.* at 825.

60. It has been well established that reasonable time, place, and manner restrictions upon protected speech are permissible provided that they further an important state interest and are precisely tailored to accomplish their purpose. Bates v. State Bar of Ariz., 433 U.S. 350, 384 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976); Grayned v. City of Rockford, 408 U.S. 104, 115-16 (1972); Adderly v. Florida, 385 U.S. 39, 46-48 (1966); Cox v. Louisiana, 379 U.S. 536, 554 (1965); Kovacs v. Cooper, 336 U.S. 77, 85-87 (1949); Cox v. New Hampshire, 312 U.S. 569, 575-76 (1941). *See generally* G. GUNTHER, INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW: CASES AND MATERIALS 740-858 (1976); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Kalven, *The Concept of the Public Forum*: Cox v. Louisiana, 1965 SUP. CT. REV. 1; Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027 (1969); *The Supreme Court, 1975 Term*, 90 HARV. L. REV., 171, 186 (1976); Note, *Equal Protection and the First Amendment: Zoning Away Skid Row*, 31 U. MIAMI L. REV. 713 (1977) [hereinafter cited as Note, *Equal Protection*]. *See also* note 64 *infra*.

In United States v. O'Brien, 391 U.S. 367 (1968), the Court defined an elaborate test for speech that contains elements of both speech and nonspeech. Although it could be argued that the *O'Brien* test is limited to symbolic speech and does not extend to all conduct cases, that is, cases containing time, place, or manner restrictions, this argument has been successfully refuted. *See* Buckley v. Valeo, 424 U.S. 1, 17, 65 n.76 (1976); Ely, *supra*, at 1484 n.11; Nimmer, *Symbolic Speech*, *supra* note 27. The *O'Brien* standard is as follows:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.

A second intriguing and extremely subtle aspect of *O'Brien* is that the Court, in formulating its standard, relied not only upon decisions regulating conduct (time, place, or manner regulation) but also upon decisions regulating the content of speech. Hence, a plausible argument can be constructed that, despite the criticism *O'Brien* received from some absolutists, *see, e.g.*, Alfange, *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 SUP. CT. REV. 1, it might, in fact, represent the high water mark for such theorists. Certainly, one might infer that the Court, by unifying the two types of cases under the standard presented, was announcing that government regulation over speech could only occur if the government interest was not related to the suppression of speech. This, of course, is the equivalent of saying that all content regulation is constitutionally impermissible—the exact position espoused by the modern day absolutists and by a majority of the Warren Court. *See generally* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965). For an interesting reinterpretation of this argument favoring the balancers, see note 69 *infra*.

61. Mr. Justice Rehnquist referred to the Court's refusal to meet the issue head on as merely a "series of verbal sideswipes." 421 U.S. at 830 (Rehnquist, J., dissenting).

arises out of the second tier of its analysis, that is, its balancing test. After concluding that the *Bigelow* advertisement merited constitutional protection, the Court recognized that under certain circumstances even first amendment expression could be regulated.[62] The Court determined the propriety of such regulation of commercial speech through a balancing analysis that compared the various interests in the free exercise of the expression with the state's justifications supporting the suppression.[63] Superficially, this appears to be a reacceptance of the principle of ad hoc balancing[64] to determine first amendment protection. However, the Court's linguistic standard is far removed from traditional first amendment analysis:[65] "Advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest."[66] This standard is much more suggestive of the rationally related purpose

62. *Id.* at 826.

63. *Id.* at 826-29.

64. As already indicated, *see* note 60 *supra*, it is well recognized that certain restrictions of time, place, or manner of expression are permissible. Beyond this, however, there is considerable divergence between two fundamental and alien positions—that of the "absolutists" and that of the "balancers." The term "absolutists" is a misnomer and has generally given way to "categorizers" or "definitional balancers" since this camp does not contend that *no law* shall abridge free speech. Rather, it is their position that certain categories of speech are not protected by the first amendment. *See* note 27 *supra* and authorities cited therein. These categories are to be determined under exacting scrutiny, *see* notes 55, 56 and accompanying text *supra*, and beyond these few limited areas, speech, except for reasonable time, place, and manner restrictions, shall not be abridged by the government. Whatever balancing must occur to determine what speech is protected speech has already been accomplished by the drafters of the Bill of Rights. Konigsberg v. State Bar of Cal., 366 U.S. 36, 61 (1961) (Black, J., dissenting). *See* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Gooding v. Wilson, 405 U.S. 518 (1972); Cohen v. California, 403 U.S. 15 (1971). *See generally* G. GUNTHER, *supra* note 60, at 647-50; M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW (1966); Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962).

The balancers believe that a government regulation directly suppressing speech can be approved if under exacting scrutiny it substantially furthers a compelling state interest and it is the least intrusive alternative method to further the state interest. *See* Elrod v. Burns, 427 U.S. 347, 360-63 (1976); *id.* at 381, 387, 389 (Powell, J., joined by Burger, C.J., and Rehnquist, J., dissenting); Buckley v. Valeo, 424 U.S. 1, 25, 64-65 (1976); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); Procunier v. Martinez, 416 U.S. 396, 413 (1974); Konigsberg v. State Bar of Cal., 366 U.S. 36 (1961); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958); American Communications Ass'n v. Douds, 339 U.S. 382 (1950). *See generally* Ely, *supra* note 60; Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001 (1972); Linde, *Clear and Present Danger Reexamineed: Dissonance in the* Brandenburg *Concerto*, 22 STAN. L. REV. 1163 (1970); Mendelson, *The First Amendment and the Judicial Process: A Reply to Mr. Frantz*, 17 VAND. L. REV. 479 (1964); Note, *The Unconstitutionality of Limitations on Contributions to Political Committees In the 1976 Federal Election Campaign Act Amendments*, 78 YALE L.J. 953 (1977); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969) [hereinafter cited as Note, *Less Drastic Means*].

In the earliest freedom of speech cases, the Supreme Court used an ad hoc balancing approach, *see* Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919), and continued to do so until the Warren Court years witnessed the emergence of the categorization approach, *see* cases cited *supra*. However, recent cases emanating from the Supreme Court appear to indicate that once again the balancers have the upper hand. It is in the midst of these developments that the commercial speech cases reached the Court.

65. The word "traditional" is used here to describe the balancing approach, *see* note 64 *supra*, although under both the absolutist and balancing approaches the Court has employed terms like "compelling; substantial; subordinating; paramount; cogent; strong;" United States v. O'Brien, 391 U.S. 367, 376-77 (1968).

66. 421 U.S. at 826.

test of equal protection[67] than of those doctrines that have traditionally been employed in the regulation of free expression.[68] Moreover, the diverse array of cases cited in support of this proposition only enhances the confusion.[69]

Under close scrutiny, it is evident that the Court had a dual purpose: first, to reestablish the principle of ad hoc balancing of protected speech; and second, to provide commercial speech with less constitutional protection than pure speech. The problem is that the Court so intertwined the two as to blunt the impact of the holdings. To some extent, this confusion may have been intentional; it plays upon the near unanimity of distaste for the commercial speech doctrine and avoids any unnecessary general confrontation over the first amendment.[70] In any event, an analysis of the decision reveals the following: first, that at least for commercial speech, the Court invoked an ad hoc balancing standard to determine when protected speech might be suppressed; second, that the Court, although employing minimum scrutiny language, clearly did not utilize such a standard;[71] third, that the Court did not follow the traditional

67. The courts have traditionally applied a two-tiered test to equal protection cases—an exacting scrutiny standard to cases concerning suspect classifications or fundamental rights and a minimal scrutiny standard to all other cases. Under the latter test, a governmental regulation will be upheld if it is reasonably related to its stated purpose. *See* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Note, *A Question of Balance: Statutory Classification Under the Equal Protection Clause*, 26 STAN. L. REV. 155 (1973); Note, *Equal Protection*, *supra* note 60. For all practical purposes, a regulation scrutinized under a rationally related purpose standard is always upheld, while precisely the opposite fate awaits those regulations examined under the exacting scrutiny test. *See* authorities cited in this note and *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

68. *See* note 64 *supra*.

69. The cases cited by Mr. Justice Blackmun in support of his reasonable regulation to serve a legitimate public interest test were Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) (a case of dubious relevance; *see* notes 29-40 and accompanying text *supra*) and Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (a questionable decision holding that first amendment rights only exist in public forums; *see* notes 40-50 and accompanying text *supra*). The Court also cited the following cases in a footnote: Adderly v. Florida, 385 U.S. 39 (1966) (holding that the first amendment does not provide free access to jailhouse property for the purpose of making a public protest); Cox v. Louisiana, 379 U.S. 536 (1965) (upholding a statute that prohibited demonstrations within close proximity to a court building as a reasonable regulation of conduct, *i.e.*, a time, place, or manner restriction); Poulos v. New Hampshire, 345 U.S. 395 (1953) (upholding a nondiscretionary ordinance which mandated that a license be obtained in order to hold an open air public meeting); Kunz v. New York, 340 U.S. 290 (1951) (striking down an ordinance requiring that a permit be obtained prior to holding a public worship meeting because it granted the city official too much discretion); Cox v. New Hampshire, 312 U.S. 569 (1941) (a holding similar to *Poulos*). Thus, the cases merely stand for the proposition that reasonable regulations can be placed upon conduct. 421 U.S. at 826 n.11. It is inevitable that at times an individual's interest in expression will come in conflict with the public's interest in use of its parks and streets and the state must be permitted to make reasonable regulations to reconcile the two. *See* Neimotko v. Maryland, 340 U.S. 268, 273-89 (1951) (Frankfurter, J., concurring). *See also* note 60 *supra*. In *Bigelow*, the balancing wing of the Court may have been attempting to utilize the subtle argument of United States v. O'Brien, 391 U.S. 367 (1968), which harmonized the speech regulation cases in an attempt to end all content regulation. *See* note 60 *supra*.

70. *See generally* note 64 *supra*.

71. As indicated *supra* note 67, when the minimum scrutiny test is employed the government regulation is almost invariably upheld. Similar challenges under the minimum scrutiny test of the equal protection clause have resulted, as anticipated, in decisions favorable to the government, and some of

exacting scrutiny standard for the ad hoc suppression of protected speech based upon its content;[72] and last, that the Court did employ a modified balancing version of the time, place, or manner standard, even though the controversy concerned the direct suppression of speech.

