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IN DEFENSE OF THE IMPRECISE DEFINITION OF COMMERCIAL SPEECH

NAT STERN*

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"[A] well-schooled [person] is one who searches for that degree of precision in each kind of study which the nature of the subject at hand admits . . . ."

In 1976, the Supreme Court formally abandoned its longstanding position that commercial speech categorically falls outside the realm of First Amendment protection.\(^2\) Over the course of more than two dozen decisions since then, the Court has not spelled out exactly what constitutes commercial speech and thus receives the "limited measure of protection"\(^3\) to which that expression is entitled. Rather, the Court has recited various descriptions, indicia, and disclaimers without settling upon a precise and comprehensive definition.\(^4\) The absence of a clearer demarcation between commercial and noncommercial expression is routinely denounced by commentators and occasionally within the Court itself.\(^5\) Some critics advocate alternative formulas to the Court's allegedly fumbling efforts to delineate the ambit of commercial speech.\(^6\) Others assert that no principled distinction exists be-

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1. ARISTOTLE, NICOMACHEAN ETHICS 5 (Martin Ostwald trans., Macmillan Publ'g Co. 1962).
4. See infra Part II.A (surveying the Court's evolving definition of commercial speech).
5. See infra Part II.B (surveying criticisms of the commercial speech definition).
6. See infra notes 231-236 and accompanying text (reviewing different definitions proposed to expand or narrow the Court's definition); Part III.F (evaluating the effectiveness of the standard set out in United States v. O'Brien, 391 U.S. 367 (1968)).
tween commercial expression and other types, so that the entire enterprise is inherently futile.\footnote{See infra note 216 (surveying commentators who argue that it is impossible to distinguish commercial from noncommercial speech).}

This Article contends that judicial reluctance to embrace a set of all-encompassing criteria for commercial speech represents a healthy pragmatism, not jurisprudential failure. Specifically, this Article seeks to show that freedom of expression has not suffered as a result of an indeterminate or overly expansive conception of commercial speech. The Court has developed a flexible but coherent method of identifying commercial speech commensurate with the complexity of the subject and the needs of a still-evolving First Amendment doctrine. While the Court has sometimes tolerated undue regulation of speech in commercial contexts, these lapses can generally be ascribed to excessive substantive deference to state regulation rather than improper designation of the nature of the restricted expression.

Admittedly, still greater clarity and protection might be achieved by eradicating the commercial speech category altogether; under such a regime, speech connected with commercial transactions would stand on the same plane as political and other types of expression that enjoy full-blown First Amendment protection. However, the Court has demonstrated scant inclination to take this step. More importantly, this Article argues that the Court’s current framework can accommodate the protection sought by all but the most zealous champions of expression plausibly denominated as commercial speech. At the same time, preservation of commercial speech as a discrete category fosters a more helpful body of precedent than ad hoc treatment of each issue as presenting a wholly new set of problems.

Part I provides an overview of modern commercial speech doctrine and the scholarly reaction that it has provoked. Part II canvasses more specifically the Court’s efforts to draw the bounds of commercial speech and reviews criticism of those efforts. Part III undertakes to show that theoretical deficiencies arising from the lack of a firmer test for characterizing speech as commercial dissipate upon closer inspection. Conversely, Part IV, endorsing Professor Schauer’s rejection of the view that “a distinction that cannot be sharply drawn cannot be drawn at all,”\footnote{Frederick Schauer, Commercial Speech and the Architecture of the First Amendment, 56 U. CIN. L. REV. 1181, 1189 (1988).} argues for the affirmative value of this imperfectly defined category of expression.
I. A Short History of Commercial Speech

The Court's decisions addressing the protection afforded commercial speech can be roughly grouped into three periods. In 1976, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* launched a fairly brief flourish of decisions emphatically rejecting governmental attempts to suppress accurate commercial information. The Court's opinion in *Central Hudson Gas & Electric Corp. v. Public Service Commission* in 1980 signaled the advent of a more ambiguous phase, during which the Court lurched between the anti-paternalistic impulse of *Virginia Pharmacy* and greater tolerance of restrictions on commercial speech. Finally, the current decade has been marked by a revived if not quite unswerving commitment to the original philosophy of *Virginia Pharmacy*.

A. Early Vigor

*Virginia Pharmacy's* robust protection of commercial speech decisively shed the long-eroded doctrine of *Valentine v. Chrestensen*. In a "casual, almost offhand" ruling, *Chrestensen* had pronounced "purely commercial advertising" ineligible for First Amendment consideration. Subsequent decisions, however, acknowledged that the com-

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12. See infra Part I.C (discussing the Court's decisions in the 1990s).


