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ISSUE ADVERTISING, COMMERCIAL EXPRESSIONS, AND FREEDOM OF SPEECH: A PROPOSED FRAMEWORK FOR FIRST AMENDMENT ADJUDICATION

The increased environmental awareness of the late 1960's and the energy crisis of the early 1970's led to efforts by many oil,[1] steel,[2] lumber,[3] and other companies[4] to use advertising to inform the public of their anti-pollution actions as well as to discuss their views on other issues of public concern,[5] and create good will among consumers.[6] As a result, in the early 1970's, members of Congress[7] and commentators[8] increasingly examined the government's authority to regulate corporate issue advertisement. Their primary concern was whether the first amendment protected these issue advertisements, or whether they were a form of commercial speech which, at this time, was wholly unprotected by the first amendment.[9]

In the 1976 case of *Virginia State Board of Pharmacy v. Virginia Citizen's Consumer Council*,[10] the Supreme Court re-examined its previous holdings concerning commercial

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[1] *See, e.g.*, "Texaco — 'Putting Aesop to Work,'" *reprinted in* STAFF OF SUBCOMM. ON ADMIN. PRACTICE AND PROCEDURE, 95TH CONG., 2D SESS., SOURCEBOOK ON CORPORATE IMAGE AND CORPORATE ADVOCACY ADVERTISING 44–47 (Comm. Print 1978) [hereinafter SOURCEBOOK] (suggestions to improve automobile mileage); "Shell Oil Company," *reprinted in id.*, at 78–79 ("corporate campaign aimed at seeding the great grass-roots with good reasons for seeing in Shell a good corporate citizen and a quality brand name").

[2] *See, e.g.*, "U.S. Steel — 'We're Involved,'" *reprinted in* SOURCEBOOK, *supra* note 1, at 37–39 (U.S. Steel's involvement with auto safety, the environment, taxes, waste management, and energy).

[3] *See, e.g.*, "Weyerhauser Company: Explaining Conservation Concepts," *reprinted in* SOURCEBOOK, *supra* note 1, at 55 (depicting lumber company as "good steward of its 5.7 million acres of land while providing leadership in forestry research, regeneration and utilizations programs").

[4] The range of companies and issues is very broad. *See, e.g.*, "ITT's approach to Corporate Advertising," *reprinted in* SOURCEBOOK, *supra* note 1, at 17–22 (equal opportunity employment, development of nutritious foods in schools, global art campaign); "Alcoa: 'Focusing on the Issues,'" *reprinted in* SOURCEBOOK, *supra* note 1, at 52–54 (use of aluminum contributes to conservation of energy); "Kellogg Company," *reprinted in* SOURCEBOOK, *supra* note 1, at 76–77 (nutritiousness of breakfast cereals).

[5] *See, e.g.*, Petition to FTC of Bayh, McIntyre, Moss, Aspin, Rosenthal, and Young, January 9, 1974, at 3 [hereinafter Petition to FTC], *reprinted in* SOURCEBOOK, *supra* note 1, at 1094.

[6] Petition to FTC, *supra* note 5, at 5, *reprinted in* SOURCEBOOK, *supra* note 1, at 1096.

[7] *See* Petition to FTC, *supra* note 5.

[8] *See, e.g.*, Ludlam, *Abatement of Corporate Image Environmental Advertising*, 4 ECOLOGY L.Q. 247 (1974); Note, *And Now a Word Against Our Sponsor: Extending the FCC's Fairness Doctrine to Advertising*, 60 CALIF. L. REV. 1416, 1426–29 (1972); Note, *The Regulation of Corporate Image Advertising*, 59 MINN. L. REV. 189 (1974).

[9] *See* Ludlam, *supra* note 8, at 266. Professor Ludlam observed that, "[c]entral to any discussion of whether the [Federal Trade] Commission may assert jurisdiction over image advertising is whether the first amendment's guarantee of freedom of speech protects these advertisements from regulation or whether image advertising is a form of 'commercial speech' and thus unprotected by the first amendment." *Id.*

For a discussion of commercial speech in the early 1970's, see Note, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 207–22 (1976).

[10] 425 U.S. 748 (1976).

speech. After an extensive discussion of the nature and importance of commercial speech, the *Virginia Board* Court held that the first amendment protected commercial speech to some degree.[11] Despite the Supreme Court's re-examination of the law governing commercial speech, commentators have not re-examined the nature and protection of corporate issue advertising in light of the *Virginia Board* decision and its progeny.[12]

The uncertainty of the first amendment protection accorded issue advertisements[13] arises because this form of expression shares certain features of both "core" first amendment speech, which concerns matters of public importance, and commercial speech. The first amendment fosters the free exchange of ideas on matters of public importance, by freeing speech from undue governmental interference.[14] Courts, therefore, afford broad protection to speech which falls within the core of the first amendment.[15]

Commercial speech also is entitled to some constitutional protection, but a state may regulate commercial expressions to a greater degree than core first amendment speech.[16] The Supreme Court has defined commercial speech as speech solely related to the economic interests of the speaker and its audience,[17] as well as speech which does no more than propose a commercial transaction.[18] Generally, although a state cannot regulate core first amendment speech because of the content of the speech, a state may prohibit commercial speech based on its content.[19]

Because issue advertisements may be economically motivated as well as relate to matters of public concern, courts have treated these expressions inconsistently, depending upon whether the court stressed the economic motivation of the speaker or the subject of public concern contained in the speech. Some courts have regarded issue advertisements as commercial speech and have allowed government regulation, reasoning that advertisers should not be permitted to transmit deceptive information.[20] Other courts, stressing the importance of the advertiser's viewpoint, have viewed issue advertisements as examples of core first amendment speech and accorded them full first

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[11] See *infra* notes 52–54 and accompanying text for a discussion of Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976), which granted first amendment protection to commercial speech.

[12] *See, e.g.*, the one page discussion of issue advertising in E. ROME & W. ROBERTS, CORPORATE AND COMMERCIAL FREE SPEECH 107 (1985).

[13] In this note, issue advertising is defined as speech by a corporation or other business entity which describes the entity, its activities, or its views, but does not *explicitly* propose a commercial transaction. *See infra* note 67. *See also* Ludlam, *supra* note 8, at 251–52 (1974). On the problem of defining issue advertising, see Darling, *How Companies are Using Corporate Advertising*, in SOURCEBOOK, *supra* note 1 at 97.

[14] *See, e.g.*, J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 864 (2d ed. 1983).

[15] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 44–45.

[16] *See, e.g.*, Bolger v. Youngs Drug Prods., 463 U.S. 60, 68 (1983) ("qualified but nonetheless substantial protection accorded commercial speech").

[17] *See, e.g.*, Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n, 447 U.S. 557, 561 (1980).

[18] *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizen's Consumer Council, 425 U.S. 748, 762 (1976).

[19] *See* Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 106 S. Ct. 2968, 2976–78 (1986) (state may prohibit advertising of casino gambling). *See also Central Hudson*, 447 U.S. at 564 n.6 ("In most other contexts, the First Amendment prohibits regulation based on the content of the message. Two features of commercial speech permit regulation of its contents.") (citation omitted).

[20] *See, e.g.*, *Youngs Drug*, 463 U.S. at 66–67.

amendment protection.[21] The Supreme Court has adopted both approaches at different times.[22]

This note will examine the courts' inconsistent treatment of issue advertising and suggest a framework for analyzing and regulating issue advertisements. Section I will discuss briefly the types of expressions which fall within both core first amendment and commercial speech. This section will also address the protection accorded both types of speech.[23] Section II will examine the treatment issue advertising has received in the courts.[24] Section III will analyze the approaches taken thus far by the courts.[25] Finally, section IV will suggest a new framework for deciding issue advertising cases. This note proposes that issue advertising constitutes a unique category of speech. Because issue advertising shares certain features of both core first amendment speech and commercial speech, this note proposes a hybrid protection. Under the proposed framework, government may prohibit an advertisement that contains false or deceptive statements of fact, which the advertiser knows, or should know, are false or deceptive. An advertisement will receive full first amendment protection, however, when it contains statements of opinion rather than fact, statements that are truthful and nondeceptive, or statements that the advertiser has no reason to know are false.[26] The proposed framework will resolve the confusion associated with issue advertising and avoid conceptual and practical problems inherent in current judicial treatments.

I. The First Amendment and Commercial Speech

A. *Core First Amendment Speech*

The first amendment of the United States Constitution[27] protects an individual's right to self-expression.[28] The Constitution protects this right both in order to foster the discovery of truth[29] and permit the free and open exchange of

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[21] *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978).

[22] *Compare Youngs Drug*, 463 U.S. at 67–68 (Supreme Court adopted a motivation-oriented analysis when condom manufacturer distributed informational pamphlets detailing use of condoms in preventing venereal disease) *with Bellotti*, 435 U.S. at 776–78 (1978) (Supreme Court adopted content-oriented analysis when state sought to prevent Bank from advocating its position on tax reform).

[23] *See infra* notes 27–65 and accompanying text.

[24] *See infra* notes 66–128 and accompanying text.

[25] *See infra* notes 130–44 and accompanying text.

[26] *See infra* notes 148–64 and accompanying text.

[27] The first amendment provides, in relevant part, "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend I. The first amendment applies to the states by incorporation through the fourteenth amendment. Gitlow v. New York, 268 U.S. 652, 666 (1925).

[28] Consolidated Edison Co. of New York v. Public Serv. Comm'n of New York, 447 U.S. 530, 534 n.2. (1980); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 n.12 (1978). *See also* Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591, 593 (1982).

