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Alan Howard

ARTICLE

THE CONSTITUTIONALITY OF DECEPTIVE SPEECH REGULATIONS: REPLACING THE COMMERCIAL SPEECH DOCTRINE WITH A TORT-BASED RELATIONAL FRAMEWORK

*Alan Howard**

Under the commercial speech doctrine, deceptive speech that is deemed commercial may be regulated while in general deceptive speech that is deemed noncommercial may not be. However, the critical determination of whether speech is commercial lacks standards, resulting in arbitrary rulings. The author proposes that the commercial speech doctrine be scuttled in favor of a relational framework that examines a regulation's impact on protected speech, the nature of the speech affected, and the justification for protecting a listener's reliance on the regulated speech.

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INTRODUCTION

A BROAD AND diverse range of statutory and common law has developed to regulate speech that is deemed to be "deceptive."[1] The Supreme Court of the United States has not regarded deceptive speech itself as worthy of first amendment protection.[2] However, since regulating deceptive speech can chill,[3] or actually restrict,[4] protected speech, the regulations must be analyzed under the first amendment to determine whether they unduly burden protected speech. To date, however, courts, including the Supreme Court, have subjected very few regulations of deceptive speech to first amendment review.[5] In the few cases where courts have engaged in first amendment review, judges have done little more than apply the "Commercial Speech Doctrine," a simplistic "either/or" test that distinguishes between "commercial" and "noncommercial" speech under the first amendment, with the former receiving no more than "rational basis" protection and the latter

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1. "Deceptive speech" in this article means false or misleading speech. "False speech" means untruthful speech, such as speech that is contrary to fact. "Misleading speech" is not technically false but may mislead listeners because it is incomplete, creates false impressions, or is otherwise flawed.

2. *See, e.g.*, Konigsberg v. State Bar, 366 U.S. 36, 49-50 n.10 (1961) (including misrepresentation and false advertising among the limited categories of speech not afforded first amendment protection).

3. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964) (establishing constitutional value of avoiding "self-censorship").

4. A regulation designed, or at least purporting, to censor only deceptive speech might also suppress nondeceptive, protected speech for at least two reasons. First, a speech regulation could be enforced in a biased manner. A regulator may, in bad faith, attempt to enforce a regulation against truthful speech simply because the regulator disapproves of the speech. *See* F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 81-82 (1982). Secondly, regardless of bias, a regulator may mistakenly suppress truthful speech. *See* Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U.L. REV. 1, 24-25 (1986).

These risks increase for speech that is more difficult to verify and for regulations that define deceptive speech more broadly or vaguely. *See* Cass, *Commercial Speech, Constitutionalism, Collective Choice*, 56 U. CIN. L. REV. 1317, 1371 (1988). Including truthful but misleading speech within a deceptive speech regulation poses an even greater risk of overregulation than one that reaches only false speech. *See* Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U.L. REV. 1212, 1218-19 (1983).

5. The Supreme Court has only considered deceptive speech regulation in the areas of commercial advertising, false light invasion of privacy, intentional infliction of emotional distress, defamation, and, to a limited degree in one case, political speech. *See infra* notes 220-22 and accompanying text. A few lower courts have considered challenges to other types of deceptive speech regulations. For example, courts have considered such challenges in connection with advertisements by businesses addressing political issues. *See infra* text accompanying notes 130-218.

receiving "strict scrutiny" protection, if not total immunity.[6]

This article contends that many more deceptive speech regulations should and will be subjected to first amendment challenge and review.[7] The regulations' undue impact on protected speech will be the primary concern. As such challenges increase in frequency, it will become more apparent that courts considering deceptive speech under the first amendment need a more sophisticated analytical framework than the procrustean Commercial Speech Doctrine.

The richness and complexity of the content of regulated speech and the multiplicity of contexts in which deceptive speech is used and regulated in our society quickly stretch the simplistic Commercial Speech Doctrine to its breaking point. Consider a cigarette manufacturer that disputes scientific claims about tobacco or attempts to air more innocuous advertisements; an organization created by the insurance industry that takes out ads blaming high insurance premiums on a "litigation crisis"; an investment broker who discusses an investment; a birth control manufacturer that promotes family planning; a politician who intentionally lies about his or her voting record to raise more campaign funds; a lawyer who attempts to solicit or advise clients to challenge a law; and an oil company that criticizes federal international policy. Should the first amendment analysis of speech regulation begin and end by questioning whether the speech "does 'no more than propose a commercial transaction' "?[8] Many courts facing such scenarios have felt compelled to use this simplistic first amendment analysis. Not surprisingly, jurists have often struggled with the naive and ineffectual simplicity of this analysis when dealing with complex questions.[9]

This article proposes a more coherent and complex analytical framework, referred to as the "Relational Framework," which focuses on the relationship between deceptive speakers and victimized listeners. The Relational Framework considers, on a case-by-case basis, which party, the speaker or the listener, should have a

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6. *See infra* notes 81-82 and accompanying text.

7. A number of regulations, such as common law rules relating to misrepresentation and professional malpractice, have not even received lower court consideration. *See infra* text accompanying notes 219-45.

8. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)).

9. *See infra* text accompanying notes 114-29.

"truth burden" or "burden of care," and the nature of that burden. In some cases, the listener may have a reasonable expectation of truthful, careful, or honest speech and a special need for the government to ensure that expectation. These cases normally involve listeners seeking factual information or professional advice, rather than lay opinion, enlightenment, inspiration, or entertainment. Here, the listener is often in a particular listening mode, such as a consumer's fact-gathering mode, or a client or patient mode where professional advice is sought. However, in other cases, first amendment values may be best served by recognizing the listener's responsibility to hear speech with a critical, more active ear. Examples include a listener hearing a political speech or a reader reading a novel or a newspaper editorial. Similarly, the Relational Framework considers whether speech should be afforded special first amendment protections because of risks such as censorship or chill, or whether the speech is hardy, objective, or otherwise especially suited to survive strict regulation. This Relational Framework also distinguishes speech that primarily implicates speaker values, such as self-expression, from speech that primarily implicates listener values, such as the listener's interest in obtaining information that will aid him or her in making decisions. The Relational Framework draws this distinction to illustrate why the first amendment is more likely to permit regulation of deceptive speech implicating listener values than deceptive speech implicating speaker values.[10]

This article contains four parts. In the first, the proposed Relational Framework is presented and discussed. The second discusses and criticizes the Commercial Speech Doctrine and examines cases applying the Commercial Speech Doctrine to deceptive speech regulations. The Relational Framework is then applied to the same cases to illustrate that the Relational Framework provides courts with a better means of assessing the regulations' constitutionality. The third part discusses kinds of deceptive speech regulation that are ripe for, but have not yet been subject to first amendment challenge, although they would not violate the Relational Framework. The fourth part examines deceptive speech regulations that courts have viewed as noncommercial. Again, the

10. The Relational Framework recognizes an exception to this analysis for political speech where listeners should receive less first amendment protection despite the usefulness of truthful political speech in the listener's decision-making processes. *See infra* text accompanying notes 246-73.

courts' analyses are contrasted with the Relational Framework.

I. THE RELATIONAL FRAMEWORK

A. A Tort-Based Approach

Virtually all deceptive speech regulations are designed to protect a listener's reliance on the truth of the regulated speech.[11] Each deceptive speech regulation potentially affects protected, nondeceptive speech.

In determining whether a deceptive speech regulation violates the first amendment, the proposed Relational Framework focuses on three analytical elements: (1) the extent to which the regulation impinges upon protected speech, (2) the nature of the protected speech, and (3) the justification for protection in terms of the relationship between the speaker and the listener, and the allocation of the "truth burden" between them. Where the impact on important protected speech is great and the justification for its protection is weak, the regulation may violate the first amendment.

Although firmly rooted in the fundamental tenets of the first amendment, the Relational Framework proposed in this article also draws from traditional tort law analysis. This hybrid pedigree is not surprising, since most instances of deceptive speech regulation are based on tort law remedies against intentional or negligent misrepresentation.[12] The Relational Framework provides a

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11. The principal purpose of most deceptive speech regulations is promoting rational decision making by removing erroneous information from the decision-making process. Individual listeners are injured when they rely on false statements to their detriment. *See, e.g.*, 2 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 7.1, at 378 (2d ed. 1986) ("The type of interest protected by the law of deceit is the interest in formulating business judgments without being misled by others . . . ."); Note, *Protecting The Rationality of Electoral Outcomes: A Challenge to First Amendment Doctrine*, 51 U. CHI. L. REV. 892, 913 (1984) (noting that some states have enacted campaign statutes seeking to protect voters from being misled by false information).

False information threatens political and economic markets. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976) (arguing that accurate commercial information is indispensable to the proper allocation of resources in our free enterprise system); Note, *supra* at 914 (statutes that prohibit false political statements "foster rational electoral outcomes" and "enhance[] good government"). Some deceptive speech regulations also protect nonlistener, third party interests. For example, the primary purpose of defamation actions is to protect the reputation of third parties. *See* 2 F. HARPER, F. JAMES & O. GRAY, *supra* § 5.1, at 24-37.

12. *See generally* 2 F. HARPER, F. JAMES & O. GRAY, *supra* note 11, §§ 7.1-7.15 (discussing the elements and characteristics of the torts of misrepresentation and nondisclosure).

first amendment analysis of the constitutionality of deceptive speech regulations by examining the regulations in terms of tort law principles such as appropriate or acceptable standards of care and reasonable expectations and reliances. The Relational Framework identifies circumstances that justify protecting a listener's expectation in accurate, expert, or super-accurate speech. The Relational Framework also identifies circumstances where imposing a burden of care on a speaker would not be proper, either because such a burden unduly chills protected speech, or because the listener should not have a protected right to, or expectation of, accurate speech.

The tort elements of the Relational Framework also play a role in its implementation. This article recommends that the Relational Framework be used to determine, among other things, whether the standard of care imposed on a speaker is unconstitutional. For example, the Relational Framework might indicate that the first amendment would permit the imposition of a negligence standard, but not a strict liability standard on a speaker. This type of analysis is very similar to the Supreme Court's decision in *New York Times Co. v. Sullivan*,[13] where the Court stayed within the doctrinal confines of traditional tort law in applying the first amendment to defamatory speech regulation.[14] Beginning in *New York Times* and continuing through the entire line of defamation cases, the Supreme Court has required that libel law conform to the constitutional rules of free speech. The Supreme

13. 376 U.S. 254 (1964).

14. In "constitutionalizing" the defamation tort, the Supreme Court did not uproot traditional libel tort principles and replace them with a different and distinct first amendment test. Instead, the Court simply modified the common law strict liability tort of libel. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 113, at 772-74 (4th ed. 1971) (discussing the strict liability common law tort of libel and its development). The court did this largely by reshaping the common law strict liability standard of libel to make it more closely resemble the common law tort of deceit. *See* Note, *Tort Liability for Nonlibelous Negligent Statements: First Amendment Considerations*, 93 YALE L.J. 744, 750 (1984) ("Rather than substitute a new set of First Amendment standards for existing tort principles in libel, the *Sullivan* Court expanded the traditional privilege of 'fair comment' to give proper First Amendment protection to those who comment on the conduct of public officials." (footnotes omitted)). *Compare New York Times*, 376 U.S. at 279-80 (announcement of the "actual malice test" under which a statement is fraudulent if made "with knowledge that it was false or with reckless disregard of whether it was false or not"), *with* RESTATEMENT (SECOND) OF TORTS § 526 (1976) ("A misrepresentation is fraudulent if the maker (a) knows or believes that the matter is not as he represents it to be, (b) does not have the confidence in the accuracy of his representation that he states or implies, or (c) knows that he does not have the basis for his representation that he states or implies.").

Court has accomplished this by increasing liability standards from strict liability to other standards of fault, such as intentionality, recklessness,[15] or negligence,[16] and by shifting burdens of proof and presumptions from defendants to plaintiffs,[17] rather than by applying more traditional first amendment doctrine such as the "clear and present danger" test[18] or the simple balancing test.[19] This Article proposes a similar tort-based analysis for deceptive speech, which shares much in common with defamatory speech.

The multidimensional nature of the Relational Framework reflects, and attempts to take into account, the multiplicity and variety of forms and contexts of deceptive speech regulation. As Parts II, III, and IV of this article discuss in more detail, current law regulates deceptive speech in a broad spectrum of contexts. This spectrum ranges from holding speakers strictly liable for even truthful but "misleading" speech to the other extreme of holding speakers virtually blameless for intentional lies. At one end of the regulatory spectrum is speech, such as commercial advertising, that the government has been permitted to regulate with virtually no first amendment limitation. Current federal law, for example, allows the federal government (most notably, the Federal Trade Commission and the Securities and Exchange Commission) to impose numerous extreme restrictions on commercial advertisers and the sellers of securities.[20] These restrictions include

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15. *See, e.g.*, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) (public figure, public issue, intentional infliction of emotional distress); Brown v. Hartlage, 456 U.S. 45 (1982) (public official, public issue, nondefamatory false speech); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (public figure, public issue, defamation); *New York Times*, 376 U.S. at 279-80 (public official, public issue, defamation).

16. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (private figure, public issue, defamation).

17. *See, e.g.*, Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776-77 (1986) (shifting the burden of proving falsity in public speech cases involving private figures from defendant to plaintiff); *New York Times*, 376 U.S. at 279-80 (shifting the burden of proving the falsity and defamatory nature of the speech in public speech cases involving public officials from defendant to plaintiff).

18. *See, e.g.*, Bridges v. California, 314 U.S. 252, 263 (1941) ("the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished").

19. *See, e.g.*, Board of Educ. v. Pico, 457 U.S. 853, 869-72 (1982). *See generally* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1501-06 (1975) (suggesting a balancing of first amendment rights against the state's interest in flag desecration cases involving "improper use" statutes).

20. Since 1938 the Federal Trade Commission has been empowered to regulate deceptive commercial advertising. *See* 15 U.S.C. § 45(A)(2) (1988) ("The Commission is

(1) strict liability for false speech[21] and strict liability for true but (even unintentionally) misleading speech,[22] (2) a duty to issue "corrective" speech dictated by the agency after it determines, in its own discretion, that prior statements were false or mislead-

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empowered and directed to prevent . . . unfair or deceptive acts or practices in or affecting commerce."); *FTC Powers*, 3 Trade Reg. Rep. (CCH) ¶ 7536 (1988) (describing FTC powers to prevent deception in commerce). The Securities and Exchange Commission's authority to regulate deceptive "securities" speech is found in various provisions of the securities acts. *See, e.g.*, 15 U.S.C. § 77h(d) (1988) (authorizing the commission to suspend a registration statement—required when enrolling securities with the commission—if the registration contains any untrue statements); *id.* § 78n(e) (prohibiting deceptive statements, acts, and practices in connection with tender offers). *See generally* L. Loss, FUNDAMENTALS OF SECURITIES REGULATION 699-869 (2d ed. 1988) (discussing the Securities and Exchange Commission's authority to regulate fraud and manipulation).

Other federal regulatory bodies with authority to regulate deceptive speech include the Commodity Futures Trading Commission, *see* 7 U.S.C. § 6c(A)(C) (1988) (prohibiting price falsification in any commodity transaction); *id.* § 12a(2)(G) (authorizing the commission to assess a penalty against an applicant for registration that willfully makes a false statement on its application), the Food and Drug Administration, *see* 21 U.S.C. § 331(q)(2) (1988) (prohibiting falsification on any required report); *id.* § 352(n) (requiring that true information regarding various topics be included in all advertisements), and the United States Postal Service, *see* 39 U.S.C. § 3005 (1988) (authorizing the postal service to act to prevent fraudulent schemes operated through the mails).

21. The FTC has authority to regulate deceptive advertising whether or not the advertiser's misrepresentation was made knowingly, recklessly, or even negligently. *See, e.g.*, Warner-Lambert Co. v. FTC, 562 F.2d 749, 763 n.70 (D.C. Cir. 1977) ("Innocence of motive is not a defense . . . ."), *cert. denied*, 435 U.S. 950 (1978); Chrysler Corp. v. FTC, 561 F.2d 357, 363 n.5 (D.C. Cir. 1977) ("An advertiser's good faith does not immunize it from responsibility for its misrepresentations . . . ."). Similarly, the SEC's regulatory authority over deceptive securities speech (such as deceptive speech contained within registration statements, proxy materials, or other corporate reports filed with the SEC) is not confined to cases where untrue statements were made knowingly or negligently. *See, e.g.*, SEC v. Okin, 58 F. Supp. 20, 23 (S.D.N.Y. 1944). The securities acts also provide for strict civil liability against issuers for their deceptive speech. *See, e.g.*, Greenapple v. Detroit Edison Co., 618 F.2d 198, 203 (2d Cir. 1980) (acknowledging that an issuer is strictly liable to a stock purchaser under 15 U.S.C. § 77k (1988), when the registration statement contains materially false or misleading statements).

22. Cases upholding FTC regulatory authority over misleading advertising claims include American Home Prods. Corp. v. FTC, 695 F.2d 681, 686-87 (3d Cir. 1982) (finding that literally true claims are deceptive if they communicate misleading impressions); Trans World Accounts, Inc. v. FTC, 594 F.2d 212, 214 (9th Cir. 1979) ("[m]isrepresentations are condemned if they possess a tendency to deceive."); *Chrysler Corp.*, 561 F.2d at 363 (concluding that advertising claims capable of conveying misleading impressions even though other nonmisleading interpretations may also be possible may be deceptive).

For a discussion of SEC authority to regulate misleading speech in proxy statements, see L. Loss, *supra* note 20, at 477-80. The securities laws make the issuer strictly liable to "any person acquiring such security" for misleading statements in the registration statement. *See* 15 U.S.C. § 77k. However, the law limits the victimized purchaser to restitution. *See id.* § 77(e); *see also* Goldman v. Bank of the Commonwealth, 332 F. Supp. 699, 706-07 (E.D. Mich. 1971), *aff'd*, 467 F.2d 439 (6th Cir. 1972).

ing,[23] and (3) a requirement that, on the agency's demand, speakers provide documentation of the factual basis of their claims.[24] Moreover, administrative agencies usually decide the critical elements of these regulations, with the judiciary playing a minor, deferential role and abjuring independent review.[25]

Further along the regulatory spectrum is a large body of expert speech that is subject to demanding negligence standards. Examples of this type of speech include the diagnoses and opinions of doctors and lawyers, which are regulated by malpractice common law.[26] Still further along the spectrum is speech that is regulated only if grossly negligent, reckless, or intentionally false. Common examples are criminal fraud statutes that require proof of an intent to deceive.[27] At the furthest end of the regulatory spectrum is speech such as political speech or literature, where it is unclear that the first amendment allows any government regulation of even intentionally false speech. Although one federal appellate court has questioned the constitutionality of campaign lying laws,[28] other courts have upheld these laws if they reach exclusively deceptive speech made knowingly or with reckless disregard of its accuracy[29]—the *New York Times* actual malice test. Even in these contexts, however, the courts have carefully guarded the right to an independent judicial review of the critical fact-based

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23. *See* Warner-Lambert Co. v. FTC, 562 F.2d 749, 759-63 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978). Similarly, the SEC has authority to require corporations to correct false or misleading statements contained in registration statements and proxy materials. *See* L. Loss, *supra* note 20, at 459-60.

24. The FTC's advertising substantiation policy states that making a claim without adequate substantiation is a deceptive practice, even if the claim is true. *See, e.g.*, National Dynamics Corp. v. FTC, 492 F.2d 1333, 1336 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974); Firestone Tire & Rubber Co. v. FTC, 481 F.2d 246, 251 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973). *See generally* Note, *The FTC Ad Substantiation Program*, 61 Geo. L.J. 1427, 1428-32 (1973) (describing the claim substantiation principle).

25. For example, federal circuit courts traditionally have deferred to both the FTC's interpretation of advertising claims and its determination of their truthfulness. *See, e.g.*, Simeon Management Corp. v. FTC, 579 F.2d 1137, 1142 (9th Cir. 1978) ("We are not to set aside the Commission's action unless it is apparent that it is unsupported by substantial evidence, or is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." (citations omitted)).

26. *See infra* text accompanying notes 231-45.

27. *See, e.g.*, 18 U.S.C. § 1341 (1988) (federal mail fraud statute); 18 U.S.C. §§ 1621-1623 (1988) (federal perjury statute).

28. *See* Rudisill v. Flynn, 619 F.2d 692, 695 (7th Cir. 1980) ("Attempts to establish limits on deceptive speech or requirements for disclosure in election campaigns may create their own constitutional difficulties."); *see also infra* text accompanying notes 246-73.

29. *See, e.g.*, Vanasco v. Schwartz, 401 F. Supp. 87, 92 (S.D.N.Y. 1975), *aff'd*, 423 U.S. 1041 (1976).

determinations.[30]

Before applying the Relational Framework to specific types of deceptive speech regulations, it will be helpful to describe and analyze each of the Relational Framework's three elements individually.

B. The Relational Framework's Elements

1. Prong One: The Impact on Protected Speech

Although it is reasonable to question whether deceptive speech itself is entitled to first amendment protection,[31] the primary concern of the Relational Framework is the extent of the deceptive speech regulation's impact on speech that is not deceptive, and thus clearly protected by the first amendment.[32] As previously noted, such an impact may occur in at least two ways. First, the deceptive speech regulation may chill nondeceptive speech.[33] Second, the deceptive speech regulation may directly re-

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30. *See, e.g.*, Lebron v. Washington Metro. Area Transit Auth., 749 F.2d 893, 897 n.7 (D.C. Cir. 1984); Pestrak v. Ohio Elections Comm'n, 670 F. Supp. 1368, 1377 (S.D. Ohio 1987).

31. Generally, the Supreme Court adheres to the view that factually false speech is undeserving of first amendment protection. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) ("erroneous statement of fact is not worthy of constitutional protection . . . ."). However, since its decision in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the Court has provided varying degrees of first amendment protection to unintentional defamatory speech. The Court's explanation for protecting some libelous speech is the need to provide breathing space for nondefamatory protected speech in situations where the deceptive speech, if not protected, would likely bring about an unacceptable degree of self-censorship. *See Gertz*, 418 U.S. at 340-341.

To date, the Court has not afforded similar strategic protection to calculated falsehoods. *See* Garrison v. Louisiana, 379 U.S. 64, 75 (1964) ("[a] lie, knowingly and deliberately published about a public official should [not] enjoy . . . immunity"). *But cf.* Pickering v. Board of Educ., 391 U.S. 563, 574 n.6 (1968) (the issue of whether the first amendment protects "harmless" false statements, even when made deliberately, was left undecided). Moreover, the Court has not had occasion to consider whether a "beneficial" lie or a "white" lie exists and, if so, whether these intentional falsehoods should be afforded first amendment protection. For example, do parents have a free speech right (or a due process right or even freedom of religion right) to deceive their children deliberately as to the existence of Santa Claus or the Easter Bunny? Some argue that other white lies, such as medical placebos, serve useful purposes and should be afforded first amendment protection. *See generally* S. BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 57-122, *passim* (1978) (discussing ethical dilemmas posed by beneficial lies).

32. The nondeceptive speech would not be protected if it fell within the narrow scope of any other unprotected category such as "fighting words," *see* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), or "obscenity." *See* Roth v. United States, 354 U.S. 476 (1957).

33. *See supra* note 3 and accompanying text.

strict nondeceptive speech if it happens to apply, or be applied, to such speech.[34]

Assessing the impact of deceptive speech regulations on protected speech requires reference to the factors mentioned by the Supreme Court in footnote twenty-four of its historic commercial speech case, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,—the hardiness and objectivity of the speech.[35] Although the Court in *Virginia Pharmacy* noted the relevance of the hardiness and objectivity of the speech to distin-

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34. *See supra* note 4 and accompanying text. Although the two concepts of chilling speech and directly restraining speech are related, and often overlap, they are not identical. Certain regulations, although only applied to actually deceptive speech, will prevent some cautious speakers from engaging in a certain amount of nondeceptive speech. Other regulations, because of their broad scope or sloppy or biased enforcement, will actually restrict nondeceptive speech directly. Obviously, the more the latter is known to occur, the more likely is the former.

35. 425 U.S. 748, 771 n.24 (1976). In the first paragraph of this lengthy footnote, the *Virginia Pharmacy* Court identified two attributes that it characterized as "commonsense" differences between commercial and noncommercial speech and that justify giving the government more leeway to regulate deceptive commercial speech under the first amendment:

> 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. 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* of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely.

Id. (citation omitted).

In later cases, the Court has, as it did in footnote 24, discussed the attributes of "hardiness" and "objectivity" as being distinct. In fact the two factors are related. A speaker making more objectively verifiable claims should be more confident that he or she can prove the nondeceptive nature of the speech and thus should be less chilled by deceptive speech regulations. For this reason, more easily verifiable speech would also tend to be hardier. *See infra* text accompanying note 43.

Objectivity is also an important factor in assessing the likelihood of overregulation. The government is less likely to mistake truthful speech for false speech where the speech is objective in nature. *See* Posner, *supra* note 4, at 39-40 ("A false representation regarding the price, quality, or quantity of a good or service offered for sale can usually be unmasked in a legal proceeding without a great expenditure of time and money or a great risk of error.").

guishing commercial from noncommercial speech, the factors are also relevant to analyzing the extent to which a deceptive speech regulation chills protected speech.[36] The objectivity of the speech is also relevant to determining whether there is a substantial risk of protected speech being inadvertently restricted.[37]

Presently, courts use analytical factors such as hardiness and objectivity primarily as footnote rationalizations for affording commercial speech less protection than noncommercial speech.[38] Both concepts, however, apply generally to the regulation of any deceptive speech—not just commercial speech—and should be used explicitly and directly in a broader, more complex framework. Thus, instead of playing a supporting role in a one-dimensional morality play about the second class status of commercial speech, hardiness and objectivity should play a leading role in the review of deceptive speech regulations.