The *Bigelow* Court's standard could, therefore, be summarized as follows: a government regulation directly suppressing commercial speech is valid if (1) upon a balancing of the various interests, the state's justification prevails under close scrutiny, (2) the regulation substantially furthers a legitimate, albeit not compelling, state purpose, and (3) the regulation, narrowly tailored to accomplish its designed purpose, constitutes the least restrictive alternative.[73] Using this standard, the Court had little difficulty in granting the factually significant *Bigelow* advertisement constitutional protection in light of the "little, if any weight"[74] accorded to the government justifications for its suppression.[75]

B. Virginia State Board of Pharmacy: *The New "Lesser Protected" Commercial Speech Doctrine Becomes Firmly Entrenched, the Old Commercial Speech Doctrine Fades Away*

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[76] the Supreme Court expanded and refined its *Bigelow* test. In *Virginia Pharmacy Board*, the Court was confronted with the question that it had decided it need not resolve in *Bigelow*: whether an advertisement that merely proposes a commercial transaction is "wholly outside the protection of the First Amendment."[77] The case arose out of a

these decisions are favorably cited in footnote 10 of the Court's opinion. 421 U.S. at 825 n.10. Furthermore, although the language used by the Court suggests a minimum scrutiny test, the analysis and the cases cited do not. *See* 421 U.S. at 826-29; note 69 *supra*. *See also* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); note 90 and accompanying text *infra*. Mr. Justice Rehnquist recognized this weakness in the Court's opinion and argued that surely "the statute in question is a 'reasonable regulation that serves a legitimate public interest.' " 421 U.S. at 836 (Rehnquist, J., dissenting).

72. The Court's language, citations, and analysis clearly do not comport with an exacting scrutiny standard. It is impossible to ignore the Court's use of "reasonable regulation" language or its citations to numerous time, place, or manner cases dealing with reasonable restrictions upon expression.

73. If one prefers, the three prongs can be collapsed into two by combining elements (1) and (2). That is, the regulation will be upheld when it substantially furthers an important state interest outweighing the interests of those it is regulating. It should also be noted that the phrase "close inspection," although not employed in *Bigelow*, seems to suggest the analysis actually used (as opposed to exacting scrutiny) and hence was taken by this author from *Virginia Pharmacy Board*. 425 U.S. at 769. For further discussion of this test and its justifications, see Part IV. A. *infra*.

74. 421 U.S. at 828.

75. The Court was wholly unimpressed by the argument that Virginia was preserving the quality of medical care by preventing fee splitting arrangements and other referral service abuses.

76. 425 U.S. 748 (1976). This was a seven to one decision in which Justice Rehnquist dissented. *Id.* at 781.

77. *Id.* at 761. The Court was initially confronted by the question whether the plaintiffs had standing to bring the action. They were not directly subject to the prohibition, but contended that they had a right to "receive information that pharmacists wish to communicate to them through advertising or other professional means, concerning the prices of . . . drugs." *Id.* at 754. This concept had

challenge by prescription drug consumers to have a Virginia statute, which in essence prohibited pharmacists from advertising prescription drug prices, invalidated as being violative of the first and fourteenth amendments to the United States Constitution. In resolving this question the Court fully laid to rest whatever "fragment of hope" *Bigelow* left[78] for the *Chrestensen* doctrine;[79] namely, that commercial speech is an unprotected form of expression. At the same time the Court reinforced the concept of a new commercial speech doctrine:

> In concluding that commercial speech enjoys First Amendment protection, we have *not* held that it is wholly undifferentiable from other forms. There are *commonsense differences* between speech that does "no more than propose a commercial transaction," . . . and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a *different degree of protection* is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.[80]

In *Virginia Pharmacy Board* the Court again applied a two-tiered test, but one with several marked differences from the *Bigelow* test.[81] The first level of analysis consisted of an ad hoc balancing that included all three prongs of the *Bigelow* standard.[82] The Court acknowledged that since commercial speech does not fall within a category of unprotected speech, any attempt to regulate it must be based upon its content.[83]

Mr. Justice Blackmun then proceeded to weigh the various interests in support of the speech against the state's interest in its regulation. Focusing on the interests favoring free speech, the Court looked to: first, the advertiser's interest—which, despite its economic nature, is entitled to first amendment protection;[84] second, the consumer's interest—which "may be

received significant support from the academic community, *see* T. EMERSON, *supra* note 27; A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 39 (1948); Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 435-36 (1971), and received the support of the Court here. "If there is a right to advertise, there is a reciprocal right to receive the advertising." 425 U.S. at 757. *See also* Procunier v. Martinez, 416 U.S. 396, 409 (1974); Kleindienst v. Mandel, 408 U.S. 753 (1972); Lamont v. Postmaster Gen., 381 U.S. 301 (1965).

78. 425 U.S. at 760. *See also* Linmark Assocs. v. Willingboro, 431 U.S. 85, 91 (1977). *See generally The Supreme Court, 1975 Term*, 90 HARV. L. REV. 143 (1976).

79. The Court noted that "last Term in Bigelow v. Virginia, 421 U.S. 809 (1975), the notion of unprotected 'commercial speech' all but passed from the scene." 425 U.S. at 759.

80. 425 U.S. at 771-72 n.24 (emphasis added) (citations omitted).

81. The first level of the *Bigelow* test included a refutation of the *Chrestensen* doctrine and the announcement that the advertisement would be accorded protection under a *New York Times* rationale. The second level was an ad hoc balancing of interests. In *Virginia Pharmacy Board* the first level (*Bigelow* having disposed of the nonspeech concept for commercial advertisements) was an ad hoc balancing, while the second tier was a general analysis of whether this particular form of protected speech could be regulated.

82. *See* text accompanying note 73 *supra*.

83. 425 U.S. at 761.

84. The Court relied upon the freedom of expression enjoyed by parties to a labor dispute despite their economic interest. *See, e.g.*, NLRB v. Gissell Packaging Co., 395 U.S. 575 (1969); Thornhill v. Alabama, 310 U.S. 88 (1940).

as keen, if not keener by far, than his interest in the day's most urgent political debate"[85] that is the cornerstone of first amendment protection;[86] and last, the public's interest—which is also compelling because the advertisement may contain information of general public interest and, even if it does not, "is indispensable to the proper allocation of resources in a free enterprise system."[87] Pure commercial advertising therefore satisfies the content test of *Bigelow* and *New York Times* in that it provides assistance to the public in rendering enlightened decisions on matters of general concern. The Court thus reaffirmed the relationship of speech in "the marketplace of products or of services" to the capstone of free expression—"the marketplace of ideas,"[88]—definitively rejecting the notion that commercial speech is unprotected speech.[89]

"Arrayed against these substantial individual and social interests"[90] were a number of inconsequential and uncompelling state justifications.[91] The Court was not persuaded by the assertion that the ban on advertisement of prescription drug prices was necessary to maintain the quality and professionalism of pharmaceutical care, primarily because it was founded upon the "highly paternalistic" approach of keeping the public in ignorance.[92] "[I]nformation is not itself harmful . . . . [P]eople will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication rather than to close them."[93] Thus, the Court employed an ad hoc balancing test in evaluating the competing interests. It cast a keen eye toward whether the regulation substantially furthered an important

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85. 425 U.S. at 763.

86. *See* Brennan, *supra* note 60, at 1; Part IV. A. *infra*. *See also* Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

87. 425 U.S. at 765. The Court also reasoned that even if one accepted Dr. Alexander Meiklejohn's theory as expressed in FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT, *supra* note 77—that the first amendment pertains to public enlightenment in the administration of democratic decision-making—commercial information would still be somewhat protected. Pure commercial messages provide the citizenry with important information concerning how the system is functioning and how it should be regulated or altered. *Compare* Alexander Meiklejohn's theory *with* that espoused by Donald Meiklejohn, *supra* note 2, *and* Redish, *supra* note 77. *See* Part IV. A. *infra*. This is true only to the extent that the information provided is accurate and truthful. *See* note 130 *infra*.

88. 425 U.S. at 760 (quoting Bigelow v. Virginia, 421 U.S. 809, 825-26 (1975)).

89. *See id.* at 762.

90. *Id.* at 766.

91. The pharmacy board argued that the removal of the prescription drug price prohibition would (1) force pharmacists to stop providing certain services to their customers, (2) induce consumers to price shop and thus end the traditional and important pharmacist-customer relationship, and (3) cause the pharmacist to lose his professional self-image. *Id.* at 766-70.

92. *Id.* at 770. The Court pointed out that 95% of all prescription drugs are prepackaged by the manufacturer and merely sold by the pharmacist. Moreover, studies have indicated that the price differentials of certain drugs have ranged up to 1200% within one city. Most significantly, the Court added that since the profession is already extensively regulated, it could successfully and less intrusively continue to maintain quality health care without the advertising ban.

93. *Id.* This is clearly a "marketplace of ideas" rationale.

state interest and was the least intrusive alternative[94]—and found the Virginia regulation lacking on both counts.

The first level of the *Virginia Pharmacy Board* Court's analysis appears to establish, first, that all commercial speech is entitled to some first amendment protection,[95] and second, that the relevant Virginia statute was constitutionally infirm as determined by an ad hoc balancing. It is not self-evident what standard of examination the Court used in conducting the balance—a *Bigelow* standard, an exacting scrutiny standard,[96] or a rational reason standard.

The Court did not state which standard it actually relied upon, although it did expressly reject any possibility that the *Bigelow* "reasonably related" language was intended to create a minimum scrutiny standard.[97] The most significant analysis, however, is provided by the Court in the second tier of its examination. This level of analysis dealt with the traditionally accepted principle that all forms of protected speech can, under appropriate circumstances, be regulated. To his discussion of one of these permissible forms of commercial speech restriction,[98]—namely, the prohibition of false, deceptive, and misleading advertisements—Justice Blackmun appended his all-important footnote twenty-four. This footnote reads as follows:

> In concluding that commerical speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are commonsense differences between speech that does "no more than propose a commercial transaction," . . . and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired. The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the *sine qua non*

94. Concerning the least intrusive alternative, see generally Note, *Less Drastic Means*, *supra* note 64.

95. It is interesting that in order to arrive at this result the Court was forced to employ an analysis that could be labeled "reverse definitional balancing."

96. For support of the view that exacting scrutiny was employed, see Schiro, *supra* note 2, at 96; Note, *Commercial Speech Blockbusting, and the First Amendment:* Linmark Associates, Inc. v. Willingboro, 7 CAP. L. REV. 271, 281-83 (1977); *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 145-48 (1976).

97. The Court stated that it would not invoke the equal protection standard of rational reason employed in Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 424 (1963), Williamson v. Lee Optical Co., 348 U.S. 483 (1955), and Semler v. Dental Examiners, 294 U.S. 608 (1935), because the first amendment demands closer scrutiny. 425 U.S. at 769.

98. The Court noted four such permissible forms of commercial speech regulation: reasonable time, place, and manner restrictions; prohibition of false, deceptive, and misleading advertisements; prohibition of advertisements proposing illegal transactions; and reasonable restrictions upon the use of the electronic media. *Id.* at 771-73.

> of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely.
>
> Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker. . . . They may also make it appropriate to require 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. . . . They also make inapplicable the prohibition against prior restraints. . . .[99]

The major question concerning this footnote is whether its tremendously significant language is limited to the problem of deceptive advertising. If so, it provides little assistance regarding the appropriate scrutiny to be employed in the regulation of truthful advertising. On the other hand, if its "commonsense differences," "not . . . valueless," and "different degree of protection" language refers to commercial speech in general, then the Court obviously was employing a *Bigelow*-type standard. Most probably the whole question is illusory, for the term "misleading" can be defined as broadly as desired.[100] If one wishes to justify a government regulation of commercial speech, one need only say that the speech would be misleading or deceptive without such a restriction. This, in essence, supports a *Bigelow* standard according less protection to commercial speech, that is, the new commercial speech doctrine.