[29] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (The Supreme Court noted that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether by the Government itself or a private licensee"); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[Those who won our independence] believed that freedom to think as you will and to speak as you think are means indispensible to the discovery and spread of political truth.").

ideas.[30] The Constitution especially protects ideas related to political issues[31] and matters of public concern.[32]

In order to protect the right of speakers to speak their minds, as well as the right of listeners to receive as much information and as many different ideas as possible, the United States Supreme Court subjects state regulation of expression to a "strict scrutiny" standard of review.[33] Under this standard, a state may not regulate speech unless the regulation advances a compelling state interest,[34] and the means used to regulate the speech are closely related to advancing that state interest.[35] By adopting this exacting level of scrutiny, the Court limits a state's ability to infringe first amendment rights. The strict scrutiny standard affords speech the highest level of constitutional protection.

In addition, although the Supreme Court has concluded that false statements of fact have no first amendment value,[36] the Court nevertheless protects these false statements because it has reasoned that denying such protection would chill valuable speech.[37] For example, newspapers might be discouraged from publishing true but unverifiable information if they were subject to libel suits merely upon the showing that a report was false and injurious to one's reputation. Furthermore, the Court also has adopted the "overbreadth doctrine" in order to avoid chilling valuable speech.[38] The overbreadth doctrine grants standing to challenge a statute or regulation even if the plaintiff cannot demonstrate that his or her speech was in fact endangered by the statute.[39] The Court's concern with "chilling" has led it to conclude that a government agency cannot restrain speech prior to its dissemination, even if it may regulate the same speech after it is expressed.[40]

Courts thus afford first amendment speech broad protection from government regulation because of the speakers' interests in disseminating their messages, as well as the listeners' interests in receiving their messages. In order to be valid, therefore, any state regulation of core first amendment speech must withstand strict scrutiny. In addition, even regulation of false or misleading core first amendment speech must pass the Court's strict scrutiny standard.

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[30] Justice Holmes advanced the "marketplace of ideas" theory for first amendment protection in Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the ultimate good is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market"). *See also Consolidated Edison*, 447 U.S. at 537–38; Gertz v. Robert Welsh, Inc., 418 U.S. 323, 339–40 (1974); *Red Lion*, 395 U.S. at 390.

[31] *Bellotti*, 435 U.S. at 776–77; *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring). *See also* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1, 26 (1971) (only political speech should be protected by the first amendment).

[32] *Consolidated Edison*, 447 U.S. at 534–35; Mills v. Alabama, 384 U.S. 214, 218–19 (1966); Thornhill v. Alabama, 310 U.S. 88, 101–02 (1940).

[33] Bates v. Little Rock, 361 U.S. 516, 524 (1960).

[34] Buckley v. Valeo, 424 U.S. 1, 44–45 (1976); *Bates*, 361 U.S. at 524.

[35] *See, e.g., Consolidated Edison*, 447 U.S. at 540; *Bates*, 361 U.S. at 525.

[36] *Gertz*, 418 U.S. at 340. In *Gertz*, the Court observed that "there is no constitutional value in false statements of fact."

[37] New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).

[38] *See generally* Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1.

[39] Bates v. State Bar of Arizona, 433 U.S. 350, 380 (1977).

[40] Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.").

B. *Commercial Speech*

The Supreme Court defines commercial speech as speech that does no more than propose a commercial transaction,[41] or speech that relates solely to the economic interests of the speaker and its audience.[42] Often courts use both definitions together.[43] The Supreme Court also employs a "commonsense distinction," rather than specific criteria, to determine whether speech is commercial or noncommercial.[44] Generally, if the advertisement contains any commercial element, courts define the speech as commercial, regardless of any reference to matters of public concern.[45]

The Supreme Court has recognized that although the first amendment protects commercial speech to some extent, states have greater freedom to regulate commercial speech.[46] The Court allows this greater regulation because it reasons that there is less

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[41] Friedman v. Rogers, 440 U.S. 1, 10 n.9 (1979); *Bates*, 433 U.S. at 363–64 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976).

[42] *Central Hudson*, 447 U.S. at 561; Michigan Beer & Wine Wholesalers Ass'n v. Attorney General, 142 Mich. App. 294, 302, 370 N.W.2d 328, 332 (1985).

Commentators have proposed other definitions of commercial speech. *See, e.g.*, Alderman, *Commercial Entities' Noncommercial Speech: A Contradiction in Terms*, 1982 UTAH L. REV. 731, 732 (commercial speech should be defined broadly as "any and all speech of a commercial entity"); Comment, *Commercial Speech: A Proposed Definition*, 27 HOW. L.J. 1015, 1027 (1984) (commercial speech is expression designed primarily to promote a product, service or business interest); Recent Developments, Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, *100 S. Ct. 2343 (1980)*, 11 ENVTL. L. 767, 782–83 (1981) (commercial speech related to contract formation).

[43] *In Re* National Serv. Corp., 742 F.2d 859, 861 (5th Cir. 1984); Spiritual Psychic Science Church v. Azusa, 39 Cal. 3d 501, 510, 703 P.2d 1119, 1123, 217 Cal. Rptr. 225, 229 (1985).

[44] *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 (1985); Bolger v. Youngs Drug Prods., 463 U.S. 60, 64 (1983); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978); *Virginia Bd.*, 425 U.S. at 771 n.24.

[45] *See, e.g., Youngs Drug*, 463 U.S. at 68. The Supreme Court stated:

> We have made clear that advertising which links a product to a current debate is not thereby entitled to the constitutional protection afforded noncommercial speech. A company has the full panoply of protections available to its direct comments on public issues, so there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions. Advertisers should not be permitted to immunize false or misleading product informations from government regulations simply by including references to public issues.

Id. See also Central Hudson, 447 U.S. at 563 n.5; American Future Sys. v. Pennsylvania State Univ., 752 F.2d 854, 860–62 (3d Cir. 1984).

At least one court, however, has taken a contrary view, holding that speech which contains discussion of matters of public concern in addition to proposing a commercial transaction should be accorded full first amendment protection. *Spiritual Psychic Science Church*, 39 Cal. 3d at 511, 703 P.2d at 1123, 217 Cal. Rptr. at 229–30. The California Supreme Court stated that:

> The principle emerging from these cases is that commercial speech is that which has but one purpose — to advance an economic transaction. By contrast, noncommercial speech encompasses activities extending beyond that purpose. For example, an advertisement that cherries can be purchased for a dollar a box at store X may be commercial speech, but an advertisement informing the public that the cherries for sale at store X were picked by union workers is more: it communicates a message beyond that related to the bare economic interests of the parties.

Id.

[46] *See, e.g., Zauderer*, 471 U.S. at 637. The Court stated that "[t]here is no longer any room to

danger of chilling speech that proposes commercial transactions because advertisers generally have the information to determine the truthfulness of their claims.[47] In addition, the Court has noted that businesses must advertise their products or services in order to make a profit and therefore will advertise even if their advertisements are regulated.[48] Accordingly, the Court applies an intermediate level of scrutiny to state regulation of commercial speech and allows states to prohibit false or misleading commercial speech.[49] If, however, the speech is not false or misleading, the state must show that the regulation directly advances a substantial state interest through the least restrictive means available.[50]

The Supreme Court first granted commercial speech some degree of protection in the 1976 case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[51] In finding that commercial speech deserves some first amendment protection, the Court noted that although the advertiser's interest in expressing itself may be purely economic, economic motivation alone does not deprive a speaker of its first amendment protections.[52] Moreover, the Court reasoned that commercial speech that contains information concerning the availability of certain products and their prices may be more important to the listener than discussion of the most pressing political matters.[53] The Court also observed that in order to maintain an efficient free enterprise system, information must flow freely so consumers can make informed decisions about how to spend their money.[54] Thus, the Court concluded that the first amendment protects commercial speech because of its importance to the listener and society. The speaker's economic motivation does not, in the Court's view, disqualify the speech from first amendment protection.

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doubt that what has come to be known as 'commercial speech' is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded noncommercial speech." *Id.*

[47] *See, e.g., Central Hudson*, 447 U.S. at 584 n.6. The Court noted:

> First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy and the lawfulness of the underlying activity. In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not "particularly susceptible to being crushed by overbroad regulation."

Id. (citations omitted).

[48] *Id.*

[49] *Id.* at 573 (Blackmun, J., concurring) (characterizing majority's four-part test as intermediate scrutiny).

[50] *Id.* at 564.

[51] 425 U.S. 748 (1976). Since *Virginia Bd.* was decided, an enormous body of literature has been published concerning commercial speech. *See, e.g., Survey of the Literature: Commercial Speech and Commercial Speakers*, 2 CARDOZO L. REV. 659 (1981) (annotated bibliography).

The historical background of the "new commercial speech" doctrine of *Virginia Bd.* and its progeny is well documented. *See, e.g.*, D. BOGEN, BULWARK OF LIBERTY 95–98 (1984); Alderman, *supra* note 42, at 732–41; Casenote, *Constitutional Law — Commercial Speech — Federal Statute Prohibiting Mailing of Unsolicited Contraception Advertisements Violates First Amendment as Applied to Accurate Mailings That Contribute to Informed Decision Making*, Bolger v. Youngs Drug Products Corp., *103 S. Ct. 2875 (1983)*, 14 U. BALT. L. REV 367, 368–74 (1985).