Almost by definition, "hardy" speakers are less likely to be chilled by government regulations. The *Virginia Pharmacy* Court

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36. Neither hardiness nor objectivity are unique to commercial speech, notwithstanding footnote 24. Many critics have noted that noncommercial speech can be as hardy and/or as objective as commercial speech. *See* Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U.L. REV. 372, 386 (1979). The hardiness of some anti-abortion speech and anti-nuclear speech, where not even the prospects of criminal arrest and imprisonment have served to deter the most ideologically committed speakers, supports Professor Farber's view. Other examples of hardy noncommercial speech include speech largely compelled by law such as nonprivileged grand jury testimony and filling out one's tax return. *See infra* text accompanying note 41.

In addition, commentators have pointed out that much speech traveling under the flag of political speech is no less driven by economic self-interest than is any commercial advertisement. *See* Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 633 (1982) (newspapers and commercial magazines are in the business of making money as well as presenting political speech). General Motors, Israel, and Citizens for a Fair Tax System retain professional lobbyists to assist legislators in ascertaining "the public interest" because commercial advertising is not the only kind of speech motivated, at least in part, by money.

Commentators also have challenged the Court's use of objectivity in distinguishing commercial from noncommercial speech. They have noted that objective speech may be found in packages not labeled commercial speech and that some commercial packaging contains speech that is not objective. A politician's misrepresentation of his or her educational background is as subject to verification as a commercial advertiser's listing of product ingredients and much more subject to verification than a commercial advertiser's claims about quality. *See, e.g., id.* ("many statements made in the course of political debate . . . are simply assertions of fact, which are presumably verifiable"); Shiffrin, *supra* note 4, at 1212, 1218 (questioning the idea that commercial speech is more susceptible of verification than political speech).

37. *See supra* note 4 and accompanying text.

38. *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 n.5 (1985).

suggested that financially motivated commercial advertisers will continue searching for a way to spread their message, even when faced with arduous government regulations and barriers.[39] This point extends far beyond commercial speech, or even speakers with economic interests.[40] For example, the average citizen has strong incentive, due to applicable criminal and civil sanctions, among other things, to speak fully and truthfully in a whole range of contexts, such as on income tax returns.[41] In these circumstances, even burdensome speech regulations are unlikely to chill the relevant speech, especially to the extent that the speech and its accuracy are actually mandated by law.[42] On the other hand, one can easily imagine examples of far less hardy speech, such as a teacher's letter of recommendation. If Congress enacted a law that punished potentially misleading speech in the context of recommendations, it would not be surprising if many students in search of employment would find themselves without recommendation letters. When analyzing this speech regulation under the first amendment, the hardiness of the speech in question must be

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39. *See Virginia Pharmacy*, 425 U.S. at 771 n.24.

40. *See supra* note 36 and accompanying text (noting similarities between commercial and noncommercial speech). Attacking the relevance of the hardiness factor in chill analysis, Professor Redish has argued that a regulation can readily influence what hardy speakers say, even if the regulation does not chill them from speaking. He writes: "The possibility of regulation would not deter [the commercial advertiser] entirely from advertising, but it might deter him from making certain controversial claims for his product." Redish, *supra* note 36, at 633. Redish's argument has limited weight for two reasons. First, "content-chill" is much less likely to occur with easily verifiable speech, which a speaker can more confidently regard as not deceptive. *See supra* note 35 (discussing the objectivity factor). Second, even less verifiable, controversial claims are less likely to be chilled when the speaker is strongly motivated. Often a strongly motivated speaker will decide that the benefits of the speech outweigh the regulatory costs—at least this balance will favor speech that is hardy more often than speech that is not. Thus the hardiness of the speech is even relevant to Professor Redish's "content-chill"; the hardier the speech, the more the speaker will resist the modifying effects of regulation, especially to the extent that the chilling effect conflicts with the reasons that the speaker wants to speak. For example, a profit-minded advertiser who feels strongly that boastful and controversial quality claims help sales will be less likely to cut back or tone down those claims because of arduous regulations.

41. *See, e.g.*, 26 U.S.C. § 6651 (1988), *as amended by* Act of Dec. 19, 1989, Pub. L. No. 101-239, § 7741(A), 103 Stat. 2404 (civil liability for negligent failure to file a tax return); 26 U.S.C. § 7203 (1988), *as amended by* Act of Nov. 29, 1990, Pub. L. No. 101-647, § 3303(A), 104 Stat. 4918 (criminal liability for willful failure to file a tax return).

42. Some laws not only mandate certain speech but also require that the compelled speech be truthful. Failure to file a truthful tax return exposes a taxpayer to civil and criminal liability. *See, e.g.*, 26 U.S.C.A. § 6662 (West Supp. 1991) (civil liability for negligently filing a false return); 26 U.S.C. § 7207 (1988) (criminal liability for fraudulently filing a false return).

considered, inter alia, in relation to the potential chill on protected speech.

Objectivity is relevant to both the factors of chill and of direct regulation. Government regulation requiring certain speakers to communicate facts accurately is less likely to chill speech when the speaker can determine the accuracy of the information in a relatively straightforward and affordable manner.[43] Similarly, regulations addressing deceptive "facts" are less likely to engender an inadvertent restriction on directly protected speech than deceptive "opinions." Since it is easier to determine the truth or falsity of more objective information, it is less likely that a court or agency will inadvertently impose a direct burden on the communication of accurate information.[44]

On the other hand, regulating subjective speech, such as opinion, is far more treacherous. First, cautious speakers of opinion are more likely to be chilled by speech regulations because they will have more difficulty determining the similarity between their opinion and a specific instance of regulated speech. It is much easier to feel comfortable that one is stating a price correctly than to be confident that one's opinion will not mislead any significant minority of listeners. The risk of inadvertent direct regulation of protected speech is also greater with valuative speech. An agency or a jury is more likely to stray from the decision a judge would have made in the case of deceptive opinions than in the case of false objective information. Moreover, a biased decision maker (be it judge, jury, or agency) may be more tempted to label (or may feel it is easier to get away with labelling) controversial opinions as "false" than more objective and verifiable facts. Thus, regulating subjective communications is more likely both to chill and to affect protected, nondeceptive speech than regulating objective speech.

In addition to hardiness and objectivity, three other key factors affect the impact of a regulation on nondeceptive speech. A regulation's procedure, standard, and legal consequences all affect the extent of chill, and to a degree, the amount of direct regulation. With respect to procedure, the risk of chill may be greater where critical determinations are made primarily by an administrative agency or even by a jury, rather than by a judge.[45]

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43. *See supra* note 35.
44. *See id.*
45. *See* Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 522-

The availability of independent judicial review may give some speakers a bit more courage to test a regulation's limits and may reduce the risk of inadvertent regulation. In numerous contexts, such as in defamation and obscenity cases, the Supreme Court has noted that the first amendment entitles a regulated speaker to an independent examination of a jury or agency determination that the speech is subject to the regulation.[46] Although this same right may not apply to all speakers of deceptive speech,[47] it should certainly be a factor in determining the extent of the impact on protected speech.

The standard of liability under a regulation is also relevant. A regulation that imposes liability only on intentionally false speech should not have much impact on even the most cautious speakers, so long as they are not intentionally lying. On the other hand, a strict liability standard may give the most aggressive speakers pause, since even their most strenuous efforts to confirm accuracy may not immunize them if they are wrong and someone suffers. The regulation's liability standard is such a fundamental element that often the standard itself offends the first amendment, as in the defamation cases. In *New York Times Co. v. Sullivan*,[48] the Supreme Court ruled that regulations of libelous speech concerning public officials and matters of public importance could not be subject to any standard stricter than reckless or intentional misconduct. A stricter standard, such as negligence or strict liability, carries too great a threat of chilling protected speech.[49] Parts II, III, and IV of this article discuss how the first amendment analysis of deceptive speech regulation, and the Relational Framework analysis, focus on the acceptability of the standard of care imposed on the speaker and the listener.

Finally, the consequences of the regulation for speakers are relevant. For example, punitive damages, by definition, create a much greater chill on speech.[50] An example illustrates the combi-

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24, 526-32 (1970) (explaining that judges are better protectors of first amendment rights than administrative agencies or juries).

46. *See* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984) (defamation); Freedman v. Maryland, 380 U.S. 51 (1965) (obscenity).

47. For example, as previously noted, federal appellate courts defer to FTC determinations that commercial advertisements are false or misleading. *See supra* note 25 and accompanying text.

48. 376 U.S. 254 (1964).

49. *See id.* at 277-83.

50. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) ("jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censor-

nation of all of these factors. A regulation authorizing an agency to hold strictly liable, and to punish harshly, any poet who unintentionally misleads a reader into thinking the poet believes that taking drugs is acceptable is more likely to affect protected speech than a regulation targeting only intentionally false statements made by the poet's publisher about the price of the poet's book. However, even if both regulations had the same impact on protected speech, the Relational Framework would still distinguish the nature of the speech affected.

2. Prong Two: The Nature of the Speech Affected

The relevance of the nature of the speech affected is both undeniable and extremely controversial. Content neutrality is a basic first amendment principle.[51] Somewhat inconsistently, the Supreme Court has also permitted more rigorous restrictions on certain kinds of protected speech, such as commercial speech, in terms of the "subordinate position [of the speech] in the scale of First Amendment values."[52] The tension between the principle of content neutrality and the Court's prioritization of first amendment values for different kinds of protected speech has been well discussed in the literature.[53] However, while the Relational Framework recognizes, and to an extent leaves intact, this speech discrimination inherent in the "scale of First Amendment values," the Relational Framework attempts to restate the bases for such distinctions in terms more consistent with principles of content neutrality. Thus, rather than regarding commercial speech as simply less valued than political speech, the Relational Framework employs less content-specific factors to distinguish between categories of speech.

The primary distinction between different kinds of speech the

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ship"). *But cf.* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 753-55 (1985) (permitting recovery of presumed and punitive damages in defamation cases without a showing of actual malice if the defamatory statements do not involve matters of public concern).

51. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dep't v. Mosley, 408 U.S. 92, 95 (1971); *see* Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 21 (1975) ("more fundamentally, the principle of equal liberty lies at the heart of the first amendment's protections against government regulation of the content of speech.").

52. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).

53. *See, e.g.*, Farber *supra* note 36, at 373-76 (discussing the tension between the commercial speech doctrine and the principle of content neutrality).

Relational Framework recognizes is the distinction between speech primarily serving speaker interests, such as "self-actualization," and speech primarily serving listener interests, such as informed decision making. Although the Supreme Court has recognized these two sets of interests as distinct first amendment values,[54] they have not acknowledged the usefulness of the distinction for purposes of replacing the Commercial Speech Doctrine with a more content neutral analysis. The Relational Framework's second prong attempts to achieve this by distinguishing between regulations designed to limit false factual statements where first amendment listener interests predominate and regulations designed to limit false statements where speakers have strong first amendment interests. The fundamental premise of the Relational Framework's second prong is that deceptive speech regulations are less problematic when enforced in speaker-listener contexts where listener interests predominate.

In many contexts, the sole or primary purpose of speech is to help listeners make informed decisions. This speech is "informational speech."[55] Regulations designed to insure the accuracy of

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54. For example, the majority and dissenting justices in First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978), recognized two distinct first amendment values. The Court labeled one value "individual self-expression." *See id.* at 777 n.12. This value supports the speaker's interest in expressing his or her own thoughts, whether they concern politics, commerce, art, or science. Further, the Court has recognized a speaker's interest in conveying feelings, *see* Cohen v California, 403 U.S. 15, 25-26 (1971), and in using speech to entertain as well as to persuade, Schad v. Mt. Ephraim, 452 U.S. 61, 65 (1981). The Court recognized a second value furthered by the first amendment. This second value is the informational function of the first amendment. *See Bellotti*, 435 U.S. at 777 n.12 ("The individual's interest in self-expression is a concern of the First Amendment *separate from the concern for open and informed discussion* . . . ." (emphasis added)). This second value focuses on the listener and his or her interest in receiving information necessary to allow the listener to make informed judgments, whether in deciding for whom to vote or what to buy.

55. In this article, "informational speech" describes speech primarily serving the informational function discussed in *Bellotti*, 435 U.S. at 777 n.12; *see also supra* note 54. This speech is often, but not necessarily, factual speech. It includes certain "nonfactual" speech, such as professional opinion.

Other categories of "informational speech" discussed in this article include commercial advertising, *see infra* text accompanying notes 77-93, product speech, *see infra* text accompanying notes 223-30, and professional speech, *see infra* text accompanying notes 231-45. These categories of speech warrant first amendment protection because they provide information that helps recipients make rational decisions. Although the Supreme Court has yet to discuss the first amendment protection of product speech or professional speech, it has justified protection for commercial advertising by discussing the need to promote the first amendment's informational function. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 780 (1976) (Stewart, J., concurring) ("Commercial price and product advertising differs markedly from ideological

informational speech are consistent with the purpose of the regulated speech itself. An individual filling out his or her tax return or a company preparing a price list is engaging in a protected speech activity only because and to the extent that such speech promotes listener interests. These listener interests may be informed revenue collection, informed shopping, or other informed activity. These first amendment listener interests depend upon the speech's accuracy. In these examples, false speech is the enemy of the first amendment interest in promoting informed decision making. Simultaneously, the speech implicates few or none of the traditional first amendment speaker values of self-expression or self-actualization.

By contrast, the relationship between speaker and listener, in other contexts, more directly implicates speaker interests in self-realization.[56] Many kinds of speech, especially expressions of opinion or works of art are primarily personal statements, implicating elements of self-actualization and creativity.[57] In some such situations, perverse as it may sound, accuracy may be irrelevant to the speaker, and even to listeners, who may benefit from, or at least appreciate, the speech. To the speaker and even the listener an

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[speech] . . . . The First Amendment protects the advertisement because of the 'information of potential interest and value' conveyed rather than because of any direct contribution to the interchange of ideas." (citation omitted)). Inaccurate information, however, would frustrate rather than promote the first amendment's informational value of fostering informed and rational decision making. *See id.* at 781 (Stewart, J., concurring) ("Indeed, the elimination of false and deceptive claims serves to promote the one facet of commercial price and product advertising that warrants First Amendment protection—its contribution to the flow of accurate and reliable information relevant to public and private decisionmaking."). Arguably, political speech is also "informational speech," but the Relational Framework treats political speech separately because of policies unique to democratic processes. *See infra* text accompanying notes 248-75. Additionally, the focus on the value to listeners of "informational speech" does not mean that there are not other types of speech that listeners value, such as entertainment. However, the value of such noninformational speech is not primarily related to its accuracy, and, thus, for the most part the speech is not and should not be subject to deceptive speech regulations.

56. In this article, "self-expression speech" refers to speech that serves speaker interests of self-expression or self-actualization rather than, or in addition to, the listener's interest in merely receiving accurate information.

57. Professor C. Edwin Baker would limit first amendment protection exclusively to such "self-expression speech." His speaker-centered first amendment theory does not recognize any distinct listener interest in information except that it be provided freely by the speaker. Because Professor Baker believes that commercial advertising is coerced speech, dictated by economic considerations, and not freely spoken speech, driven by self-expression, he does not afford first amendment protection to commercial advertising, notwithstanding its informational value to consumers. Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976).

expressed opinion may be extremely speculative, virtually a trial balloon.[58] To subject self-expression speech to a rigorous test of accuracy would not be consistent with the purpose of the speech. Similarly, the concept of truth does not apply as easily to opinions and ideas as it does to facts. Often opinions and ideas explain or interpret facts, and there may be more than one legitimate explanation or interpretation of facts. For example, a statement that the temperature outside is sixty degrees may be deemed false or misleading more easily than a statement that the temperature is too cold to go swimming.[59] In any case, deceptive speech regulations of self-expression speech may threaten one set of first amendment values, while similar regulations of informational speech may support another set of first amendment values.

Instead of accepting or applying the concept that certain kinds of speech may be more or less subordinate in the "scale of First Amendment values," the Relational Framework recognizes that different speech contexts and different kinds of speech implicate different first amendment values. As discussed above, pursuant to the second prong of the Framework, deceptive speech regulations affecting speaker values such as the freedom of political debate or the freedom of creative expression must simply be acknowledged as more suspect under the first amendment than a similar regulation of commercial advertising or of tax returns. Additionally, the government's interest in protecting the listener's entitlement to accurate speech is less significant in the context of self-expression speech.

3. Prong Three: The Justification for the Protection of the Listener's Reliance

Once it is determined that the regulation in question affects protected nondeceptive speech, and the nature of the affected speech is assessed, the Relational Framework focuses on the rela-

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58. Common law tort principles gave opinions a privileged status long before the Supreme Court first proclaimed opinions to be largely unregulable under the first amendment, *see* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) ("under the First Amendment there is no such thing as a false idea."), and long before the Court began readjusting common law doctrines to conform to first amendment requirements. *See* RESTATEMENT (SECOND) OF TORTS §§ 539, 542, 543 (1976) (indicating that there are some circumstances in which a recipient's reliance upon a representation of opinion is not justified and, therefore, not actionable).

59. *See* Posner, *supra* note 4, at 26 ("the truth of many ideas and the beauty of most art cannot be resolved by any forensic process").

tionship between the speaker and the listener to determine whether the harm to the particular protected speech is outweighed by the need to protect listener reliance on the speech's accuracy.

Legislatures and courts have protected listener reliance on speech accuracy for many reasons. In the commercial advertising context, for example, it is presumed that false or misleading advertising will interfere with marketplace efficiency. Consumers may be led to purchase the wrong products or prevented from purchasing those that suit their needs. Similarly, ineffective products may waste scarce resources, while effective products remain underused. These economic arguments seem straightforward enough and easily justify a constitutional receptivity to regulations protecting consumer's interests in accurate commercial speech.[60]

The Relational Framework's third prong focuses on properly allocating the burden of truth determination between the speaker and the listener. As previously discussed, in the commercial advertising context, the elaborate regulatory scheme enforcing truth in advertising allocates the primary responsibility for truth determination to the speaker.[61] This seems fair and correct. As the Supreme Court itself has noted the manufacturer or distributor of a product is generally in the best position to ascertain and verify the

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60. Although this distinction is perhaps subtle, the first amendment should be understood as valuing the protection of listener reliance on accurate speech, rather than as promoting efficient commercial markets per se. The *Virginia Pharmacy* Court partially rested its decision to extend first amendment protection to truthful commercial speech on economic efficiency grounds. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976). For doing so, it was criticized in a dissent by Justice Rehnquist who, while accepting the Court's economic analysis, accused the Court of adding the promotion of free enterprise to the list of previously recognized first amendment values. *See id.* at 783-84 (Rehnquist, J., dissenting). This free enterprise interest is the same value the *Lochner* Court mistakenly sought to have incorporated into the due process clause. *See* Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 30-33 (1979). Although the *Virginia Pharmacy* Court may have erred in defending first amendment protection of truthful commercial speech as a means of promoting well-functioning free markets, economists and others have defended the Court's understanding of the impact of false information on the market place of goods. *See, e.g.*, Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 671-73 (1977); Posner, *supra* note 4, at 31; Note, *Developments in the Law: Deceptive Advertising*, 80 HARV. L. REV. 1005, 1026 (1967).

The *Virginia Pharmacy* Court also justified commercial speech protection and regulation in terms of the first amendment's informational function. The Court reasoned that protecting truthful commercial advertising while regulating false and misleading advertising helped ensure listeners' access to information relevant to them in making decisions. *See Virginia Pharmacy*, 425 U.S. at 763-65; *see also* Redish, *supra* note 36, at 630-32.

61. *See supra* notes 20-25 and accompanying text.

facts about the product that would be relevant to the market.[62]

In an extreme example, it is far cheaper, and more efficient, for manufacturers to determine in advance how much corn goes into each of its thousands of cans, than to expect shoppers to weigh each can before they buy it and then attempt to estimate how much of the weight is attributable to the corn inside.[63]

If the seller is in a better position to determine this fact than the buyer, it makes sense to require the seller to discharge this task responsibly. Otherwise, unscrupulous, lazy, or incompetent sellers may mislead shoppers who are likely to rely, or helpless not to rely,[64] on sellers' representations about their products, and who may not be able to regulate efficiently injurious false speech.[65]

Fair play and the principles of division of labor and specialization also support placing the truth burden on the expert speaker rather than on the lay listener. No one can or should become an expert in all areas. Where people are forced and encouraged to specialize, it seems reasonable and fair to provide protection to nonexperts in their dealings with experts. Where speech, particularly technical speech, is intended to inform listeners so that they can make a purchasing decision, fairness, as much as efficiency, justify placing the burden of accuracy on the speaker and not on the disadvantaged and vulnerable listener.[66]

The same sorts of arguments may be made to support laws regulating deceptive political speech. Deceptive political speech may lead some voters to vote for the wrong candidate, or prevent

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62. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564 n.6 (1980) ("[C]ommercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their message . . . .").

63. *See* Reich, *Toward a New Consumer Protection*, 128 U. PA. L. REV. 1, 23 (1979).

64. *See id.* at 25 (discussing unequal bargaining power, lack of coordination among consumers, and the high costs of private litigation, as factors forcing consumers to rely on sellers' representations).

65. One thousand shoppers defrauded of a dollar each may not bother to take the time to do anything about the petty loss, including notifying the manufacturer that the package's information is false.

66. The importance of this factor, i.e., the relative expertise and knowledge of the speaker and listener, is recognized and incorporated into the common law tort concept of "justifiable reliance." A listener relying to his or her detriment on a misrepresentation can recover against the speaker only if the reliance is found to be justifiable. *See* RESTATEMENT (SECOND) OF TORTS § 537 (1976). To prove justifiable reliance, generally the listener must show that the speaker had superior knowledge or expertise and that it was reasonable for the listener to defer to the speaker's judgment and to accept the speaker's factual claims as accurate. *See id.* §§ 541-542.

them from voting for the best candidate.[67] However, the distinction drawn by many courts between government regulation of commercial advertising and political campaign speech is defensible.

The allocation of responsibility for the determination of truth or accuracy in political speech requires a different analysis than with commercial speech. For much political speech, especially in light of the press's active role in providing the public with political information, the cost of acquiring information for the speaker and listener may be similar.[68] More importantly, however, excessive listener protectionism in the context of political speech potentially undermines the policy of encouraging every individual citizen to be actively and primarily responsible for his or her own political judgments.[69] Thirdly, there are practical limits to how much a listener can or should "reasonably rely" on most political statements. Even a politician's strongest promises are little more than vague predictions about how the representative might act in the future under changed circumstances. Should the law really attempt to enforce politicians' campaign promises the way it enforces the promises of vendors? "Read my lips—no price increases on tomatoes during the four year term of this contract."[70] Fortunately, the political process generally loosely enforces many politi-

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67. *See* Note, *supra* note 11, at 897 (stating that accurate voting depends, in part, on the availability of accurate, relevant information).

68. Niemi & Weisberg, *Is It Rational to Vote?*, in CONTROVERSIES IN AMERICAN VOTING BEHAVIOR 22, 27 (R. Niemi & H. Weisberg eds. 1976).

69. The basis for this claim is democratic theory. Democratic theory largely rejects principles of specialization and division of labor, which are prevalent in the commercial arena. These economic principles assume that some people are better suited than others to perform certain jobs. For example, a premise of state bar exams is that some people are not sufficiently intelligent or educated to practice law. Democratic theory, on the other hand, rejects such a premise for performing the job of citizen. No native born citizen need pass a citizen competency test to vote or run for office. *See* S. LEVINSON, CONSTITUTIONAL FAITH (1988). In the eyes of a democracy all citizens are, in theory, equally expert on all public issues. What follows from this is: (1) the right of any citizen to vote or speak out on public issues should not be "abridged" on the grounds that the citizen is not sufficiently "expert" to evaluate or discuss the subject; and (2) citizen speakers and citizen listeners should be treated as equals in terms of political expertise and knowledge. Therefore, it is unreasonable, and in a sense, even dangerous for the citizen listener either to defer to the political judgment of another or to accept on faith and unreflectively the factual claims made by the citizen speaker. The point is not so much that politicians lack expertise in areas of public policy, but rather that democracy functions best when citizens, especially voters, exercise their own judgment and minimize unexamined deference to the judgments of others.

70. *See* 2 F. HARPER, F. JAMES & O. GRAY, *supra* note 11, § 7.10, at 442; RESTATEMENT (SECOND) OF TORTS § 531 (1976).

cal promises by threatening that politicians "breaking their promises" will be recalled or at least not reelected.

Should these arguments prevent a legislature against protecting voters from politicians who intentionally lie about matters of which they have special knowledge, such as their confidential financial status and practices? Even the most responsible voter may find it impossible to determine when a politician provides false personal data.[71] Imposing the duty to investigate on the listener may be inefficient, unfair, and unnecessary. Similarly, there may be limits to the faith that should be placed in the concept of the expert citizen. Even the most diligent citizen can not obtain some information. Fortunately, an active media can partially compensate for this disadvantage, though probably not enough to make political deceptive speech laws directed at such narrow areas of politician speech unnecessary or unwarranted.