Upon close examination, it becomes apparent in any event that the language and content of footnote twenty-four call for a more comprehensive interpretation.[101] In support of this contention are the following: first, the Court's specific use of the words "close inspection";[102] second, the Court's cautious and moderate analysis; third, the broad language of the first three sentences of the footnote; fourth, the form of the question the Court posed—whether commercial speech "is wholly outside the protection of the First Amendment";[103] fifth, the Court's ultimate holding that a state could not "*completely* suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients";[104] and last, the recent *Bigelow* decision, also authored by Mr. Justice Blackmun.

The lower degree of protection afforded commercial speech exists because commercial speech is both less valuable[105] and less vulnerable[106]

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99. 425 U.S. at 771-72 n.24 (citations omitted).

100. *See* Warner-Lambert Co. v. FTC, 562 F.2d 749, 770 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978); Reich, *Consumer Protection and the First Amendment: A Dilemma for the FTC?*, 61 MINN. L. REV. 705 (1977); Note, *Yes, FTC, supra* note 2.

101. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).

102. 425 U.S. at 769. Note that the Court did not state under "closest" or "exacting" inspection.

103. *Id.* at 761. *See also* Linmark Assocs. v. Willingboro, 431 U.S. 85, 91 (1977).

104. 425 U.S. at 773 (emphasis added).

105. *See* note 153 *infra.*

106. *See* notes 107-09 and accompanying text *infra.* This is significant in that the primary criticism of the ad hoc balance, which the Court is here adopting, is its lack of advance warning and

than other varieties of speech. Concerning the vulnerability of commercial messages, the Court stated that commercial speech is (1) easier to verify so that it is "less necessary to tolerate inaccurate statements"[107] and (2) "[s]ince advertising is the *sine qua non* of commercial profits,"[108] more durable so that mandating accurate and provable statements is less likely to have a chilling effect. After all, a state has a legitimate interest in ensuring that commercial information flows "cleanly as well as freely."[109] Thus, truthful and legitimate commercial speech is constitutionally protected, although it is slightly more susceptible to legitimate governmental regulation than other varieties; in other words, a lower standard of examination exists. On the other hand, false, deceptive, and misleading advertisements pose no obstacle to state regulation.[110]

Thus, a new commercial speech doctrine has surfaced in which a constitutionally protected area of speech, due to its very nature and its "commonsense differences," is entitled to a lesser degree of protection. Significantly, this is the first instance in which the Court has used content to distinguish an area of protected speech in order to grant it diminished status.[111] Will this concept be extended to other categories of speech? Rather than relegating an area to a *Chaplinsky* nonspeech category, will the Court further employ this intermediate approach? Or is this new principle to be employed exclusively in conjunction with commercial speech, in light of its "commonsense differences"?[112] What effect does this decision have upon *New York Times* and *Bigelow*? Are all forms of commercial speech, regardless of their content, to be accorded this lower degree of protection? Are we to continue to distinguish and variably protect commercial speech depending upon the significance of its particular message?[113]

It is apparent that the *Virginia Pharmacy Board* decision leaves some important questions unanswered. Many of these present the same confounding problems as the *Chrestensen* doctrine, on a different level.

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hence its potential chilling effect upon speech. *See* T. EMERSON, *supra* note 27; Nimmer, *The Right to Speak, supra* note 27. By pursuing the concept of vulnerability, the Court is able to avoid this criticism.

107. 425 U.S. at 772 n.24.

108. *Id.* In footnote 24, the Court further noted that these "commonsense differences" might also permit certain prior restraints in addition to the prescribed warnings, disclaimers, or additional information in the advertisement itself.

109. *Id.* at 772.

110. 425 U.S. at 771-72. *See* note 130 and accompanying text *infra.*

111. Although one commentator has pointed out that, in the case of libel, the Court has already separated protected speech from unprotected speech on a content analysis, *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 196 (1976), this is the first instance in which the *degree* of protection has been based upon content. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (both establishing libel as a category of unprotected—not less protected—speech). *See generally* note 189 *infra.*

112. *See* Part IV. A. *infra* for a discussion of these questions concluding that the new doctrine should not be extended to other areas of speech.

113. *See* Part IV. A. *infra* for a discussion of these questions concluding that the first amendment value of the commercial message's content must be taken into consideration in determining whether full or lesser protection will be accorded.

Now, instead of determining which types of commercial speech are entitled to constitutional protection, the lower courts must decide which forms are entitled to full protection and which are entitled to a lesser degree of protection.

C. Linmark Associates, Inc. v. Willingboro: *Some Further Guidance*

Linmark Associates, Inc. v. Willingboro[114] presented to the Court a factual situation closely paralleling that of *Virginia Pharmacy Board* and *Bigelow*. Hence, the Court[115] had little difficulty in resolving the issue in favor of the free exercise of expression.[116] The case does, however, provide some limited additional guidance concerning the nature and extent of the new commercial speech doctrine.

The Township of Willingboro, after much thought and study, enacted an ordinance prohibiting the placement of "for sale" and "sold" signs in front of residential dwellings. The prohibition was designed to stem what was perceived as a white exodus from the township. Challenging the ordinance were a New Jersey corporation owning real estate in Willingboro and a local real estate agent.

In analyzing this case, two fundamental inquiries must be recognized: first, the extent to which a state may regulate speech due to its content; and second, whether this regulation can be considered to restrict reasonable time, place, or manner. The first inquiry raises once again the crucial issue of assessing the applicable standard to determine whether protected commercial speech (as opposed to false, deceptive, or misleading advertisements) can be regulated. The Court provides some initial assistance in rejecting the standard of the court of appeals:[117] that "commercial speech may be restricted if its 'impact be found detrimental' by a municipality, and if 'the limitation on any pure speech [as opposed to commercial speech] element is minimal.' "[118] But the Court immediately restricts any possible expansive interpretation of this thought by stating that "[a]fter *Virginia Pharmacy Board* it is clear that commercial speech cannot be banned because of an unsubstantiated belief that its impact is 'detrimental.' "[119]

Mr. Justice Marshall, writing for the Court, makes no further reference to the appropriate standard to be employed. Nevertheless, his

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114. 431 U.S. 85 (1977).

115. Mr. Justice Marshall delivered the unanimous opinion of the Court. Mr. Justice Rehnquist did not participate in the consideration of the case.

116. The Court noted that, as in *Virginia Pharmacy Board*, the speaker (advertiser), consumer, and public all had significant first amendment interests. Interestingly, the Court also seemed to be impressed by the large financial investment that was at stake. *Id.* at 92.

117. 535 F.2d 786 (3d Cir. 1976).

118. 431 U.S. at 92 n.6 (quoting 535 F.2d at 795).

119. *Id.*

analysis of the constitutionality of the Willingboro ordinance supports the position that the Court was employing a standard similar to that used in *Bigelow*.[120] In holding that the balancing of interests favored the free exercise of expression even when the ordinance advanced an important governmental objective, the Court in essence found that the government regulation failed to satisfy all aspects of the new standard.[121] Since the township failed to demonstrate that it was experiencing massive panic selling or that this type of ordinance could reduce such sales,[122] it could not demonstrate that its regulation *substantially* furthered a legitimate state interest.[123] More importantly, the Court expressed its extreme distaste, as in *Virginia Pharmacy Board*, for any regulation that relied upon keeping the public in ignorance of truthful and vital information.[124] The Court clearly believes that there are more suitable alternatives to such "highly paternalistic" suppression of information.[125] Hence, under close inspection, the first amendment interests were clearly dominant.

It should be noted here that the other reviewable segment of this decision, that is, the time, place, or manner restriction, although less significant for the purposes of this article, is the more controversial aspect of the opinion. The township contended that its ordinance only imposed a reasonable time, place, or manner restriction—the constitutional validity of which has long been recognized[126]—upon the use of "for sale" and "sold" signs. The Court, however, was unpersuaded by this assertion; the ordinance, which only banned placement of specified signs in certain

120. The *Bigelow* standard, note 73 and accompanying text *supra*, is a three-part test: a government regulation that suppresses commercial speech is justified if (1) the state's interest in the regulation, under close inspection, outweighs the first amendment interests, (2) the regulation substantially furthers an important (not a compelling) state interest, and (3) the regulation is the least restrictive alternative. Part (3) of this test is readily supported throughout the Court's opinion. 431 U.S. at 95-97. It is far more difficult to support elements (1) and (2). The Court, in discussing the merit of Willingboro's purpose, employs language such as "vital goal," "importance," "substantial benefits," "strong national commitment," "important governmental objective," and "strong interest." Obviously, neither this language nor any other in the opinion conclusively demonstrates that the Court was in fact employing a close inspection and legitimate purpose standard rather than an exacting scrutiny test.

121. 431 U.S. at 95-97.

122. The Court indicated in footnote 9, 431 U.S. at 95, that it was not deciding whether proof of massive white flight resulting from the use of "for sale" and "sold" signs would affect its decision as it had the Seventh Circuit's decision in Barrick Realty, Inc. v. City of Gary, 491 F.2d 161 (7th Cir. 1974) (prohibition of "for sale" signs upheld on record showing that signs caused panic selling). Yet even if the Court had heard such evidence and found it compelling, a problem would remain under part (3) of the *Bigelow* standard—*i.e.*, the requirement of the least restrictive alternative. Query, if the Court actually believed *Barrick* could survive the *Linmark* decision, why it did not remand this case for a finding of facts on the "panic selling" issue.

123. 431 U.S. at 95-97.

124. *Id.*

125. The Court indicates that the public will be able to absorb all the necessary information and make its own decisions in what it believes to be its own best interest. *Id.* at 97; *see also* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 770 (1976). In Part III of its opinion, however, the Court reaffirms its position that there are commonsense differences between commercial speech and pure speech, implying that a township may have added leeway in remedying the problem.

126. *See* note 60 *supra*.

locations,[127] for all practical purposes barred efficient communication of the true message.[128] Hence, the Court invalidated the ordinance due to its impermissible impairment of the free flow of legitimate and truthful commercial speech.

D. Bates v. State Bar of Arizona: *Another Degree of "Lesser Protection"*

The case of *Bates v. State Bar of Arizona*[129] reaffirmed the cardinal principles underlying the commercial speech doctrine, but did not provide solutions to the unanswered problems left by its predecessors. First, the decision restated that truthful and legitimate commercial speech is constitutionally protected, although it did not clarify the appropriate standard of protection. Second, false, deceptive, and misleading advertisements were found not to be entitled to constitutional protection and thus subject to regulation by the states.[130] Finally, the Court found that "commonsense differences" distinguishing commercial speech from other varieties justified the application of a different constitutional standard.