[52] *Virginia Bd.*, 425 U.S. at 762. *See also* Bigelow v. Virginia, 421 U.S. 809, 818 (1975); Ginzburg v. United States, 383 U.S. 463, 474 (1966).

[53] *Virginia Bd.*, 425 U.S. at 763.

[54] *Id.* at 765.

Despite the *Virginia Board* Court's conclusion that commercial speech has some first amendment protection, the Court permitted government regulation of commercial speech because it determined that the regulation presented minimal danger of "chilling." The Court noted that because advertising relates to a specific product, claims concerning the product generally are verifiable.[55] Thus, although the Court has tolerated false factual statements in other first amendment expressions in order to protect the free exchange of ideas, the Court stated this does not support permitting an advertiser to make false statements about its own product.[56] The Court also stressed that because businesses must advertise to make a profit and will advertise even if their advertisements are regulated, little danger exists that government regulation will chill accurate and nondeceptive commercial expressions.[57] Thus, in *Virginia Board*, the Court concluded that commercial speech should be protected because of its value to the listener, but it should be accorded less rigorous protection because of the minimal danger of chilling this type of speech.

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[55] *Id.* at 771–72 n.24. The Court noted that:

> 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.

Id. Justice Stewart makes the same argument in his concurrence, noting that "[s]ince the factual claims contained in commercial price or product advertisements relate to tangible goods or services, they may be tested empirically and corrected to reflect the truth without in any manner jeopardizing the free dissemination of thought." *Id.* at 780–81 (Stewart, J., concurring). *See also* Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n, 447 U.S. 557, 561, 564 n.6 (1980); Bates v. State Bar of Arizona, 433 U.S. 350, 383 (1977). Some commentators have criticized this rationale for limited protection of commercial speech. *See, e.g.*, Farber, *Commercial Speech and First Amendment Theory*, 74 Nw. U.L. Rev. 372, 385–86 (1979).

[56] *Virginia Bd.*, 425 U.S. at 771–72. The courts have not established criteria for determining whether a statement is one of fact or opinion in commercial speech cases. Courts have discussed this distinction, however, in defamation cases. *See, e.g.*, Kelley v. Schmidberger, 806 F.2d 44, 47–48 (2d Cir. 1986); Janklow v. Newsweek, Inc., 759 F.2d 644, 649–51 (8th Cir. 1985); Ollman v. Evans, 750 F.2d 970, 1001–02 nn.6–7 (D.C. Cir. 1984) (Appendix).

[57] *Virginia Bd.*, 425 U.S. at 772 n.24 (advertising as *sine qua non* of commercial profits). *See also Central Hudson*, 447 U.S. at 564 n.6 (commercial speech as "offspring of economic self-interest"); *Bates*, 433 U.S. at 383 (advertiser has "commercial interest in dissemination"). *See also* Tribe, Constitutional Choices 211 (1985) ("[s]ince commercial speech is animated solely by the profit motive, the Court considers it a hardier breed of expression; profit is an antifreeze enabling such speech to resist, for example, the chill from state regulations intended to promote truth in advertising").

For a discussion of prior restraints of commercial speech, see Kleiner v. First Nat'l Bank of Atlanta, 751 F.2d 1193, 1204 (11th Cir. 1985); United States Postal Serv. v. Athena Prods., 654 F.2d 362, 367 (5th Cir. 1981); Fargo Women's Health Org. v. Larson, 381 N.W.2d 176, 180 (N.D. 1986). See also Note, *Commercial Speech and the FTC: A Point of Departure from Traditional First Amendment Analysis Regarding Prior Restraint*, 16 New Eng. L. Rev. 793 (1981) which gives the policy reasons both for allowing and prohibiting prior restraints on commercial speech.

For a discussion of overbreadth in commercial speech, see Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 496–97 (1982) (overbreadth does not apply to commercial speech); *Bates*, 433 U.S. at 380 ("overbreadth analysis applies weakly, if at all, in the ordinary commercial context").

In addition, the Court has noted that commercial speech is entitled to less protection because of its lesser worth. *See, e.g.*, *Central Hudson*, 447 U.S. at 563 n.5 ("less constitutional moment"); *Id.* at 584 (Rehnquist, J., dissenting) ("[s]ignificantly more subordinate position in the hierarchy of First Amendment values").

In the 1980 case of *Central Hudson Gas & Electric v. Public Service Commission of New York*, the Supreme Court developed a four-part test that established an intermediate level of scrutiny of state regulation of commercial speech.[58] First, the Court held, if an advertisement contains false information,[59] is misleading,[60] or proposes an illegal transaction,[61] it may be prohibited entirely.[62] Second, the Court continued, if the advertisement does not fall within one of these categories the state may regulate the speech only if a substantial state interest is involved.[63] Third, the Court noted, once the state demonstrates a substantial interest the regulation is valid only if it directly advances that interest.[64] Finally, the Court concluded, even if the regulation directly advances the substantial state interest, the regulation will be upheld only if it is narrowly tailored to advancing that interest.[65]

In sum, because of the minimal danger of chilling, the Supreme Court permits states greater leeway to regulate commercial speech as compared to core first amendment speech. States may prohibit entirely false or misleading commercial speech. In addition, a state need only show a substantial state interest, rather than a compelling interest, to justify a statute that infringes commercial speech. Thus, depending on the type of speech, the Court has applied different standards of scrutiny to determine what degree of

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[58] *Central Hudson*, 447 U.S. at 573 (Blackmun, J., concurring) ("Under this four-part test a restraint on 'commercial communication [that] is neither misleading nor related to an unlawful activity' is subject to an intermediate level of scrutiny.").

[59] *Id.* at 563. See also *Virginia Bd.*, 425 U.S. at 771–72 where the Court noted:

> Untruthful speech, commercial or otherwise, has never been protected for its own sake. Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.

Id.

[60] *Central Hudson*, 447 U.S. at 564. This requirement has been extended to include statements which are potentially misleading. *See, e.g.*, Friedman v. Rogers, 440 U.S. 1, 11–16 (1979) (use of trade names in connection with optometrical practice leads to significant possibilites for deception, so state can prohibit such trade names).

[61] *Central Hudson*, 447 U.S. at 564. *See also* Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 496 (1982) (drug related paraphernalia). This requirement has been extended to include statements which propose a potentially illegal transaction. *See* Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 106 S. Ct. 2968, 2979 (1986) (state may prohibit advertisements for gambling casino because it may prohibit gambling altogether). *But see Central Hudson*, 447 U.S. at 574 (Blackmun, J., concurring) ("The Court recognizes that we have never held that commercial speech may be suppressed in order to further the State's interest in discouraging purchases of the underlying product that is advertised."). *See also* Wuliger, *The Constitutional Rights of Puffery: Commercial Speech and the Cigarette Broadcast Advertising Ban*, 36 FED. COM. L.J. 1, 22 (1984) ("There is no reason why government should burden First Amendment rights to achieve indirectly what it does not have the courage to achieve directly.").

[62] *Central Hudson*, 447 U.S. at 563.

[63] *Id.* at 564.

[64] *Id.*

[65] *Id.* Federal courts differ on whether the requirement that the regulation be no broader than necessary is identical to the least restrictive means test employed in core first amendment cases. *Compare* American Future Sys. v. Pennsylvania State Univ., 752 F.2d 854, 865–66 (3d Cir. 1984) (the no broader than necessary test is not the same as the least restrictive means test) *with* Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Comm'n, 701 F.2d 314, 333 n.26 (5th Cir. 1983) (construes last part of *Central Hudson* test as least restrictive means).

protection the speech receives under the first amendment. Consequently, because issue advertising contains elements of both core first amendment speech and commercial speech, courts have been uncertain about the degree of protection this type of speech receives under the first amendment.

II. Current Judicial Treatment of Issue Advertising

Issue advertising, also known as "editorial" or "image" advertising or "advertorials," is defined in this note as speech by a business entity which expresses its views on issues of public importance, or describes the business entity itself and its activities.[66] Issue advertisements come in many forms, including public service announcements, paid editorials on matters of public concern related and unrelated to the advertiser's business, and image advertising that informs the public about the advertiser's activities.[67] Although the advertiser does not explicitly propose a commercial transaction, these advertisements often are economically motivated. In fact, many issue advertisements are designed to boost sales[68] and improve relations with stockholders, consumers, suppliers or business customers, or the government,[69] as well as discuss matters of concern both to the general public and the business entity.

Issue advertisements fall between commercial speech and fully protected first amendment expressions. In general, courts have used two methods to analyze these expressions. Some courts have examined the advertiser's motive and have concluded that if the expressions are really implicit proposals for commercial transaction, then they should receive only the lesser protection afforded commercial speech. Other courts have examined the value to the public of the message conveyed by the advertisement and have concluded that if the content falls within the core of the first amendment, then the advertisement should receive full first amendment protection.

A. *Economic-Motivation Analysis*

Some courts stress the speaker's motivation in publishing its message, rather than the value of that message, in determining what type of speech is involved in issue advertising. Because these courts generally find that the speech is economically moti-

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[66] FTC Memorandum to the Commission — Corporate Image Advertising, Division of National Advertising, in Sourcebook, *supra* note 1, at 1156.

[67] *See* Ludlam, *supra* note 8, at 253–54. Ludlam distinguishes image advertising, which relates a corporation's activities or products to the corporation's sense of social responsibility, from public service advertising which addresses topics not directly related to the corporation's activities or products. The author notes, however, that every corporation has an indirect interest in every public or private activity, and that public service announcements may reflect favorably on the corporation's sense of social responsibility, as well as perhaps generating additional profits. *Id.* at 253.