Another factor is the concern that parties with governmental power may censor political speech unfairly under the guise of deceptive speech regulation.[72] Arguably, the truth burden should be placed on the listener because the government cannot be trusted to enforce objectively a rule placing the burden on the speaker.[73]

The concern of biased regulation appears less valid in regulating commercial advertising. Unless the agency, the legislature, or the judge has invested heavily in a competing product, the same sort of prejudice would not be present.[74]

Considering all of these factors together, the Relational Framework presumes that commercial advertising regulation is constitutional, absent special circumstances such as undue impact on significant protected speech or a weak justification for the protection of the listener's reliance. However, the Relational Framework presumes that political speech regulation is unconstitutional, absent special circumstances such as a minimal impact on significant protected speech or a very strong justification for protecting listener reliance. As suggested above, an example of the latter is a

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71. The informational costs are less for the politician for these kinds of facts.

72. *See supra* note 4 (discussing biased enforcement of speech regulations).

73. One can conceive of devices that might mitigate the danger of biased, partisan regulation of political speech. For example, borrowing from rules used to ensure jury impartiality under the sixth amendment, the law could combat biased regulation and promote objective decision making by requiring the regulatory body enforcing the regulation to include a cross section of political interests, or require unanimity for a finding of liability.

74. *See* Shiffrin, *supra* note 4, at 1265-66; Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191, 1195 (1965).

law regulating politicians who intentionally lie about objective facts peculiarly within their knowledge—such as their confidential investments. Limiting the regulation to intentional falsehoods minimizes the chill on protected, truthful speech. Limiting the scope of the regulation to objective facts such as investments, as opposed, for example, to statements about the opposing candidate's position on a public issue,[75] the law concerns more precisely only objective nonjudgmental facts better ascertained by the speaker than by the listener. Otherwise, listeners should not be encouraged to rely on the truth of a politician's claim that his or her opponent is opposed, for example, to abortion, but may be permitted to rely in general on statements by a politician as to whether he or she owns stock in an abortion clinic.

In summary, the Relational Framework's third prong focuses on the tort-based need to protect reasonable reliance of listener's on the accuracy of the speech in question. The Relational Framework is most likely to uphold regulations of deceptive speech that are limited to statements of objective facts most efficiently determined by speakers and reasonably relied upon by listeners. The Relational Framework is least likely to uphold regulations of deceptive speech involving subjective statements upon which listeners are neither likely nor should be encouraged to rely[76] because of fundamental notions of independent political citizenship. The difficult cases are the ones falling between these two extremes. This article next discusses areas of deceptive speech regulation in which courts have applied the Commercial Speech Doctrine. After describing the doctrine and criticizing its use in certain cases involving deceptive speech regulations, the same cases are then analyzed under the Relational Framework.

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75. *See, e.g.*, Kennedy v. Voss, 304 N.W.2d 299, 300 (Minn. 1981).

76. The Supreme Court itself has speculated that statements, of both opinion and fact, about politics are apt to be discounted by listeners. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 791-92 (1978) (noting that the listener may consider the source and its credibility in evaluating political speech); Posner, *supra* note 4, at 40-41 (discussing the weighing that occurs in employees' minds during a union representation election).

II. A CRITIQUE OF THE COMMERCIAL SPEECH DOCTRINE AS APPLIED

A. The Commercial Speech Doctrine versus the Relational Framework

The current definition of commercial speech, according to the Supreme Court, is a combination of a "core notion" surrounded by a penumbral boundary defined on the basis of three characteristics. The core notion of commercial speech is "speech which does 'no more than propose a commercial transaction.' "[77] Outside this core area is a body of commercial speech identified by some undefined combination of the following characteristics:

(1) whether the speech is in the form of an advertisement,
(2) whether the speech refers to a specific product, and
(3) whether the speaker is economically motivated.[78]

As Justice Marshall stated in *Bolger v. Youngs Drug Products Corp.*, while none of these factors is sufficient (or possibly even necessary)[79] to establish the speech as commercial, "[t]he combination of *all* three characteristics . . . provides strong support for the . . . conclusion that the [speech is] commercial speech."[80]

As noted earlier, most courts have used the Commercial Speech Doctrine as both a starting point and a finishing line in determining whether the first amendment permits a given regulation of deceptive speech. If the speech is deemed "commercial" in nature, most courts, including the Supreme Court, have assumed that there is little reason to interfere with even the most extreme regulations.[81] If the speech is not commercial, however, courts scrutinize the regulation strictly and usually strike it down.[82]

The Relational Framework in the preceding section is an alternative to the Commercial Speech Doctrine.[83] The Commercial

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77. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)).

78. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66-67 (1983).

79. *See id.* at 67 n.14.

80. *Id.* at 67 (emphasis in original).

81. *See, e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 468 (1978).

82. *See, e.g.*, Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 513-14 (1984).

83. The "core notion" characteristic, and the characteristics that comprise the outer boundary of commercial speech, can actually be better understood in terms of the Relational Framework than in terms of a definition of commercial speech itself. Beginning with

Speech Doctrine is inferior to the Relational Framework proposed in this Article for a number of reasons. First, the Commercial Speech Doctrine gives determinative power to an elusive definition test that the Supreme Court, as evidenced by *Bolger*, has been unable to articulate in a precise, coherent manner.[84] Considering its purpose in the law, the "commercial speech" definition is too conclusory, as well as being underinclusive and overinclusive, leading to both false positives and false negatives if followed literally. Speech possessing none of the *Bolger* commercial speech characteristics, such as a false police report, might properly be subject to

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the "core notion" characteristic, speech merely proposing a commercial transaction may tend to be relatively more hardy, more objective, and more remote from core speaker values than other forms of speech. Moreover, speakers of such speech can be assumed to have greater knowledge of their topic than do their listeners, whose reliance on the information should therefore be seen as reasonable. Similarly, imposing a duty of care on such speakers probably promotes a more efficient market than requiring listeners to verify the accuracy of the speech before acting on it.

Admittedly, such presumptions may not apply in a particular case. Primarily for this reason, the Relational Framework would not apply a level of first amendment protection on the basis of how speech fared in an either/or commercial speech litmus test. Rather, the Relational Framework would enable a court to analyze the constitutionality of a regulation in terms of its impact on protected speech, which in turn depends on the three elements of the Relational Framework. *See supra* notes 31-76 and accompanying text.

Similarly, the penumbra or boundary characteristics of commercial speech are also better understood as relevant factors in the Relational Framework, rather than as elements of a murky definition. Speech in the form of an advertisement, for example, at least to the extent the advertisement promotes a product or service, tends to be hardier, more objective, and more remote from speaker values than, for example, a poem or a political commentary. Generally, speech referring to a specific product would probably be more objective than speech about vague moral abstractions. Finally, speakers who are economically motivated are arguably less likely to be chilled by regulation, making their speech hardier.

Thus, the characteristics the Court currently uses to "define" commercial speech can be reused much less formalistically and, arguably, more coherently to elucidate the degree of impact on protected speech, the nature of the speech affected, and even the justification for the regulation. Instead of relying on clumsy and imprecise categorizations, the Relational Framework permits a court to sort out the relevant factors in terms addressing the first amendment's mandate to bar excessive restraints on protected speech.

84. *See* Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1185 n.17 (1988) (characterizing *Bolger*'s effort to define commercial speech as "sketchy" and "inconclusive"). It has become almost commonplace in commercial speech cases for the Court, after applying the distinction between commercial and noncommercial speech, to acknowledge the ill-defined nature of the distinction itself. *See, e.g.*, Zauderer v. Office Of Disciplinary Counsel, 471 U.S. 626, 637 (1985) (stating that the "precise bounds" of commercial speech are "subject to doubt"); *Bolger*, 463 U.S. at 81 ("the impression that 'commercial speech' is a fairly definite category of communication . . . may not be wholly warranted") (Stevens, J., concurring); *In re* Primus, 436 U.S. 412, 438 n.32 (1978) (the line between commercial and noncommercial speech "will not always be easy to draw").

government regulation under the first amendment.[85] On the other hand, space purchased in a newspaper by the United Auto Workers criticizing Chrysler's closing of a plant in which a certain kind of car had been built should not be found to constitute "commercial speech" and should be largely immune from government regulation, even though all three of the *Bolger* factors are present.

Thus, even if a commercial speech categorization could serve some purpose, the court's inability to fashion a coherent definition of commercial speech undermines its usefulness. Such an uncertain definition disserves judges, who need clear doctrinal guidance, and exacerbates the chill of protected speech. Speakers that might approach the edge of a bright line test might be inclined to steer well clear of an unpredictable definitional boundary.[86] A court applying the Relational Framework avoids the quagmire of trying to define the exact scope or definition of commercial speech, such as whether the category is limited to speech that merely proposes a commercial transaction, or whether it includes various forms of related speech.[87]

A second advantage of the Relational Framework over the Commercial Speech Doctrine is that the Relational Framework also relieves courts of the need to classify as either commercial or

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85. *See* United States v. Rodgers, 466 U.S. 475, 476-77 (1984).

86. *SEC v. Lowe* demonstrates the difficulty of predicting where courts might draw the commercial speech line in any given case. *See generally* text accompanying notes 114-29 (discussing *Lowe* at length). On the question of whether Christopher Lowe's investment newsletter, which the SEC was seeking to enjoin, was commercial speech, two federal judges thought that it was and two thought it was not. SEC v. Lowe, 556 F. Supp. 1359 (E.D.N.Y. 1983) (not commercial speech), *rev'd*, 725 F.2d 892 (2d Cir. 1984) (two judges held the newsletter was commercial speech and one disagreed), *rev'd on other grounds*, 472 U.S. 181, 211 (1985) (decided on statutory grounds but three Justices regarded the newsletter as commercial speech without providing analysis).

One can sympathize with the judges attempting to define Lowe's investment newsletters as either commercial or noncommercial speech. Clearly investment newsletters do not fall within the "core definition" of commercial speech. However, an assessment of investment newsletters in terms of the three *Bolger* "factors" is inconclusive. Although the economic motivation factor appears to be present, the other two factors appear to be absent. In the past, the Court has stated that economic motivation alone will not disqualify speech from full first amendment protection. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 787 (1985) (Brennan, J., dissenting) ("[T]his Court has consistently rejected the argument that speech is entitled to diminished First Amendment protection simply because it concerns economic matters or is in the economic interest of the speaker or the audience.").

87. Concededly, to some speakers the Relational Framework may not boast many bright lines either. However, at least the Relational Framework better identifies the relevant factors and requires courts to evaluate them openly. Over time, this should result in a body of law and analytical tools that will provide clear guidance to judges and speakers.

noncommercial various types of speech that are largely resistant to such categorization.[88] The Commercial Speech Doctrine artificially reduces complex instances of human behavior to simplistic either/or paradigms of mere commercial proposition. The Relational Framework does not oversimplify speech by categorizing it as either commercial or not.

A third reason for preferring the Relational Framework over the Commercial Speech Doctrine is that the Relational Framework has a more general application; it applies to all forms of deceptive speech regulation, not just the regulation of commercial speech. This is necessary because both statutory and common law have long recognized that many listeners other than merely potential customers may have a reasonable expectation of truthful speech that merits protection.[89] No matter how courts define commercial speech, it is unlikely that they could define the category broadly enough to encompass all of the speech the government properly would want and need to regulate. Unlike the Commercial Speech Doctrine, the Relational Framework is available for reviewing any and all deceptive speech regulations. Since the Relational Framework does not employ the dichotomous formalism of the Commercial Speech Doctrine, it more openly assesses the multiplicity of factors a court needs to evaluate before deciding whether or not a deceptive speech regulation violates the first amendment.

The commercial speech characterization glosses over significant variations in the key underlying factors. By overestimating the importance of this characterization and by neglecting other relevant factors, courts may be misled into allowing improper regulation of certain kinds of commercial speech and into disallowing permissible regulations of noncommercial speech. One form of commercial speech might be less hardy, less objective, less remote from core first amendment speaker values, and less reasonably relied upon than another.[90] Conversely, one can easily imagine

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88. *See supra* note 86.

89. *See* RESTATEMENT (SECOND) OF TORTS § 311 comments a-b, illustrations 1-3 (1976).

90. For instance, a burdensome licensing or disclosure law that heavily regulates advertisements for movies could chill artists from advertising their latest low budget art film for a number of reasons, including the cost of compliance. In turn, such a chill on advertising could substantially abridge important protected speech by reducing the movie's audience or even by affecting the way artists create their movies. For example, to minimize a mandated "bad language" disclosure, an artist might choose to end a movie with "Frankly,

speech that does not fall within one of the definitions of commercial speech being more hardy, more objective, more remote from recognized first amendment speaker values, and more reasonably relied upon than certain kinds of commercial speech, and thus more regulable under the first amendment.[91]

In contrast, the Relational Framework demonstrates that commercial speech is merely one category of speech, and an amorphous category at that, that may often, but will not necessarily, have certain relevant characteristics, such as hardiness, objectivity, and remoteness from core first amendment speaker values and may often be more fact-oriented than idea-oriented, which would render its regulation generally more acceptable under the first amendment. Characterizing the speech as commercial or not is an unnecessary middle step. This characterization is at best a generalization of certain relevant factors and at worst a misleading, arbitrary, and inaccurate presumption.

Finally, the Relational Framework does not require courts to justify a more lenient standard for the review of speech regulation by making a value judgement that certain kinds of speech (for example, speech proposing a commercial transaction) are somehow less valuable than other kinds of speech. As noted earlier, to justify the double standard between the regulation of commercial and noncommercial speech, courts, including the Supreme Court, have begun to assign commercial speech a second-class status based solely on its content.[92] This is a potentially dangerous ero-

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my dear, I don't give a hoot."

91. Take, for example, trial testimony compelled through the question, "Do you own a car?" Under pain of perjury or contempt, a witness is highly motivated to answer the inquiry, and to answer truthfully. Knowing that others have been punished for lying should not chill a speaker who is able to tell the truth, especially where not speaking is also punishable by contempt. Without running the speech through the rest of the Relational Framework analysis, which would entail examination of such factors as the absence of speaker values and the presence of reasons why juries and judges are entitled to rely on witness speech, the Relational Framework would easily uphold the constitutionality of perjury and contempt sanctions for this speech even though it is in no way commercial.

92. *See supra* notes 52-53 and accompanying text. Two years after Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976); *see also supra* note 35 and accompanying text (discussing *Virginia Pharmacy* at length), the Court without prior warning announced a third rationale to justify according commercial speech less protection than other categories of protected speech. In addition to being more objective and hardier, the Court proclaimed that commercial speech was also less valuable than noncommercial speech. In *Ohralik v. Ohio State Bar Ass'n*, Justice Powell, writing for the majority, declared that commercial speech occupies a "subordinate position in the scale of First Amendment values." 436 U.S. 447, 456 (1978). Justice Powell, however, did not explain what makes commercial speech less valuable. Justice Powell also

sion of the core principal of content-neutrality in first amendment jurisprudence.[93] In contrast, the Relational Framework does not require a devaluation of commercial speech to justify the legality of stricter commercial speech regulation. Although the Relational Framework admittedly draws distinctions between different kinds of speech and treats different kinds of speech differently, it attempts to base these distinctions on more neutral and acceptable factors than solely the value of the speech itself, such as whether the speech implicates core speaker values or primarily promotes the interest of listeners in receiving accurate information.

Admittedly the Relational Framework requires a court judging a deceptive speech regulation to afford greater protection to speech with high speaker values than speech that is purely or primarily informational. Rather than holding the latter less valuable—it is hard to imagine speech more "valuable" to a listener than the information that a certain liquid is poisonous—the Relational Framework bases its distinctions on the reasons that government regulation of informational speech is more appropriate and

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did not attempt to reconcile his assessment of lower value with the Court's earlier analysis in *Virginia Pharmacy*, which seemed to indicate that commercial speech was as important as, and as valuable as, political speech. *See* Shiffrin, *supra* note 4, at 1218 (contending that the *Virginia Pharmacy* Court equated commercial and political speech).

Justice Powell's lesser value position in *Ohralik* is also difficult to reconcile with his views set out in FCC v. Pacifica Found., 438 U.S. 726 (1978). In *Pacifica*, decided the same year as *Ohralik*, Justice Powell objected to the plurality's willingness to give some protected speech less protection than other protected speech on the basis of its lower value. *See id.* at 761 (Powell, J., concurring) ("I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most 'valuable' and hence deserving of the most protection, and which is less 'valuable' and hence deserving of less protection."). Nonetheless, in subsequent cases, the Court has continued to hold to the view that commercial speech is less valuable than other forms of protected speech. *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 n.5 (1985); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563 n.5 (1980). However, the Court has yet to explain the characteristics of commercial speech that make it less valuable than other categories of protected speech or to explain why such a position does not conflict with the Court's announced content-neutrality principle. *See supra* notes 51-53 and accompanying text.

Many commentators have disagreed with the notion that commercial speech has less value than other categories of protected speech. *See, e.g.*, Posner, *supra* note 4, at 11 ("I am skeptical whether [commercial advertising] can be placed below political speech by reference to differences in value."); Redish, *supra* note 36, at 634-35 (asserting that it is impossible to justify any differences in the treatment of commercial and noncommercial speech on the premise that one is less valuable than the other); Shiffrin, *supra* note 4, at 1282 (the lesser status for commercial speech contradicts the content-neutrality principle).

93. *See* Farber, *supra* note 36, at 374 ("[A]s a result of [the tension between the commercial speech doctrine and the content-neutrality principle], the principle of content neutrality has itself come into question.").

acceptable under the first amendment than regulation of other speech.

Several of the above listed faults of the Commercial Speech Doctrine are related. One reason courts, including the Supreme Court, have been unable to settle on a workable, consistent definition of commercial speech may be that they feel the definition must include virtually any speech that they are inclined to deem readily regulable. The balance of this section discusses several of these cases in an effort to show that courts, struggling with the interface between the Commercial Speech Doctrine and the regulation of deceptive speech, would be better served by the Relational Framework.

B. Judicial Applications

1. Lawyer Solicitation

The Supreme Court, in *Ohralik v. Ohio State Bar Association*,[94] clearly demonstrated that it will begin and virtually end its first amendment analysis of a state regulation of deceptive speech by determining whether the regulated speech is "commercial." *Ohralik* involved a first amendment challenge to a state regulation prohibiting attorneys from making in-person solicitations on behalf of their for-profit business.[95] Finding the solicitation to be commercial speech, the Court, in the words of Justice Powell, proclaimed that "[w]hile this does not remove the speech from the protection of the First Amendment . . . it lowers the level of appropriate judicial scrutiny."[96]

After the Court determined that such speech was commercial, the Court employed a mere rationality test, similar to the deferential standard used in economic due process challenges to regulations of nonspeech conduct.[97] Not surprisingly, the regulation, deemed to be rationally related to an important state interest,[98] was upheld notwithstanding the fact that it constituted a

94. 436 U.S. 447 (1978).

95. *See id.* at 448-49.

96. *Id.* at 457.

97. *See id.* at 459 ("A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation. While entitled to some constitutional protection, appellant's conduct is subject to regulation in furtherance of important state interests." (citation omitted)).

98. The *Ohralik* Court identified several interests a state might legitimately seek to promote by banning in-person solicitations including protection against "fraud, undue influ-

blanket prior restraint of an entire category of speech[99] that even the state would concede includes a large amount of nondeceptive protected speech.

The extent to which the speech in *Ohralik* was denied true first amendment treatment was further clarified in the Court's decision in *In re Primus*,[100] a companion case where the Court held unconstitutional an application of virtually the same regulation as in *Ohralik* to a solicitation made in writing by an ACLU lawyer. In *Primus*, an attorney wrote a letter to a Medicaid patient who had been sterilized as a condition to receiving Medicaid assistance. The letter stated that the ACLU would be willing to represent the patient without fee in a lawsuit against the doctor who performed the sterilization.[101] The Court held that a state could not restrict the speech unless it made a specific finding that the particular speech it sought to restrict was in fact deceptive.[102]

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ence, intimidation, overreaching, and other forms of 'vexatious conduct.' " *Id.* at 462. The Court's characterization of lawyer solicitation as "conduct" rather than "speech" and its recognition that a state can protect the listener from "overbearing" speech are two additional indicia supporting the conclusion that the Court was applying a standard of review more deferential than it normally applies when reviewing regulations of speech. Thus, the Court has given no indication that it would similarly allow the state to protect listeners from such conduct outside the area of commercial speech. Indeed, it would be hard to reconcile a similar judicial solicitude towards protecting listeners from over-bearing political speech with the Court's often repeated support of "the principle that debate on public issues should be uninhibited, robust and wide-open." New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

99. *See Ohralik*, 436 U.S. at 468.

100. 436 U.S. 412 (1978).

101. *See id.* at 914-17.

102. The Court held that Primus could not be disciplined unless the state could show that her solicitation was in fact false or vexatious. *See id.* at 434-35, 438. The Court characterized Primus's solicitation as tantamount to fully protected political speech and, therefore, the state's disciplinary action had to "withstand the 'exacting scrutiny applicable to limitations on core First Amendment rights.' " *Id.* at 432 (quoting Buckley v. Valeo, 424 U.S. 1, 44-45 (1976)). The Court's suggestion that the state could have punished Primus if her speech was, in fact, deceptive or overreaching, however, seems to indicate that the Court does not view political solicitation speech (at least by lawyers) in the same manner as political speech generally. Again, it is unlikely the Court would permit states to regulate vexatious *political* speech. *See supra* note 98.

The Court has suggested that the government's authority to regulate deceptive political speech is limited to regulating false political statements of fact, made knowingly or recklessly. *See* Brown v Hartlage, 456 U.S. 45, 61 (1982). The *Primus* Court did not decide whether the first amendment allows a state to discipline a speaker like Primus for an innocently made misrepresentation. *See Primus*, 436 U.S. at 438 n.33. It is also unclear whether the Court's discussion that Primus could be disciplined for misleading statements, *see id.* at 434-36, 438, should be understood as allowing states to regulate misleading as well as false political solicitations. Some lower courts have stated that governmental authority over deceptive political speech is confined to false (as opposed to merely misleading)

Justice Powell, the author of both opinions, explained in *Primus* that the reason for the dramatic double standard was that the Court felt the solicitation in *Ohralik* was apolitical and profit-motivated, while in *Primus* the solicitation was related to what in effect was political expression through litigation.[103] Obviously, such a simplistic either/or standard exaggerates the significance of the differences between the two situations. Moreover, such an analysis does not prepare a court for intermediate cases, such as solicitations by lawyers who make a modest profit defending or prosecuting the economic rights of more politically significant litigants, such as minorities, women, the aged, and the disadvantaged. Should the judicial choice between strict scrutiny and a mere rationality standard turn so heavily on the wealth of the client being solicited by a lawyer or the Court's opinion of the political or social significance of the lawsuit?[104] Certainly the fact that one novelist is more profit motivated than another should not change the level of protection their books receive under the first amendment.[105] Even if profit motive is somehow relevant because of its role in defining commercial speech, in *Bolger* the Supreme Court made clear that profit motive is only one factor in the

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statements of fact. *See infra* note 249.

There are two possible ways to limit the *Primus* Court's acceptance of state regulation of speech actually found to be overbearing or misleading so that not all political speech could be similarly regulated. One way is to limit the case to political solicitations by lawyers. *See Primus*, 436 U.S. at 438. A second possibility is to draw a distinction between political solicitations (including those made by a lawyer, a political candidate, or a citizens group soliciting funds for a cause) and political statements where no request for money is made. However, the Court has not favored such a distinction. *Cf.* Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 628 (1980) ("It is urged that the ordinance should be sustained because it deals only with solicitation and because any charity if free to propagate its views from door to door in the Village without a permit as long as it refrains from soliciting money. But this represents a far too limited view of our prior cases . . . ."). Nevertheless, it may well be that the Court does view political solicitation, because it involves the request for money, differently than other political speech, and so there may be a greater role for state regulation in the former situation.

103. *See Primus*, 436 U.S. at 438 n.32.

104. *See id.* at 442 (Rehnquist, J., dissenting) (arguing that Ohralik could have characterized his personal injury litigation as a form of political expression as Primus had done).

105. Support exists in Supreme Court decisions for the proposition that the economic motivation of a speaker should not serve to limit constitutional protection. *See* Central Hudson Gas & Elec. Corp. v Public Serv. Comm'n 447 U.S. 557, 580 (1980) (Stevens, J., concurring) ("Nor should the economic motivation of a speaker qualify his constitutional protection; even Shakespeare may have been motivated by the prospect of pecuniary reward."); *see also supra* note 86.

definition.[106]

On the other hand, the Relational Framework analyzes factors such as profit motive and the political nature of the speech specifically in terms of the hardiness of the speech, the remoteness of the affected speech from recognized speaker values, and the justification for the state regulation, including the state's interest in protecting the reasonable expectations of listeners in receiving accurate speech. The following systematic analysis of these factors, described in terms of the three prongs of the Relational Framework, is a far cry from the simplistic extremism of commercial/mere rationality versus noncommercial/strict scrutiny employed by the Supreme Court in *Ohralik* and *Primus*.

Under the Relational Framework's first prong, a court assesses the extent to which the regulation chills protected speech. In *Ohralik*, the speech chilled is primarily the speech banned: apolitical solicitations by profit-motivated lawyers. Even outside the strict scope of the statute, some conservative attorneys may be reluctant to speak to groups about legal issues for fear of being accused of trying to drum up business in violation of the law. In short, unlike a law that allows the state to silence solicitations determined to be deceptive (or speakers determined to be deceivers)[107] the law in *Ohralik* on its face encompasses nondeceptive protected speech and may chill other speech as well. On the other hand, profit-motivated lawyers may be considered hardy souls and may find ways through written advertisements and "word of mouth" to get their pitches out. The key question in the chill element is whether the ban will prevent or unduly restrict the speakers from effectively getting out the intended message to the intended audience in a reasonable way.