The issue in *Bates*, however, was extremely narrow: "[W]hether the State [could] prevent the publication in a newspaper of . . . [a] truthful advertisement concerning the availability and terms of routine legal services."[131] This issue was not confronted in *Virginia Pharmacy Board*, although the Court's comments suggested a high probability of a positive answer.[132] In arriving at the opposite result, the Court, speaking through

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127. The Court found that the town was not genuinely interested in regulating the manner or place of signs since it did not prohibit all front lawn signs or all signs with a particular purpose. It appeared to the Court that the ordinance was aimed at signs containing a specific message. 431 U.S. at 93-94.

128. The Court was of the opinion that there was no economically feasible alternative means of communicating the desired message since both "newspaper advertising and listing with real estate agents" were significantly more costly and perhaps even less effective. *Id.* at 93.

129. 433 U.S. 350 (1977).

130. This near carte blanche regulation of false, misleading, and deceptive commercial speech is justified by the fact that any benefit derived from this type of speech depends entirely upon its truthfulness and accuracy. A consumer's economic decision-making process is facilitated only if factual and reliable information is provided. Furthermore, it is unlikely that opposing viewpoints would be generally available to the public.

131. 433 U.S. at 384. Appellants John R. Bates and Van O'Steen, licensed attorneys in the state of Arizona, placed an advertisement in a local Phoenix newspaper in order to increase their legal clinic's clientele. Knowing that the advertisement violated Arizona's disciplinary code, the two challenged the constitutionality of the code's blanket suppression of attorney advertising in the disciplinary action brought by the state bar association. The advertisement merely stated that the clinic provided services at "very reasonable fees" and went on to describe five services and the fees charged for these services: (1) uncontested divorces—$175 plus $20 filing fee; (2) "do your own" divorce packet—$100; (3) uncontested adoption—$225 plus publication cost; (4) individual, uncontested bankruptcy—$250 plus $55 filing fee or $300 plus $110 filing fee for joint bankruptcy; (5) change of name—$95 plus $20 filing fee. *Id.* at 385. The Arizona Supreme Court ultimately upheld their convictions but reduced the penalty to censure.

132. The Court indicated that there is a significant difference between physicians and lawyers—who render professional services of infinite variety—and pharmacists. 425 U.S. at 773 n.25. *See id.* at 774 (Burger, C.J., concurring). *See also id.* at 781 (Rehnquist, J., dissenting).

Mr. Justice Blackmun,[133] first undertook a comprehensive review of its holding in *Virginia Pharmacy Board.* In relying upon that decision, Mr. Justice Blackmun was careful to point out that the information provided was truthful and legitimate (and could not in any sense be deemed misleading), that the alternative course of action chosen by the state regulatory body was to maintain the public in ignorance,[134] and that the regulation's application to attorneys was not sufficient to distinguish the controversy. This last point, however, must be considered in light of the narrow question posed by the Court.[135]

Arrayed against the first amendment interests[136] were the numerous justifications proffered by the state,[137] which the Court refuted one by one.[138] At this juncture the Court provided an additional basis for the lesser degree of protection offered commercial speech (the others being the lack of constitutional protection for false, misleading, and deceptive advertisements and the less demanding judicial review standard in general). Rather than terminate the case once it determined that the blanket suppression of legal advertisements would suppose some constitutionally protected speech, the Court proceeded to analyze whether the advertisement in question was outside the scope of the first amendment. The Court reasoned that the overbreadth doctrine,[139] which in the typical first amendment case would have been sufficient to uphold

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133. Mr. Justice Blackmun, in the first amendment portion of his decision, was joined by Justices Brennan, White, Marshall, and Stevens. The Chief Justice and Justices Stewart, Powell, and Rehnquist dissented.

134. From both *Virginia Pharmacy Board* and *Linmark* it is apparent that the Court finds paternalistic maintenance of ignorance a particularly unacceptable alternative.

135. The Court specifically stated that it was not dealing with advertising claims that related to quality of performance or with in-person solicitation. 433 U.S. at 366. Moreover, the Court specifically limited its decision to *newspaper* advertisements pertaining to price of "routine legal services," which it carefully avoided defining. *Id.* at 384.

136. Interestingly, the Court did not attempt to enumerate the first amendment interests that are implicated in a commercial speech setting, evidently believing that these had been sufficiently described in *Virginia Pharmacy Board.*

137. The justifications offered were: (1) the adverse effect on professionalism; (2) the inherently misleading nature of attorney advertising; (3) the negative effect on our system of justice; (4) the increased costs of advertising; (5) the adverse effect on quality of services rendered; and (6) the administrative enforcement problems. 433 U.S. at 368-79.

138. Taking the state bar's arguments in order, the Court responded that: (1) the public is well aware that attorneys are engaged in earning a livelihood; (2) it is never preferable to keep the public in ignorance; (3) any increase in the amount of litigation is perfectly proper so long as wrongs are being remedied; (4) it is just as likely that advertising will lower costs and ease entry barriers; (5) an attorney who will perform shoddy work will do so regardless of his ability to advertise; and (6) it is inconsistent to argue that attorneys are virtuous individuals and then argue that they will utilize advertising to commit wrongs. *Id.* at 368-74. Ironically, the Court, in the antitrust segment of its opinion, noted a strong justification for state control of attorneys:

> [R]egulation of the activities of the bar is at the core of the State's power to protect the public. Indeed, this Court in *Goldfarb* acknowledged that "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' "

Id. at 361-62 (quoting Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975)).

139. *See* note 53 *supra.*

Bates' attack,[140] had little application in the field of commercial speech.[141] Once again, this distinction was based upon the "commonsense difference" in the vulnerability of commercial speech and other varieties.[142] Significantly, the Court also verified the notion that the "commonsense differences" language and the other teachings of footnote twenty-four of *Virginia Pharmacy Board* apply to commercial speech in general, not just to deceptive advertisements.[143]

Having concluded that, on the narrow issue presented, the balance of interests favored the first amendment, the *Bates* Court proceeded to the second level of its new commercial speech analysis.[144] As in *Virginia Pharmacy Board*, the Court examined whether any justification existed to permit the regulation of constitutionally protected speech.[145] Having determined that there was no such justification, the Court merely ruled that truthful and legitimate price advertisements concerning *routine* legal services could not be suppressed from newspaper publication.[146]

E. Ohralik v. Ohio State Bar Association: *The Supreme Court Resolves Some Uncertainties of the New Commercial Speech Doctrine*

The United States Supreme Court recently decided two companion cases concerning the constitutional protection to be accorded in-person and mail solicitation by attorneys—*Ohralik v. Ohio State Bar Association*[147] and *In re Primus*.[148] In *Ohralik*, Mr. Justice Powell, writing for the Court,[149] held that the solicitation[150] perpetrated by attorney Ohralik was

140. 433 U.S. at 379-81. "In the First Amendment context, the Court has permitted attacks on overly broad statutes without requiring that the person making the attack demonstrate that in fact his specific conduct was protected." *Id.* at 380.

141. *Id.* at 380-81. *See also* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 462 n.20 (1978).

142. 433 U.S. at 380-81 (citing Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 n.24, 775-81 (1976)).

143. 433 U.S. at 380-81.

144. The same analysis was utilized in *Virginia Pharmacy Board*. *See* notes 81, 98, and accompanying text *supra*.

145. The Court, as it had in *Virginia Pharmacy Board*, mentioned the following permissible forms of commercial speech regulation: (1) restrictions upon false, deceptive, and misleading advertisements; (2) reasonable time, place, or manner restrictions; (3) prohibitions upon the advertising of illegal transactions; and (4) reasonable restrictions upon the use of the electronic media. 433 U.S. at 383-84.

146. "[T]he Court [in *Bates*] ruled that the justifications for prohibiting truthful, 'restrained' advertising concerning 'the availability and terms of routine legal services' are insufficient" to override the constitutional interest. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 454 (1978).

147. *Id.* at 454.

148. 436 U.S. 412 (1978). *In re Primus* held, predominantly under a freedom of association theory, that the first amendment protected an attorney who, on behalf of the American Civil Liberties Union and without remuneration, wrote to a woman to inform her that she would be represented free of charge if she elected to sue the physician who sterilized her.

149. Mr. Justice Powell was joined by the Chief Justice and Justices Stewart, White, Blackmun, and Stevens. Justices Rehnquist and Marshall filed concurring opinions, while Mr. Justice Brennan did not participate in the decision.

150. Mr. Justice Marshall termed the activities "classic examples of 'ambulance chasing.' " 436 U.S. at 469 (Marshall, J., concurring).

not constitutionally protected. A state "may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent."[151]

Ohralik was distinguishable from *Bates* on both sides of the ad hoc balance—not only was the state's interest more powerful but the first amendment interest was also not as compelling. Presented with a situation in which it could, for the first time, apply its new commercial speech doctrine to resolve a controversy *against* the defendant's first amendment interests, the Court took the opportunity to clarify some of the test's ambiguities. First, the Court clearly established that *all* commercial speech—not just deceptive advertising—is distinguishable from other varieties of speech.[152] Second, Mr. Justice Powell significantly stated that the Court has afforded commercial speech "a *limited measure of protection*, commensurate with its *subordinate position* in the scale of First Amendment values,"[153] thus confirming the belief that commercial speech is accorded its lower degree of protection not only because it is less vulnerable but also because it is less valuable. Third, the Court found that the government may suppress commercial speech in some instances in which the suppression of pure speech would not be tolerated.[154] Fourth, the opinion recognizes that laws regulating, for example, securities, antitrust, and labor[155] commonly make it illegal to pursue a course of conduct that necessarily implicates speech. Last, the Court indicates that a compelling interest need not be presented by the state in support of its regulation, but only a legitimate or important state interest.[156]

The *Ohralik* decision thus completely substantiates the existence of a new commercial speech doctrine comprised of the elements discussed above.[157] It fails, however, to resolve some basic questions concerning the

151. *Id.* at 449.

152. *Id.* at 455-56. Moreover, Ohralik's in-person solicitation did "not stand on a par with truthful advertising about the availability and terms of routine legal services, let alone with forms of speech more traditionally within the concern of the First Amendment." *Id.* at 455.

153. *Id.* at 456 (emphasis added). This holding was inevitable in light of the grave difficulty the courts would encounter if they sought to apply a mere "less vulnerable" standard. As suggested in *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 198, 206-07 (1977), this standard became unworkable when the Court indicated that attorneys would receive less first amendment protection than pure product advertisements, even though attorney advertisements are obviously more difficult to verify and less durable.

154. 436 U.S. at 456.

155. *Id.*

156. *Id.* at 462. The Court specifically stated:

> We need not discuss or evaluate each of these interests in detail as appellant has conceded that the State has a legitimate and indeed "compelling" interest in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of "vexatious conduct." Brief for Appellant 25. We agree that protection of the public from these aspects of solicitation is a legitimate and important state interest.
>
> [Appellant has conceded] that strong state interests justify regulation . . . .