Additionally, it often is difficult to determine when an advertisement is related to the corporation's activities. *See infra* notes 103–05 and accompanying text. For these reasons, this note includes public service announcements within the definition of image or advocacy advertising.

[68] FTC Memorandum, *supra* note 66, at 1156. In a survey, executives were asked to indicate the reasons their companies engaged in issue advertising. Forty-seven percent expected that such advertisements would boost sales. *Id.* at 1157.

[69] *Id.* In the survey, the executives were allowed to check more than one reason for engaging in issue advertising: 64% checked stockholder relations, 55% checked consumer relations, 46% checked supplier or business customer relations, and 32% checked government relations. *Id.*

vated, these courts conclude that the speech is commercial speech. Consequently, these courts subject state regulation of the speech to an intermediate level of scrutiny.

The Supreme Court applied this motivation analysis in the 1983 case of *Bolger v. Youngs Drug Products*, and found that an informational pamphlet concerning the usefulness of condoms was commercial speech when published by a condom manufacturer.[70] Youngs, a prophylactics manufacturer, distributed by mail unsolicited informational pamphlets discussing the problem of venereal disease and the use of condoms in the prevention of that disease.[71] The pamphlet did not mention Youngs' specific products by name. The only reference to Youngs was a statement, at the bottom of the last page, that the pamphlet was provided by Youngs Drugs, distributor of Trojan brand prophylactics.[72]

The Court stated that several factors supported characterizing the pamphlet as commercial speech. The Court observed that the pamphlet was labelled as an "advertisement."[73] Additionally, the Court noted, the advertisement referred to a specific product.[74] Finally, the Court reasoned, there was strong indication of Youngs' economic motivation in publishing and distributing the pamphlet.[75] Thus, although the prevention of venereal disease may be a matter of public concern, the Court's focus on the speaker's motivation, as evidenced by its relationship to, and interest in, the message, led the Court to characterize the pamphlet as commercial speech.[76]

Prior to *Youngs*, the Court of Appeals for the Seventh Circuit also used a motivation analysis in deciding an issue advertising case. In *National Commission on Egg Nutrition v. FTC* (*NCEN*), the Seventh Circuit held that the Federal Trade Commission properly classified the plaintiff's editorials as commercial speech.[77] In *NCEN*, the FTC prohibited the National Commission on Egg Nutrition from publishing advertisement that claimed that no significant evidence exists that egg consumption increases one's risk of heart and circulatory disease.[78] The Seventh Circuit upheld this prohibition,[79] based on its conclusion that the advertisement contained false and misleading commercial speech.[80]

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[70] 463 U.S. 60 (1983).

[71] *Id.* at 62. Youngs distributed three types of pamphlets. The first type consisted of multi-page flyers informing the public of a variety of products available at a drugstore, including prophylactics. *Id.* The second type consisted of promotional flyers devoted exclusively or substantially to promoting prophylactics. *Id.* The third type consisted of informational pamphlets concerned with the desirability of prophylactics. *Id.* at n.4. Only the third type troubled the Court in determining proper classification. *Id.* at 66.

[72] *Id.* at 62 n.4.

[73] *Id.* (citing New York Times v. Sullivan, 367 U.S. 254, 265–66 (1964)) (mere fact that speech is labelled as an advertisement does not compel conclusion that the speech is commercial speech).

[74] *Id.* at 66.

[75] *Id.* at 67.

[76] *Id.*

[77] 570 F.2d 157, 162–63 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978).

[78] *Id.* at 159. See *In Re* National Comm'n on Egg Nutrition, 88 F.T.C., 89, 91 (1976), for the text of NCEN's advertisement. The Federal Trade Commission claimed jurisdiction under § 5 of the Federal Trade Commission Act. *Id.* Section 5 states, in relevant part, that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." 15 U.S.C. § 45(a)(1) (1982). Section 5 is applicable to false or misleading advertisements. *See, e.g.*, Giant Food Inc. v. FTC, 322 F.2d 977, 981 (D.C. Cir. 1963) ("There can be no doubt at this late date that advertising which is false or deceptive is within the proscription of § 5."), *cert. dismissed*, 376 U.S. 967 (1964).

[79] *NCEN*, 570 F.2d at 165–67. The order was upheld with modification. For the original order, see *In Re* National Comm'n on Egg Nutrition, 88 F.T.C. at 203–05.

[80] *NCEN*, 570 F.2d at 160–63.

In arriving at this decision, the court followed the Supreme Court's definition of commercial speech as speech which does no more than propose a commercial transaction.[81] The Seventh Circuit rejected NCEN's argument that its statements were more an expression of opinion concerning a matter of public debate than an invitation to transact business.[82] The court reasoned that NCEN's statements did not constitute opinion because the statements were phrased as factual claims that denied the existence of medical evidence concerning cholesterol.[83]

Furthermore, the Seventh Circuit stated that a court's view of the importance of the issue raised by an advertisement is not relevant in determining the protection granted the speech.[84] The court concluded that even though NCEN's editorial concerned an important public health matter, the editorial's content alone should not entitle the speech to full first amendment protection.[85] Moreover, the court construed the Supreme Court's definition of commercial speech to include claims about an advertiser's product made for the purpose of persuading the consumer to purchase that product, regardless of the manner in which the advertiser presents the information.[86] Thus, although NCEN's advertisements did not explicitly propose a commercial transaction, the court determined that the advertisements implied a transaction and, therefore, constituted commercial speech.[87] Because the Seventh Circuit found that NCEN's advertisements qualified as commercial speech, and that the advertisements were false and misleading, the court upheld the FTC prohibition.

In summary, some courts have used a motivation analysis in deciding issue advertising cases. In general, these courts consider the speaker's motivation, as evidenced by the speaker's relationship to the product discussed, as relevant in determining whether the speech is commercial speech. Thus, even though the speech's content may relate to a matter of public concern, the courts conclude that the importance of the content alone does not entitle the speech to full constitutional protection.

B. *Content-Oriented Analysis*

In contrast to the motivation analysis, other courts have stressed the importance of the content of the speech rather than the speaker's motivation in communicating the

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[81] *Id.* at 162. See *supra* notes 41–45 and accompanying text for definitions of commercial speech.

[82] *NCEN*, 570 F.2d at 162–63.

[83] *Id.* at 163. The court stated that "[f]irst, as to the nature and purpose of NCEN's statements, they were not phrased as statements of opinion but categorically and falsely denied the existence of evidence that in fact exists and were made for the purpose of persuading the people who read them to buy eggs." *Id.*

[84] *Id.* The court noted that "the right of the government to restrain false advertising can hardly depend upon the view of an agency or court as to the relative importance of the issue to which the false advertising relates." *Id.*

[85] *Id.*

[86] *Id.* The Seventh Circuit concluded that:

> [A]s to the intended scope of the Supreme Court's expressions on the subject of commercial speech, we believe they were not intended to be narrowly limited to the mere proposal of a particular commercial transaction but extended 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. The nature of the communication is not changed when a group of sellers joins in advertising their common product.

Id.

[87] *Id.*

message. Because these courts generally find that the speech concerns a matter of important public debate, they characterize the speech as noncommercial. Consequently, these courts subject the regulation of the speech to the strict level of scrutiny that applies to core first amendment speech.

The Supreme Court used this content-oriented approach in *First National Bank of Boston v. Bellotti*, where the Court found unconstitutional a statute that prohibited corporations from contributing to discussions of political matters that did not directly affect the corporation.[88] In *Bellotti*, the Bank of Boston wished to publicize its views concerning an upcoming referendum that would permit the legislature to impose a graduated tax on individual income.[89] The Massachusetts General Laws, however, prohibited certain types of business corporations from making contributions to influence a public vote on any issue not materially affecting their business.[90] The Massachussets Attorney General invoked the statute to prohibit the bank from expressing its views on the tax referendum, arguing that a corporation has freedom to engage only in commercial speech, that is, speech which materially affects the corporation.[91] The bank, however, argued that a graduated personal income tax would affect its business materially by creating a tax climate which would drive business corporations away from Masssachusetts and adversely affect the bank's financial position.[92]

Although the Supreme Court did not rule on the merits of the bank's argument, it found the statute unconstitutional. The Court reasoned that the statute infringed on corporate political speech that may be valuable to its listeners.[93] The *Bellotti* Court noted that Massachussets sought to invert the commercial speech doctrine by allowing first amendment protection to a corporation's "hawking of wares," while imposing criminal

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[88] 435 U.S. 765, 784–86 (1978). *Bellotti* has been the subject of a great deal of critical scrutiny. *See, e.g.*, Miller, *On Politics, Democracy, and the First Amendment: A Commentary on* First National Bank v. Bellotti, 38 WASH. LEE L.R. 21 (1981); Prentice, Consolidated Edison *and* Bellotti: *First Amendment Protection of Corporate Political Speech*, 16 TULSA L.J. 599 (1981); Schaefer, *The First Amendment, Media Conglomerates and "Business" Corporations: Can Corporations Safely Involve Themselves in the Political Process?*, 55 ST. JOHN'S L. REV. 1 (1980); Shaw, *Corporate Speech in the Marketplace of Ideas*, 7 J. CORP. L. 265 (1982); Note, *The Corporation and the Constitution: Economic Due Process and Corporate Speech*, 90 YALE L.J. 1833, 1853–57 (1981); Casenote, *Constitutional Law — First Amendment — Corporate Free Speech:* First National Bank of Boston v. Bellotti, 20 B.C.L. REV. 1003 (1979).