15. *Chrestensen*, 316 U.S. at 54. Chrestensen had violated a municipal ban on distribution of advertising material in the streets by disseminating handbills that publicized his exhibit of a retired United States Navy submarine. *Id.* at 53. Upholding enforcement of the ban in *Chrestensen*, *id.* at 55, the Court followed suit in subsequent decisions. See *Breard v. Alexandria*, 341 U.S. 622, 641-45 (1951) (denying First Amendment protection to door-to-door solicitations of magazine subscriptions), overruled by Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 632 & n.7 (1980); *Martin v. City of Struthers*,
mercial aspect of the sale of periodicals did not nullify First Amendment protection of their contents, declared that a newspaper's receipt of payment for publishing a public affairs advertisement did not diminish the First Amendment guarantee for that publication, and indicated that a city's power to prohibit want ads in sex-designated columns flowed from the illegal discrimination promoted by such advertisements rather than the wholesale irrelevance of First Amendment values to commercial expression. One term prior to Virginia Pharmacy, the Court explicitly recognized that First Amendment interests must be taken into account in assessing the validity of governmental restrictions on commercial advertising.

Virginia Pharmacy emphatically affirmed the potency of those interests. In striking down Virginia's ban on advertising the prices of prescription drugs, the Court linked communication of the suppressed information to a variety of First Amendment concerns. First was the ability of consumers to fulfill themselves by utilizing the comparative pricing data made available by the Court's ruling. The Court speculated that the elderly and others threatened by financial

319 U.S. 141, 142 n.1 (1943) (invalidating a ban on door-to-door solicitation as applied to a Jehovah's Witness, and noting that the ban was "not directed solely at commercial advertising"); Murdock v. Pennsylvania, 319 U.S. 105, 110-11 (1943) (quoting Chrestensen for the proposition that states may prohibit the use of the streets to distribute "purely commercial leaflets").

16. Breard, 341 U.S. at 642 ("[T]he fact that periodicals are sold does not put them beyond the protection of the First Amendment.").

17. New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) ("[W]e hold that if the allegedly libelous statements would otherwise be constitutionally protected from the present judgment, they do not forfeit that protection because they were published in the form of a paid advertisement.").


21. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-57, 757 n.15 (1976). The stake of listeners as well as speakers in free speech is a prominent motif of Virginia Pharmacy; see, e.g., id. at 756 (noting that First Amendment
drain from prohibitive drug prices could benefit from "the alleviation of physical pain or the enjoyment of basic necessities."\textsuperscript{22} In addition, the Court tied the accessibility of commercial information to the issue of public decisionmaking, often thought to lie at the heart of the First Amendment, by arguing that the free flow of commercial information helps citizens to make informed decisions about the extent to which America's predominantly free market economy should be regulated or altered.\textsuperscript{23}

Finally, and most fundamentally, the Court invoked the First Amendment's bedrock presumption in favor of the salutary nature of free expression. In a passage reminiscent of Holmes's call for a "free trade in ideas"\textsuperscript{24} and Brandeis's admonition against succumbing to fear as a reason for stifling expression,\textsuperscript{25} the Court rejected Virginia's contention that drug price advertising could trigger distorted perceptions and misguided conduct.\textsuperscript{26} Virginia had raised the specter that unrestrained advertising would generate a downward spiral in the pharmaceutical profession, as consumers chased the cheapest rather than best pharmacists, pharmacist-customer relationships unraveled, and the pharmacist's status was degraded "to that of a mere retailer."\textsuperscript{27} While not dismissing these concerns as implausible, the Court bluntly cast them as premised on the "advantages of [citizens] being kept in ignorance."\textsuperscript{28} The First Amendment, said the Court, did not counte-
nance "this highly paternalistic approach." Instead, it embodied a constitutional judgment that "the dangers of suppressing information" outweigh "the dangers of its misuse if it is freely available."

Still, the Court declined to extend unqualified First Amendment protection to commercial speech. The Court singled out two attributes of commercial speech that justify subjecting it to greater regulation than would be tolerated with respect to other modes of expression. First, the relative "objectivity" of commercial speech and advertisers' familiarity with their product or service support an expectation that commercial speakers can verify the truth of their message. Second, the "hardiness" of commercial speech, based on the dependence of commercial profits on advertising, reduces the possibility that it will be discouraged by regulation reasonably designed to insure that "the flow of truthful and legitimate commercial information is unimpaired."

The immediate progeny of Virginia Pharmacy continued to sound that decision's "anti-paternalistic" theme. In Linmark Associates, Inc. v. Township of Willingboro, the Court struck down an ordinance forbidding residents to display "For Sale" or "Sold" signs. The ban was aimed at "stem[ming] the flight of white homeowners from a racially integrated community." While approving the aim of promoting racially integrated housing, the Court condemned this means because it restricted certain messages based on apprehension "that they will cause those receiving the information to act upon it." As in Virginia Pharmacy, the state could not bar the dissemination of accurate information out of fear that its recipients would react "irrationally."