Id. See also note 73 and accompanying text *supra*. It could be argued, however, that this restrained scope of judicial scrutiny is due to the conduct element of the speech and not its commercial aspects.

157. The most troubling aspect of the Court's opinion in *Ohralik* is its failure to pursue the question of less drastic alternatives. *See generally* Note, *Less Drastic Means*, *supra* note 64. The omission tends to substantiate the notion that this principle frequently announces a result rather than explaining it.

extent of this new doctrine's applicability both within commercial speech—will use of the doctrine vary with the content of the message?[158]—and beyond—will the doctrine be extended to other areas of speech?

IV. TOWARD A NEW COMMERCIAL SPEECH DOCTRINE AND ITS RAMIFICATIONS FOR FIRST AMENDMENT THEORY

A. *The New Commercial Speech Doctrine: Its Content and Justification*

The recent Supreme Court cases analyzed in the preceding section establish a two-tiered ad hoc balancing test to determine the constitutional validity of governmental regulations that suppress commercial expression. The first level of analysis weighs under close scrutiny the implicated first amendment interests[159] against the state's justification for its regulation, with particular focus upon whether the regulation substantially furthers a legitimate state interest and whether a less drastic alternative is available.[160] Although this standard is less rigorous than the traditional first amendment test to determine the propriety of content regulation—exacting scrutiny to determine whether a compelling state interest exists[161]—it is far from undemanding. Five of the six cases analyzed above resulted in decisions favorable to the first amendment interests.[162]

This new and modified freedom of speech standard is appropriate in the area of commercial speech due to the "commonsense differences" between it and other forms of speech. Commercial speech is both less valuable and less vulnerable than noncommercial speech and hence is entitled to a lesser degree of constitutional protection. Expression of a commercial nature, however, is "not valueless" and is therefore entitled to a certain degree of protection under the first amendment. It simply does not merit[163] the lofty, preferred[164] position accorded "pure" speech in our

158. Nonetheless, *In re Primus* and *Ohralik* taken together lend strong support to the view that the *New York Times* rationale is applicable to the new commercial speech doctrine. *See* notes 163-65 and accompanying text *infra*.

159. In *Virginia Pharmacy Board* and *Linmark* the Court carefully examined the various interests in the speech (*i.e.*, the interests of advertiser, the consumer, and the public in general), *see* notes 84-89 and accompanying text *supra*, whereas in *Bates* the Court did not feel the need to reiterate this analysis and merely relied upon its reasoning in the prior two cases.

160. The second tier of the analysis will not be discussed again because it does not differ from that used for noncommercial speech, *i.e.*, is there any appropriate way to regulate this form of protected speech? *See* notes 60, 98, 126, 127, 144-46 and accompanying text *supra*.

161. *See* note 64 *supra*.

162. The lone exception was *Ohralik*, a case clearly presenting a factual situation worthy of government regulation.

163. A complete analysis of this matter is beyond the scope of this article. *See generally* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES (1941); N. DORSEN, P. BENDER, & B. NEUBORN, EMERSON, HABER AND DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1-59 (4th ed. 1976) (containing excerpts from Milton's *Areopagitica* and J.S. Mill's *On Liberty*); T. EMERSON, *supra* note 27; A. MEIKLEJOHN, *supra* note 77; Brennan, *supra* note 60; Polsby, Buckley v. Valeo: *The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1. *Compare* Baker, *supra* note 2 *with* Redish, *supra* note 77. *Compare also* both of these latter articles *with* the prior authorities.

constitutional system of democracy. It has been said that the first amendment

> protects two kinds of interests in free speech. There is an individual interest, the need of many men to express their opinions on matters vital to them if life is worth living, and a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way.[165]

Dr. Alexander Meiklejohn, the leading spokesman concerning the social aspect of the first amendment over the last half century,[166] reasoned that in our system of self-government the electorate must be properly informed to render enlightened decisions. The rulers, who are also the ruled in the American process, must be receptive to debate and must not foreclose it because it is false or dangerous. This concept was roundly supported by the Supreme Court in *New York Times v. Sullivan*: "The constitutional safeguard, we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' "[167] This country has "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[168] Erroneous statements are "inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.' "[169] In the Court's view, commercial speech is simply not deserving of such esteemed deference.[170]

Equally decisive in determining that commercial speech is not entitled to complete first amendment protection is its diminished vulnerability.[171] "Since advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible"[172] to being chilled by reasonable government regulations. Accordingly, the lower degree of protection afforded to commercial speech does not (1) permit the application of the first amendment overbreadth doctrine,[173] (2) prevent the prohibition of false, misleading, and deceptive advertisement,[174] (3)

164. *See* G. GUNTHER, *supra* note 60, at 639-74, and authorities cited therein. *See also* authorities cited *supra* note 163.

165. Z. CHAFEE, *supra* note 163.

166. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 765 n.19. *See generally* A. MEIKLEJOHN, POLITICAL FREEDOM (1960); A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245.

167. 376 U.S. 254, 269 (1964) (quoting Roth v. United States, 354 U.S. 476, 484 (1967)).

168. *Id.* at 270.

169. *Id.* at 271-72. Moreover, the individual self-fulfillment obtained from political, social, or literary speech has no parallel in commercial speech. *See* T. EMERSON, *supra* note 27, at 150 n.46; Baker, *supra* note 2. *See also* First National Bank of Boston v. Bellotti, 435 U.S. 765, 804-05 (1978) (White, J., dissenting).

170. 376 U.S. at 271-72.

171. *See* notes 106-09 and accompanying text *supra*.

172. Bates v. State Bar of Ariz., 433 U.S. 350, 381 (1977).

173. *See* notes 139-43 and accompanying text *supra*.

174. *See* note 130 and accompanying text *supra*.

prevent the requirement that an advertiser verify his message,[175] (4) prevent the appropriate requirement that the advertisements include such information, warnings, or disclaimers as necessary,[176] or (5) prevent the proper use of prior restraints upon commercial information.[177]

Based upon these distinctions, value and vulnerability, the Court in *Virginia Pharmacy Board* and *Ohralik* was correct in concluding that "speech that does 'no more than propose a commercial transaction' "[178] does not deserve treatment comparable to that afforded "pure" speech. Commercial speech that does more, however, is entitled to full constitutional protection. Hence, the *New York Times* rationale is left unscathed by the new doctrine.[179] It is obvious that this development will do nothing to diminish the workload of the judicial system; there are, however, no reasonable or constitutionally sound alternatives. A court need only take into account in its balancing the commercial or noncommercial nature of the message and adjust its balance according to the extent of the commerciality—"a small price to pay for the continued preservation of so precious a liberty as free speech."[180] Moreover, the discretion to be exercised in adjusting this sliding scale is severely limited to the narrow channel between close inspection and exacting scrutiny.

Another issue that arises is whether this new doctrine should be applied to other areas of speech. Rather than relegate an area to total lack of protection, as has been done, for example, with obscenity, why not use this intermediate approach and merely grant less protection? This is apparently what the plurality attempted to accomplish in *Young v. American Mini Theatres, Inc.*[181] In that case, the plurality,[182] relying upon previous libel[183] and commercial speech[184] decisions, held that a city could

175. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 772 n.24 (1976).

176. *Id.*

177. *Id.*

178. *Id.* (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)).

179. *See also In re* Primus, 436 U.S. 412 (1978).

180. Lehman v. City of Shaker Heights, 418 U.S. 298, 321 (1974) (Brennan, J., dissenting).

181. 427 U.S. 50 (1976).

182. In *American Mini Theatres*, the Court was presented with three issues concerning the propriety of a Detroit zoning ordinance that prohibited the location of a "regulated" establishment within 1000 feet of any two regulated uses or within 500 feet of a residential neighborhood. The term "regulated use" was statutorily defined to include, *inter alia*, adult movie theaters, adult book stores, hotels or motels, pawnshops, and pool halls. The respondents offered three arguments in support of their contention that the ordinance was constitutionally infirm: (1) that the ordinance was void for vagueness; (2) that the ordinance constituted an illegal prior restraint upon speech; and (3) that the ordinance unconstitutionally classified certain movie theaters based upon the content of their films. The Court was able to muster a majority on the first two issues (Mr. Justice Stevens was joined by the Chief Justice and Justices White, Powell, and Rehnquist) but not on the third and most important question (Mr. Justice Powell filed a concurring opinion). Justices Brennan, Stewart, Marshall, and Blackmun dissented.

183. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

184. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). The *American Mini Theatres* decision was rendered prior to *Linmark, Bates*, and *Ohralik*.

properly impose specific restrictions upon "adult" movie theaters based upon the content of their offerings, namely, sexually explicit films. It was the plurality's belief that such expression was less valuable[185] than political or social speech and that although such expression was protected by the first amendment, the state might nevertheless "legitimately use [its] content" as a basis for separate classification and hence protection.[186] The plurality felt that prior Supreme Court decisions to the contrary (holding that the government was absolutely forbidden from restricting expression based upon its subject matter or content)[187] were overly broad and not absolute. After all, the plurality asserted, the Court has recognized (in the areas of libel and commercial speech) that the constitutional protection of speech may vary with content. The plurality did, however, specifically acknowledge that the government has a "paramount obligation of neutrality" and could not regulate speech based upon its "social, political or philosophical message."[188]

Although the plurality's reliance on these two areas is misplaced,[189] its ultimate holding may nevertheless be proper, since *American Mini Theatres* presented closely related questions of state power to regulate land use[190] and strong governmental interest in maintaining the quality of

185. A majority of the Court, in disposing of the threshold question of vagueness in favor of the city of Detroit, found that "there is surely a *less vital interest* in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance." 427 U.S. at 61 (emphasis added). The plurality also found it to be "manifest that society's interest in protecting this type of expression [nonobscene erotic speech] is of a wholly different, and *lesser*, magnitude than the interest in untrammeled political debate." *Id.* at 70 (emphasis added). Finally, a majority of the Court also ruled that the ordinance did not constitute an unlawful prior restraint.

186. *Id.* at 70-71. "Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures." *Id.*

187. Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Police Dep't v. Mosley, 408 U.S. 92 (1972). The dissenting Justices, in an opinion written by Mr. Justice Stewart, believed that these two decisions were dispositive. In fact, Justice Stewart stated that the restriction in *American Mini Theatres* "precisely parallels the content restriction" employed in *Erznoznik*, a case that had just been decided the previous term. 427 U.S. at 88. It was the dissenters' view that the Court must never apply first amendment protection based upon the perceived value of the speech. The Court, they implored, must protect distasteful and offensive speech as well as "important" ideas and expressions:

> The Court must never forget that the consequences of rigorously enforcing the guarantees of the First Amendment are frequently unpleasant. Much speech that seems to be of little or no value will enter the marketplace of ideas, threatening the quality of our social discourse and, more generally, the serenity of our lives. But that is the price to be paid for constitutional freedom.

Id.

188. *Id.* at 70.