[89] *Bellotti*, 435 U.S. at 769.

[90] MASS. GEN. L. ch. 55, § 8 (1978). The statute provides, in pertinent part:

> No corporation carrying on the business of a bank, trust, surety, indemnity, safe deposit . . . [or any] business corporation incorporated under the laws of or doing business in the commonwealth and no officer or agent acting in behalf of any corporation mentioned in this section, shall directly or indirectly give, pay, expend or contribute, or promise to give, pay, expend or contribute, any money or other valuable thing for the purpose of aiding, promoting or preventing the nomination of election of any person to pubic office, or aiding, promoting or antagonizing the interests of any political party, or influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation.

Id.

[91] *Bellotti*, 435 U.S. at 771. The Supreme Judical Court of Massachusetts held that a corporation can express itself only on matters materially affecting the corporation. First Nat'l Bank of Boston v. Attorney General, 371 Mass. 773, 785, 359 N.E.2d 1262, 1270 (1977).

[92] *Bellotti*, 435 U.S. at 770 n.4.

[93] *See id.* at 785 n.21.

sanctions for expressions of opinion on matters of general public interest.[94] The Court emphasized that the first amendment is designed to foster not only self-expression,[95] but also access to discussion, debate, and the dissemination of ideas.[96] The *Bellotti* Court noted that Massachussets sought to regulate speech found at the "heart of the First Amendment" — speech concerning a matter which was to be put to public vote.[97] The Court dismissed the argument that the integrity of the elective process was jeopardized because the bank could outspend many other groups and communicate its message to the voters more effectively.[98] Rather, the Court concluded that a speaker should not be penalized merely because he or she may have a greater ability to influence listeners.[99]

Furthermore, the *Bellotti* Court stressed that the first amendment emphasizes the worth of the speech, rather than the nature of the speaker and the speaker's relation to the message.[100] According to the Court, commercial speech is protected because of the society's interest in the free flow of commercial information, not to protect the corporation's business interests.[101] For this reason, the Court did not decide whether the speech materially affected the speaker's business interests as the Massachusetts statute required.[102] The Court noted that the bank's alleged interest in the question of graduated personal income tax demonstrated the amorphous and often conjectural nature of modern economic relationships.[103] As a result, the Court observed, a business can never

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[94] *Id.* at 783 n.20. The Court noted that:

> It is somewhat ironic that appellee seeks to reconcile these [commercial speech] decisions with the "materially affecting" concept by noting that the commercial speaker would "have a direct financial interest in the speech." Until recently, the "purely commercial" nature of an advertisement was thought to undermine and even negate its entitlement to the sanctuary of the First Amendment. Appellee would invert the debate by giving constitutional significance to a corporation's "hawking of wares" while approving criminal sanctions for a bank's expression of opinion on a tax law of general public interest.

Id. (citation omitted).

The Court borrows the phrase "hawking of wares" from Justice Rehnquist's dissent in the *Virginia Bd.* decision. Justice Rehnquist stated that "[t]he logical consequences of the Court's decision in this case, a decision which elevates commercial intercourse between a seller hawking his wares and a buyer seeking to strike a bargain to the same plane as has been previously reserved for the free marketplace of ideas, are far reaching indeed." *Virginia Bd.*, 425 U.S. at 781 (Rehnquist, J., dissenting).

[95] *Bellotti*, 435 U.S. at 783. *But see* Justice White's dissent:

> 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-fulfilment, is not at all furthered by corporate speech. It is clear that the communications of profitmaking corporations are not "an integral part of the development of ideas, of mental exploration and the affirmation of self."

Id. at 804–05 (White, J., dissenting) (citations omitted).

[96] *Id.* at 783.

[97] *Id.* at 776. The majority rejected Justice Rehnquist's argument that, because the first amendment is designed to foster self expression and a corporation has no "self" to foster, a corporation has no first amendment rights. *Id.* at 825–26 (Rehnquist, J., dissenting).

[98] *Id.* at 789–90. *But see* Miller, *supra* note 88, at 23–24.

[99] *Bellotti*, 435 U.S. at 790.

[100] *Id.* at 783.

[101] *Id.*

[102] *See id.* at 785 n.21.

[103] *Id.* The Bank argued that a graduated income tax might lead to an unfavorable tax climate in Massachusetts which would cause businesses to either leave Massachusetts or choose not to relocate

be certain when a court would agree that a certain political issue could materially affect the business.[104] Because a business may refrain from speaking on any matter, including matters of public importance, due to the fear of government regulation and penalties, the Court accorded the bank's speech full first amendment protection.[105] Thus, the *Bellotti* Court held that on matters of public importance, speech by a business entity is afforded full first amendment protection because of the speech's value and the potential chilling effects of a regulation permitting only speech which relates to the business.

The Supreme Court also followed a content-oriented approach in the 1980 case of *Consolidated Edison Co. of New York v. Public Service Commission of New York.*[106] In this case, Consolidated Edison placed inserts in its billing envelopes that argued that nuclear power plants are safe, economic, and clean.[107] The Public Service Commission subsequently prohibited Consolidated Edison from using its billing envelopes to discuss political matters, including the "desirability of future development of nuclear power."[108] The Supreme Court, in contrast, held that the first amendment fully protected Consolidated Edison's speech concerning nuclear energy because of the importance of the content.[109]

Because the Court focused on the content of the utility company's speech, it did not consider whether the relationship between Consolidated Edison and the advertised issue turned the inserts into implicit commercial transactions.[110] The Court emphasized that the speech was political in nature, discussed an issue of public concern, and added a valuable viewpoint which the public should be entitled to hear.[111] The Court therefore accorded Consolidated Edison's speech the full protection of the first amendment.[112]

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to Massachusetts, thus depriving the Bank of potential loans to, and deposits by, these relocated businesses and their employees. *Id.*

[104] *Id.*

[105] *Id.*

[106] 447 U.S. 530, 533–35 (1980). *Consolidated Edison* has generated considerable scholarly literature. *See, e.g.*, Prentice, *supra* note 90; Note, *The Two-Track Model of First Amendment Adjudication After* Consolidated Edison Co. v. Public Service Commission, 62 B.U.L. REV. 215 (1982); Casenote, Consolidated Edison Company of New York v. Public Service Commission: *Freedom of Speech Extended to Monopolies — Is There No Escape for the Consumer?* 8 PEPPERDINE L. REV. 1087 (1981).

[107] *Consolidated Edison*, 447 U.S. at 532.

[108] *Id.*

[109] *Id.* at 533, 535, 544.

[110] *See Central Hudson*, 447 U.S. at 563 n.5 (1980). The Supreme Court stated that, "[w]e rule today in *Consolidated Edison Co. v. Public Service Comm'n* that utilities enjoy the full panoply of First Amendment protection for their direct comments on public issues. There is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions." *Id.*

[111] *Consolidated Edison*, 447 U.S. at 535.

[112] *Id.* In Pacific Gas & Elec. Co. v. Public Util. Comm'n of California, 106 S. Ct 903 (1986), the Supreme Court again used a content-oriented analysis. PG&E inserted a newsletter in its billing envelope. *Id.* at 905. One newsletter included stories about PG&E's payment plans, its efforts to help the bald eagles in California, holiday recipes, and instructions on how to weatherstrip one's home. *Id.* at 905 n.1. *See* Appellant's Jurisdictional Statement and Appendix thereto, at A-183–A-190, Pacific Gas & Elec. Co. v. Public Util. Comm'n of California, 106 S. Ct. 903 (1986). The insert stated, "[b]ald eagles in the Pit River area of Northern California have a friend in PG&E. The company, cooperating with state and federal agencies, is working to help them prosper." *Id.* at A-186. Other editions included editorials on the merits of recently passed and currently pending legislation. *PG&E*, 106 S. Ct. at 905. Unfortunately, no examples of PG&E's statements on legislation were included in either the parties' briefs to the Court or the Supreme Court's opinion. The Court concluded that the content of the newsletters contained matters of public concern, and therefore

Similarly, in the 1986 case of *In the Matter of R.J. Reynolds*, an administrative law judge ruled that the first amendment fully protected a cigarette manufacturer's editorial which claimed that a recent government study failed to prove any connection between smoking and heart disease.[113] In reaching this conclusion, the judge looked at the manner in which the advertiser presented the speech and its contribution to debate on important public issues.[114] Because the judge found that the speech was presented in an editorial format rather than as a commercial advertisement and related to a matter of public health, the judge granted full first amendment protection to the manufacturer's speech.[115]

In this case, R.J. Reynolds, a major cigarette manufacturer, published an editorial advertisement that stated that an extensive government study, which cost $115,000,000 and took ten years, failed to prove a link between smoking and heart disease.[116] The

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accorded full first amendment protection to the newsletters. *Id.* at 908. The Court stated that PG&E's newsletter "thus extends well beyond speech that proposes a business transaction, and includes the kind of discussion of 'matters of public concern' that the First Amendment both fully protects and implicitly encourages." *Id.* (citations omitted).

[113] No. 9206 at 12–13 (FTC Aug. 4, 1986) (order granting motion to dismiss) [hereinafter *Reynolds Order*].

[114] *Id.* at 7.

[115] *Id.* at 7, 9, 10, 12–13.