Perhaps even more telling was the Court's willingness to overturn the legal profession's longstanding taboo on advertising in popular

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29. Id. at 770.
30. Id.
31. Id. ("[W]e of course do not hold that it can never be regulated in any way. Some forms of commercial speech regulation are surely permissible.").
32. Id. at 772 n.24.
33. Id.
34. See Martin H. Redish, Tobacco Advertising and the First Amendment, 81 Iowa L. Rev. 589, 612 (1996) (noting that "[s]ubsequent decisions have adhered to the anti-paternalism model originally adopted in Virginia Board").
36. Id. at 86, 97.
37. Id. at 86.
38. Id. at 94.
39. Id. at 96.
media. In *Bates v. State Bar*, the Court ruled that a state through its bar could not prohibit attorneys' advertising about the price of routine legal services. As in *Linmark*, the State's justification was rooted largely in the feared impact of the proscribed message. However, while the town in *Linmark* was concerned with the socially destructive behavior that “For Sale” signs might spark, not their accuracy, the State argued in *Bates* that advertising of legal services inherently conveys distorted information. Specifically, the State asserted that such advertising is inevitably misleading because the exact mix of legal services required varies among clients, and that the type of advertising at issue in *Bates* did not contain all of the information relevant to the selection of an attorney.

In essence, the *Bates* Court viewed the State's theory as dependent on demeaning premises about the intelligence and decisionmaking capacity of those whom the State would shield from truthful information. The Court assumed that clients could determine the general type of services that they needed and that they were not prone to simplistic fallacies about the nature of advertising. More broadly, the Court again expressed its skepticism of justifications for suppressing truthful information “based on the benefits of public ignorance.”

During the same term, the Court also rejected a state's attempt to restrict commercial speech thought to overwhelm the public's sensibilities rather than its intellect. In *Carey v. Population Services International*, the Court struck down a blanket ban on the advertisement or display of contraceptives. The Court regarded as inadequate under the First Amendment the justification that advertisements of contra-

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41. Id. at 384.
42. Id. at 368-79 (suggesting that attorney advertising would undermine the profession's reputation, its focus on service to clients, its ability to secure client trust, and the effective administration of justice).
43. *Linmark*, 431 U.S. at 94-96 (noting that the township banned “For Sale” signs because of their effect, and that such signs communicated matters of fact).
45. Id. at 372. The state also argued that the lack of standardization of legal services renders fee schedules meaningless. Id. at 372-73. The Court responded that variations in the delivery of legal services did not make advertising misleading as long as the attorney performed the specified work at the advertised price. Id.
46. Id. at 374.
47. See id. at 375 (expressing suspicion that the argument that advertising's incomplete information misleads the public "rests on an underestimation of the public").
48. Id.
50. Id. at 700-02.
ceptive products would prove "offensive and embarrassing" to those exposed to them.\textsuperscript{51}

In the two subsequent terms, the Court upheld a pair of restrictions on commercial speech; neither decision, however, inevitably repudiated the anti-paternalistic heart of \textit{Virginia Pharmacy}.\textsuperscript{52} \textit{Ohralik v. Ohio State Bar Ass'n}\textsuperscript{53} sustained Ohio's limitations on the ability of its attorneys to solicit clients in person.\textsuperscript{54} Although the Court referred to commercial speech's "subordinate position in the scale of First Amendment values,"\textsuperscript{55} the opinion principally emphasized the dangers of intimidation and other forms of "'vexatious conduct'" peculiar to in-person solicitation,\textsuperscript{56} as well as Ohralik's own egregious conduct.\textsuperscript{57} Similarly, in approving a prohibition on practicing optometry under a trade name, the Court in \textit{Friedman v. Rogers}\textsuperscript{58} dwelt on the distinctive capacity of trade names to project a misleading impression of the character of the practice represented.\textsuperscript{59} Optometrists were still free to advertise in other ways the same information that was imperfectly conveyed through this label.\textsuperscript{60} Accordingly, the 7-2 majority that included Justices Stevens and Brennan\textsuperscript{61} perceived the ban as simply implementing \textit{Virginia Pharmacy}'s principle that a state may re-

\textsuperscript{51} Id. at 701.


\textsuperscript{53} 436 U.S. 447 (1978).

\textsuperscript{54} Id. at 467-68.

\textsuperscript{55} Id. at 456.

\textsuperscript{56} Id. at 462 (quoting Brief for Appellant at 25).

\textsuperscript{57} See id. at 463 ("[T]he appropriate focus is on appellant's conduct."); id. at 467 (noting that Ohralik "approached two young accident victims at a time when they were especially incapable of making informed judgments or of assessing and protecting their own interests"); id. at 470 (Marshall, J., concurring) (describing the Court's holding as limited to circumstances "presenting substantial dangers of harm... independent of the solicitation itself").