The Relational Framework's second prong examines the nature of the speech chilled. The *Ohralik* majority and concurrence analyzed this issue intensely and disagreed sharply. The majority characterized the speech at issue as little more than a nonverbal

106. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67 (1983). The Supreme Court has yet to address or rationalize the fundamental inconsistency between its position that a profit motive does not reduce the speaker's rights under the first amendment with the position that commercial speech, which is defined in part by the speaker's profit motive, should be given a lower value under the first amendment than other speech.

107. For example, the government may revoke a professional's license for past misrepresentations. *See infra* note 114 and accompanying text (describing the SEC's revocation of an investment advisor's license).

business transaction,[108] while Justice Marshall in concurrence argued that such speech would include important and truthful information of use to interested aggrieved parties.[109] Justice Marshall appears to have the stronger position. Given the nature of lawyer solicitations, the ban may prevent lawyers from conveying, among other things, certain information about the law and legal rights to potential clients, including information that might be extremely controversial, opinionated, creative, and politically significant, as well as being truthful and useful.

Finally, the Relational Framework's third prong focuses on the relationship between speakers and listeners, and the state's justification for allocating the truth burden between them. Here, it is significant that lawyers may be able to manipulate and exploit nonlawyers because of a lawyer's expertise, training, and practice in the skills of persuasion.[110] On the other hand, many people listen to lawyers with some skepticism, and for good reason.

Because of the special circumstances in *Ohralik*, a court applying the Relational Framework to the *Ohralik* situation might

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108. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 457 (1978) ("In-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component.").

109. *See id.* at 473 (Marshall, J., concurring). Justice Marshall noted that rules against solicitation impede the flow of important information concerning legal rights to consumers of legal services from those most likely to provide it—the practicing members of the bar. He also observed that Ohralik had provided his prospective clients with useful information about their legal rights and remedies. *See id.*; *see also* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 677 (1985) (O'Connor, J., concurring in part and dissenting in part) ("[T]he antisolicitation rule in *Ohralik* would in some circumstances preclude an attorney from honestly and fairly informing a potential client of his or her legal rights . . . .").

The overinclusiveness of prophylactic rules and their threat to free speech has been recognized. For example, in *Zauderer* the Court invalidated a prophylactic restraint on potentially false or misleading print advertising after concluding that such a rule, almost by definition, is not sufficiently tailored to promote the state's legitimate interest in protecting consumers from being deceived by false or misleading claims. *See id.* at 644-46. The Court wrote:

> Were we to accept the State's argument in this case, we would have little basis for preventing the government from suppressing other forms of truthful and nondeceptive advertising simply to spare itself the trouble of distinguishing such advertising from false or deceptive advertising. The First Amendment protections afforded commercial speech would mean little indeed if such arguments were allowed to prevail.

Id. at 646.

110. As stated in *Ohralik*, "the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person." *Ohralik*, 436 U.S. at 465; *see Zauderer*, 471 U.S. at 678 (O'Connor, J., concurring in part and dissenting in part).

have reached the same result the Court reached under the Commercial Speech Doctrine. However, a court applying the Relational Framework would base its conclusion more appropriately on a close analysis of such factors as the impact of a per se rule on protected speech, the nature of the protected speech adversely affected by the rule, and, perhaps most importantly, the nature of the relationship between the lawyer and the prospective client at the time of the solicitation to determine how to allocate the truth burden. On balance, rather than allowing a ban of all face-to-face for-profit solicitation, the first amendment should prevent a court from enforcing a statutory ban unless there are special circumstances that render the risk of exploitation excessive. Apparently Justice Marshall saw *Ohralik* as such a case; an experienced lawyer solicited one of the prospective clients, a teenage woman, in her hospital room where she lay in traction immediately after she had been injured in a car accident.[111]

Similarly, the first amendment might require a state to focus more on specific proven deceivers or on deceptive speech, but only after the fact. For instance, the first amendment might allow a right to damages on a case-by-case basis,[112] or it might allow a requirement that certain disclosures be included in all solicitations, such as requiring lawyers to disclose whether they have ever been found to have committed malpractice.[113]

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111. Justice Marshall characterized Ohralik as an experienced lawyer in practice for over 25 years who approached two 18 year old women shortly after they had been in an accident and while they were still in pain and on medication. *See Ohralik*, 436 U.S. at 469 (Marshall, J., concurring). Ohralik himself conceded that a subset of in-person solicitations might be inherently injurious. *See id.* at 466 n.27.

112. The *Zauderer* Court expressed a strong preference for case-by-case regulation, as opposed to a prophylactic approach in regulating fraudulent speech. *See Zauderer*, 471 U.S. at 649.

113. The Court has yet to decide whether a state can require a professional to disclose prior misconduct to prospective clients. *See* Lowe v. SEC, 472 U.S. 181, 186 n.11 (1985). The Supreme Court has approved the power of the state to require a lawyer to make certain disclosures to eliminate consumer confusion caused by statements in the lawyer's advertisement. The *Zauderer* Court upheld a requirement that a lawyer set out additional information about the terms of his representation to ensure that prospective clients would not be misled as to their costs. *See* 471 U.S. at 650-53. The Court did state that a requirement to disclose more information might itself interfere with speaker values protected by the first amendment if the requirement, unjustified or unduly burdensome, would chill protected speech. *See id.* at 651. The Court announced as its disclosure requirement test, that an advertiser's first amendment rights would be adequately protected "as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id.* (footnote omitted). The *Zauderer* Court, which was dealing with a commercial speech issue, might limit its test to commercial disclosures. It is unlikely the

Although the results the Court reached in both *Ohralik* and *Primus* are defensible, the Relational Framework would have provided the Court with a fairer and more reasoned analytical approach to deciding the first amendment issues raised in the cases than the Commercial Speech Doctrine employed by the Court.

2. Investment Newsletters

An excellent example of the Commercial Speech Doctrine's inadequacies in deceptive speech cases is illustrated by Judge Oakes's opinion for the Second Circuit in *SEC v. Lowe*.[114] Judge

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Court would permit similar disclosure requirements to be imposed on political speakers. *See, e.g.*, Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1, 16 (1986).

The constitutionality of disclosure requirements is more appropriately analyzed under the Relational Framework than under the Commercial Speech Doctrine. For example, applying the second prong of the Relational Framework, the state's authority to require disclosures would contract the more the speech implicates speaker values. Under prong three, the less justified the listener's reliance on the speaker, the less appropriate it would be for the state to impose a disclosure requirement. For application of the Relational Framework to a specific disclosure requirement, see *infra* notes 196-97 and accompanying text.

114. 725 F.2d 892 (2d Cir. 1984), *rev'd*, 472 U.S. 181 (1985). Judge Oakes's opinion describes Christopher Lowe as a registered investment adviser from 1974 and continuing until his license was revoked in 1981. *See id.* at 894-95. As an investment adviser, Lowe, among other activities, published various investment newsletters. *See id.* at 894. The SEC revoked Lowe's license to practice investment advice on the basis of his convictions for various deceptive acts, some of which related to his investment advisory business. *See id.* at 894-95. After his license was revoked, Lowe continued to publish investment newsletters, which resulted in the SEC petitioning the United States District Court to enjoin Lowe from continuing to distribute his newsletters to paid subscribers. *See id.* at 895-96. The District Court judge, Chief Judge Weinstein, declined to issue the injunction on the grounds that it would violate Lowe's first amendment right of free speech and freedom of the press. *See id.* at 896. However, Judge Weinstein did not find the Investment Advisers Act unconstitutional but rather construed the Act's definition of investment adviser narrowly to limit the SEC's authority to regulate those who give personal or person-to-person advice. Therefore, because Lowe's newsletters were mere publications, or impersonal investment advice, the SEC had no power to ban them. *See id.* Judge Weinstein did enter a limited injunction banning Lowe from giving personal investment advice through telephone conversations and similar media. *See id.*

The Second Circuit reversed the lower court, with Judge Oakes concluding that Lowe was engaged in the business of investment advice within the meaning of the Investment Advisers Act and that the SEC was authorized to regulate Lowe's newsletters. *See id.* at 897-98. Furthermore, Judge Oakes held that such regulation would not violate first amendment rights under a commercial speech doctrine analysis. *See id.* at 899-901. Lowe appealed to the Supreme Court, which reversed. *See* Lowe v. SEC, 472 U.S. 181, 211 (1985).

Although the Court granted certiorari to decide whether the permanent injunction authorized by the second circuit banning Lowe from continuing to publish his newsletters was or was not consistent with the first amendment, *see id.* at 188-89, the majority concluded, as a matter of statutory construction, that Lowe's publications were not within the SEC's regulatory powers under the Investment Advisers Act. *See id.* at 211. Therefore, the Court found it unnecessary to address or comment on Judge Oakes's first amendment anal-

Oakes and the Second Circuit were confronted with a first amendment defense against the imposition of an injunction against the publisher of various investment newsletters, whose license to practice as an investment adviser had earlier been revoked by the SEC.[115]

The court indicated that the prior restraint of potentially deceptive speech, historically an odious form of regulation,[116] would

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ysis, which relied on the Commercial Speech Doctrine. *See id.*

Justice White, joined by Chief Justice Rehnquist, concurred in the judgment but disagreed with the majority's construction of the Investment Advisers Act, concluding that in light of the Act's language, history, and purpose, it was intended to reach nonpersonalized investment advice, such as Lowe's newsletters. *See id.* at 227 (White, J., concurring). Consequently, Justice White found it necessary to address the first amendment issue. In deciding the issue in Lowe's favor, Justice White concluded that the Act conflicted with the first amendment because it extended beyond personalized investment advice (advice tailored to the individual needs of individual clients) and also covered impersonal investment advice published for public consumption. *See id.* at 233, 236 (White, J., concurring). While his personal versus impersonal analysis represents an alternative approach to Judge Oakes's commercial speech analysis, and comports more closely with the Relational Framework's third prong, Justice White did consider whether Judge Oakes had properly applied the Commercial Speech Doctrine. Justice White acknowledged that even if "mere 'commercial speech' [was] concerned, the First Amendment permits restraints on speech only when they are narrowly tailored to advance a legitimate governmental interest." *Id.* at 234 (White, J., concurring). In this instance, Justice White concluded that, although the government had a legitimate interest, the means chosen were too extreme and therefore unconstitutional. *See id.* at 234-35 (White, J., concurring).

Although overruling Judge Oakes, the Supreme Court's approach (both that of the majority and Justice White) confirms the point made in the text and illustrated by Judge Oakes's opinion that the Commercial Speech Doctrine has not provided courts with adequate analytical assistance largely because courts have been unable to define the boundaries of commercial speech. In light of the split in the lower courts, where two judges believed Lowe's speech was commercial, and two believed it was noncommercial, *see supra* note 86, one would have expected the Court to have clarified the meaning of commercial speech so as to provide more guidance. Yet, not one of the eight Justices participating in the case attempted to do so.

115. *See Lowe*, 725 F.2d at 894-95.

116. The Supreme Court of the United States defines prior restraints broadly to cover not only administrative licensing schemes but also court issued injunctions. *See* New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (stating that an injunction imposed upon a newspaper preventing it from publishing a classified study, like " '[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.' " (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963))).

The Court's antipathy towards injunctions, at least in certain cases, may not be warranted. When limited to banning specific speech already adjudged by a court to be false or otherwise unprotected, issuing an injunction as a remedy does not appear to raise serious first amendment concerns. The threat of an injunction limited to speech found to be unprotected is unlikely to chill protected speech. *See* Jeffries, *Rethinking Prior Restraint*, 92 YALE L.J. 409, 429 (1983) (arguing that an injunction with specifically drawn commands make it less likely to threaten protected speech). The injunction sought by the SEC in

be unconstitutional if the speech were noncommercial, fully protected speech, but would be constitutional if the speech were commercial.[117]

Due largely to the Supreme Court's inability to establish clear guidelines for the definition of commercial speech, Judge Oakes, although unable to articulate his own definition of commercial speech, seemed to have little difficulty vaguely concluding that commercial speech is "broad enough to encompass Lowe's publications."[118] Two other judges in the same case—Judge Brieant, the dissenting member of the appellate panel, and Judge Weinstein, the district court judge—applied a very narrow definition of commercial speech[119] and concluded that the subject speech was noncommercial.[120]

Such an unpredictable standard disserves judges, not to mention speakers, in need of a clear set of constitutional rules, or at least policies. Conservative speakers, fearful that their "potentially deceptive" speech will be deemed "commercial" by an unguided judge, may be chilled from speaking and risking arbitrary sanction. Even the most well-intentioned judge will find little value in this vague definition, while a result-oriented decision maker will be unrestrained by the elastic doctrine.

Even if the Commercial Speech Doctrine contained a coherent standard, use of the doctrine as the primary tool for first amendment analysis causes the decision maker to gloss over several fundamental first amendment concerns. As the Relational Framework recognizes, the court must first consider the impact of the regulation on protected speech. To the extent that Lowe's speech is nondeceptive, the regulation directly and intentionally suppresses nondeceptive, protected speech, which in this case, at

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Lowe was somewhat more odious because it was not confined to speech found to be false or misleading but would have prohibited Lowe from publishing an investment newsletter containing no false or misleading statements. *See Lowe*, 472 U.S. at 235 n.12 (White, J., concurring).

117. For instance, after acknowledging that commercial speech deserves only " 'middle level' " protection, *Lowe*, 725 F.2d at 901 n.6, the court prohibited Lowe from selling clients specific securities advice, but he was not prohibited from publishing or stating his views on any matter of public interest, *see id.* at 902, which is the type of speech usually associated with full first amendment protection.

118. *Id.* at 901.

119. Both judges equated commercial speech with commercial advertising. *See id.* at 904 (Brieant, J., dissenting); 556 F Supp. 1359, 1366 (E.D.N.Y. 1983).

120. *See Lowe*, 725 F.2d at 904 (Brieant, J., dissenting); 556 F Supp. at 1367.

least, paying subscribers apparently want to receive.[121] Conceivably, other truthful speakers might also be chilled by the regulations. Normally the Relational Framework would consider the objectivity and hardiness[122] of the investment advice, as well as the chilling and suppressing effect of the statutory standards (for example, fraudulent intent versus negligence), statutory procedures, and the remedy permitted (prior restraint/injunctive relief). However, in this case, chill will be limited. Since the regulations only applied to Lowe after the SEC revoked his registration as an investment adviser because he had been convicted twice of crimes relating to his investment advisory business, it is unlikely a speaker with honest intent will feel threatened. This factor obviates to some extent the need for an in depth analysis of the other chill factors.[123]

The commercial speech analysis employed by Judge Oakes was also oversimplified regarding the nature of the speech chilled or suppressed, which is covered by the Relational Framework's second prong. The court should have considered the extent to which the regulated speech was informational (high listener value) or interpretative and ideological (high speaker value), and whether silencing Lowe would adversely affect his readers' ability to form important political or personal judgments. Indeed, Judge Brieant found that much of the information in investment newsletters like Lowe's is similar to the content of political writings—for example, predictions about interest rates or the effect certain world events might have on financial markets.[124]

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121. *See Lowe*, 725 F.2d at 895.

122. Investment newsletters and advice are both speech and "products" that are purchased by listeners. This "product speech," discussed at length *infra* notes 223-30 and accompanying text, can be considered relatively hardy. As noted there, a speaker of product speech who stops speaking is literally out of business. The survival instinct will serve to fortify such speech against chill. *See infra* note 229 and accompanying text.

123. 15 U.S.C. § 80b-3(e)(1) (1988) provides that the SEC may censure, suspend, or revoke the license of an investment adviser for filing false reports with the SEC. One assumes that criminal liability for making a false report would be premised on a finding of criminal intent. Consequently, license revocation and an accompanying ban on professional speech would not be invoked as a penalty unless knowingly false speech was made earlier. In this respect, the imposition of an injunction would chill speech no more, and possibly less, than imposing damages after a finding of actual malice in the context of defamatory speech.

124. Judge Brieant wrote:

> I cannot express a better description of a typical investment newsletter than that found in the majority opinion; whether in recommending specific stocks or predicting near and long term market trends, Lowe, and the typical investment

Finally, unlike Judge Oakes's abbreviated analysis, the Relational Framework focuses on the justification for the regulation and the need to protect the reader's reliance—that is, why and to what extent the government should be allowed to place the burden of determining truth or accuracy on the investment adviser rather than on the reader. Such an analysis requires, among other things, focusing on the relationship between the speaker and the listener. Justice White, in his *Lowe* concurrence, seemed to be pursuing this sort of analysis in arguing that impersonal investment advice should be more protected from regulation than personal advice, since a person giving personalized advice is more like a fiduciary who owes a special duty to the reader.[125]

> newsletter writer is in effect "publishing or stating his views as to any matter of current interest, economic or otherwise, such as the likelihood of war, the trend in interest rates, whether the next election will affect market conditions, or whether future enforcement of the Anti-Dumping Act to protect basic American smokestack industry from foreign competition is likely."

Lowe, 725 F.2d at 909 (Brieant, J., dissenting) (quoting *id.* at 902 (opinion of the court)).

The Second Circuit's reversal of Judge Weinstein's decision was limited to upholding an injunction that would ban "selling to clients advice and counsel, analysis and reports as to the value of specific securities or as to the advisability of investing in, purchasing or selling or holding specific securities." *Id.* at 902 (footnote omitted). However, such advice might also include analysis of the nature described by Judge Brieant. Presumably Judge Oakes would uphold an injunction prohibiting Lowe from publishing a newsletter that said, "I would strongly recommend that you buy (sell?) Exxon because I believe there is a good prospect that war will break out soon in the middle east." Concededly, Judge Oakes would allow Lowe to publish his war analysis if he deleted his Exxon recommendation, but clearly the market for much of Lowe's social, political, and economic analysis is dependent on linkage to specific recommendations. Therefore, Judge Oakes's authorized injunction, while technically permitting any analysis not linked to specific recommendations, further ensures that a substantial amount of such analysis will never be published.

In the end then, much protected speech could be suppressed. Indeed, a majority of Supreme Court Justices in *Lowe* characterized Lowe's newsletters, which were one court decision away from being banned, as containing factual information about past transactions and market trends, and also containing commentary on general market conditions. Concerning this speech, the Court concluded: "[T]here can be no doubt about the protected character of the communications . . . ." 472 U.S. at 210 (footnote omitted).

125.

> One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession . . . . Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech, or of the press."

Lowe, 472 U.S. at 232 (White, J., concurring) (footnote omitted).

For a court applying the Relational Framework to *Lowe*, the most difficult assessment might be that of characterizing the relationship between Lowe and his subscribers, and determining the extent to which subscribers of investment advice are entitled to accurate speech.[126] The more the information falls within the adviser's expertise and the more the subscriber uses the information to aid in making investment decisions, the greater the justification for placing the truth burden on the speaker. This is true even if an investment adviser does not tailor advice to a specific client.[127] On the other hand, where the speech contained in the investment newsletter is more subjective and deals with topics on which the investment adviser is not uniquely qualified to speak, such as political events, and subscribers utilize this information for making political decisions as well as investment decisions, any government regulation of such speech would be more problematic under the first amendment.[128] Where one places Lowe's newsletter or that of any other investment adviser along the spectrum from objective, expert investment advice to subjective, political analysis is an empirical question for a court to answer in each individual case.

There is a final consideration that courts need to appraise. In *Lowe*, perhaps more important than the relationship between the speaker and listener (fiduciary/trust versus impersonal/skeptical) and the nature of the speech (personalized/informational versus impersonal/ideological) is the fact that the regulation involved an attempt by the government to prevent a man convicted of criminal

126. Justice White's distinction between personal and impersonal advice, *see supra* note 114, while useful, cannot be dispositive. Commercial advertisers cannot be said to be speaking "personally" to individual consumers, yet the Supreme Court's commercial speech decisions are premised on a finding that false or misleading speech by commercial advertisers may be restricted. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake.") Therefore, the simple fact that Lowe's newsletter was aimed at a large audience and not tailored to the needs of any one individual should not determine whether he owes a fiduciary duty to his listeners to speak truthfully. Instead it might be more appropriate to determine whether Lowe's speech is more analogous to a commercial advertisement that is based in part on the speaker's expertise.

127. In such a case the investment adviser would be speaking more as a commercial advertiser than as a citizen or a politician. The type of information or analysis that an investment adviser could provide as an expert would not include predictions about war and peace, but might include predictions about the effect of either on individual stocks or the stock market generally.

128. It is arguable that government regulation of similar speech in a commercial advertisement would also raise serious first amendment concerns. *See infra* notes 130-218 and accompanying text.

fraud from defrauding again. The government should generally be permitted to burden twice convicted criminals rather than their innocent victims, absent some major countervailing policy.[129] If the regulation had been triggered by a simple negligence standard, a very different analysis might apply, for then the justification for the regulation and the risk of chill would be much more controversial.

3. Mixed Commercial/Political Advertising

Another category of deceptive speech over which the Commercial Speech Doctrine reigns with dismal effect is the regulation of businesses allegedly making false or misleading statements about issues affecting their profits and yet also involving matters of public concern. Examples of these sorts of statements include insurance company advertisements criticizing large damage awards in tort cases, tobacco company advertisements criticizing the government's position regarding the health effects of smoking, egg industry advertisements arguing that eating eggs does not increase the risk of heart disease, and health care insurer/provider comparative advertisements claiming superiority of products over those of their competitors.

In all these cases government agencies or private litigants have attempted to control the speech in question pursuant to federal or state laws restricting "false or misleading" statements by businesses, and the business speakers have defended on first amendment grounds. In most of these cases courts have begun and virtually ended their first amendment analyses by deciding whether the speech is "commercial" speech or not; if it is, the regulation is constitutional, but if it is not the regulation is usually unconstitutional.

As with the judicial review of other deceptive speech regulations discussed in this article, the first problem with the courts' simplistic approach is the lack of a good definition of commercial speech. Befuddled by the murky and shifting definition of commercial speech, judges often reach conflicting results in simi-

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129. Concededly, any penalty restricting speech implicates first amendment concerns. However, restricting a professional from continuing to provide informational speech for a fee because he intentionally misled clients in the past does not seem to constitute a substantial abridgement of free speech. In contrast, prohibiting a candidate from continuing to speak out on political issues after the candidate was found to have made, even intentionally, false political statements would raise more serious first amendment concerns.

lar—and in some instances even in the same—cases.[130] What is worse, the decision makers are unable to generate cogent arguments to persuade those disagreeing with their judgments, since, simply as a matter of definition, there are no convincing reasons why one definition of commercial speech is better than another. Few judges attempt to explain why a particular definition of commercial speech is legally correct, much less why applying such a categorization is correct, however it is defined. Finally, the simplistic definitional approach fails to account for many relevant first amendment factors. Many of these factors, if weighed explicitly instead of implicitly or not at all, could actually make the decision easier and certainly less arbitrary. All of these factors, which are mentioned briefly below, are considered carefully in the Relational Framework but are basically ignored in the commercial speech analyses currently used by courts, at least if the speech is deemed commercial.

First, virtually all of these cases involve laws purporting to reach misleading speech in addition to false speech.[131] Some courts define misleading speech so broadly as to include speech that would mislead only the most ignorant, unthinking, or credulous of listeners.[132] Thus, such a statute could render illegal

130. *See, e.g.*, SEC v. Lowe, 556 F.Supp. 1359 (E.D.N.Y. 1983), *rev'd*, 725 F.2d 892 (2d Cir. 1984), *rev'd*, 472 U.S. 181 (1985).

131. *See supra* note 22 and accompanying text.

132. *See* Quinn v. Aetna Life & Casualty Co., 96 Misc. 2d 545, 554, 409 N.Y.S.2d 473, 478 (Sup. Ct. 1978) (unfair business acts statute was "enacted to safeguard the 'vast multitude which includes the ignorant, the unthinking and the credulous.' " (quoting State v. Volkswagen of Am., Inc., 47 A.D.2d 868, 868, 366 N.Y.S.2d 157, 158 (1975))). Traditionally, the federal appellate courts have interpreted section five of the FTC Act as also protecting careless and unsophisticated listener-consumers. *See, e.g.*, Parker Pen Co. v. FTC, 159 F.2d 509, 511 (7th Cir. 1946) (In protecting the public against deceptive advertising, "the Commission's duty is to protect the casual, one might even say the negligent, reader, as well as the vigilant and more intelligent and discerning public."); Charles of the Ritz Distribs. Corp. v. FTC, 143 F.2d 676, 679 (2d Cir. 1944) (noting that the FTC Act was designed to protect the public, not experts). Beginning with the Reagan Administration, however, and under the leadership of its Chairman, James Miller III, the FTC sought to substitute a "reasonable person" standard for the "gullible" or "credulous" consumer standard. Representative John D. Dingell, Chairman of the House Committee on Energy and Commerce, which oversees the FTC, voiced congressional opposition to the change. Letter from Chairman Dingell to Chairman Miller (Oct. 25, 1983), *reprinted in* 5 Trade Reg. Rep. (CCH) ¶ 50,455, at 56,086 (Oct. 31, 1983). Recently, however, the FTC has applied a "reasonable person" standard in section five cases. *See, e.g.*, Thompson Medical Co., 104 F.T.C. 648, 808 (1984) (utilizing a reasonable, ordinary, average consumer standard), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987); *In re* Cliffdale Assocs., 103 F.T.C. 110, 164-65 (1984) (adopting a reasonable consumer standard).

speech that is neither false nor misleading to the vast majority of the public. Second, all of these statutes have a strict liability standard. The intent or level of care of the speaker is irrelevant.[133] Third, some of the statutes in question allocate the decision of whether the speech is commercial and whether it is false or misleading to administrative agencies.[134] Courts always defer to agency determinations of whether the speech is deceptive.[135] This can be contrasted with all other first amendment judicial review of unprotected forms of speech, such as obscenity and libel, which courts have clearly stated must receive independent judicial review under the first amendment.[136] Fourth, the cases all involve multiple relationships, that is, between advertising businesses and various categories of listeners—consumers, the public, voters, and potential jurors, to name a few.[137] Lastly, some cases also involve prior restraint regulations,[138] a highly suspect form of regulation of speech under the first amendment.[139] Discussing some of these cases specifically clarifies the Commercial Speech Doctrine's inadequacies and the Relational Framework's usefulness.