189. A complete analysis of this misplaced reliance is beyond the scope of this article, but it is clear that the libel argument is inapposite for several reasons. First, there is a unique historical relationship between the first amendment and libel. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 369 (1974) (White, J., dissenting); New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Second, the trend in the libel area is toward providing first amendment protection, whereas in this case the plurality is seeking to grant less constitutional protection. Third, the protection accorded in libel cases does not depend upon the content of the questioned speech, but upon a definitional balancing of two fundamental interests (speech and reputation). *See* T. EMERSON, *supra* note 27. Last, there is a difference regarding the chilling effect upon other speech.

190. Mr. Justice Powell, who joined with the four plurality Justices in Parts I and II, could not join in Part III of the opinion. It was his belief that the plurality was mistaken in invoking a system of

neighborhoods.[191] Moreover, the plurality recognized as the essential question whether the state could properly restrict the location where adult films might be exhibited—not whether they could be suppressed completely.[192]

The plurality's reliance upon *Virginia Pharmacy Board* and the new commercial speech doctrine is inapposite for several reasons. The new doctrine establishing that commercial speech merits partial constitutional protection is premised upon both its lesser value *and* lesser vulnerability as compared with other varieties of speech. By contrast, in *American Mini Theatres* the questioned speech was stripped of constitutional protection solely for its lack of value. The Court in *Virginia Pharmacy Board* primarily focused upon the aspect of vulnerability in granting commercial speech some protection and did not actively pursue the aspect of value until subsequent decisions. Clearly, the vulnerability of nonobscene erotic speech is not less than that of other varieties of speech; in fact, it is, if anything, more vulnerable. Unlike commercial speech, which is the *sine qua non* of profits and hence the very existence of a business, nonobscene erotic speech might easily be chilled. Moreover, to say that such speech is less valuable raises numerous fundamental questions and possibilities for serious abuse. If we permit our judicial system to rank various categories of constitutionally protected speech in order of their "value," granting each category a different degree of protection, we will severely handicap the first amendment. As the dissenters recognized in *American Mini Theatres*, in order to preserve the precious guarantee of freedom of speech, we must tolerate some insensitive and offensive remarks. This is not, however, to assert that the ultimate holding in *American Mini Theatres* is incorrect, but only that its reliance upon and expansion of the new commercial speech doctrine is totally unjustified. The propriety of such a ruling can lie only in its limited interference with free speech in the furtherance of a compelling state interest in the efficient and legitimate regulation of land use.

What appears to be occurring today is that the Supreme Court's earlier battles concerning "offensive speech"[193] are resurfacing and the new

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content regulation. He viewed the case as simply "presenting an example of innovative land-use regulation, implicating First Amendment concerns only incidentally and to a limited extent." 427 U.S. at 73. In arriving at this conclusion, which has much merit, Justice Powell employed the standard established in *O'Brien*, contending that the ordinance was merely a place restriction and not a regulation pertaining to content. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968); note 60 *supra*. Here, Justice Powell appears to have overlooked the fact that the ordinance affects only certain types of movies based upon their content. Nevertheless, Justice Powell's analysis might result in the same conclusion under the applicable exacting scrutiny standard since, as he recognized, the state's interest in effective land use regulation is extremely strong and the impact of the Detroit ordinance upon speech was only minimal. "The ordinance is addressed only to the places at which this type of expression may be presented [which are abundant], a restriction that does not interfere with content." 427 U.S. at 78-79.

191. Even Mr. Justice Stewart's dissent recognized this point. *Id.* at 87 (Stewart, J., dissenting).

192. *See id.* 70-72 & n.35.

193. *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Brown v. Oklahoma, 408 U.S. 914 (1972); Lewis v. City of New Orleans, 408 U.S. 913 (1972); Rosenfeld v. New Jersey, 408 U.S.

commercial speech doctrine is being used as a device by which regulation can be justified. In retrospect, these earlier cases accurately predicted how most of the Justices would vote in the situation represented by *American Mini Theatres*.[194] Regardless of this revived conflict and its ultimate outcome, it is an egregious error for any element of the Court to employ *Virginia Pharmacy Board* and its progeny to influence the result. The two distinct lines of decisions are simply not comparable; any modification of the offensive speech holdings must be independently derived. The new commercial speech doctrine and its rationale should not be extended to other, noncommercial types of speech without serious thought and compelling reason.

Recent litigation suggests that the legal doctrines that affect commercial speech are in an accelerated state of development. Accordingly, this article will now briefly analyze several recent cases in order to further define the parameters and mechanics of the new commercial speech doctrine.

B. *Some Additional Parameters of the New Commercial Speech Doctrine: A Review of Recent Decisions*

The final United States Supreme Court decision that will be examined in this article is *First National Bank of Boston v. Bellotti*.[195] In *Bellotti*, the Court held that a Massachusetts statute prohibiting banks and business corporations from expending funds "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than

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901 (1972); Gooding v. Wilson, 405 U.S. 518 (1972); Cohen v. California 403 U.S. 15 (1971). These cases hold that offensive speech not amounting to "fighting words" is constitutionally protected.

194. The following chart summarizes the various Justices' voting records on the decisions cited in the preceding note and indicates (1) how, based on that record, they would be expected to vote in *American Mini Theatres* and (2) how, in fact, they did vote in that case. Added weight should be given to the *Erznoznik* case because of its similarity to *American Mini Theatres*.

	Cohen[a]	*Gooding*[a]	*Brown*[a]	*Lewis*[a]	*Rosenfeld*[a]	*Erznoznik*[a]	*Mini Theatres Anticipated*	*Mini Theatres Actual*
Burger	Diss.	Diss.	Diss.	Diss.	Diss.	Diss.	A	A
Brennan	Maj.	Maj.	Maj.	Maj.	Maj.	Maj.	F	F
Stewart	Maj.	Maj.	Maj.	Maj.	Maj.	Maj.	F	F
White	Diss.	Maj.	Maj.	Maj.	Maj.	Diss.	F?	A
Marshall	Maj.	Maj.	Maj.	Maj.	Maj.	Maj.	F	F
Blackmun	Diss.	Diss.	Diss.	Diss.	Diss.	Maj.	A	F
Powell	*b*	*b*	*c*	*c*	Diss.	Maj.	?	*d*
Rehnquist	*b*	*b*	Diss.	Diss.	Diss.	Diss.	A	A
Stevens	*b*	*b*	*b*	*b*	*b*	*b*	?	A

A = against protection of the offensive speech
F = for protection of the offensive speech
a = the majority opinion in each of these cases favored protection for the offensive speech at issue.
b = did not participate in decision.
c = concurred in result.
d = took intermediate position in concurring opinion.

195. 435 U.S. 765 (1978).

one materially affecting any of the property, business or assets of the corporation"[196] was violative of the first amendment. Significantly, the Court[197] in so holding focused upon the right of the listeners to receive information that is "intimately related to the process of governing."[198]

It is ironic that in granting the petition of the corporate parties to have the statute declared constitutionally infirm, the Supreme Court Justices, nearly unanimously, reversed their traditional first amendment positions. This reversal, however, was prompted not by the first amendment issue per se but by its interplay with the question of corporate constitutional rights. The dissenters argued that a state could prevent a corporation from using corporate funds for purposes not materially affecting its business.[199] The majority, on the other hand, although embracing first amendment protection, did not support the position that corporations were entitled to political rights equivalent to those of natural individuals. They merely adhered to Meiklejohn's principle[200] that the electorate had a right to be informed, through whatever source, concerning the fundamental workings of government. The issue, they believed, was not "whether and to what extent corporations have First Amendment rights,"[201] but whether the Massachusetts statute "abridges expression that the First Amendment was meant to protect."[202]

By adhering to Meiklejohn's interpretation of the first amendment, the Court implicitly lent credence to the concept of a hierarchical system of values and degrees of protection under the amendment, with political debate holding the preeminent position. "The speech proposed by appellants is at the heart of the First Amendment's protection . . . . It is the type of speech indispensable to decisionmaking in a democracy."[203] When a governmental restriction is directed at this type of speech, " 'the State may prevail only upon showing [under exacting scrutiny] a

196. *Id.* at 768.

197. Mr. Justice Powell delivered the opinion in which he was joined by the Chief Justice and Justices Stewart, Blackmun, and Stevens. Oddly, Justices Brennan, White, Marshall, and Rehnquist all dissented; Justice Rehnquist, however, filed a separate dissent.

198. 435 U.S. at 786. This is clearly a Meiklejohnian analysis.

199. Mr. Justice White, joined by Justices Brennan and Marshall, noted that if a state could not prevent such expenditures, the laws of 31 states and the Federal Corrupt Practices Act were in serious jeopardy. *Id.* at 803 (White, J., dissenting). Mr. Justice Rehnquist asserted that corporations are mere creatures of the states and can be controlled accordingly. *Id.* at 823-24 (Rehnquist, J., dissenting). But query whether the power to prohibit the very existence of the corporation also gives the state the power to deny it lesser rights or privileges.

200. *See generally* notes 166-69 and accompanying text *supra*. The Court specifically stated that political speech is the heart of the first amendment, that the first amendment was designed to protect free discussion of governmental affairs, and that free speech is the essence of self-government. 435 U.S. at 776-77 & nn.11 & 12. The Court, in addition to citing Dr. Alexander Meiklejohn's *Free Speech and Its Relation to Self-Government*, *supra* note 77, also referred to two previous Supreme Court cases that have been acknowledged as being Meiklejohnian in nature—Garrison v. Louisiana, 379 U.S. 64 (1964), and New York Times Co. v. Sullivan, 376 U.S. 254 (1964). 435 U.S. at 777 nn.11 & 12.

201. 435 U.S. at 775-76.

202. *Id.* at 776.

203. *Id.* at 776-77 & n.11. The following authorities were cited: Thornhill v. Alabama, 310 U.S. 88, 101-02 (1940); T. EMERSON, *supra* note 27, at 9; A. MEIKLEJOHN, *supra* note 77, at 24-26.

subordinating interest which is compelling.' "[204] It is possible that a less rigorous standard would be applicable to less valuable speech, such as the standard already applied to commercial speech. Although this position was not expressly adopted by the *Bellotti* Court, it is not difficult to find support for such a proposition in the opinion.[205]

Complementing *Bellotti* are three recent decisions of the United States courts of appeals pertaining to the implementation of the new commercial speech doctrine. Two of these decisions deal with remedies (least intrusive alternative and corrective advertising); the third also concerns the degree of protection to be afforded commercial speech.