[116] R.J. Reynolds Tobacco Co., No. 9206 (LEXIS, Genfed library, FTC file) (FTC June 11, 1986) [hereinafter *Reynolds Complaint*]. Reynolds' editorial, "Of Cigarettes and Science," stated, in part:

> You probably know about research that links smoking to certain diseases. Coronary heart disease is one of them.
>
> Much of this evidence consists of studies that show a statistical association between smoking and the disease.
>
> But statistics themselves cannot explain why smoking and heart disease are associated. Thus, scientists have developed a theory: that heart disease is caused by smoking. Then they performed various experiments to check this theory.
>
> We would like to tell you about one of the most important of these experiment.
>
> . . . .
>
> It was called the Multiple Risk Factor Intervention Trial (MR FIT).
>
> In the words of the Wall Street Journal, it was "one of the largest medical experiments ever attempted." Funded by the Federal government, it cost $115,000,000 and took 10 years, ending in 1982.
>
> The subjects were over 12,000 men who were thought to have a high risk of heart disease because of three risk factors that are statistically associated with this disease: smoking, high blood pressure and high cholesterol levels.
>
> Half of the men received no special medical intervention. The other half received medical treatment that consistently reduced all three risk factors, compared with the first group.
>
> . . . .
>
> After 10 years, there was no statistically significant difference between the two groups in the number of heart disease deaths.
>
> . . . .
>
> We at R. J. Reynolds do not claim this study proves that smoking doesn't cause heart disease. But we do wish to make a point.
>
> Despite the results of MR FIT and other experiments like it, many scientists have not abandoned or modified their original theory, or re-examined its assumptions.
>
> They continue to believe these factors cause heart disease. But it is important to label their belief accurately. It is an opinion. A judgment. But not scientific fact.

Id.

Federal Trade Commission brought suit against R.J. Reynolds, alleging that these editorials were commercial speech.[117] Furthermore, the FTC alleged that the editorials were deceptive and misleading[118] because they failed to mention that the government study showed that men who quit smoking had a lower rate of heart disease than those who continued to smoke.[119]

The administrative law judge, noting that no precise definition of commercial speech exists,[120] observed that from a common sense point of view, the advertisement clearly was an editorial.[121] In arriving at this conclusion, the judge looked at the advertisement's language and format.[122] Thus, because Reynolds phrased and formatted its advertisement to look like an editorial, the judge held that, using common sense, it was an editorial.

The judge reasoned that an advertiser's motive is immaterial in determining an advertisement's meaning, and rejected evidence submitted by the FTC that demonstrated Reynolds' motive in publishing the editorials.[123] Although the judge considered the

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[117] Reynolds Order, *supra* note 113, at 7.

[118] Reynolds Complaint, *supra* note 116, para. 8. ("The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.").

[119] *Id.* at para. 7. The complaint read:

> In light of the respresentation made in the advertisement, and because of the way in which the advertisment describes the MR FIT study and its results, respondent's failure to disclose:
>
> (a) that men in the study who quit smoking had a significantly lower rate of coronary heart disease death than men who continued to smoke; or
>
> (b) that the MR FIT study results are consistent with previous studies showing that those two (sic) quit smoking enjoy a substantial decrease in coronary heart disease mortality,
>
> renders the advertisement deceptive.

Id.

[120] Reynolds Order, *supra* note 113, at 3.

[121] *Id.* at 7. The judge noted that "[t]o argue that this editorial ad is similar to the informational pamphlets in *Bolger* or to the NCEN ad is contrary to reason and common sense. From a common sense approach, Reynolds' 'Of cigarettes and science' is clearly an editorial; it is not commercial speech by any stretch of the imagination." *Id.*

[122] *Id.* at 7–8. The judge reasoned that, "[*f*]*irst*, we think the language of the ad is uncomplicated and the ad will be easily understood by any reasonable reader as an op-ed piece, not a cigarette ad." (emphasis in original). *Id.* The judge concluded that "[i]n this case, Reynolds' ad is on its face an editorial expression of Reynolds' opinion regarding a public issue of economic importance." *Id.* at 12.

[123] *Id.* at 8 n.8. The judge stated that "[t]he Commission [the FTC] and courts, however, have consistently held that the intent or motive of an advertiser is immaterial to the determination of an ad's meaning . . . . And in none of the commercial speech cases complaint counsel rely on or we are aware of, the Court went beyond the ads to resolve the commercial/noncommercial speech issue." *Id.* (citations omitted).

The FTC, however, had proposed a framework for deciding issue advertising cases where the motive of the advertiser is relevant in determining an advertisement's meaning. According to this proposal, an image advertisement falls within the FTC's jurisdiction if its dominant effect is economic rather than political. FTC Memorandum, *supra* note 66, at 1166. In determining whether the speech is economic or political, the FTC considers the advertiser's motive relevant. Publication with the hopes of improving the advertiser's financial situation supports the inference that the speech should be classified as commercial expression. *Id.* at 1177.

In addition, the FTC considered other factors relevant, such as whether a business entity prepared the advertisement; whether the advertisement includes elements usually included in the

possibility that advertisers may craft promotional messages in the form of editorials to immunize false and deceptive speech,[124] the judge held that the danger of chilling free expression by businesses on public issues outweighed that concern.[125]

In addition to considering the content of Reynolds' speech, the judge also considered the Federal Trade Commission's motivation for invoking section 5 of the Federal Trade Commission Act, which prohibits unfair or deceptive acts affecting commerce.[126] The judge speculated that the FTC invoked section 5 not because R.J. Reynolds' statements were misleading, but because the FTC distrusted anything a cigarette manufacturer may say concerning smoking and its relation to health.[127] The judge noted, moreover, that the first amendment is fundamentally opposed to restrictions designed to curtail expression of a particular point of view.[128] Because of its relationship to a matter of public concern, and to avoid possibly chilling valuable expression, the administrative law judge accorded R.J. Reynolds' editorial full protection under the first amendment.[129]

In conclusion, when courts have used a content-oriented analysis in deciding issue advertising cases, courts stress the importance of the content and its relation to matters of public concern. In general, because these courts determine that protection is accorded the speech because of its value to the listener, the speaker's motivation is not relevant in determining whether the speech should be considered commercial or noncommercial speech. When issue advertising relates to a matter of public concern, therefore, courts grant the advertisements full first amendment protection under a content-oriented analysis, and require any regulation of issue advertising to withstand strict scrutiny.

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business's product advertisements; whether the business sells products under the same brand name that appears in the advertisement; whether the advertisement describes the business's activities or contains statements about subjects other than business activities; whether the advertisement focuses on the business's activities rather than some general subject; and whether the advertisement expressly connects the business's activities to a political issue. *Id.* at 1167. The presence of these factors would indicate that a reader would understand the advertisement as primarily economic, and not political in nature, and the corporate expression would therefore fall within commercial speech and FTC regulations. *Id.* at 1166–67.

[124] Reynolds Order, *supra* note 113, at 12–13. The judge noted that "[a]dmittedly, proper classification of Reynolds' ad is not an easy task. The thought that it may be possible to craft promotional messages in the guise of an editorial gives us pause." *Id.*

[125] *Id.* at 13, where the judge noted:

> On the other hand, any attempt to expand the traditional boundaries of Section 5 jurisdiction in order to reach editorial ads which may contain elements complaint counsel may consider objectionable, as appears to be the case here, is likely to produce the unwanted effect of chilling free expression of opinions on public issues of concern to business firms which enjoy the full protection of the First Amendment with respect to noncommercial speech.

Id.

[126] See *supra* note 78 for the text of § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1982).

[127] Reynold Order, *supra* note 113, at 11. The judge found "these statements suggestive of what may be complaint counsel's unstated reasons for invoking Section 5 in this case, namely their solicitude for the public health and wariness of anything a cigarette manufacturer may have to say about this issue of smoking and health." *Id.*

[128] *Id.* at 11–12. The judge noted that "[t]he Court has made it clear that regulation of speech that is motivated by a desire to curtail expression of a particular point of view on controversial issues of general interest is 'the purest example' of a law abridging freedom of speech and is impermissible under the first amendment." *Id.* (citations omitted).

[129] *Id.* at 12–13.

III. A Critical Analysis of Current Approaches to Issue Advertisements

To date, courts have not approached issue advertisement cases consistently or predictably.[150] Some cases have focused on the value of the speech to the listener while others have looked to the motivation of the speaker. In addition to leading to inconsistent results, both the motivation and the content based approaches have serious flaws. In light of the Supreme Court's reasons for protecting speech, both approaches suffer from conceptual and practical shortcomings.

The motivation analysis is conceptually flawed because under this approach courts assume that an economic motivation automatically deprives speech of full first amendment protection. As the Supreme Court noted in *Virginia Board*, however, motivation is not a sufficient reason for limiting the right of the speaker.[151] Indeed, the *Virginia Board* Court held that merely because the advertiser has an economic motive for advertising, this motivation does not deprive commercial speech of constitutional protection.[152] The motivation-oriented approach, therefore, is inconsistent with the *Virginia Board* Court's reasons for allowing commercial speech first amendment protection because it allows greater state regulation based on the business's motivation in publishing its viewpoint.

The *Virginia Board* Court granted commercial speech some first amendment protection because both the consumer and society in general may have an interest in what the corporation says about its product.[153] Although the *Virginia Board* Court did not grant commercial speech plenary protection, the Court limited the protection not because the speaker was economically motivated, but because the advertiser can verify the truthfulness of its claims and because the necessity of business advertising would outweigh any chilling effects regulations may have on the speech.[154] Therefore, based on the reasons for granting limited protection to commercial speech, economic motivation should not limit the protection offered.