(a) Insurance Industry Advertisements

In *Quinn v. Aetna Life & Casualty Co.*,[140] a state court judge ruled that an insurance company's advertisements blaming high insurance premiums on large tort damage awards was commercial speech and, thus, could be enjoined if found to be false or misleading.[141] When the case was removed to federal district court,[142] the

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133. *See supra* note 21 and accompanying text.

134. *See supra* note 20 and accompanying text.

135. *See supra* note 25 and accompanying text.

136. *See supra* note 46 and accompanying text.

137. *See, e.g., infra* notes 130-218 and accompanying text.

138. *See, e.g., infra* text accompanying notes 140-58 (discussing a case involving an injunction) & 178-98 (discussing a case involving a cease and desist order). In some cases, the false advertiser may also be liable for damages. For example, the Lanham Act authorizes private lawsuits by competitors injured by false advertisements. *See* 15 U.S.C. § 1125 (1988). Moreover, unlike the Lanham Act, most state consumer protection acts provide for private causes of action against false advertisers by consumers. *See, e.g.*, N.Y. GEN. BUS. LAW § 350-e(3) (McKinney Supp. 1991).

139. *See supra* note 116 and accompanying text.

140. 96 Misc. 2d 545, 409 N.Y.S.2d 473 (Sup. Ct. 1978).

141. Plaintiffs involved in on-going personal injury actions sought to enjoin Aetna from continuing publication of statements in certain magazines that criticized the tort system and what Aetna perceived to be excessive damages awarded in many personal injury cases. *See id.* at 548-49, 409 N.Y.S.2d at 474-75. The plaintiffs argued, among other things, that the advertisements should be enjoined because they contained misleading state-

district court judge concluded that the advertisements were not commercial speech,[143] and the Second Circuit affirmed.[144] Without explaining, much less justifying, his definition of commercial speech, the federal district judge simply concluded that the state court judge had "engaged in a fundamental misconception by calling the advertisements here in question 'commercial speech.' "[145] Compared to the Relational Framework, this conclusory war of definitions leaves everything to be desired. In definitional terms, the speech is clearly both commercial and political.[146] Judges at-

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ments violating New York law. *See id.* at 549, 409 N.Y.S.2d at 475. In response Aetna argued that their publications, which Aetna characterized as advocating tort law reform, were political expression and fully protected by the first amendment. *See id.* The state judge disagreed with Aetna's characterization of its publication, finding that the statements were commercial speech deserving less than full first amendment protection. He also reasoned that, unlike fully protected political speech, less protected commercial speech could be enjoined if false or misleading. *See id.* at 553-54, 409 N.Y.S.2d at 478.

The court's decision turned on its characterization of Aetna's speech as less protected commercial speech. The court did not explain, however, why Aetna's speech was not fully protected political commentary, as the company argued. Moreover, much of what the court said about the speech contradicted its finding that the speech was commercial. The judge held that the speaker's purpose was to influence potential jurors to give lower damage awards. *See id.* at 554, 409 N.Y.S.2d at 478. He did not find that Aetna had targeted its statement at consumers or that the statement sought to promote insurance products.

142. Aetna was successful in removing the case to federal district court. *See* Quinn v. Aetna Life & Casualty Co., 482 F. Supp. 22, 25 (E.D.N.Y. 1979), *aff'd*, 616 F.2d 38 (2d Cir. 1980) (per curiam).

143. *See id.* at 29.

144. In affirming, the Second Circuit provided only scant analysis. *See* Quinn v. Aetna Life & Casualty Co., 616 F.2d at 40.

145. 482 F. Supp. at 29. In Rutledge v. Liability Ins. Indus., 487 F. Supp. 5 (W.D. La. 1979), involving insurance company advertising statements similar in content to those published by Aetna in *Quinn*, the district court judge, like his counterparts in *Quinn*, held that the advertisements were not commercial speech. *See id.* at 8. However, unlike the federal district and appellate judges in *Quinn*, the *Rutledge* district court judge attempted to explain why the publications were not commercial speech. Defining commercial speech narrowly as speech proposing a commercial transaction, *see id.*, the district court judge concluded that the advertising was not commercial speech because "[t]he ads [made] no attempt to sell insurance or to recommend any particular type of insurance coverage . . . ." *Id.* Finding the speech to be fully protected noncommercial speech, the district court, with little analysis, concluded that issuing an injunction in the case would be tantamount to imposing a prior restraint on publication in violation of the first amendment. *See id.* at 8-9. *Rutledge* is distinguishable from *Quinn* in one other significant way. In *Rutledge*, the plaintiffs did not aver that the advertising was false. Their sole concern was that the advertisements might improperly influence jurors to award lower damage awards. *See id.* at 7.

146. "Commercial" means merely that Aetna and the insurance industry were motivated exclusively (given their corporate raison d'etre of maximizing profits) by economic concerns and their advertisements were related to those concerns. Aetna did not write the advertisements because of an abstract concern over good public policy. It saw the existing tort system as adversely impacting on its profits. Moreover, although both the *Quinn* and

tempting to enforce the first amendment are poorly served by a doctrine that bases its result almost entirely on an arbitrary either/or decision about whether speech that is both commercial and political shall be deemed commercial.

In contrast, the Relational Framework enables a court to consider all relevant factors in a single coordinated process, and not merely by presumption or secondarily after rendering the critical decision—"commercial or not." The Relational Framework's first concern is the extent to which the regulation—in this case an injunction against the insurance company ad—would affect protected speech.[147] Answering this question requires an assessment of some of the factors mentioned earlier, such as the chilling nature of a regulation making speakers strictly liable for speech that is misleading only to a minority, as determined by zealous bureaucrats.[148]

As previously discussed, the chill analysis also considers the hardiness and objectivity of the speech.[149] Arguably, the profit-motivated speech in *Quinn* is relatively hardy.[150] Since the speech involves company statements about what affects its own prices or premiums, the speech contains a measure of objectivity and speaker expertise. However, other portions of the speech, such as statements about whether jury damage awards are too high or not, is a classically subjective, nonexpert opinion.[151] Finally, the prior

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Rutledge courts understood that the advertisements were directed at both potential jurors, who might be influenced to render lower awards, and to voters, who might be influenced to support changes in the tort system, it is conceivable that the advertisements were also directed to consumers, seeking to convey the message: "Don't blame the insurance company for high premiums. Blame the tort system." The advertisements can also be characterized as political speech because they communicated a political message to citizens and jurors.

147. *See supra* text accompanying notes 31-50.

148. *See supra* text accompanying notes 132-34. In *Quinn*, the only relevant impact factors missing were administrative enforcement and the availability of damage awards. *See supra* note 134. All the other significant impact factors were present. The case involved an injunction sought pursuant to a statute imposing a strict standard of liability, *see* N.Y. GEN. BUS. LAW § 350 (McKinney 1988 & Supp. 1991), and a deceptive speech definition covering speech that might leave false impressions on the credulous and naive. *See Quinn*, 96 Misc. 2d at 554, 409 N.Y.S.2d at 478. With the later amendment to the New York unfair business practices act allowing a private cause of action against advertisers for their false advertising, the threat of damages was added as an additional impact factor. *See* N.Y. GEN. BUS. LAW § 350-e(3) (McKinney Supp. 1991). The amended statute also allows treble damages for knowingly made false advertisements. *See id.*

149. *See supra* text accompanying notes 36-37.

150. *See supra* note 39 and accompanying text.

151. Thus the listener should be on notice to assess critically such claims and not to rely on any of the speaker's expertise. In fact, the speaker's obvious economic bias should

restraint aspect of the regulation, although traditionally anathema under the first amendment, actually chills other speakers much less than, for example, compensatory or punitive damages or criminal penalties. Even so, a company concerned about both its public relations and its litigation budget might be quite chilled from making statements that could expose it to publicized litigation for illegal business practices and result in court orders.

The Relational Framework next considers the nature of the speech being chilled.[152] Business criticism of jury behavior, which is presumably intended to influence jurors and voters as much as insurance consumers, can be considered relatively close to core first amendment values of public debate on politically and socially significant issues. On the other hand, notwithstanding *First National Bank v. Bellotti*,[153] ideological speech by incorporated, economic entities motivated solely by profit—that is, devoid of self-actualization values—may have less speaker value than speech by individuals.[154]

Finally, the Relational Framework considers the justification of the regulation, given the relationship between the speaker and the listener.[155] Statements about what causes high insurance premiums are addressed at least primarily to insurance consumers. Between insurance companies and their consumers, government might understandably allocate the "truth duty" to the companies, although adding the dimension of "misleading" speech compli-

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make the listener somewhat skeptical of the "opinion."

152. *See supra* notes 10-11 and accompanying text.

153. 435 U.S. 765, 784 (1978) (first amendment protects corporate political speech).

154. In *Bellotti*, neither the majority nor the dissent saw corporate speech as implicating self-expression concerns. The majority was willing to protect corporate political speech only because such speech served listeners and furthered the informational function of the first amendment. *See id.* at 781-83. Justice White, in a dissent joined by Justices Brennan and Marshall, explicitly stated that corporate speech has no value in terms of the first amendment interest in promoting speaker self-actualization. *See id.* at 804-05 (White, J., dissenting) ("Indeed, what some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech." (footnote omitted)).

Arguably, however, a corporate manager speaking on behalf of his or her corporation may, to some extent, also be speaking on behalf of himself or herself personally. Perhaps that is one reason the individual sought, took, or kept the job. Admittedly, many of Justice White's arguments about the unfair use of corporate funds by managers to engage in political speech, *see id.* at 809-21 (White, J., dissenting), may well support allowing the government greater control over corporate political speech than purely individual political expression. However, the majority and dissent may have been too quick in rejecting the relevance of speaker values to corporate political speech.

155. *See supra* notes 10-11 and accompanying text.

cates the decision.[156] On the other hand, speech about whether jury awards are too high is more obviously a matter of opinion—and obviously biased opinion—addressed to the public at large, and possibly prospective jurors in particular. The public should be able to discount such speech accordingly, without the benefit of protective government intervention, except to the extent that a naive listener might be tempted to defer to the "expertise" of the insurance company, which has had to pay all these judgments.[157]

In some ways, the speech regulated in *Quinn* is more like a report on jury reform by an American Bar Association committee than a simple sales pitch, except that, like the latter, it is the product of profit motive.[158] Moreover, these insurance industry advertisements seem closer to speech directed at the reader as citizen and voter than the reader as consumer.

The purpose of this exercise was not to re-decide *Quinn* using the Relational Framework, or even to suggest which of its conflicting results was correct. Rather, it is to show how the Relational Framework would enable a decision maker to undertake a more appropriately complex and precise analysis—one that might be used to make fairer, more convincing decisions than those reached

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156. In *Quinn*, the state judge concluded Aetna's criticism of high jury awards was misleading because it failed to mention that many of those awards are overturned or reduced on appeal. *See* Quinn v. Aetna Life & Casualty Co., 96 Misc. 2d 545, 554, 409 N.Y.S.2d 473, 478 (Sup. Ct. 1978). Of course, some of the awards are not reduced on appeal. Moreover, all statements are incomplete in one way or another and could be elucidated to reduce the risk of misleading a gullible or naive listener. Completeness and the risk of someone being misled are matters of degree, not absolute values. The threat of chilling protected speech is enhanced by the uncertainty created by drawing lines between acceptable and unacceptable completeness and acceptable and unacceptable risk of naive misunderstandings. Moreover, even the "extra" speech that a judge thinks can "cure" one misunderstanding may itself be incomplete or potentially misleading possibly leading to an infinite regress of "clarifications." For example, the statement that "many excessive jury awards are overturned on appeal" could lead some listeners to think that the jury system is very inaccurate or inefficient.

157. The Supreme Court itself accepts the empirical claim that listeners may consider the speech's source and the risks of distortions caused by the speaker's biases. In *Bellotti* Justice Powell wrote, "Moreover, the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate." 435 U.S. at 791-92 (footnotes omitted). Perhaps Justice Powell was making an empirical observation as well as stating a normative belief that individuals have a responsibility to listen and judge. *See also supra* note 76.

158. Perhaps it is more accurate to state that the profit motive may be somewhat greater in the case of the insurance company. Obviously, economic considerations may influence an ABA committee's recommendations.

under the Commercial Speech Doctrine. Nevertheless, it is fairly clear that the Relational Framework would tend to afford corporate political speech such as that in *Quinn* virtually the same protection as similar speech by an individual.

(b) Cigarette Industry Advertising

The determinative power, and yet frustrating imprecision, of the Commercial Speech Doctrine is perhaps best illustrated by a case before the Federal Trade Commission involving tobacco industry attacks on the federal government's position that there exists a link between smoking and heart disease. On June 16, 1986, the FTC issued a complaint against R.J. Reynolds ("RJR") alleging that RJR's criticisms were false and misleading advertising in violation of the Federal Trade Commission Act.[159] The adminis-

159. *See In re* R.J. Reynolds Tobacco Co., 111 F.T.C. 539, 539-40 (1988). The FTC's complaint was directed at an advertisement RJR disseminated entitled "Of Cigarettes and Science." *Id.* at 539. The advertisement discussed an experiment known as the Multiple Risk Factor Intervention Trial (MR. FIT). *Id.* at 539-40. As described by RJR in its publication, the experiment involved several thousand men who smoked and had elevated blood pressure and cholesterol levels. *Id.* at 554 (Oliver, Chairman, dissenting). These men were divided into two groups. The men in one of the groups received mandatory medical treatment that consistently reduced their smoking and their blood pressure and cholesterol levels. Those in the other group were not subject to the mandatory medical care. *Id.* (Oliver, Chairman, dissenting). The tag line of the RJR publication was its statement that: "After 10 years, there was no statistically significant difference between the two groups in the number of heart disease deaths." *Id.* (Oliver, Chairman, dissenting). The RJR publication went on to say that the company was not claiming that the MR. FIT "study proves that smoking doesn't cause heart disease." *Id.* (Oliver, Chairman, dissenting). Rather RJR had referred to the MR. FIT study as support for two different claims the company was making. First, RJR argued that a fair reading of the results of existing scientific testing on the relationship between smoking and heart disease would lead to the conclusion that the smoking-heart disease thesis has yet to be proven or disproven. *Id.* (Oliver, Chairman, dissenting). Second, RJR argued that the federal government's position that the thesis has been proven establishes that the government is applying a scientific double standard. If the government applied standards of proof normally required in scientific inquiries, it would have reached the conclusion that the question remains open. *Id.* at 554-55 (Oliver, Chairman, dissenting).

The FTC charged in its complaint that RJR's publication constituted a commercial advertisement which misrepresented both the purpose and results of the MR. FIT study. *Id.* at 540. Specifically, the FTC alleged that the advertisement contained three false and misleading claims about the study: (1) that it was designed and performed to test whether cigarette smoking causes heart disease; (2) that it provides credible scientific evidence that smoking is not as hazardous as the public has been led to believe; and (3) that it tends to refute the theory that smoking causes heart disease. *Id.*

It is interesting that Chairman Oliver, who dissented from the majority's decision overturning the administrative law judge's decision, read the advertisement the way RJR read its publication and not the way the FTC counsel read it. He understood RJR simply to be saying that in its judgment there still exists a scientific question whether the theory

trative law judge held that the advertisements were not commercial speech, and thus the first amendment fully protected them against the FTC's enforcement.[160] On appeal the majority of the Commission decided the administrative law judge had misapplied the Commercial Speech Doctrine,[161] while the Chairman, in dissent, concluded the speech was not commercial.[162] The only view the entire Commission shared was that the determination of whether the speech was commercial or not would dictate the final result.[163]

The heart of the disagreement among the commissioners was whether the mixed commercial/political speech should be deemed one or the other—admittedly a difficult question when it was so obviously both, just as were Aetna's advertisements.[164] This forced determination would be analogous to requiring an art appraiser to decide first whether a black and white painting was either black or white in order to judge its value.

Although primarily relying on the characteristic-based test employed in *Bolger*,[165] the majority did distinguish commercial speech from "speech that does not benefit the economic interests of the speaker by influencing the reader or listener in the role of consumer, but instead provides . . . information relevant to individual political decisions, or to artistic or cultural choices."[166] Although not in the context of defining speech as commercial, the Relational Framework's third prong also focuses on the same sorts of elements in assessing whether the truth burden should be

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linking smoking and heart disease is valid, and that those scientists who support the theory have applied a less rigorous standard of proof than generally applied to scientific questions. *Id.* at 551-52 (Oliver, Chairman, dissenting).

160. *See id.* at 539.

161. *See id.*

162. *See id.* at 552 (Oliver, Chairman, dissenting).

163. *See id.* at 541 ("We [the majority] agree with the parties and the ALJ that unless the Reynolds advertisement can be classified as commercial speech, it is not subject to the Commission's jurisdiction."); *id.* at 551 (Oliver, Chairman, dissenting) ("The Commission's jurisdictional authority extends to the hawking of wares, not the hawking of ideas.").

164. *See supra* note 146 and accompanying text.

165. From its review of the complaint and the advertisement itself, the majority concluded that RJR's advertisement possessed all three of the *Bolger* factors: (1) the speech was in the form of a paid advertisement; (2) it referred, at least generically, to a specific product, *i.e.*, cigarettes and (3) since the advertiser was a manufacturer of cigarettes, it was "reasonable to infer that Reynolds, as a seller of cigarettes, had a direct, sales-related motive for disseminating the . . . advertisement." *In re* R.J. Reynolds Tobacco Co., 111 F.T.C. 539, 547 (1988).

166. *Id.* at 546.

placed on the speaker or the listener.[167] Despite recognizing these elements, the majority indicated that the advertisement was commercial speech and, thus, could be regulated freely by the government.[168] This is especially problematic because RJR's publication was an attempt to criticize a governmental stand.[169] Commercial or not, rebutting controversial government positions could hardly be closer to core first amendment values.[170]

The dissent's analysis also suggested elements of the Relational Framework. For example, the Chairman questioned both the objectivity[171] and hardiness[172] of the company's advertise-

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167. Applying the Relational Framework's third prong, the more the speech can be found to be directed at voters and as an attempt to influence voters in making political judgments, the less the speech's recipient should be entitled to have the government require the speaker to speak accurately. *See supra* text accompanying notes 68-76.

168. *See R.J. Reynolds*, 111 F.T.C. at 546-48.

169. *See id.* at 565 (Oliver, Chairman, dissenting) ("[RJR] has challenged the official position taken by the Surgeon General and the United States Congress.").

170. *See* Posner, *supra* note 4, at 11; ("The most important aspect of freedom of political speech is simply the right to criticize government officials and policies . . . ."). *See generally* Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (examining the idea that free speech is valuable, in part, because of its ability to check official power). The Court itself has noted that "[f]reedom of expression has particular significance with respect to government because '[i]t is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression.' " First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 n.11 (1978) (quoting T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 9 (1966)).

Moreover, like the insurance publications in Quinn v. Aetna Life & Casualty Co., 482 F. Supp. 22, 25 (E.D.N.Y. 1979), *aff'd*, 616 F.2d 38 (2d Cir. 1980); *see supra* notes 140-58 and accompanying text, and Rutledge v. Liability Ins. Indus., 487 F. Supp. 5 (W.D. La. 1979), RJR's publication seemed more directed at voters than consumers, as Chairman Oliver argued. *See In re* R.J. Reynolds Tobacco Co., 111 F.T.C. 539, 569 (1988) (Oliver, Chairman, dissenting) ("[RJR's publication] is, on its face, direct comment on a public issue and not commercial speech."). In this setting readers should be found to have little entitlement to government protection against false claims by openly biased corporations, on subjects over which the corporation has no special expertise, or unique or special access to such expertise.

171. *See R.J. Reynolds*, 111 F.T.C. at 563 (Oliver, Chairman, dissenting). Chairman Oliver concluded that RJR's speech should not be seen to be particularly objective. *See id.* (Oliver, Chairman, dissenting). However, his conclusion was not based on an assessment of the lack of objectivity of the claims themselves. Rather, Chairman Oliver's point was directed at the issue of expertise and special access to the factual information contained in the publication or information on which other more valuative statements rested. *See id.* (Oliver, Chairman, dissenting) ("[T]he claims made . . . do not address an aspect of cigarettes uniquely within the knowledge of RJR."). He noted that RJR's publication did not discuss information about the company's brand name cigarettes such as price, weight, and composition, which is the type of information that the advertiser can find and objectively verify better than others. *See id.* at 563 & n.21 (Oliver, Chairman, dissenting).

Chairman Oliver's objectivity analysis implicates considerations of the Relational

ments. Although his purpose seems to have been to buttress his conclusion that the speech should not be defined as commercial, his consideration of the subjective and nonhardy nature of the speech is similar to the way the impact of the regulation on protected speech would be analyzed under the Relational Framework's first prong.[173]

Similar to the Relational Framework's second prong, the dissenting commissioner also focused on the nature of the speech af-

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Framework's first and third prongs. Under the first prong, the speech's objectivity is important to assessing impact because the less objective the speech the government seeks to regulate, the greater the risk the regulation will chill or suppress protected speech. *See supra* notes 43-44 and accompanying text. However, as Chairman Oliver's analysis suggests, objectivity is also relevant to the third prong in that the listener should not rely on factual statements or valuative claims resting on specific facts, where the listener can investigate the facts or learn about them as easily as the speaker. *See supra* text accompanying notes 61-66 and accompanying text. Thus, in Relational Framework terms, speakers should be held less responsible for their misrepresentations, especially their misleading statements, when the speaker is no better situated than the listener to investigate and ascertain whether the statements made are true or false. *Cf.* RESTATEMENT (SECOND) OF TORTS § 551 comment k (1976).

172. Chairman Oliver did not view RJR's speech as hardy. *See R.J. Reynolds* 111 F.T.C. at 563 (Oliver, Chairman, dissenting). Without explaining why, he simply stated that "since the subject matter discussed by RJR is a matter of public concern, this type of speech by RJR is particularly susceptible to being crushed by regulation." *Id.* (Oliver, Chairman, dissenting). Chairman Oliver supported his conclusion by noting that the company had stopped publishing the statement after the FTC filed its complaint. *See id.* (Oliver, Chairman, dissenting). While Chairman Oliver can be faulted for not providing more analysis supporting his nonhardiness reasoning, especially considering that RJR's commentary may have been quite hardy since the issue of the adverse health consequences of smoking affected RJR's profits, he should be commended for at least addressing the hardiness of the speech the government sought to regulate.

173. The debate between the majority and Chairman Oliver over whether RJR's statement was commercial speech, as the majority viewed it, or political commentary, as Chairman Oliver saw it, again points out the inadequacy of the *Bolger* criteria for distinguishing between commercial and noncommercial speech. Both the majority and Chairman Oliver claimed *Bolger* as their lodestar, yet they reached opposite conclusions. The majority, mechanically applying the three *Bolger* factors and apparently assuming that any speech possessing all three characteristics is commercial speech, found all the *Bolger* factors present and indicated that RJR's publication was commercial speech. *See id.* at 546-48. In contrast, Chairman Oliver found that RJR's publication satisfied the third *Bolger* factor but not the first or second criteria. Chairman Oliver found the first criteria, that the speech be in the form of a paid advertisement, absent. *See id.* at 563 (Oliver, Chairman, dissenting). He defined a paid advertisement as speech that the speaker not only has paid to have published, but also speech whose content promotes a specific product or service. To Chairman Oliver, RJR's publication was not an advertisement, although the company had paid to have it published, because it did not promote the company's cigarettes. *See id.* at 563-64 (Oliver, Chairman, dissenting). Chairman Oliver also found the second factor, product specification, absent. Chairman Oliver appeared to require, at least as to this publication by RJR, specific reference to RJR's brand name cigarettes to satisfy the second criteria. *See id.* (Oliver, Chairman, dissenting).

fected. He characterized the company's speech as a direct comment on a matter of public concern, making it largely immune to government regulation.[174]

The dissent's analysis also anticipated aspects of the Relational Framework's third analytical prong by suggesting that RJR had targeted its advertisement as much to voters and citizens as to consumers.[175] Moreover, the dissent noted that the government, rather than RJR, had prepared the study the company was discussing and that others with equal expertise could likewise comment on the study's truthfulness.[176] The lack of any special expertise by the company and the likelihood of rebuttal speech in the market would weigh in favor of placing the truth burden on the listener, instead of the speaker.[177]

The *Reynolds* case demonstrates the fundamental weakness of Commercial Speech Doctrine. Whether mixed commercial/political speech is primarily commercial or primarily political should not dictate, by itself, the extent to which and the manner in which the political portion or dimension of the speech should be protected by the first amendment. Without subjecting the *Reynolds*

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174. *See id.* at 564 (Oliver, Chairman, dissenting). Significantly, Chairman Oliver believed the majority's holding would allow the government to regulate any statement made by a corporation if the statement could influence a consumer to purchase the corporation's products. *See id.* at 562 (Oliver, Chairman, dissenting). If Chairman Oliver's understanding is accurate, then the majority would limit *Bellotti*'s full first amendment protection of corporate political speech, *see supra* note 153, to those statements that could influence voters, but not consumers. The consequence of holding corporations accountable for the accuracy of any statement, whether political or not, that could influence a consumer purchasing decision, as Chairman Oliver pointed out, would be the introduction of a double standard of first amendment protection for some corporate political speech. As Chairman Oliver saw it, "Virtually every other person and corporation in America is free to participate in the debate about cigarette smoking and health, without government evaluation whether their claims are true or false." *Id.* at 564 (Oliver, Chairman, dissenting). Only corporations such as RJR, because it manufactures cigarettes, would find their political speech regarding cigarettes subject to regulation. Such a double standard seems inappropriate, especially where the manufacturer's statements are directed to voters as well as consumers.