In the most recent of these cases, *National Commission on Egg Nutrition v. FTC*,[206] the Seventh Circuit had to decide whether to classify the relevant advertisement as a purely commercial advertisement or a *New York Times* type advertisement. The National Commission on Egg Nutrition (NCEN), an egg producers' trade association, was organized in an attempt to combat the damage being done to the egg industry by the anticholesterol forces. In its attempt to achieve this goal, the Federal Trade Commission (FTC) alleged that NCEN made several false and misleading statements in its advertising campaign. Principally, the FTC contended and subsequently ruled that it was an unfair trade practice for NCEN to represent "that there is no scientific evidence that eating eggs increases the risk of . . . heart [and circulatory] disease . . . ."[207] Moreover, in addition to ordering the NCEN to cease and desist from the above-mentioned representation, and several others, the FTC ordered that (1) any reference made to the relationship between cholesterol (and hence eggs) and circulatory disease be accompanied by a conspicuous statement that many medical authorities believe that eating cholesterol might in-

204. 435 U.S. at 786 (quoting Bates v. City of Little Rock, 361 U.S. 516, 524 (1960)).

205. A final point that must be made with respect to this decision is that Mr. Justice White has taken a disturbingly archaic and myopic perspective in his dissenting opinion concerning the role of corporate social responsibility. Mr. Justice White totally subordinates any notion of the ethical investor or corporate social responsibility. *See generally* H. BOWEN, SOCIAL RESPONSIBILITY OF THE BUSINESS MAN (1953); P. DRUCKER, THE PRACTICE OF MANAGEMENT (1945); W. GREENWOOD, ISSUES IN BUSINESS AND SOCIETY (1977); R. HEILBRONNER, IN THE NAME OF PROFIT (1972); J. SIMON, C. POWERS, & J. GUNNEMAN, THE ETHICAL INVESTOR: UNIVERSITIES AND CORPORATE RESPONSIBILITY (1972); Davis, *The Case For and Against Business Assumption of Social Responsibility*, 16 ACAD. MANAGEMENT J. 312-13 (1972).

Furthermore, Mr. Justice White asserts that since a corporation cannot possibly speak on behalf of a multitude of shareholders with divergent views, corporate funds should not be expended for the advancement of "political and social issues that have no material connection with or effect upon their business, property, or assets." 435 U.S. at 806 (White, J., dissenting). What Mr. Justice White fails to realize is that the logical extension of his argument leads to the same result that obtained in the 19th century—namely, that charitable and public donations by corporations are impermissible, ultra vires acts. Clearly, modern notions of corporate responsibility cannot accommodate such a restriction on corporate activity.

206. 570 F.2d 157 (7th Cir. 1977).

207. *Id.* at 159. In an earlier proceeding before the Seventh Circuit, the court of appeals had reversed the district court in ordering that a temporary injunction be issued against NCEN barring it from continuing its allegedly deceptive practices but permitting it to fairly present its side of the controversial issue. FTC v. National Comm'n on Egg Nutrition, 517 F.2d 485 (7th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976).

crease the risk of heart or circulatory disease,[208] and (2) any representation disparaging the scientific evidence connecting cholesterol and heart and circulatory disease is forbidden.[209]

NCEN, in defense of its statement, asserted that (1) the statement was true,[210] (2) even if not true, the statement was constitutionally protected by the first amendment, (3) even if the statement was not constitutionally protected, the FTC order was unconstitutionally vague,[211] and (4) the FTC order was unconstitutionally overbroad.

The second of these contentions, that is, the first amendment argument, was the most strenuously pursued.[212] Judge Tone, however, properly resolved this issue. He initially pointed out that the new commercial speech doctrine does not prevent the states from dealing effectively with the question of false, misleading, or deceptive advertisements.[213] He then proceeded to answer the more difficult question, whether NCEN's advertisements fit into the paradigm of commercial speech, that is, " 'speech that does no more than propose a commercial transaction.' "[214] He found that the nature or purpose of the communication "is not changed when a group of sellers joins in advertising their common product."[215]

An advertisement will not, and should not, be raised to the level of *New York Times* speech merely because it discusses an important and controversial issue of legitimate public concern. The courts must delve into the purpose of the advertisement and the potential harm to the consuming public. Like the Seventh Circuit in *Egg Nutrition*, they must not be hesitant to prevent an advertiser from misleading consumers under the veil of important public debate.[216] Once again, the courts must exercise their

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208. 570 F.2d at 159-60.

209. *Id.* at 160.

210. NCEN apparently went too far in this regard. The court found that NCEN had " 'done more than espouse one side of a genuine controversy. . . . It has made statements denying the existence of scientific evidence which the record clearly shows does exist. These statements are, therefore, false and misleading.' " *Id.* at 161 (quoting from its earlier opinion, 517 F.2d at 489).

211. The court ruled against this assertion on the grounds that the challenged language was as specific as possible and that administrative orders must have a certain degree of flexibility in order to prevent future similar illegal occurrences. *Id.* at 164.

212. NCEN relied upon *Virginia Pharmacy Board, Bigelow,* and *New York Times* in asserting that commercial misrepresentation is not actionable unless it is made deliberately or with a reckless indifference to its truth or falsity. *Id.* at 162.

213. *Id. See* notes 99-110, 130, and accompanying text *supra. See also* Young v. American Mini Theatres Inc., 427 U.S. 50, 68 n.31 (1976) (affirmatively citing the earlier *Egg Nutrition* decision, 517 F.2d 485 (7th Cir. 1975)).

214. 570 F.2d at 162 (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 n.24 (1976)).

215. 570 F.2d at 163.

216. Judge Tone, quoting from the FTC opinion stated:

> Publications designed to convey the point that consumption of a particular product, will not increase the risk of heart disease, are clearly likely to induce the purchase of that product. The fact that the message is conveyed by means of selected quotations from the works of scientists and popular writers does not alter the commercial character of the publication. Nor is it altered by self-serving professions of eleemosynary intent, e.g. "Brought to you in the public

discretion—but must be careful not to abdicate their paramount constitutional obligation.

The court was more sympathetic to NCEN's contention that the FTC's affirmative disclosure order[217] was an overly broad remedial decree.[218] It held that the first amendment prohibited a remedy "broader than that which is necessary."[219] And, since the order directed NCEN to argue that the other side of the issue rather than merely acknowledge the existence of the controversy, it unduly infringed upon NCEN's freedom of speech.[220]

In reaching this conclusion, the Seventh Circuit relied upon an earlier case, *Beneficial Corp. v. FTC.*[221] In that case, the FTC brought a deceptive trade practice action against Beneficial Corporation on two grounds: (1) that Beneficial's "instant tax refund" loan deceived customers; and (2) that Beneficial improperly utilized information it had received in its tax preparation business to further its loan operation. Concerning the first and more important issue, the FTC contended that advertising a tax refund loan or instant tax refund was deceptive in that the loan was not in any way connected with a tax refund but was merely Beneficial's everyday loan based on the applicant's creditworthiness. The latter issue was easily resolved against Beneficial since the record showed that Beneficial had in fact improperly used its tax information to solicit loan customers.[222]

In *Beneficial*, the Third Circuit found the FTC's remedial order—which prohibited the use of the words "instant tax refund" altogether—unconstitutional because it did not invoke the least intrusive restriction upon the *protected* commercial speech. It held that the FTC "must start from the premise that any prior restraint is suspect, and that a remedy, even for deceptive advertising, can go no further than is necessary for the elimination of the deception."[223] On first reading, this would appear to

interest." If anything the misleading effect of respondents' advertisements is enhanced by casting them in the guise of a "public service message" presented by an unidentified "National Commission".

Id. (footnote omitted).

217. See note 208 and accompanying text *supra.*

218. The Court relied on Beneficial Corp. v. FTC, 542 F.2d 611 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977) and distinguished Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978). *Beneficial* is discussed at notes 221-29 and accompanying text *infra*; *Warner-Lambert* is discussed at notes 236-45 and accompanying text *infra.*

219. 570 F.2d at 164.

220. Ultimately, the court amended the order, upon a motion by the FTC, to hold that (1) the NCEN cannot disseminate any advertisement that represents that the consumption of eggs or cholesterol does not enhance the risk of heart or circulatory disease unless it conspicuously discloses that a controversy exists surrounding this contention and that the advertisement is merely stating its position and (2) that NCEN cannot disseminate any advertisement that presents scientific evidence supporting the position that the consumption of eggs and/or cholesterol does not increase the consumer's risk of heart or circulatory disease *unless* it conspicuously discloses that many medical authorities are of the belief that the eating of eggs (cholesterol) does, based on scientific evidence, increase one's risk of heart or circulatory ailment. *Id.* at 165-66.

221. 542 F.2d 611 (3rd Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

222. *Id.* at 621.

223. *Id.* at 620.

conflict with the language in *Virginia Pharmacy Board*, in which the Supreme Court stated that the first amendment did not present an obstacle to the states' effective handling of deceptive advertisements.[224] These two statements are, nonetheless, perfectly consistent—unlike other types of speech, deceptive or false advertising can be regulated by a state, but the state must employ the least intrusive alternative. This rule is particularly pertinent in controversies in which the court is mandating the incorporation of an affirmative disclosure in future advertisements that themselves were enjoined from being deceptive. In these cases, the remedy would compel a specified statement in a prospective truthful advertisement. Neither *Beneficial* nor *Egg Nutrition*, however, fit into this category of litigation.

Egg Nutrition is distinguishable from *Beneficial* in that the regulated advertisements would be deceptive but for the inclusion of the affirmative disclosure.[225] In *Beneficial* the court did not order the inclusion of any specified statement. To the contrary, the appellate court reversed an FTC order prohibiting Beneficial from using its copyrighted slogan "Instant Tax Refund" and permitted it to incorporate it into future advertisements on the condition that they not be misleading.[226]

The *Beneficial* decision is questionable in that it appears that the court overreacted in performing its duty. By failing to accept the opinions of the FTC and the administrative law judge that the disputed phrase is "inherently contradictory,"[227] the court, without providing any satisfactory alternatives,[228] mistakenly overruled the FTC's special expertise.[229] Certainly, the courts should ensure that federal agencies do not abridge constitutional freedoms; on the other hand, the FTC, in dealing with

224. 425 U.S. at 771.

225. *See generally* note 220 *supra*. The remedy of affirmative disclosure is employed when an additional disclosure is necessary to prevent an advertisement from being deceptive. *See* Mann & Gurol, *An Objective Approach to Detecting and Correcting Deceptive Advertising*, 54 NOTRE DAME LAW. 73 (1978).

226. 542 F.2d at 618-20.

227. Judge Van Dusen, dissenting on this issue, also supported the FTC's position:

> No brief language is equal to the task of explaining the Instant Tax Refund slogan, for the phrase is inherently contradictory to the truth of Beneficial's offer. In truth, the Instant Tax Refund is not a refund at all, but only Beneficial's everyday loan service . . . ; nor is it in the least related to any tax refunds, for the size of the loan Beneficial wishes to sell is geared to the customer's credit limit instead of his government refund and many people due a government refund do not qualify for an Instant Tax Refund loan at all . . . .

Id. at 618 (quoting from the FTC opinion).