Motivation analysis also may lead to undesirable practical consequences. If a business exists for the purpose of making money, courts may find that any and all of its advertisements are economically motived — that is, published either to increase sales directly by proposing a transaction, or increase sales indirectly by presenting a positive image. Further, even if economic interest does not motivate all decisions, as the *Bellotti* Court noted, virtually any particular advertisement or editorial might affect the business in some way.[155] Given this possibility, a governmental agency could assert that almost any speech by a business is commercial speech, and could curtail such speech under the less exacting intermediate scrutiny review when it disagrees with the business's viewpoint.

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[150] *Compare* Bolger v. Youngs Drug Prods., 463 U.S. 60, 67–68 (1983) (Supreme Court adopted a motivation-oriented analysis when condom manufacturer distributed informational pamphlets detailing use of condoms in preventing venereal disease) *with* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776–78 (1978) (Supreme Court adopted content-oriented analysis when state sought to prevent Bank from advocating its position on tax reform) *and* Consolidated Edison Co. of New York v. Public Service Comm'n, 447 U.S. 530, 537–40 (1980) (Supreme Court used content-based analysis when utility commission tried to restrain utility from including pamphlets in its billing envelopes claiming that nuclear energy is clean and efficient).

[151] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976).

[152] *Id.*

[153] *Id.* at 763–65.

[154] *Id.* at 771 n.24.

[155] *Bellotti*, 435 U.S. at 785 n.21.

Thus, if courts consistently used a motivation analysis, they could label all speech by a commercial enterprise commercial speech, and the government could unduly regulate information that is important to the public or espouses a controversial view on a matter of public concern. This undue regulation would undermine the first amendment's commitment to uninhibited and robust discussion of matters of public concern.[136] The motivation analysis, therefore, is flawed not only because it does not take into account the reasons for protecting commercial speech, but because it could lead to excessive government intervention through prohibiting speech with which the government disagrees.

The "content-oriented" analysis, however, also presents both conceptual and practical problems in analyzing issue advertisements under the first amendment. In using the content-oriented analysis, courts examine the value in the expression.[137] If they find that the speech relates to a matter of public concern, courts will accord the issue advertisement full first amendment protection.[138]

Conceptually, however, this approach is misguided because, although it recognizes that commercial speech lies within the first amendment, it fails to consider the limitations imposed on the protection granted commercial speech. According to the *Virginia Board* Court, commercial speech receives first amendment protection because it contributes to well informed decisions concerning the private allocation of resources, and because the information conveyed may be more important to the individual than the most pressing political concerns of the day.[139] At this level, therefore, the content-oriented approach correctly grants first amendment protection to issue advertisements because of their content's importance.

In *Virginia Board*, however, the Court also noted that speech by a business entity may be entitled to less than full first amendment protection even when the content is important to consumers.[140] The Court noted that commercial speech protection is limited because of the minimal danger of chilling, not because of the content's lesser value.[141] Thus, the conceptual problem created by the content-oriented approach is that it fails to consider that the advertiser may be able to verify the truthfulness of its advertisements, as well as the possibly minimal danger of chilling — the reasons for limiting commercial speech protection.

In addition to the conceptual problems with the content-oriented approach, two practical problems emerge when employing this analysis. First, if courts granted issue advertisements full first amendment protection because of the importance of the content, an advertiser could publish deceptive, misleading, or false information under the guise of an editorial, although the advertiser could not publish that information otherwise.[142]

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[136] *See* Reynolds Order, *supra* note 113, at 11.

[137] *See, e.g., Pacific Gas*, 106 S. Ct. at 908 (articles on weatherstripping, utility company's efforts to help bald eagles and recipes accorded full first amendment protection); *Bellotti*, 435 U.S. at 776–78 (bank's statements regarding proposed tax reform protected).

[138] *See, e.g., Bellotti*, 435 U.S. at 776–78.

[139] *Virginia Bd.*, 425 U.S. at 763–64, 770.

[140] *Id.* at 771 n.24.

[141] *Id.*

[142] Reynolds Order, *supra* note 113, at 11. *See also* Myers, *Suit Against R.J. Reynolds Is No Threat to Corporate Expression*, L.A. Daily J., July 9, 1986, at 4, col. 6. The author notes that "[t]he company tries to disguise this clearly commercial effort by putting its ad into the format of a newspaper editorial or op-ed piece, simply to expand its First Amendment protection." *Id.*

Second, by stressing the speech's value, courts create a "slippery slide," creating uncertainty about which topics should receive full first amendment protection and which topics are of lesser value and entitled to lesser protection.[143]

The motivation-oriented and content-oriented analyses also share a common flaw. Both approaches attempt to fit the speech into existing pigeonholes, either of core first amendment speech or commercial transaction.[144] By its very nature, an issue advertisement is a hybrid, containing both an expression on a controversial issue of public concern and an expression of a possible implied commercial transaction. As such, an issue advertisement cannot fit neatly into either category.

In summary, both the motivation-oriented and the content-oriented analyses cannot evaluate issue advertisements properly in light of the Supreme Court's interpretation of first amendment protections. The motivation-based approach grants a lesser degree of protection to such speech based on the motivation of the speaker, although economic motivation alone is not a sufficient reason for limiting protection. In practical effect, a governmental agency may claim that economic considerations motivate any speech by a business entity and, therefore, the agency may restrict speech with which it disagrees if the regulation can withstand the lesser scrutiny accorded to commercial speech. The content-oriented analysis fails to consider the reason for not granting full first amendment protection for commercial speech, that is, because of the lesser possibility of chilling. In practice, the content-oriented analysis allows a business entity to publish false and misleading information, although that information could not be published if the speech were considered commercial expression. Furthermore, no clear criteria exist for determining whether the speech has sufficient public importance to allow full protection. Finally, both approaches attempt to fit issue advertisements into the pre-existing categories of either commercial speech or core first amendment speech without considering the unique characteristics of issue advertisements.

IV. A Proposed Framework for Deciding Issue Advertising Cases

This note proposes a new framework for determining the protection that issue advertisements should receive under the first amendment. Rather than attempt to ca-

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[143] *See Libel Law and the First Amendment: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice*, 99th Cong., 1st Sess. 10 (1985) (testimony of Floyd Abrams, Esq., Partner, Cahill, Gordon & Reindel). Attorney Abrams observed that:

> [Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 462 U.S. 749 (1985)] is a troubling, disturbing opinion for a variety of reasons. The reason is not that it is all that important that credit reports receive as much protection as political speech; the reason is that the Court has now, it seems to me, plunged into the area of determining for itself what sort of speech is more important and less important speech, an approach which I thought they had rejected.
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> . . . .
>
> Are the courts really to pass on whether the topic or the subject was important enough to get first amendment protection?
>
> Now, my problem with it is not just administrative. There is an administrative or bureaucratic problem; we're going to have a lot more cases, the courts are going to have to answer a lot more questions. That is not the end of the world. The problem is that I don't think the courts ought to be in the business of making that sort of decision in the first place. And so, for that reason, the decision does trouble me a lot.

Id. at 24–25.

[144] On the tendency of the Supreme Court to "pigeonhole" first amendment cases, see Tribe, *supra* note 57, at 218.

tegorize issue advertising as either core first amendment or commercial speech, this framework regards issue advertisements as a separate category of expression. Under this framework, courts deciding issue advertisement cases should use neither the strict scrutiny standard of review reserved for regulations of core first amendment speech, nor the intermediate scrutiny reserved for regulations of commercial speech. On the contrary, courts should apply a different level of scrutiny when deciding whether regulations of issue advertisements are acceptable. This note proposes that if the regulated speech contains false or deceptive statements of fact which the advertiser should know are false or deceptive, then the government may prohibit the advertisement regardless of its interest in regulating the speech. If, however, the regulated speech consists of a statement of opinion, a truthful statement of fact, or a false and misleading statement of fact which the advertiser cannot know was false or misleading, then courts should subject the regulation to strict scrutiny.

Courts currently use two analyses when confronted with issue advertisements. Some courts focus on the speaker's motivation and regard issue advertisements as commercial speech and, therefore, apply an intermediate level of scrutiny to the regulation of the speech. Other courts focus on the importance of the content of the speech, find that the speech lies within the core of the first amendment, and apply a strict level of scrutiny to the regulation.[145] Instead of attempting to fit issue advertisements into either the category of commercial speech or core first amendment speech, courts should regard issue advertisements as a unique entity, sharing qualities of both types of speech. In conformity with its hybrid nature, courts should use a hybrid standard of review in deciding issue advertising cases.

This proposed framework draws upon elements of both types of speech. It is necessary, therefore, to examine the underlying reasons for the protections afforded each type in order to determine the proper standard of judicial review for issue advertisements. Courts strictly scrutinize regulations of core first amendment speech because free and open public debate is important and courts are reluctant to chill the free flow of ideas.[146] Regulation of commercial speech, however, is subject only to the intermediate level of scrutiny which the Court adopted in *Central Hudson*.[147] Under the *Central Hudson* standard, if the commercial speech is false or misleading, government may prohibit it.[148] If the commercial speech is not false or misleading, however, the state may regulate it only if the state demonstrates a substantial government interest in regulating the speech, the regulation advances that substantial interest, and it is no broader than necessary to achieve that goal.[149] Although courts refer to this as a four-part test, both structurally

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[145] *Compare* Bolger v. Youngs Drug Prods., 463 U.S. 60, 67–68 (1983) (Supreme Court adopted a motivation-oriented analysis when condom manufacturer distributed informational pamphlets detailing use of condoms in preventing venereal disease) *with* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776–78 (1978) (Supreme Court adopted content-oriented analysis when Massachusetts sought to prevent Bank from advocating the Bank's position on tax reform) *and* Consolidated Edison Co. of New York v. Public Serv. Comm'n, 447 U.S. 530, 537–40 (1980) (Supreme Court used content-based analysis when utility commission tried to restrain utility from inserting into its billing envelopes pamphlets claiming that nuclear energy is clean and efficient).