175. *See id.* at 563-65 (Oliver, Chairman, dissenting). To Chairman Oliver, RJR's speech was noncommercial, even though some of its statements might influence some consumers to buy cigarettes. Again, Chairman Oliver explained that allowing a corporate political claim to be turned into a commercial claim because the statements might influence individuals as consumers would make any statement by the company regarding the health effects of its product commercial speech, since such statements would invariably involve "an attribute of cigarette smoking of concern to purchasers of its product." *Id.* at 564 (Oliver, Chairman, dissenting).

176. *See id.* at 563 (Oliver, Chairman, dissenting).

177. *See supra* text accompanying notes 68-73.

case to the entire Relational Framework analysis, it is worth noting that the Relational Framework supports substantial first amendment protection. Much as discussed above, key factors include the speech's political nature, its presentation as political commentary, its discussion of facts not within the speaker's control or expertise, and its antigovernment slant.

(c) Egg Industry Advertising

Another FTC case involving mixed commercial/political speech is *National Commission on Egg Nutrition v. FTC*,[178] in which the Seventh Circuit upheld an FTC order prohibiting an egg industry trade association from making certain statements about the health value of eggs.[179]

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178. 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978).

179. *See id.* at 158-59. The Seventh Circuit affirmed with some modification an FTC order prohibiting the egg industry from making several specific claims including that: (1) there is no scientific evidence linking eggs with heart disease; (2) there is scientific evidence that eating eggs decreases the risk of heart disease; (3) avoiding eating eggs increases the risk of heart disease; (4) eating eggs does not increase blood cholesterol level in a normal person; (5) blood cholesterol levels are not affected by eating eggs; and (6) that scientific studies establishing a link between egg consumption and heart disease are insignificant. *See id.* at 165-67. The Seventh Circuit also approved the imposition of certain disclosure requirements on the egg industry that would be triggered when the industry makes certain representations. Thus, the FTC order did not prohibit the egg industry from representing that eating eggs does not increase the risk of heart disease. However. the order did require the industry, when making such a representation, to also indicate the existence of a controversy among medical experts and that the industry was presenting its side of the controversy. *See id.* at 165-66. Similarly, the order did not prohibit the egg industry from indicating that there is scientific evidence supporting the theory that eating eggs does not increase the risk of heart disease. However, the industry, at the same time it discussed this evidence, was required to disclose that many medical experts disagree and believe that existing evidence supports the link between egg consumption and heart disease. *See id.*

In the Seventh Circuit case, the egg industry primarily challenged the FTC order banning industry claims "that there is no scientific evidence linking the eating of eggs to an increased risk of heart and circulatory disease." *Id.* at 160. As an initial matter, the egg industry argued that the statement was not false and, therefore, could not be banned. *See id.* The egg industry noted that while many scientists believe there is sufficient evidence supporting the theory of a link between egg consumption and heart disease, other scientists and doctors disagree and do not believe credible evidence exists supporting this theory. For these scientists and doctors the claim that "there is no scientific evidence linking the eating of eggs to an increased risk of heart and circulatory disease" is a truthful statement. *See id.* at 160-61.

The industry also argued that FTC regulation of the statement violated the industry's first amendment rights. *See id.* at 161-63. The industry argued that the statement was either a commercial statement on a controversial public issue in which case the statement, even if false, could not be regulated unless it could be shown to have been made with actual malice, or an expression of a political opinion fully protected by the first amendment. *See id.*

The case illustrates the extreme lengths to which a court is prepared to go to allow government regulation of speech it deems commercial. In particular, the court approved the FTC position that commercial speech that can be interpreted to mean different things is unlawful if one of its interpretations, whether intended by the speaker or not, would make the statement false.[180] The court did so by characterizing determinations of meaning and deception as factual findings of an administrative agency, which should be given deference.[181] This deference conflicts with basic first amendment doctrine that requires courts to determine for themselves whether the first amendment protects particular speech.[182]

Interestingly, the egg industry, analogizing between its statements and a defamatory statement about a public official, had contended that the first amendment limits liability for false statements concerning a controversial public issue to those made with actual malice, as defined in *New York Times*.[183] The court held that a strict liability standard was acceptable for one reason—the speech was commercial.[184] The court held that claims as to the harmlessness of a product asserted to persuade consumers to buy the product constitute commercial speech.[185] One wonders how an either/or test would treat even closer cases, such as a government

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180. *See id.* at 161 & n.4. The court cited with approval FTC decisions holding that language susceptible of more than one meaning will be deemed misleading if one of its meanings is false. *See id.* at 161 n.4. Here, the court found that the FTC had not acted unreasonably by interpreting the "no scientific evidence" claim to convey at least to a substantial number of readers the meaning that there are no studies supporting a link between egg consumption and heart disease. *See id.* at 161. Moreover, the court believed that since such studies did exist, regardless of whether some scientists found the studies unpersuasive, a statement denying the existence of such studies was clearly false. *See id.*

181. *See id.* at 161 (" '[w]hether particular advertising has a tendency to deceive or mislead is obviously an impressionistic determination more closely akin to a finding of fact than to a conclusion of law.' " (quoting Beneficial Corp. v. FTC, 542 F.2d 611, 617 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977))).

182. *See supra* note 46 and accompanying text.

183. *See* 570 F.2d at 162.

184. *See id.*

185. *See id* at 163. The Seventh Circuit rejected the egg industry's argument that its statements were noncommercial speech because the statements did "more than propose a commercial transaction . . . ." *See id.* at 162-63. The Seventh Circuit read the Supreme Court's commercial speech decisions more broadly than the egg industry contended it should: "[T]he Supreme Court's expressions were not intended to be narrowly limited to the mere proposal of a particular commercial transaction but extend to false claims as to the harmlessness of the advertiser's product asserted for the purpose of persuading members of the reading public to buy the product." *Id.* at 163.

restriction on the same statements made by a scientist employed, or even just funded, by the egg industry.

By contrast, the Relational Framework enables a judge to assess the constitutional choice between a strict liability standard and the actual malice standard in the same manner the Court employed in *New York Times*[186]—by focusing on the extent to which the applicable standard chills protected speech, the nature of the speech chilled, and the societal justification or need for the challenged standard. Without engaging in a full Relational Framework analysis here, it is sufficient to note that the analysis would be similar in many ways to the analysis applied to the insurance and cigarette speech cases discussed earlier.[187] Again, this discussion's purpose is not to suggest that the result in the *Egg Nutrition* case was wrong—just the manner of the Court's analysis.[188] It is conceivable that judicial wisdom might reach the same result—that is, allowing the agency to prohibit the speech—by applying the Relational Framework. However, the Relational Framework suggests that the first amendment entitles a speaker to the court's full application of the Relational Framework's complex and inclusive analysis, and not merely judicial deference to an agency conclusion that certain speech is commercial, whatever that means, and could be interpreted, or so an administrative agency would believe, by some to mean something the agency thinks is false.[189] Public debate on controversial issues of public concern (even where one of the speakers is trying to sell some-

186. *See supra* text accompanying notes 11-19.

187. *See supra* text accompanying notes 140-77.

188. Professor Farber has defended the result reached by the Seventh Circuit by analogizing the egg industry publication to an express warranty by a seller that its product is safe. *See* Farber, *supra* note 36, at 390. Under well-settled principles of contract law, a seller is obligated to deliver its product in conformity with its description set out in the contract and in conformity with all express warranties. *See* RESTATEMENT OF CONTRACTS §§ 312, 314, 327 (1932). There are at least two problems with Professor Farber's analogy. First, the warranty analogy is weakened if one accepts the egg industry's argument that it simply was saying that there is no credible scientific evidence linking eggs to heart disease. Arguably, this falls short of a warranty-type assertion that in fact there is no such link between eating eggs and heart disease. Second, the warranty analogy is inapt to the extent that the egg industry was speaking to voters on a controversial political issue concerning the regulation of eggs, and not just to consumers in order to influence them to buy eggs.

Professor Farber assumes, without explanation, that contract rules dealing with express warranties are themselves consistent with free speech norms. Applying the Relational Framework to such principles one can establish that such rules do not raise serious first amendment concerns although, as Professor Farber recognizes, these principles do at least raise first amendment questions. *See* Farber, *supra* note 36, at 386.

189. *See supra* notes 180-81 and accompanying text.

thing, but especially when the speaker is trying to rebut government orthodoxy) deserves more careful analysis, if not more protection, under the first amendment. Certainly a court should be willing and equipped with serviceable doctrines to decide when the impact on speech, the nature of the speech affected, and the justification for the regulation, when considered together, require an independent application of an actual malice standard instead of a rubber-stamped strict liability standard for speech that an agency deems misleading.

The Relational Framework's analysis in the egg industry case can be compared to the preceding discussion of the cigarette industry case.[190] Both cases involve industry speech criticizing government interpretations of scientific claims about the health value of a product[191] as well as speech not peculiarly within the speaker's expertise.[192] Under the Relational Framework, these factors would not generally favor allowing strict regulation of the speech.

On the other hand, there is at least one reason that the speech at issue in the egg industry case should be more readily regulable. The advertisement in the egg industry case was more clearly directed at consumers, as opposed to voters, than the advertisement in the cigarette case.[193] For this reason, the Relational Framework's hostility towards state protection of listener reliance on the accuracy of political statements[194] would apply less in the egg industry case.

One other aspect of the egg industry case deserves special attention under the Relational Framework and the first amendment. In the egg industry case, the FTC sought to compel the industry speaker, when referring to the health value of eggs, to acknowledge the existence of contrary scientific studies.[195] A similar sort of compelled speech regulation was held unconstitutional in *Pacific Gas & Electric Co. v. Public Utilities Commission.*[196] In *Pacific Gas & Electric*, the Supreme Court held unconstitutional a

190. *See In re* R.J. Reynolds Tobacco Co., 111 F.T.C. 539 (1988).

191. *See supra* notes 159 & 179 and accompanying text.

192. *See supra* note 171 and accompanying text. Likewise, the egg industry did not discuss information uniquely within its knowledge such as the price, weight, and composition of its product.

193. *See supra* note 170.

194. *See infra* text accompanying note 273.

195. *Egg Nutrition*, 570 F.2d at 165-66.

196. 475 U.S. 1 (1986).

state utility commission requirement that a utility company provide space in its billing envelope for opposing political viewpoints.[197] Although not disallowing any compelled speech regulation categorically, the Relational Framework would carefully consider the extent to which such a compelled speech requirement would chill protected speech, the nature of the speech chilled, and the extent to which the relationship between the speaker and the listener justified such a requirement. Considering the foregoing factors and the analysis in the cigarette industry case,[198] but without completing an exhaustive analysis under the Relational Framework, a general position can be articulated: the Relational Framework would not tolerate a compelled speech regulation such as that in the egg industry case if it is likely that the regulation would substantially chill protected speech and if the regulated speech is speech that listeners should analyze more with citizen-listener skills than with consumer-listener skills.

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197. *See id.* at 4-7. In one sense the compelled speech requirement in the egg industry case might be seen as even more offensive to first amendment principles than that in *Pacific Gas & Electric.* In *Pacific Gas & Electric,* the utility was required only to include the opposing side's statement in the same envelope. *See id.* at 5-7. In contrast, in the egg industry case the FTC ordered the regulated company itself to express the opposing viewpoint, at least to an extent. *See supra* note 179. However, since the egg industry was only being ordered to acknowledge an opposing position, rather than to express it in detail, this distinction may not be significant. Nevertheless, the first amendment has long restricted the right of the government to force people to express views they find abhorrent. *See* Wooley v. Maynard, 430 U.S. 705, 717 (1977); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

A second distinction between the egg industry case and *Pacific Gas & Electric* is that the purported purpose of the regulation in *Pacific Gas & Electric* was to provide for a diversity of views, *see* 475 U.S. at 6, while in the egg industry case the regulation was intended to protect against deceptive speech. *See Egg Nutrition,* 570 F.2d at 164. This distinction would be relevant to the first two prongs of the Relational Framework only to the extent that one type of regulation might chill more, or different, speech than another. With respect to the Relational Framework's third prong, the policy against the state's protection of political speech listeners would apply as equally, if not more, to government efforts to ensure that listeners hear all sides of a political issue from one speaker as it would to government efforts to ensure that one side speaks more accurately. Conceivably, the Relational Framework's third prong could be modified to assess whether a listener does or should rely on the completeness or diversity of a speaker's communications, or whether there is a need to impose on a powerful speaker's communications to ensure that a listener hears the opposing views of weaker speakers. However, it is unlikely that regulations mandating sponsorship of diverse speech would be deemed acceptable under the Relational Framework if they appreciably chilled protected speech. *Cf.* Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) ("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment").

198. *See supra* text accompanying notes 159-77.

(d) Health Insurance/Provider Comparative Advertising

The Third Circuit's decision in *United States Healthcare Inc. v. Blue Cross*[199] also illustrates the comparative inadequacy of the Commercial Speech Doctrine in reviewing a first amendment challenge to government regulation of corporate deceptive speech concerning a public issue. The case involved counter suits by rival health care provider/insurers each accusing the other of false advertising in violation of the Lanham Act[200] and state laws against commercial disparagement, defamation, and tortious interference with contractual relations.[201]

The district court judge held that for either side to prevail on its Lanham Act and/or ancillary state causes of action it had to prove, by clear and convincing evidence, that the opposing party's misrepresentations were made knowingly or recklessly.[202] The imposition of the *New York Times* actual malice standard was mandated by the first amendment, the district court reasoned, because of the political nature of the advertisements.[203] On appeal the

199. 898 F.2d 914 (3d Cir.), *cert. denied*, 111 S. Ct. 58 (1990).

200. *See id.* at 917. Federal law allows competitors to sue each other for injuries caused by commercial advertising misrepresentations about the qualities of their own or their competitors' products. *See* Lanham Act § 43(A), 15 U.S.C. § 1125(A)(2) (1988). A competitor-plaintiff must prove: (1) that the competitor-defendant made a material misrepresentation that deceived or had the tendency to deceive a substantial segment of the audience and (2) that the competitor-plaintiff has been or is likely to be injured either by lost sales or lost goodwill with the public. *See, e.g.*, Skil Corp. v. Rockwell Int'l Corp., 375 F. Supp. 777, 783 (N.D. Ill. 1974). Similar to commercial advertiser liability under the FTC Act, the defendant can be found to have violated the Lanham Act even if its misrepresentation was made in good faith and was neither knowingly nor negligently false. *See, e.g.*, Parkway Baking Co. v. Freihofer Baking Co., 255 F.2d 641, 648 (3d Cir. 1958) ("The fact that the name appeared on the wrapper because of a mistake is not a defense to an action under this section [of the Lanham Act].").

The Lanham Act permits the assessment of damages. *See* Lanham Act § 35, 15 U.S.C. § 1117(A) (1988). Most dramatically, the court can award additional damages, up to three times the amount awarded for actual damages, "according to the circumstances of the case . . . ." *Id.* Unlike similar remedy provisions, such as that found in New York's unfair business practices act providing treble damages up to $1,000 after a finding that a misrepresentation was made knowingly, *see* N.Y. GEN. BUS. LAW § 350-e(e) (McKinney Supp. 1991), the Lanham Act places no limit on the amount of treble damages awarded and does not explicitly limit treble damages to knowing misrepresentations. *See* 15 U.S.C. § 1117(A). Nor do courts believe that treble damages are necessarily limited to misrepresentations made knowingly, recklessly, or even negligently. *See, e.g.*, Alpo Petfoods, Inc. v. Ralston Purina Co., 913 F.2d 958, 970 (D.C. Cir. 1990).

201. *See United States Healthcare*, 898 F.2d at 917.

202. *See id.* at 920.

203. As noted by the Third Circuit, the district court characterized the comparative advertising campaign "as a 'dispute . . . about how best to deal with spiraling medical costs . . . .' " *Id.* at 927. Therefore, " '[t]o characterize the advertisements in this case as

Third Circuit framed the issue as whether the principles of *New York Times* apply to defamatory statements involving comparative advertising.[204]

The Third Circuit first noted that some forms of speech receive less first amendment protection because they are " 'less central to the interests of the First Amendment.' "[205] The Third Circuit reasoned, "[i]f the speech here is commercial speech, then it likely does not mandate heightened constitutional protection."[206] Accordingly, the Third Circuit concluded that the heightened protection afforded by the actual malice standard should be confined to political, as opposed to commercial, defamatory speech.[207]

Next, the court had to determine whether the speech was political speech, deserving of the actual malice standard, or merely commercial speech, unworthy of such heightened protection. Finding all three *Bolger* factors[208] present in the advertisements, the Third Circuit concluded that " 'common sense' informs us that the statements here propose a commercial transaction, and thus differ from other types of speech."[209]

Similar to the Relational Framework's first prong, the Third Circuit buttressed its *Bolger* analysis by assessing the extent to which the advertisements would be chilled by the regulation. Citing the size of the health care market and the economic self-interest behind the advertisements, the court concluded that "it would have to be a cold day before these corporations would be chilled from speaking about the comparative merits of their products."[210]

Also consistent with analysis under the Relational Framework's first prong, the Third Circuit found "[t]he facts upon which the advertisements [were] based—comparative price, procedures, and services offered—[to be] readily objectifiable."[211]

Consistent with analysis under the Relational Framework's

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mere commercial speech ignores the fact that, at their core, they are instruments in a debate between two providers of public health care intimately involved in the resolution of important public questions.' " *Id.*

204. *See id.* at 928.

205. *Id.* at 930 (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 n.5 (1985)).

206. *Id.* at 932 (footnote omitted).

207. *See id.* at 932-33.

208. *See supra* text accompanying notes 77-80.

209. *United States Healthcare*, 898 F.2d at 935.

210. *Id.*

211. *Id.* The Court also noted that in addition to being objective, the advertisements contained information about which the advertisers knew more than anyone else. *See id.*

second prong, the Third Circuit also analyzed the nature of the advertisements. Although conceding that some of the advertising claims dealt with public concerns about costs and consequences of competing health insurance and health care delivery programs,[212] the court found that other possibly defamatory claims add "little information and even fewer ideas to the marketplace of health care thought."[213] However, even as to those claims contained within the advertisements that the court recognized as contributing to political and social understanding, the court nevertheless indicated they would be viewed as less protected commercial speech, rather than fully protected political speech, because the claims were made within the context of a commercial advertisement.[214]

In what might be compared to analysis under the Relational Framework's third prong, which focuses on the relationship between the speaker and listener, the court seemed to distinguish corporate statements addressing an issue of public concern and involving a competitor that are not made in the context of a commercial advertisement from the same statements made as part of a commercial advertisement.[215] One might infer from the court's analysis that it is less willing to afford corporate speakers protection for their false and misleading statements when those state-

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212. The court found that one advertisement alleging that a financial disincentive exists for health maintenance organization ("HMO") primary care physicians to make specialist referrals, implicated an important health care concern. *See id.* at 935 n.26.

213. *Id.* at 935. The court gave examples of advertisements that do not contribute to political debate: (1) an advertisement depicting a grieving woman complaining that her HMO had sent her to an inadequate hospital, and (2) an advertisement suggesting that one health plan provided such inadequate health care services that it could jeopardize the lives of patients. *See id.* at 935 n.26. As to both advertisements, the court concluded: " 'There is simply no credible argument that this type of [advertisement] requires special protection to ensure that debate on public issues [will] be uninhibited, robust, and wide-open.' " *Id.* (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 762 (1985)). Notwithstanding the court's views, both advertisements sought to make the same point: that the competitor did not provide adequate health care services, which charge clearly implicates ultimate health care concerns.

214. The court wrote:

> Like the energy products advertised in *Central Hudson*, the products advertised here—health care insurance and delivery—are at the center of public debate. Consequently, while we agree that the quality, availability, and cost of health care are among the most important and debated issues of our time, these particular advertisements for specific health care products do not escape the commercial speech category.

Id. at 937.

215. *See id.* at 938-39.

ments are directed at consumers rather than voters.[216]

The court's use of the Commercial Speech Doctrine served to obfuscate rather than clarify the first amendment interests present in the case. The court's mechanical application of the *Bolger* factors to find the advertisements commercial speech glossed over the political nature of many of the claims. Moreover, the court's use of the Commercial Speech Doctrine prevented it from addressing the key issues in the case, such as whether the regulation unconstitutionally denied citizens the opportunity to hear an important debate between knowledgeable speakers on issues of important public interest, and whether the regulation unduly affected the political process by denying corporate speakers sufficient freedom to speak out on controversial public issues involving their products. Strict regulation of comparative advertisements, with the threat of treble damages, could jeopardize significant first amendment values by chilling the speech of key players in important debates. Comparative advertising between competitors about adequate health care could be as important as debate between opposing political candidates.

It was not until the Third Circuit relinquished its reliance on the Commercial Speech Doctrine and looked more directly at (1) the impact of the regulatory scheme on protected speech,[217] (2) the nature of the speech the regulation seeks to punish, and (3) the nature of the relationship between the advertisers and their audience, that the court began any meaningful assessment of the first amendment interests implicated in the case. Even here the court's dependency on the Commercial Speech Doctrine undermined its effort. For example, the concern the court evidenced about the regulation's impact on protected corporate political speech was assumed away by the court's finding that the speech was lower value, less protected commercial speech.[218] In this respect the Commercial Speech Doctrine functioned not simply as

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216. Certainly the Third Circuit saw the health provider publications as pitched to consumers. Resting in part on motivational analysis, the court stated that "the parties have acted primarily to generate revenue by influencing customers, not to resolve 'the issues involved.' " *Id.* at 939.

217. While the court did consider the hardiness and objectivity of the advertisements, the court should also have evaluated other factors, such as the chilling effect of the Lanham Act's strict liability standard (as compared to the fault standard in the state corporate defamation cause of action), the Lanham Act's extension to misleading rather than merely false claims, and perhaps most significantly the availability of treble damages.

218. *Id.* at 936-37.

an unnecessary additional step in the analysis but one that interfered with the proper analysis.

III. Deceptive Speech Regulations Escaping First Amendment Review

Ever since its seminal defamation decision in *New York Times Co. v. Sullivan*,[219] the Supreme Court has considered first amendment issues in connection with a growing number of deceptive speech regulations: false light,[220] false and misleading professional advertising,[221] and intentional infliction of emotional distress.[222] However, many other kinds of deceptive speech regulations, such as product-speech liability and professional malpractice, have not yet received first amendment review. In this section, the reasons courts have given, implicitly or explicitly, for not considering first amendment issues in each of these areas are critiqued, and the Relational Framework is applied to each regulation to determine whether the regulation violates the first amendment.

A. Speech-as-Product—Products Liability

On occasion speech has been characterized by courts as a product, subject to products liability claims. To date few courts have recognized the applicability of first amendment protection in this area. Courts subjecting product-speech to product liability have treated the speech as a product instead of speech, and thus not entitled to first amendment protection. However, the two categories are not mutually exclusive; product-speech is both a product and speech.

In a series of cases, federal and state courts have held airline navigational charts to be products subject to product liability. With the exception of one case, *Brocklesby v. United States*,[223] no courts have subjected the regulation of navigational charts to first amendment review. In *Brocklesby*, the Ninth Circuit held,

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219. 376 U.S. 254, 279-80 (1964) (holding that a public official must prove actual malice to recover in a defamation action).

220. *See* Time, Inc. v. Hill, 385 U.S. 374, 387-88 (1967).

221. *See In re* R.M.J., 455 U.S. 191, 203 (1982); Friedman v. Rogers, 440 U.S. 1, 12-15 (1979).

222. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988).

223. 753 F.2d 794 (9th Cir.), *vacated*, 767 F.2d 1288 (9th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986).

strangely, that navigational charts are either nonspeech products or commercial speech, and, thus, not entitled to substantial first amendment protection.[224] These illogical categorizations again demonstrate the proposition that a court determined to regulate a category of speech has little choice under current doctrine but to stretch the commercial speech category to include the speech or to shrink the definition of speech to exclude it.[225] The Relational Framework enables a court to allow a speech regulation without finding it to be a regulation of commercial speech or of nonspeech or a regulation compelled by a state interest. However, it is significant that, aside from *Brocklesby*, every other navigational chart case has failed to recognize the charts as speech at all.[226] An airline navigational chart is a combination of words and pictures designed and used for the communication of information and ideas.[227] In short, it is speech. Few would question the appropriateness of a doctrine allowing parties injured in a crash caused by a defective navigational chart to recover damages from the author or publisher of the chart. However, a court must determine, simply because the charts are speech, that the law protecting the injured traveler does not violate the first amendment. Such a violation would occur if the law excessively chilled protected, nondeceptive charts. Fortunately, the Relational Framework demonstrates why this risk is minimal in the case of airline navigational charts.