228. The court suggested the following alternative slogans: "Beneficial's everyday loan service can provide to regularly qualified borrowers an Instant Tax Refund Anticipation Loan whether or not the borrower uses our tax service"; "Beneficial's everyday loan service can provide to any regularly qualified borrower an instant loan in anticipation of his tax refund. We call it an Instant Tax Refund Anticipation Loan." *Id.* at 619. These proposed "alternatives" are far from satisfactory. *See id.* at 622 (Van Dusen, J., dissenting). This is especially true in light of the audience at which Beneficial had aimed its advertisements—the "singularly dense." *Id.* at 618.

229. *See generally id.* at 618 ("We acknowledge, of course, that we are ordinarily obliged to defer broadly to the Commission's exercise of informed discretion in framing remedial orders . . . ."); Jacob Siegel Co. v. FTC, 327 U.S. 608, 612-13 (1946); Warner-Lambert Co. v. FTC, 562 F.2d 749, 762 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978); Pitofsky, *supra* note 2; Reich, *supra* note 100.

deceptive commercial speech, must be granted a certain degree of flexibility in formulating its remedial orders.

Egg Nutrition is also a decision of dubious merit. In *Virginia Pharmacy Board*, the Supreme Court specifically stated that a state may "require 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."[230] A literal reading of *Egg Nutrition* would place in serious jeopardy the required warning upon cigarette packages and advertisements, which has been cited with approval by the Supreme Court on numerous occasions.[231] Moreover, it is doubtful that the modified decree differs so significantly from the original FTC order that it justifies application of the least intrusive alternative doctrine.[232] After all, a less intrusive alternative "is always available, provided that the government is willing to sacrifice effectiveness; but if 'less drastic means' made that the test, it would simply signal that the right in question had absolute protection."[233] In essence, the test is more properly an indication of a predetermined conclusion than a rationale justifying the result.[234]

Neither *Egg Nutrition* nor *Beneficial* presents a significant problem for the free flow of commercial information. Even if the courts had upheld the remedies imposed by the FTC, those cases would not exert a chilling effect upon other advertisers. The low vulnerability of commercial speech permits the judicial review process to grant the FTC a fair amount of flexibility in formulating its remedial decrees. Mandating that Beneficial cease further use of its questionable slogan or that NCEN incorporate the ordered affirmative disclosure into its advertisements did not interfere seriously, if at all, with their first amendment freedoms. Considering the important governmental interests in question, one can easily question the propriety of both decisions. Any impact of the FTC's order upon the advertisers' first amendment interests is "incidental and minimal."[235] Regardless how one ultimately decides these two cases, however, neither outcome is troublesome; each merely represents an insignificant variation on a legal theme.

Although even these moderate remedies can be abused, the most inherently troubling and provocative of the remedies employed to date is corrective advertising.[236] This remedy can easily have an impermissible chilling effect upon other speech and should be employed only with the

230. 425 U.S. at 772 n.24.

231. *See, e.g., id.*

232. *Compare* text accompanying notes 208-09 *supra with* note 220 *supra.*

233. Note, *Less Drastic Means, supra* note 64, at 468.

234. *Id.* at 464. *Cf.* note 157 *supra* (noting same weakness in *Ohralik* decision).

235. Young v. American Mini Theatres, Inc., 427 U.S. 50, 78 (1976) (Powell, J., concurring).

236. Corrective advertising has been defined as an order requiring that the advertiser of false or deceptive claims advise the public of this fact and of the truthful information. *See* Mann & Gurol, *supra* note 225, at 79; Pitofsky, *supra* note 2, at 694; Thain, *Corrective Advertising: Theory and Cases*, 19 N.Y.L.F. 1, 11 (1973).

greatest of restraint. The only court of appeals decision to have approved this drastic form of relief is the District of Columbia Circuit in *Warner-Lambert Co. v. FTC.*[237]

In *Warner-Lambert*, the FTC challenged the company's nearly one hundred-year-old representation[238] "that Listerine will ameliorate, prevent, and cure colds and sore throats."[239] In upholding the FTC's complaint and its utilization of the corrective advertising remedy (although modifying slightly this part of the decree),[240] the court was swayed by the long history of Warner-Lambert's deceptive trade practice,[241] by the success of the advertising campaign to create such a false image in the public's mind,[242] and by the fact that this false perception would continue if not corrected.[243] Therefore, the court held that Warner-Lambert must (1) cease and desist from representing that Listerine is effective in curing or preventing colds or sore throats, (2) cease and desist from representing that Listerine will successfully ameliorate the severity of colds or sore throats, and (3) cease and desist advertising Listerine, *unless* the next ten million dollars of advertisements includes the following disclaimer—"Listerine will not help prevent colds or sore throats or lessen their severity."[244] This mandatory disclosure statement was modified by the court by deleting the preamble—"contrary to prior advertising"[245]—that the FTC had imposed.

Although the first amendment demands that the corrective advertising remedy be judiciously employed,[246] it is clear that such a remedy is essential to the efficient functioning of the FTC.[247] Thus, a delicate balance

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237. 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978). In numerous previous instances the FTC has approved the utilization of the corrective advertising remedy. *Id.* at 759-61.

238. Listerine has been marketed as a medicine for colds since 1879. Direct advertising to the consumer began in 1921. *Id.* at 752.

239. *Id.* at 753.

240. *See* text accompanying note 245 *infra*.

241. 562 F.2d at 760-61.

242. *Id.* at 762.

243. *Id.*

244. *Id.* at 753.

245. *Id.* at 762-63.

246. Judge Wright, writing for the court, properly held that the first amendment does not present an obstacle to the use of corrective advertising when necessary to prevent its being deceptive or misleading. It was his contention that the Supreme Court foresaw this very problem and answered it in favor of allowing such relief in footnote 24 of *Virginia Pharmacy Board*. 562 F.2d at 758-59, 768-69.

247. Judge Wright referred to Professor Pitofsky's article in concluding that corrective advertising relief is essential to the effective working of the FTC. It is Professor Pitofsky's position that:

> Faced with these pathetically inadequate remedies [of the FTC—cease and desist orders and affirmative disclosure], many advertisers and advertising agencies violated the law with impunity. Rational advertisers could calculate that their chances of being detected and prosecuted were extremely slim, given the limited resources of the Federal Trade Commission . . . . Moreover, since most advertising themes are designed to run for a year or less, and since the average time for investigation and trial . . . extend[s] well over two years . . . [there is an] absence of effective government remedies . . . .

Pitofsky, *supra* note 2, at 693 (footnotes omitted). *See also* Mann & Gurol, *supra* note 225, at 78; Note, *Corrective Advertising Orders of the Federal Trade Commission*, 85 HARV. L. REV. 477, 482-84 (1971).

must be sustained in order to properly accommodate these essential interests.

If corrective advertising relief is granted too perfunctorily, it will tend to cause advertisers to refrain from making statements in fear of having to expend huge sums on corrective advertisements[248] and undercutting their own future advertising campaigns.[249] It would particularly chill the presentation of scientific and experimental data that are informative to the consumer, favoring mere puffery and nonsense commercials. It is commonly understood that the results of bona fide scientific experiments may subsequently prove to be incorrect. If an advertiser is forced to confess at great expense that its earlier good faith experimental result—Y shaving cream lasts twenty-eight percent longer—was incorrect—it actually lasts only six percent longer—the advertiser will be more inclined to forego providing the consumer with such seemingly relevant data.

This is not to suggest that corrective advertising and an effective FTC do not merit support. It suggests only that the formulation of *Warner-Lambert* and the formulations of commentators such as Professor Pitofsky concerning the appropriate use of corrective advertising are unduly lax. The *Warner-Lambert* formula would authorize corrective advertising if (1) the advertisement played a significant role in creating a false image in the public's mind, and (2) this false belief would continue even after cessation of the deceptive advertisements.[250] To this the author suggests that a requirement of bad faith, reckless indifference, or other compelling reason for the corrective advertising must also be added. Such a restriction would pay appropriate deference to the first amendment, yet allow the FTC to employ its most powerful sanction to correct egregious abuses.

It is unclear whether this added proviso would alter the *Warner-Lambert* decision; first, the court had no need to resolve the issue of Warner-Lambert's good faith in the presentation of the advertisements,[251] and second, there is insufficient information to determine whether there exists any additional compelling reason for requiring the corrective

248. In *Warner-Lambert* the company was ordered to include the corrective statement in "only . . . the next ten million dollars of Listerine advertising," the equivalent of the company's average yearly advertisement expenditure on Listerine. 562 F.2d at 753.

249. Clearly, the effectiveness of the Listerine commercials is being compromised by the forced inclusion of the corrective statement. It is interesting to note how the court justified the remedy of forcing even truthful future advertisements to contain the corrective statement. Judge Wright deftly stated that the future advertisement, "if not accompanied by a corrective message, would itself continue to mislead the public." *Id.* at 770.

250. Professor Pitofsky's formulation differs from, or clarifies, this formulation by (1) providing that the principle only applies to major advertising themes and then only when the deceit significantly affects the purchasing decision of a substantial number of consumers, and (2) placing upon the defendant the burden of demonstrating the lack of causality. Pitofsky, *supra* note 2, at 698-99. *See also* Warner-Lambert Co. v. FTC, 562 F.2d 749, 771 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978) (supplemental opinion). *See generally* 42 Fed. Reg. 12,924 (1977) (soliciting comments on proposed interpretive rule or policy statement on corrective advertising).

251. The court did state that Warner-Lambert worked a "substantial deception upon the public." 562 F.2d at 769.

message—for instance, the fact that the improper representation had been made for nearly a century. With regard to the latter point, however, one should not ignore the FTC's own lack of diligence in allowing this representation to continue for such a prolonged period.

V. CONCLUSION

Recent United States Supreme Court decisions have eliminated the doctrine that commercial speech is wholly outside the protection of the first amendment (in other words, that it is really "nonspeech"), and in its place have established the principle that speech that does no more than propose a commercial transaction is entitled to a "lesser degree" of constitutional protection. This limited grant of shelter is warranted due to the advertiser's, consumer's, and general public's interest in the communication. Such messages provide important information for the proper and efficient allocation of resources in our free market system. At the same time, commercial communication is less valuable and less vulnerable than other varieties of speech and hence does not merit complete first amendment protection.

Although this modified doctrine is well-suited to commercial speech, its appropriateness for other areas is highly questionable. Unless a category of speech satisfies both criteria of the doctrine (less valuable and less vulnerable) such expansion is totally unjustified. Moreover, the doctrine should not be applied to areas of speech that are already "protected"; it should only be used to grant limited rights to previously unprotected areas of speech.

Finally, the courts, in applying this new doctrine, must consider and delicately balance the competing interests. They must recognize the legitimate right of the FTC to regulate deceptive advertisements and provide the agency with a suitable degree of latitude; at the same time, they must not ignore their fundamental constitutional obligation to protect first amendment rights. It is inevitable that this new, intermediate doctrine will be criticized from both sides; the burden has now shifted to the critics to present a more satisfactory and practical solution to the commercial speech quandary. Contemplating the multitude of considerations to be weighed, this author takes the position that the critics will be unable to derive a formula superior to the one established by the Supreme Court and presented in this article.