[146] See *supra* notes 27–40 and accompanying text for a discussion of the protection of core first amendment speech.

[147] See *supra* notes 57–65 and accompanying text for a discussion of the *Central Hudson* four-part test.

[148] *See supra* notes 59–62 and accompanying text.

[149] Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n, 447 U.S. 557, 564 (1980).

and theoretically this test is better understood as a two-pronged test. First, the speech must be truthful and not deceptive. Second, the regulation must pass intermediate scrutiny, that is, be no broader than necessary to advance directly a substantial state interest.

Structurally, the first prong of the *Central Hudson* test relates to the advertisement itself and is based on a different rationale than the second prong, which relates to the regulation. The *Virginia Board* Court's reasoning provides the first prong. According to the *Virginia Board* Court, false factual statements may be protected only because of the chilling that would result if speakers had to ensure that all statements they made were true.[150] A commercial advertisement, however, generally contains factual statements that the advertiser can verify easily because of its knowledge of the product or service.[151] Therefore, regulations may prohibit false and misleading claims by advertisers.[152] Thus, courts allow the government to prohibit false and misleading commercial speech under the first prong of the *Central Hudson* test because, as the *Virginia Board* Court noted, advertisers generally know when their statements are false or misleading.

The second prong of *Central Hudson's* intermediate scrutiny test is justified by the *Virginia Board* Court's other reason for limiting commercial speech protection — the minimal fear of chilling. The second prong requires that the government show only a substantial state interest in regulating commercial speech. In contrast, the government must demonstrate a compelling state interest if it wants to regulate noncommercial speech because of the "chilling" that might result when individuals are reluctant to speak for fear that their otherwise protected speech may be regulated.[153] Commercial advertisers, however, must advertise in order to sell their products or services and, therefore, will continue to speak through advertising even when faced with possible regulation of their speech.[154] Thus, because of the minimal danger of chilling noted in *Virginia Board*, courts may justify *Central Hudson's* less exacting scrutiny of commercial speech regulations.[155]

In the context of issue advertisements, the first prong of the *Central Hudson* test remains applicable, but the second prong does not apply. Courts should not permit advertisers to make false statements because regardless of the format in which the information is presented, the advertiser's knowledge remains constant. Thus, whether an advertiser states that people should buy eggs because no evidence exists that eggs are related to coronary disease, or expresses this statement in an editorial concerning recent government studies, the level of the advertiser's knowledge remains the same. If the statement is false, and the advertiser has reason to know it is false because of its involvement with the product — whether presented as an invitation for commercial transaction or as an editorial on a matter of public concern — the statement should not be granted constitutional protection.

Courts should not apply the second prong of the intermediate scrutiny test to issue advertisements. Instead, courts should apply a strict level of scrutiny to afford issue

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[150] *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 n.24 (1976).

[151] *Id.*

[152] *Central Hudson*, 447 U.S. at 563–64. *See supra* notes 59–61.

[153] New York Times v. Sullivan, 376 U.S. 254, 279 (1964).

[154] *See Virginia Bd.*, 425 U.S. at 771–72.

[155] *Central Hudson*, 447 U.S. at 564.

advertisements full first amendment protection, but only if the advertisements are not false or misleading. Advertisers need not express opinions on controversial subjects to sell their products or services.[156] Undue regulation, which courts would likely uphold under an intermediate level of scrutiny, may chill an advertiser's contribution to the public debate. Under the proposed test, however, if the advertisement contains only statements of opinion, or true and nondeceptive statements of fact, then the regulation would be subject to strict scrutiny.

This framework leads to results which better effectuate the purposes underlying the first amendment's protection of speech. Unlike the content-oriented analysis, this approach would not allow an advertiser to immunize false or misleading statements under the guise and format of an editorial on a matter of public importance.[157] If the statement is false, it is not protected under the first amendment, whether expressed in connection with a commercial transaction or in a public service announcement. In addition, unlike under the motivation-oriented analysis, no danger exists that government may regulate true and nondeceptive speech by an advertiser merely because the government disagrees with the content.[158] Courts would subject the regulation to strict scrutiny. Therefore, to consider issue advertisements properly under the first amendment, courts should use the following framework. If the speech contains erroneous or misleading factual statements,[159] and the advertiser knows or should know that these statements are false or deceptive, then government may regulate or prohibit such statements. If the statement is one of opinion, however, or it is a true factual assertion, or one which the advertiser has no reason to know is false, then courts should accord the speech full first amendment protection.

Applying this framework to some previously discussed cases illustrates its benefits. For example, under this framework, courts should consider both the Bank of Boston's editorial concerning the impact of graduated personal income tax[160] and Consolidated Edison's claim that nuclear power is clean and efficient[161] statements of opinion.[162]

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[156] *See* Abrams, *Restricting Corporate Editorial Comment Hardly Serves the Public*, L.A. Daily J., July 9, 1986, at 4, col. 6. Abrams observes:

> Corporate speech [on matters of public debate] is peculiarly subject to being chilled, not because corporations are poor or defenseless but because it is so easy for them to spend their money elsewhere than on editorial advertisements. Such expressions of opinion are always controversial. For many corporations, that controversy alone is reason enough to choose silence. For most others, the prospect of a bruising battle with the FTC is ample reason to devote resources to product advertisements rather than editorial commentary.

Id.

[157] *See supra* note 124 and accompanying text.

[158] *See supra* notes 125–28 and accompanying text.

[159] *See* Note, *Yes, FTC, There is a* Virginia: *The Impact of* Virginia State Board of Pharmacy v. Virginia Citizen's Consumer Council, Inc. *on the Federal Trade Commission's Regulation of Misleading Advertising*, 57 B.U.L. REV. 833, 849–52 (1977) (suggesting reasonable person standard for determining if statement of fact contained in advertisement is false or misleading).

[160] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

[161] Consolidated Edison Co. of New York v. Public Serv. Comm'n of New York, 447 U.S. 530 (1980).

[162] The distinction between fact and opinion is not always clear, and is specific to the circumstances of each case. Courts can analogize this distinction in commercial speech cases to the treatment of the same distinction in libel and slander cases. *See supra* note 56.

Therefore, the courts would protect these expressions by the Bank of Boston and Consolidated Edison fully under the first amendment.

Alternatively, National Commission on Egg Nutrition's claim concerning cholesterol and eggs,[163] and Youngs Drugs' information on venereal disease[164] exemplify factual statements. Courts should not prohibit factual statements unless they are false or misleading, and the advertiser had reason to know they are false or misleading. In order to determine whether the advertiser should have known that an advertisement was false or misleading courts can consider the relationship between the advertiser and the product discussed. Thus, regulations could prohibit the statements by NCEN and Reynolds because courts may assume that, due to the relationship between the advertiser and the product discussed, the advertiser should have known that the statements were false and likely to deceive, if, in fact, the statements were deceptive.

In sum, under the proposed framework, states may prohibit entirely false or misleading issue advertisements. Courts should strictly scrutinize, however, state regulations of issue advertisements that are true or contain matters of opinion. This framework would prevent advertisers from using issue advertisements to make false statements that they could not make otherwise, and would also prevent government from censoring unduly an advertiser's viewpoint.

Conclusion

To date, courts have struggled to place issue advertising into one of two pre-existing categories: core first amendment speech or commercial speech. Courts strictly scrutinize any regulations of core first amendment speech — speech which relates to matters of public importance or current debate. Thus, a state may regulate such speech only if it shows a compelling state interest, and if the means used are the least restrictive available. Courts accord commercial speech regulations only an intermediate level of scrutiny. Thus, a state may regulate commercial speech if the advertisement is false or deceptive, or if the state shows a substantial interest in the regulation.

Courts have attempted to squeeze issue advertising into a pre-existing category with no principles or criteria guiding the decision. Rather than attempt to label issue advertising "commercial" or "core first amendment" speech, this note has examined the reasons courts strictly scrutinize regulations of core first amendment speech, as well as the reasons they have granted commercial speech less protection. Because of the value of the advertiser's viewpoint to the listener, the proposed framework would not permit state regulation of true factual statements or statements of opinion absent a compelling state interest. Where, however, the statement is false or misleading the government may prohibit it entirely because of the advertiser's presumed familiarity with the product. This framework would thus prevent states from banning issue advertisements merely because they disagree with the content. In addition, this framework also recognizes that advertisers may try to use issue advertisements to make false statements which may otherwise be prohibited if phrased as a product advertisement. This framework preserves

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[163] National Comm'n on Egg Nutrition v. FTC, 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978).

[164] Bolger v. Youngs Drug Prods., 463 U.S. 60 (1983).

the state's interest in the clean flow of commercial information by allowing states to prohibit knowingly false or deceptive statements made by advertisers regardless of the format advertisers use. Advertisers could not spread false statements under the guise of an editorial and government could not regulate otherwise protected speech merely because it disagrees with the content.

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