The Relational Framework's first prong, which examines the

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224. *See id.* at 800, 803. The court's perfunctory response to the chart publisher's argument that the imposition of strict liability conflicted with protection afforded commercial speech under the first amendment was a mere assertion that even if the court viewed the charts as commercial speech, rather than tortious conduct, the first amendment would not bar liability because false and misleading commercial speech is subject to regulation. *See id.* at 803. The court also stated, without explanation, that requiring a chart manufacturer to produce a safe product would not impede the publication of truthful navigational speech. *See id.*

225. In this respect, the Ninth Circuit's opinion resembles the Second Circuit's opinion in *SEC v. Lowe*, where the court characterized Lowe's newsletters as either professional conduct or commercial speech. *See id.* at 901.

226. *Compare* Brocklesby v. United States, 767 F.2d 1288, 1295 n.9 (9th Cir. 1985) (refusing to consider a first amendment claim because it was raised for the first time on appeal), *cert. denied*, 474 U.S. 1101 (1986), *with* Saloomey v. Jeppesen & Co., 707 F.2d 671, 676-77 (2d Cir. 1983) (holding that navigational charts were properly classified as products), *aff'g* Halstead v. United States, 535 F. Supp. 782 (D. Conn 1982), Aetna Casualty & Sur. Co. v. Jeppesen & Co., 642 F.2d 339, 342 (9th Cir. 1981) (same), *and* Fluor Corp. v. Jeppesen & Co., 170 Cal. App. 3d 468, 475, 216 Cal. Rptr. 68, 71 (1985) (same).

227. *See Aetna*, 642 F.2d at 342.

impact of a regulation on protected speech, is a standoff between very strong factors. On the one hand, subjecting airline navigational charts to product liability exposes the speech to a number of potentially potent chill factors—a strict liability standard of care, the availability of a judgment for broad fact-based damages, and the unavailability of independent judicial review of determinations by fact finders. Any one of these factors, by itself, could doom a speech regulation under the first amendment. Combined, they could constitute an especially severe chill on protected speech.[228]

On the other hand, a number of factors will work to minimize the chilling effect. An airline navigational chart is an unusually hardy and objective form of speech. One key aspect of the hardiness of product-speech such as this is the fact that the product being sold is the speech itself. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Supreme Court noted that advertising is relatively resistant to chilling effect because it is driven by the speaker's economic profit incentive.[229] Many companies will suffer lower profits if they are unable to advertise. However, the economic impact on a seller of a speech product is more direct and immediate—a seller of product-speech who stops speaking is, by definition, simply out of business. It is hard to imagine a survival-minded speaker lightly succumbing to chill factors.

Another anti-chill factor is the great objectivity of navigational charts. Makers of accurate charts should be able to distinguish their own work from the mistakes they see punished in the courts. One hopes navigational chart makers find incorporating severe standards of accuracy a manageable burden. If any potential chart maker is daunted by the concept of sanctions for dangerous inaccuracies, one should probably be thankful—so long as there are enough chart makers left to satisfy the demand.

Focusing on the Relational Framework's second prong, which questions the nature of the speech affected, the navigational chart

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228. Professor Tribe has observed that various features of a regulatory scheme can combine to chill protected speech. He sees some Supreme Court cases as involving a chilling effect on speech that "was caused not by any discrete act of a government official, but by the fabric of legal rules developed in a given jurisdiction over time . . . ." Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 26 (1989). This fabric involves "the *overall shape* of the state's body of judge-made rules for awarding damages to people allegedly injured by speeches or publications." *Id.*

229. 425 U.S. 748, 771 n.24 (1976); *see also supra* note 35 and accompanying text.

does not fare well. Recognized first amendment speaker values of self-expression and self-fulfillment are not strongly implicated by navigational charts. In terms of promoting first amendment values, speech in the form of a navigational chart is best understood as fostering listener interests in obtaining accurate information needed for making certain decisions that are largely void of ideological considerations. In fact, navigational chart speech is not much more than a means to a specific nonverbal end—safe air travel.

The Relational Framework's third prong, which examines the state's justification for protecting the listener's reliance, compels strict regulation. The typical reader of a chart—the pilot in the cockpit—is hardly in a position to verify the chart's accuracy or procure a second opinion (market corrections through trial and error should also be ruled out). The reader is virtually at the mercy of the chart maker. Forcing chart makers to internalize the costs of their errors allocates the risk to the proper party.[230] Moreover, considering the high stakes—human life—and the small margins of error, a strict liability standard and a remedy of damages seem entirely reasonable, if severe, measures.

Given the objectivity and hardiness of the speech, and its relatively low functional value in terms of core speaker-based first amendment interests, on balance the Relational Framework would countenance virtually any regulation of navigational charts, consistent with due process, reasonably necessary to save human lives.

B. Professional Speech and Malpractice

In many malpractice cases, professionals, including lawyers,[231] accountants,[232] doctors,[233] health care providers,[234] and air traffic controllers,[235] have been held liable to clients and certain third parties for injuries caused by their erroneous, negligent speech. Courts that have subjected such speech to malpractice liability have treated it identically to any other negligent professional

230. *See* Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 500-07 (1961).

231. *See, e.g., In re* Edson, 108 N.J. 464, 530 A.2d 1246 (1987) (attorney disbarred for counseling client to fabricate a defense).

232. *See, e.g.*, Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931).

233. *See, e.g.*, Hensley v. Heavrin, 277 S.C. 86, 282 S.E.2d 854 (1981).

234. *See, e.g.*, Johnson v. State, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975).

235. *See, e.g.*, Dickens v. United States, 545 F.2d 886 (5th Cir. 1977).

conduct, without considering whether the first amendment applies to the speech regulation.

Even if negligent professional speech is not protected by the first amendment, subjecting the negligent speech to a damage judgment could chill nonnegligent speech fully protected under the first amendment. As *New York Times Co. v. Sullivan* held with respect to defamation law,[236] the first amendment requires that the application of tort law to professional speech not unreasonably chill or restrict protected, nondeceptive speech. The risk of malpractice liability could conceivably discourage a lawyer from expressing certain opinions about legal or political issues, in fear that a jury might some day find that the opinion contributed to some flawed course of action by the client.

Fortunately, the Relational Framework demonstrates that malpractice law generally does not pose substantial or unjustified risks to protected professional speech. To reach this conclusion, the Relational Framework does not require one to characterize the speech as commercial.

The Relational Framework's first prong assesses the impact of the law on protected speech. Several aspects of malpractice law increase the risk of chill: liability based on negligence instead of actual malice or intent; the availability of money damages and the threat of disbarment as opposed to a mere injunction; and appellate court deference to jury and trial judge findings of negligence in lieu of independent review.

The inherent vagueness of the negligence standard could be particularly problematic to the extent it could include truthful yet misleading speech, as with the unfair business practice laws discussed earlier,[237] and subjective advice and opinions. On the other hand, even a vague negligence standard would be less chilling than the strict liability standard used in the unfair business practice laws.[238]

Other factors indicate less risk of chill. Limiting a professional's duty of care to a defined group of listeners—clients and certain third parties[239]—allows professionals to express their views freely to virtually everyone else. Moreover, professional speech, in

236. 376 U.S. 254, 277-83 (1964).

237. *See supra* note 22 and accompanying text.

238. *See supra* note 21 and accompanying text.

239. *See, e.g.*, Raritan River Steel Co. v. Cherry, Bekaert & Holland, 322 N.C. 200, 210, 214, 367 S.E.2d 609, 614, 617 (1988).

general, is relatively hardy and less susceptible to chill. As with navigational charts, professional speech itself constitutes part of the service the professional provides to the client. Allowing one's professional speech to be unduly chilled could cripple one's effectiveness as a professional, and thus one's livelihood.

Professional speech is also relatively objective—that is, subject to empirical or external verification—although perhaps less so in many cases than navigational charts. Interpreting a law is obviously less objective than charting a mountain, though probably objective enough to allow a fact finder to determine fairly when the interpretation is incorrect and negligent.[240]

On balance, although a certain amount of protected speech will be chilled by the threat of malpractice liability, few if any professionals will be prevented from responsibly expressing their views, with the possible exception of certain kinds of questionable statements to clients.

The Relational Framework's second prong assesses the nature and value of speech chilled by the law. Contrary to most prong two analysis in this article, malpractice laws regulate ideas and opinions as much as facts. However, perhaps expert opinion should be subject to a more rigorous accuracy standard, almost like facts, than lay opinion. In a sense, expert opinion can and should be determined to be correct or incorrect, much like a factual statement and unlike most lay opinions.[241] Although it is difficult to generalize, speech (even as to opinion) that is chilled because a trained professional fears it is inaccurate and could injure his or her client is generally not primary within the hierarchy of speaker-based first amendment values. Like navigational charts, professional speech might be considered little more than utilitarian speech—speech that has little inherent value for the speaker, in self-actualization terms or otherwise, or for society, except to the extent it is accurate and can be safely relied upon by the client.

The Relational Framework's third prong focuses on the relationship between the speaker and the listener, and the state's justification for allocating the truth burden between them. Clearly, the argument for placing a substantial truth burden on the speaker is strong. The speaker is trained and then paid a premium to give expert advice or technical judgments to a lay person. Even in this

240. *See* RESTATEMENT (SECOND) OF TORTS § 545 (1976).

241. *See* 2 F. HARPER, F. JAMES & O. GRAY, *supra* note 11, § 7.8, at 424.

day of the "second opinion," it is not efficient to have professionals feel there are no direct costs to being wrong, except possibly the risk of losing out to more accurate competitors over the long run. Moreover, malpractice law only protects the reasonable reliance of certain protected parties, such as clients. Malpractice law does not prevent professionals from speaking relatively freely to nonclients or even clients, so long as disclaimers prevent reliance.

Moreover, if professional speech is little more than a means to the end of serving or helping the listener—that is, its value is basically its value to the listener who relies on it—then a law causing it to be more accurate serves first amendment values more than it threatens them.

Fortunately, many malpractice cases may involve specific, objective, nonideological misstatements—"The hearing is on Friday" or "You can take this pill with that pill"—upon which a client can be expected to rely.[242] Professionals are rarely held liable for more subjective or ideological speech, partially because clients are less likely to rely upon it because of the speaker's lack of expertise—"Divorce is very bad for families" or "Try to exercise every day."[243] This is consistent with the need to have more freedom of speech under the first amendment in subjective and ideological speech.

Of course there are middle cases, such as a doctor warning a patient about the risks of abortion. However, so long as the professional separates strict medical statements from personal opinions, the interests of both malpractice law and the first amendment are reconcilable.[244]

Considered together, the Relational Framework's elements do not indicate a fundamental first amendment concern with the current operation of malpractice law. In a given case, however, a court may be compelled to find that subjecting a professional's particular statement to civil liability, although consistent with current malpractice doctrine, should be constrained by the first

242. *See, e.g.*, Greycas, Inc. v. Proud, 826 F.2d 1560, 1561-62 (7th Cir. 1987); RESTATEMENT (SECOND) OF TORTS § 545 comments a, b.

243. Generally speaking, lawyers are not liable for incorrectly advising clients how a court will resolve an unsettled point of law. *See* 1 R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 14, at 812-13 (3d ed. 1989).

244. Presumably a doctor could be found liable for negligently misrepresenting the comparative health risks to the mother of childbirth versus abortion. It seems less clear that a doctor, opposed to abortion, should be liable for telling a patient that "aborted fetuses go to hell."

amendment, similar to the analysis in *New York Times*.[245] When a court does so, though, its analysis should be based on the factors in the Relational Framework, and not some tortured, arbitrary characterization of the speech as "commercial" or as "nonspeech."

IV. The Relational Framework and Noncommercial Speech

One of the Relational Framework's benefits is that it can be applied to all forms of deceptive speech, not just commercial speech. In this section the Relational Framework is applied to the regulation of two categories of noncommercial deceptive speech—deceptive political speech and "how-to" books that contain mistakes. Without the Relational Framework's benefits, most courts make the mistake of perpetuating the either/or formalism of the Commercial Speech Doctrine. After concluding (or assuming) that the regulated speech is noncommercial, courts often conclude that the speech is virtually immune to regulation. Other courts impose standards similar to strict scrutiny or otherwise limit regulations without adequate analysis or explanation.

In this section, the analysis currently employed by courts in these areas is contrasted with the Relational Framework to demonstrate that the latter is more coherent, inclusive, and systematic. At the same time, however, many courts are already focusing on various elements of the Relational Framework, although not in the comprehensive, structured manner proposed here.

A. Deceptive Political Speech

Many states have laws regulating deceptive speech in political campaigns.[246] Courts subject these laws to at least strict scrutiny under the first amendment, applying standards and analyses

245. 376 U.S. at 277-83.

246. Some statutes proscribe only false statements made about a candidate. *See, e.g.*, Alaska Stat. § 15.56.010(a)(3) (1988); Miss. Code Ann. § 23-15-875 (1986); N.C. Gen. Stat. § 163-274(8) (1987); Ohio Rev. Code Ann. § 3599.091(B) (Anderson 1988); Tenn. Code Ann. § 2-19-142 (1985); W. Va. Code § 3-8-11(e) (1990). Some others, also ban false statements about referenda issues. *See, e.g.*, Colo. Rev. Stat. § 1-13-109 (1980); Neb. Rev. Stat. § 49-1465 (1988); N.D. Cent. Code § 16.1-10-04 (1991); Or. Rev. Stat. § 260.532 (1989); Utah Code Ann. § 20-14-28 (1984). Making a false political statement can also serve as the basis for dismissal from public employment. *See* Pickering v. Board of Educ., 391 U.S. 563, 574 (1968); Brasslett v. Cota, 761 F.2d 827, 839 (1st Cir. 1985).

totally different than with commercial speech.

This extreme double standard is perhaps best demonstrated by comparing how courts determine whether speech is deceptive. Courts permit laws to classify a certain instance of commercial speech as deceptive if it could possibly mislead hypothetical "ignorant, unthinking or credulous" listeners, even if the majority of listeners and readers would interpret the speech correctly.[247] In contrast, some courts confronted with ambiguous noncommercial speech will not find it deceptive if hypothetical listeners could reasonably interpret the speech so as to render it not misleading or protected opinion.[248] Truthful noncommercial speech, and especially truthful political speech, seems virtually immune from deceptive speech regulation, regardless of whether it could be or actually is misleading.[249]

Some courts have suggested that the first amendment prohibits imposing any sanctions against deceptive political speech, including intentional lies.[250] Other courts have limited political deceptive speech regulations with substantive and procedural requirements. Interestingly, all of these requirements can best be

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247. *See, e.g.*, Quinn v. Aetna Life & Casualty Co., 96 Misc. 2d 545, 554, 409 N.Y.S.2d 473, 478 (Sup. Ct. 1978).

248. *See, e.g.*, Mosee v. Clark, 253 Or. 83, 87, 453 P.2d 176, 177 (1969); Sumner v. Bennett, 45 Or. App. 275, 280, 608 P.2d 566, 569 (1980).

249. *See* Lebron v. Washington Metro. Area Transit Auth., 749 F.2d 893, 898-99 (D.C. Cir. 1984) (suggesting that the first amendment prohibits any governmental assessment of the deceptiveness of political speech); O'Connor v. Superior Court, 177 Cal. App. 3d 1013, 1019-20, 223 Cal. Rptr. 357, 360-61 (1986) (intimating that the first amendment permits government regulation of commercial speech, but not misleading political speech).

250. In Rudisill v. Flynn, 619 F.2d 692 (7th Cir. 1980), the court held:

> We do not regard intentional misstatements of fact made during an election campaign as "election frauds" in the ordinary sense. The merits of a ballot issue are matters reserved for public and private discussion and debate between opponents and proponents. It is for the voters, not this court to decide whom to elect and what ballot issues to approve.

Id. at 694 (footnote omitted). More support for finding that the first amendment absolutely bars government interference with political speech can be found in Good v. Roy, 459 F. Supp. 403 (D. Kan. 1978):

> The political system of the United States is dependent upon the virtually unfettered exchange of expressions and opinions. In the context of political campaigns that exchange often takes the form of claims and denials, accusations and counter-accusations, allegations and refutations. Such is the stuff of popular, democratic elections. It is incumbent upon the courts not to interfere with the free and vigorous campaign debate. It is the prerogative of the voters, not the courts, to weigh, balance, sift and sort the words and actions of political candidates.

Id. at 406.

understood as relevant factors in the Relational Framework, and in particular in connection with the Relational Framework's first prong, which focuses on factors affecting the extent to which the regulation impacts on protected speech. For example, some courts, including the Supreme Court of the United States, have, by way of analogy to the public libel doctrine, limited regulations of deceptive political speech to intentional falsehoods or actual malice.[251] Another tact is the prohibition of certain statutory penalties provided for deceptive political speakers. One state appellate court upheld the lower court's imposition of a fine against a member of a candidate's selection committee found knowingly to have made false statements about the opposition candidate but overturned on first amendment grounds the lower court's requirement that the defendant not engage in any political activity during the term of her probation.[252] On the other hand, courts may grant injunctions banning candidates from repeating false statements or distributing literature containing false statements,[253] and, as mentioned, fines

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251. In Brown v. Hartlage, 456 U.S. 45 (1982), the Court suggested it would extend the actual malice standard to nondefamatory, false political speech cases:

> Although the state interest in protecting the political process from distortions caused by untrue and inaccurate speech is somewhat different from the state interest in protecting individuals from defamatory falsehoods, the principles underlying the First Amendment remain paramount. Whenever compatible with the underlying interests at stake, under the regime of that Amendment "we depend for . . . correction not on the conscience of judges and juries but on the competition of other ideas." In a political campaign, a candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent. The preferred First Amendment remedy of "more speech, not enforced silence" thus has special force. There has been no showing in this case that petitioner made the disputed statement other than in good faith and without knowledge of its falsity, or that he made the statement with reckless disregard as to whether it was false or not.

Id. at 61 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974); Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

Similarly, several lower courts, both state and federal, have held that state laws regulating nondefamatory, false political speech, in order to survive first amendment review, must be premised on proof and application of the actual malice standard as defined in *New York Times*. *See* Pestrak v. Ohio Elections Comm'n, 670 F. Supp. 1368, 1375-77 (S.D. Ohio 1987), *modified*, 926 F.2d 573 (6th Cir. 1991); Vanasco v. Schwartz, 401 F. Supp. 87, 91 (E.D.N.Y. 1975), *aff'd mem.*, 423 U.S. 1041 (1976); State v. Davis, 27 Ohio App. 3d 65, 67-68, 499 N.E.2d 1255, 1258-59 (1985); Dewine v. Ohio Elections Comm'n, 61 Ohio App. 2d 25, 27-29, 399 N.E.2d 99, 102-03 (1978).

252. *See Davis*, 27 Ohio App. 3d at 66-68, 69, 499 N.E.2d at 1257-59, 1260.

253. *See, e.g.*, Tomei v. Finley, 512 F. Supp. 695, 699 (N.D. Ill. 1981); Treasurer of the Committee to Elect Gerald D. Lostracco v. Fox, 150 Mich. App. 617, 623, 389 N.W.2d 446, 449 (1986).

may be levied.[254]

Finally, courts have imposed procedural requirements on deceptive political speech regulations, such as requirements that courts rather than administrative agencies enforce the regulations,[255] and that appellate courts conduct an independent review of findings of actual malice or deceptiveness.[256]

Courts have enforced all of the foregoing limits on the regulation of deceptive political speech explicitly or implicitly on first amendment grounds. However, courts have not done so on the basis of a systematic analysis such as the Relational Framework.

Each of the foregoing limits have been discussed earlier in this article as an important factor in assessing the impact of a regulation on protected speech.[257] Clearly an actual malice or intentional falsehood requirement will chill truthful political speech less than a negligence or strict liability standard. Similarly, a harsher penalty (for example, broadly prohibiting any future speech for a probationary period) will directly and indirectly restrict protected speech far more than a tailored injunction against repetition of a statement that has been proven false. Finally, as previously discussed, procedural safeguards, such as judicial rather than agency enforcement and independent factual review, can give protected speakers a certain amount of comfort that they will not be victims of arbitrary regulation.[258]

In addition to these factors, the Relational Framework's first prong would assess the hardiness and objectivity of the political speech. Although there are obvious exceptions—such as single issue zealots—arguably political speech is less hardy than commercial speech motivated by profit.[259] Objectivity varies even more de-

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254. *See Davis*, 27 Ohio App. 3d at 66-68, 499 N.E.2d at 1257-59; *see also supra* note 252 and accompanying text.

255. *See, e.g.*, Lebron v. Washington Metro. Area Transit Auth., 749 F.2d 893, 898-99 (D.C. Cir. 1984); *Pestrak*, 670 F. Supp. at 1377-78.

256. *See, e.g., Lebron*, 749 F.2d at 897; Pestrak v. Ohio Elections Comm'n, 670 F. Supp. 1368, 1377-78 (S.D. Ohio 1987), *modified*, 926 F.2d 573 (6th Cir. 1991).

257. *See supra* notes 44-50 and accompanying text.

258. Courts have also required that deception be proven by clear and convincing evidence as required by *New York Times* in libel actions involving public issues and public officials. *See Pestrak*, 670 F. Supp. at 1376-77; Vanasco v. Schwartz, 401 F. Supp. 87, 99 (E.D.N.Y. 1975), *aff'd mem.*, 423 U.S. 1041 (1976).

259. Some commentators subscribing to a fragile political speech thesis rely on economic principles of supply and demand. Professor Lillian BeVier, for example, attributes the fragility of political speech to a lack of demand for such speech. Individual voters, she argues, do not place as high a value on political speech as individual consumers place on commercial information. *See* BeVier, *A Comment on Professor Wolfson's 'The First*

pending on the specific type of speech at issue. A politician's financial disclosure report is no less objective than a tax return,[260] and many political statements, such as "I am a Berliner," may be "true" on a level deeper than mere accuracy or signification. However, many political deception laws are aimed at the most objective extreme of the political speech spectrum—intentional lies about a candidate's endorsements,[261] resume,[262] incumbency,[263] or voting record,[264] rather than distortions about ideology or colorful rhetoric.[265]

The Relational Framework's first prong assesses all of these factors to determine the extent to which protected speech is affected by a regulation. After doing so, however, the Relational Framework also considers the nature of the speech affected (prong two) and the justification for the regulation in terms of the relationship between speaker and listener (prong three).

Both the second and third prongs strongly support minimizing the acceptable scope of regulation of deceptive political speech under the first amendment. Clearly political campaign speech is at the core of the first amendment, both in terms of the successful

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Amendment and the SEC,' 20 CONN. L. REV. 325, 328 (1988). Judge Posner reaches the same conclusion but emphasizes the lower value speakers (as well as listeners) assign their political speech in comparison to this speech. Commercial speakers, Judge Posner reasons, can pass on the costs of their commercial speech to the purchasers of their products and services. In contrast, political speakers (especially noncandidates) will rarely receive much return on their investment in political speech. *See* Posner, *supra* note 4, at 39-40. Logically extending Judge Posner's reasoning, for most individuals the costs of speaking politically will appear to outweigh the gains, so they will be disinclined to engage in political speech.

260. Early critics of footnote 24 in *Virginia Pharmacy* disputed the Court's empirical claim, based in common sense, that commercial speech is more verifiable than noncommercial speech. *See supra* note 35 and accompanying text. Several offered their own common sense rebuttal pointing out that a substantial amount of noncommercial speech, including political speech, is no less factual or verifiable than commercial speech. *See* Farber, *supra* note 36, at 386 ("political speech is often quite verifiable by the speaker"); Redish, *supra* note 36, at 633 ("many statements made in the course of political debate . . . are simply assertions of fact, which are presumably verifiable"); Shiffrin, *supra* note 4, at 1218 ("the verification distinction [between commercial and political speech] has weak empirical foundation").

261. Several states specifically prohibit false claims of endorsement. *See, e.g.*, MISS. CODE ANN. § 23-15-1065 (1990); OHIO REV. CODE ANN. § 3599.091(B)(8) (Anderson 1988).

262. *See, e.g.*, OHIO REV. CODE ANN. § 3599.091(B)(2).

263. *See* OR. REV. STAT. § 260.545 (1989).

264. *See* OHIO REV. CODE ANN. § 3599.091(B)(9).

265. Several state courts have interpreted their deceptive campaign speech statutes to reach only false statements of specific facts. *See, e.g.*, Bundlie v. Christensen, 276 N.W.2d 69, 71 (Minn. 1979) (does not include criticism of opponent); State *ex rel.* Skibinski v. Tadych, 31 Wis. 2d 189, 193, 142 N.W.2d 838, 840 (1966).

operation of the democratic system[266] and speaker self-actualization.[267] Even objective facts play a special role in political speech, as they are often used by speakers to buttress rhetorically political ideas and arguments.[268] This can be contrasted with most commercial facts, or with airline navigational facts, -for example, which are merely means to important but nonideological ends such as informed commerce or safe travel. Moreover, political speech is the form of speech most likely to be subjected to bad-faith government censorship, and thus its regulation is almost presumptively suspect.[269]

The Relational Framework's third prong shows a clear distinction between political speech and speech commonly deemed commercial or professional. Whereas efficient commercial and professional markets may benefit from placing the truth burden on manufacturers and retailers of goods instead of consumers, and on professionals rather than clients and patients,[270] a democracy will suffer if listeners—citizens—begin to rely primarily on political speakers for the accuracy of political statements. On one level, it may be more inefficient to force citizens to listen to political

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266. *See* Mills v. Alabama, 384 U.S. 214, 218 (1966) ("[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."); A. MEIKLEJOHN, POLITICAL FREEDOM (1960).

267. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 n.12 (1978) ("The individual's interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion, although the two often converge."); *see also* Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 990-91 (1978).

268. Justice Stewart recognized this important point in *Virginia Pharmacy*:

> Ideological expression, be it oral, literary, pictorial or theatrical, is integrally related to the exposition of thought—thought that may shape our concepts of the whole universe of man. Although such expression may convey factual information relevant to social and individual decisionmaking, it is protected by the Constitution, whether or not it contains factual representations and even if it includes inaccurate assertions of fact. *Indeed, disregard of the "truth" may be employed to give force to the underlying idea expressed by the speaker.*

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 779-80 (1976) (Stewart, J., concurring) (emphasis added).

269. *See Bellotti*, 435 U.S. at 777 n.11 ("Freedom of expression has particular significance with respect to government because '[i]t is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression.' " (quoting T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 9 (1966))); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 13-26, at 1129 (2d ed. 1988) ("The fear that a prevailing government might some day wield its power over political campaigns so as to perpetuate its rule generates a commendable reluctance to invest government with broad control over the conduct of political campaigns.").

270. *See supra* note 63 and accompanying text.

speech with a questioning, active ear. Certainly a candidate knows better than the voter whether he or she ever graduated from college or owns stock in Lockheed,[271] and certainly false statements can interfere with the democratic process.[272] Assessing the accuracy of political speech, however, is a fundamental part of forming political judgments. The risks that inhere in a citizen's delegation of any substantial part of that judgment to the government may often outweigh the efficiency gains of allowing the citizen to rely complacently on heavily regulated political speech. Moreover, even for a politician who has spent a lifetime studying politics, there are obvious risks inherent in voters/citizens considering such a politician an expert in this field the way one might consider a attorney or doctor an expert. In an ideal democracy, the lay voter should not defer to the expert opinion of professional politicians.[273] In short, while economic efficiency may justify compromising the principle of caveat emptor to protect consumers, clients, and patients, the democratic need for skeptical, independent, and judgmental voters calls for "caveat citizen."

Considering the three prongs of the Relational Framework together, there exist substantial risks of impact from heavy-handed regulation of a category of speech at the core of the first amendment. As between speakers and listeners, perhaps the truth burden should be primarily borne by the listener. Of course each case must be considered on its own, based on its peculiar facts. In general, however, the Relational Framework would require that courts strictly scrutinize the constitutionality of any element of a political speech regulation—be it the standard of care (actual malice, negligence, strict liability), the remedy (narrow injunction, reasonable fine, or broad prohibitions on protected political activity), or the procedure (judicial/agency determination, independent review/deference to fact finder).

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271. The economics of information collection that support fixing the duty of investigation on the advertiser rather than the consumer, *see supra* note 63 and accompanying text, also justify placing the truth burden on the candidate, rather than the voter, with respect to candidate claims about educational accomplishments and stock ownership.

272. *See* Brown v. Hartlage, 456 U.S. 45, 52 (1982) ("States have a legitimate interest in preserving the integrity of their electoral processes."); *see also supra* note 11 and accompanying text.

273. In general, the common law tort of misrepresentation requires a finding that the listener justifiably relied on the speaker's speech. *See* RESTATEMENT (SECOND) OF TORTS § 537 (1976). Where both the listener and the speaker are similarly situated—both experts or both nonexperts—tort doctrine, as a general matter, offers no protection to the deceived recipient. *See id.* § 542 comment d.

B. Nonfiction "How-To" Books

Courts uniformly hold that publishers of inaccurate how-to books are not liable in damages to readers who are injured.[274] Often courts view such holdings as virtually mandated by the first amendment.[275] Since such speech does not fit neatly into the current judicial category of commercial speech, many courts seem unable to give the speech any less than virtually the same most favored speech status as political speech or artistic expression. Such either/or formalism, however, prevents a court from recognizing the intermediate nature of much how-to speech and the legitimacy of its regulation. In contrast, the Relational Framework suggests that the first amendment permits, in many cases, holding publishers and certainly authors accountable to injured readers who detrimentally rely on inaccurate and dangerous instructional advice. The Relational Framework shows that, in terms of the first amendment, many how-to statements are more like professional malpractice or airline navigation charts than political or artistic speech, and as such are more readily regulable under the first amendment. At the same time, the Relational Framework provides a basis for distinguishing permitted, recoverable claims from actions that should be barred by the first amendment.

Often these cases involve readers' claims that the how-to instructions were inaccurate and led the readers to make dangerous

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274. Consistently courts have rejected efforts by injured readers to subject publishers to tort liability under either negligent misrepresentation or strict liability. *See* Jones v. J.B. Lippincott Co., 694 F. Supp. 1216, 1217 (D. Md. 1988) (medical text); Lewin v. McCreight, 655 F. Supp. 282, 284 (E.D. Mich. 1987) (how-to book); Alm v. Van Nostrand Reinhold Co., 134 Ill. App. 3d 716, 721, 480 N.E.2d 1263, 1267 (1985) (how-to book); Walter v. Bauer, 109 Misc. 2d 189, 191, 439 N.Y.S.2d 821, 822 (Sup. Ct. 1981) (school textbook), *modified*, 88 A.D.2d 787, 451 N.Y.S.2d 533 (1982).

Similarly, some courts have held that newspaper publishers are not liable to their subscribers for negligently or innocently made false statements, whether in a news story or advertisement. *See, e.g.*, Pittman v. Dow Jones & Co., 662 F. Supp. 921, 922 (E.D. La.) (advertisement), *aff'd*, 834 F.2d 1171 (5th Cir. 1987); Daniel v. Dow Jones & Co., 137 Misc. 2d 94, 96-100, 520 N.Y.S.2d 334, 336-39 (Civ. Ct. 1987) (news story); Gutter v. Dow Jones & Co., 22 Ohio St. 3d 286, 291, 490 N.E.2d 898, 902 (1986) (news story).

There is support for the idea that a newspaper would be liable for knowingly publishing false advertisements. *See* Goldstein v. Garlick, 65 Misc. 2d 538, 542-43, 318 N.Y.S.2d 370, 374-75 (Sup. Ct. 1971). A recent state court decision, however, held that the first amendment protects the publisher of a how-to book from any and all civil liability for misrepresentations. *See* Smith v. Linn, 386 Pa. Super. 392, 395-97, 563 A.2d 123, 125-26 (1989), *aff'd*, 587 A.2d 309 (1991).

275. *See, e.g.*, *Daniel*, 137 Misc.2d at 101, 520 N.Y.S.2d at 339; *Alm*, 134 Ill. App. 3d at 722, 480 N.E.2d at 1267.

mistakes or that the instructions failed to include warnings of foreseeable dangers that might have prevented the mistakes.[276] The key question is whether the publisher or the writer owes a duty of care to the injured reader. Most courts find that there is no such duty, often for the reason that enforcing such a duty could violate the first amendment.[277] Such findings conflict with many related tort and constitutional law doctrines. It is difficult to distinguish many of these cases from similar cases in which manufacturers and sellers are held strictly liable to consumers for injuries caused by faulty products, including even inaccurate or misleading airline navigational charts.[278] For instance, compare a store that accidentally sells a poisonous mushroom with a field manual that incorrectly identifies a poisonous mushroom as safe to eat, and compare the faulty field manual with the flawed airline chart.

Manufacturers and distributors can also be strictly liable to consumers for failure to provide accurate instruction manuals that enable the consumer to use the product safely.[279] Compare a defective hair dryer with a hair dryer accompanied by an instruction manual that, through a typographical error, states that the dryer should be used in the shower. Next, consider a third party beauty guide that makes the same mistake. Does the first amendment really require courts to impose dramatically different standards in these cases? Finally, many courts hold publishers less responsible for the faulty content of how-to books and articles than authors.[280]

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276. For example, in Walter v. Bauer, 109 Misc. 2d 189, 439 N.Y.S.2d 821 (Sup. Ct. 1981), *modified*, 88 A.D.2d 787, 451 N.Y.S.2d 533 (1982), a fourth grade student suffered injuries while performing a science experiment described in a science textbook. The father of the injured child sued the publisher of the textbook alleging that the textbook was defective because it did not contain warnings of foreseeable dangers from conducting experiments outlined in the textbook. *See id.* at 189-90, 439 N.Y.S.2d at 822.

277. *See supra* notes 274-75 and accompanying text.

278. *See supra* text accompanying notes 223-30.

279. *See, e.g.*, Incollingo v. Ewing, 444 Pa. 263, 287, 282 A.2d 206, 219 (1971); RESTATEMENT (SECOND) OF TORTS § 402B (1976).

280. Some courts have distinguished the author of a how-to book from the publisher, suggesting that only the former may be held accountable for negligently made misrepresentations. *See* Jones v. J.B. Lippincott Co., 694 F. Supp. 1216, 1216-17 (D. Md. 1988); Lewin v. McCreight, 655 F. Supp. 282, 283-84 (E.D. Mich. 1987); Alm v. Van Nostrand Reinhold Co., 134 Ill. App. 3d 716, 721, 480 N.E.2d 1263, 1267 (1985).

Courts similarly have imposed a duty of care on commercial advertisers but not on newspapers that publish the advertisements. *Compare* Gootee v. Colt Indus., Inc., 712 F.2d 1057, 1062-63 (6th Cir. 1983) (holding that a commercial advertiser is potentially liable for negligent representations), *with* Yahas v. Mudge, 129 N.J. Super. 207, 209, 322 A.2d 824, 825 (App. Div. 1974) (holding that a magazine publisher owes no duty to readers for

The following Relational Framework analysis addresses these inconsistencies and recommends a more coherent approach for this area.

Under the Relational Framework's first prong, one must consider the impact on protected speech of a legal rule that holds publishers or authors liable to readers for faulty how-to statements. The first question, of course, is whether the mistaken speech is itself protected. To the extent that the primary, if not the sole, value of a how-to book is to inform the reader accurately, there is little reason that inaccurate speech would be much protected for its own sake.[281]

The second question, then, is whether a regulation on false instructions would affect other truthful and protected speech. Here, it is necessary to assess a number of chill factors, such as the hardiness and objectivity of the speech, the standard of liability, and the severity of the penalty. As with some other speech,[282] and unlike mere commercial advertisements, a how-to book is itself the product being sold. Allowing regulations to chill speech would mean that speakers would have to give up some of their business.[283] Admittedly, publishers, if not authors, could survive regulation by publishing works on other subjects,[284] so perhaps the

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misrepresentations in commercial advertisements published in its magazine). The publisher-author distinction drawn by these courts can be contrasted with public defamation. There courts hold the author and publisher to the same standard of liability. For example, in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the Supreme Court made no attempt to distinguish between the newspaper and the authors of the political advertisement. As to either, for a public official to prevail on a libel suit, he or she would have to prove actual malice. *See id.* at 279-80, 285-86. Also, the protection from negligent liability given by these courts to newspaper publishers for their nondefamatory misrepresentations in news stories or advertisements, can be contrasted with the Supreme Court's holding in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), that newspapers can be held accountable for publishing negligent libelous speech about private individuals. *See id.* at 347 ("We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher . . . of defamatory falsehood injurious to a private individual.").

281. If the how-to book is primarily ideological or entertaining, and only incidentally instructional (e.g., R. PIRSIG, ZEN AND THE ART OF MOTORCYCLE MAINTENANCE: AN INQUIRY INTO VALUES (1974)), then accuracy per se is less relevant, and even inaccurate speech, therefore, deserves protection.

282. *See supra* notes 223-30 and accompanying text.

283. *See supra* note 229 and accompanying text.

284. The chill on authors may be greater than that on publishers. While it can be debated whether any author has the capacity to write a certain number of books, authors of how-to books, perhaps more persuasively, can argue that in their case the number is one: a book on the subject of their expertise. If that is the case, then regulating how-to books more than other books may chill certain authors from writing at all. It might also impede

how-to speech should be characterized as somewhat more hardy than professional malpractice or airline navigation charts.

Objectivity is a somewhat easier question, especially with respect to false speech. For one thing, the less objective the speech the less readers should rely on it—and thus the less speakers will be exposed to liability under the substantive law. Moreover, more objective speech is by definition more verifiable, and thus it may be less chilling to require speakers to get it right. Of course, in any given case the cost of determining the accuracy of the speech may chill speakers who would rather not, or cannot afford the expense. In such cases, it might be preferable for the publisher (and author) to disclaim knowledge, admitting to the reader that they did not have the time or money to verify the facts.[285] At a certain point, however, disclaimers become legal fictions. If readers actually rely on the books, and the publishers and authors expect them to, enforcing a meaningless disclaimer may be against public policy.[286]

Liability for misleading speech is somewhat more complicated. Generally, it is easier to determine whether a statement is accurate than whether certain listeners will be misled by it in spite of its accuracy. On the other hand, courts may find in many cases that a limited number of false and dangerous impressions can be reasonably and foreseeably drawn from a statement, and a court may hold a speaker liable for them.[287]

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the publishing of how-to books on certain subjects. *See* Walter v. Bauer, 109 Misc. 2d 189, 191, 439 N.Y.S.2d 821, 822-23 (Sup. Ct. 1981) (holding authors of how-to books strictly liable for their misrepresentations would deter authors from writing on subjects that might result in physical injury, the topic of how to cut down trees for example), *modified*, 88 A.D.2d 787, 451 N.Y.S.2d 533 (1982).

285. In the same way a commercial seller, by express and conspicuous language, can disclaim certain implied warranties concerning his goods, *see* U.C.C. § 2-316 (1989), an author and publisher might be permitted to disavow expertise as to certain matters discussed in a book.

286. A first amendment counterpart to the commercial doctrine of unconscionability, *see, e.g.*, Industralease Automated & Scientific Equip. Corp. v. R.M.E. Enters., Inc., 58 A.D.2d 482, 490, 396 N.Y.S.2d 427, 432 (1977), could develop, limiting an author's or publisher's ability to plead ignorance in certain cases.

287. To date, most of the "how-to" book cases have involved allegations that the book misleadingly failed to adequately contradict an appearance of safety through warnings and instructions. *See, e.g.*, Lewin v. McCreight, 655 F. Supp. 282, 283 (E.D. Mich. 1987); Cardozo v. True, 342 So. 2d 1053, 1054-55 (Fla. Dist. Ct. App. 1977); Alm v. Van Nostrand Reinhold Co., 134 Ill. App. 3d 716, 716-17, 480 N.E.2d 1263, 1264 (1985). Those courts prepared to hold publishers of how-to books liable for negligently failing to provide adequate warnings could seek guidance from nonpublisher failure to warn doctrine. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 311 (1976).

The risk of chill is increased substantially by the availability of money damages sufficient to compensate the victim. In comparison, prior restraint, rescission, and corrective advertising will seem like minor inconveniences to an author or publisher who suddenly has to pay a lifetime of medical bills for a class of injured readers.[288] Similarly, imposing a standard of strict liability on publishers or authors, by analogy to products liability law as well as the airline navigation chart cases, will be far more chilling than a negligence standard or an actual malice, wilfulness, or recklessness rule.[289]

As several courts have mentioned, the standard of care seems especially relevant when considering the liability of a publisher who has little firsthand knowledge of the author's research.[290] However, if substantial damage is being done by judgment-proof authors and careless publishers, one can imagine a court reasonably finding that the publisher also has a duty of care to readers. Under that duty, a publisher might be held negligent, if not strictly liable, for example, for not asking an author or his editors to substantiate foreseeably dangerous information before a book is published. Certainly a publisher of a book recommending use of a hair dryer in the shower might reasonably be expected to ask a few questions before disseminating the dangerous information to the public. Even the weighty risk of money damages will not necessarily cause an undue chilling effect, particularly if publishers and authors can fairly disclaim their certainty regarding the accuracy of the work so as to minimize the extent to which reasonable

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288. Courts have cited the risk of unlimited liability as a major factor in refusing to hold publishers liable to their readers for negligently publishing false information. *See, e.g.*, Pittman v. Dow Jones & Co., 662 F. Supp. 921, 922 (E.D. La. 1987); Demuth Dev. Corp. v. Merck & Co., 432 F.Supp. 990, 993-94 (E.D.N.Y. 1977).

289. Nevertheless, strict liability has been proposed for physical harm to consumers resulting from a seller's misrepresentations concerning the character or quality of chattels. *See* RESTATEMENT (SECOND) OF TORTS § 402B.

290. Courts view any requirement that publishers investigate and double check factual claims contained in their publications as unrealistic and overly burdensome. *See Lewin*, 655 F. Supp. at 283-84; *Alm*, 134 Ill. App. 3d at 721-22, 480 N.E.2d at 1267.

In the defamation area, although the Supreme Court has similarly stated that a speaker's failure to investigate the accuracy of published defamatory statements concerning public officials or figures does not alone support liability, *see* St. Amant v. Thompson, 390 U.S. 727, 732-33 (1968), it is unclear whether publishers have any duty to independently investigate the accuracy of statements made by sources under the negligence standard approved for private defamation actions in Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).

readers could rely.[291]

The Relational Framework's second prong is less controversial than the first. Few would contend that the typical how-to book, especially if it is inaccurate or misleading, lies close to core, speaker-centered first amendment values. To the extent this speech is little more than a means to an end, its value is directly related to its degree of accuracy. On the other hand, such speech may implicate speaker interests in self-expression somewhat more than the airline navigational charts discussed earlier.[292] The books are designed to teach readers to do something. Education, even if relatively utilitarian and nonideological, implicates many important first amendment values. On balance, though, for the vast majority of these works, there is little more political or creative expression, self-actualization, criticism, autonomy, or debate, than exists in many nonspeech tasks performed by a worker, or even the quasi-speech task of one worker training another. It is not that those values are not served by the speech. Of course they are, just as they are also served by anyone doing his job. However, in most cases there is little in the speech, as speech, that requires resort to the first amendment to give it more protection than any other economic activity.[293]

The Relational Framework's third prong focuses on the justification for a regulation in terms of the relationship between the speaker and the audience. In this case the constitutional question is basically the same as the fundamental common law issue—whether a reader reasonably and foreseeably relies on the how-to instructions. Occasionally courts will and should find, as a matter of tort doctrine, that such reliance was not reasonable.[294] However, where tort law would find reasonable and foreseeable reliance, and hold a speaker liable for resulting injuries, the Relational Framework, in many cases, suggests that the first amend-

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291. *See supra* note 287 and accompanying text.

292. *See supra* notes 223-30 and accompanying text.

293. In this context, Robert Bork's critique of self-actualization justifications for protecting speech seems closer to the mark. Bork argues the self-actualization values cannot serve to distinguish speech, at least not in any principled way, from other human activities. *See* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 25 (1971). In terms of promoting self-realization of the speaker, authoring a how-to book may be more like "trading on the stock market" or "working as a barmaid" than like writing a novel or painting a landscape. *See id.*

294. For example, it may be unreasonable to make an investment, having relied solely on financial information published in a newspaper. *See* Gutter v. Dow Jones & Co., 22 Ohio St. 3d 286, 289, 490 N.E.2d 898, 900 (1986).

ment poses no additional substantial barrier.

Otherwise, the argument for permitting the regulation of how-to speech is very similar to the analysis of government regulation of commercial advertisements, airline navigational charts, and professional malpractice. In all these cases, fairness as well as the market efficiency of allocating the bulk of the truth burden to the expert speaker strongly supports government regulation of the speech. If statutory or common law determines that society is best served by allocating the truth burden to the speaker who purports to have expertise, if the speaker profits from listeners paying for and relying upon his speech, and if the content of the speech has little value except to the listener—and then only to the extent it is accurate—the first amendment should not bar such an allocation, unless there is some countervailing policy, such as preventing a threat to protected free speech, in the particular case. For many how-to books, it would appear that there is no such policy sufficient to outweigh the regulation's benefits. Whether or not such regulation is permitted under the Relational Framework in any given case, the either/or formalism of the Commercial Speech Doctrine is less useful to a court than an analysis based on the Relational Framework's three prongs.

CONCLUSION

This Article proposes a Relational Framework to replace the Commercial Speech Doctrine in determining whether deceptive speech regulations violate the first amendment. The Commercial Speech Doctrine should be abandoned primarily for two reasons. First, the Commercial Speech Doctrine turns on an amorphous definition of commercial speech that has yet to coalesce into a coherent category. Second, the Commercial Speech Doctrine justifies diminished first amendment protection by according commercial speech less value, cutting against the policy of content neutrality that lies at the heart of the first amendment.[295]

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295. There is a parallel between the Court's Commercial Speech Doctrine and its Public Speech Doctrine as endorsed by five members of the Court in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985). The majority's attempt to distinguish speech on the basis of its content--as speech of public importance or only of private importance—and then to assign higher first amendment value to the former, *see id.* at 757-61, replicates the Commercial Speech Doctrine's two major flaws.

First, the majority has sought to draw a distinction between two categories of protected speech that will be as difficult to distinguish as commercial and noncommercial speech. Justice Brennan, dissenting in *Dun & Bradstreet*, is clearly correct in noting that it

The Relational Framework's first two prongs descend directly from *New York Times Co. v. Sullivan*,[296] which established the fundamental principle that the first amendment restricts the extent to which any government regulation of unprotected speech, including common law doctrines such as libel law, can chill or affect protected speech.[297] It is a short step from one area of tort law (libel) to another (misrepresentation) to realize that the first amendment must also restrict the extent to which any deceptive speech regulation might chill truthful, protected speech.

The second and third prongs of the Relational Framework attempt to assess whether the basis for a deceptive speech regulation justifies the chill on affected speech. The Relational Framework primarily performs this analysis by determining whether the affected speech implicates speaker-based values or listener-based values. Where strong listener-based values are present, the Relational Framework is more likely to find the deceptive speech regulation constitutional. One exception to this presumption occurs when the listener is operating in a citizen mode rather than a consumer mode, in which case there is a countervailing policy in

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will be difficult, if not impossible, for judges to decide on an ad hoc basis which publications address issues of general or public importance and which do not. *See id.* at 777 n.3 (Brennan, J., dissenting). Examining the credit report in *Dun & Bradstreet*, which the majority deemed to be private speech, *see id.* at 762, it is hard to disagree with Justice Brennan that reporting on a company's financial position and especially on its alleged filing for bankruptcy, is hardly a subject lacking in public importance. *See id.* at 789 (Brennan, J., dissenting). Second, the Court's desire to permit the government greater regulatory control over some forms of deceptive speech than others mandate, as the Commercial Speech doctrine has mandated, different degrees of value for different categories of protected speech, based on the content of the speech.

The Relational Framework avoids both flaws. It would be unnecessary to distinguish speech based on its public or private character, or to assign more value to one type of speech than the other. Rather, any regulation of a defamatory credit report would be analyzed under the Relational Framework's three prongs. To what extent would a regulatory scheme allowing for punitive damages absent finding of actual malice and arguably without even a finding of fault, *see id.* at 774 (White, J., concurring) be found to impact on protected speech? Whether characterized as speech of public or private concern, is such speech primarily informational (promoting listener interests) or ideological (promoting speaker interests) in nature? And finally, to what extent should the recipient of credit reports have a protected right, enforced by a damage award to the defamed third party, to rely on the accuracy of the reports?

296. 376 U.S. 254 (1964).

297. *See id.* at 279-80 (adopting an actual malice standard for defamation suits brought by public officials). As Justice Brennan wrote in *Dun & Bradstreet*, "Our cases since *New York Times Co. v. Sullivan* have proceeded from the general premise that all libel law implicates First Amendment values to the extent it deters true speech that would otherwise be protected by the First Amendment." 472 U.S. at 778 (Brennan. J., dissenting) (citation omitted).

favor of imposing self-reliance on the citizen listener, for fundamental reasons underlying the democratic process.[298] Admittedly, drawing distinctions between citizen listeners and consumer listeners, and between speaker-based values and listener-based values, may prove as challenging for courts as distinguishing between commercial speech and noncommercial speech. However, at least these are distinctions drawing on a venerable and well-reasoned body of tort law analysis—in particular the doctrine of reasonable reliance. Moreover, and perhaps more important, the distinctions at the heart of the Relational Framework do not require a court to assign less value to a certain kind of speech because of its content. Even if the Relational Framework's distinctions prove to be no more precise than the Commercial Speech Doctrine, the fact that they reduce the Commercial Speech Doctrine's unseemly assault on the first amendment principle of content neutrality may alone justify their use.

298. Arguably, the Relational Framework's prong three analysis also could have helped the Court in *New York Times* find additional support for its near absolute protection for public libels. *See* 376 U.S. at 279-80. The policy favoring self-reliance for citizens listening to deceptive political speech could be used to support a call for more self-reliance (less legal regulation) for persons hearing public libels. Allowing public figures to suffer some injury as a result of this policy might be an acceptable cost of assuring that citizen listeners do not lapse into complacent reliance on government control of speech concerning civic issues. See Skolnick, *Foreword: The Sociological Tort of Defamation*, 74 CALIF. L. REV. 677, 687 (1986) ("The *New York Times* doctrine assumes that consumers of information are supposed to question, not necessarily believe, what they read and hear.").