\textsuperscript{58} 440 U.S. 1 (1979).

\textsuperscript{59} Id. at 12-15.

\textsuperscript{60} Id. at 16 (noting that the statute regulating the practice of optometry does not prohibit advertising of the factual information, such as service prices, imparted by trade names).

\textsuperscript{61} Justices Stevens and Brennan may fairly be regarded as staunch advocates of strong First Amendment protection of commercial speech. \textit{See}, e.g., \textit{44 Liquormart, Inc. v. Rhode Island}, 517 U.S. 484, 503 (1996) (plurality opinion of Stevens, J.) ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.") (emphasis added); \textit{Posadas de Puerto Rico Assocs. v. Tourism Co. of P.R.}, 478 U.S. 328, 351 (1986) (Brennan, J., dissenting) (arguing that government regulation of the "dissemination of nonmisleading commercial speech relating to legal activities, for fear that recipients will act on the information provided... should be subject to strict judicial scrutiny") (emphasis added).
quire that commercial information "appear in such a form . . . as [is] necessary to prevent its being deceptive."62

B. The Ambivalent Eighties

The 1980s witnessed a step back from the principle that truthful, nonmisleading commercial speech enjoys full-blown First Amendment protection. A less stringent standard of scrutiny for restrictions on commercial speech appeared, and, in some decisions at least, the Court tacitly discarded Virginia Pharmacy's censure of paternalistic rationales. In other cases during this period, however, a pronounced anti-paternalistic strain persisted, especially in response to the bar's continuing efforts to limit lawyers' advertising.

1. Retrenchment.—Three decisions spanning the eighties—Central Hudson Gas & Electric Corp. v. Public Service Commission,63 Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico,64 and Board of Trustees of the State University of New York v. Fox65—represent downward arcs in the decade's unsteady trajectory of commercial speech protection.66 In its split between a result consistent with Virginia Pharmacy and language suggesting an approach more deferential to state regulation, Central Hudson particularly captures the Court's oscillating course. The Court struck down a state's blanket ban on advertising by an electric utility to promote the use of electricity.67 In the Court's view, the regulation suppressed more speech than necessary to further the State's interest in energy conservation.68

63. 447 U.S. 557 (1980).
64. 478 U.S. 328 (1986).
66. A fourth holding, Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (plurality opinion), discussed infra text accompanying notes 309-313, also represents a decline in protection. This plurality opinion, however, has uncertain precedential significance. See id. at 569 (Rehnquist, J., dissenting) (describing the Court's treatment of an ordinance regulating outdoor advertising as "a virtual Tower of Babel, from which no definitive principles can be clearly drawn"). Another case in which a restriction was upheld, San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522, 541 (1987), shed little light on divisions within the Court over the sort of treatment to be accorded commercial speech. See infra text accompanying notes 318-326 for a discussion of this case.
67. Central Hudson, 447 U.S. at 571.
68. Id. at 569-72. For example, the utility might advertise energy-efficient devices whose use would not undermine the State's goal. Id. at 570. Also, less restrictive alternatives, such as requiring inclusion of additional information about the efficiency of the service being advertised, might serve the State's purpose equally well. Id. at 570-71.
While champions of commercial speech could take comfort in Central Hudson's holding, the broader framework announced by the opinion contained more ominous implications. The Court promulgated a four-part test whose final and typically crucial criterion was that the restriction on commercial speech be "no[] more extensive than is necessary to serve [the State's] interest."69 Although this requirement denotes stringent scrutiny in the context of non-commercial speech,70 it assumed more tolerant overtones in the context of the Central Hudson standard.71 By suggesting its approval of more precisely tailored restrictions on promotional advertising,72 the Court indicated that truthful information could sometimes be suppressed to dampen demand for a lawful product.73 Justice Blackmun protested this apparent departure from Virginia Pharmacy's principle that government may not bar dissemination of such information in order to manipulate consumers' behavior.74

While Central Hudson marked an uncertain degree of decline in judicial solicitude for commercial speech, the Court's protection undoubtedly reached its nadir in Posadas. This decision sustained Puerto Rico's restriction of advertisements for casino gambling—a legal activity in the commonwealth—aimed at Puerto Rican residents.75 The Court first found that the prohibition passed a notably relaxed version of the Central Hudson test.76 In particular, any rigor that might be

69. Id. at 566. The first three prongs required that the speech "concern lawful activity and not be misleading" to qualify for protection, that "the asserted governmental interest [be] substantial," and that "the regulation directly advance[] the governmental interest." Id.

70. See, e.g., Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (requiring restrictions on sexually explicit telephone messages to "be carefully tailored to achieve [the government's] ends"); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978) (requiring restrictions on exposition of ideas by corporations to be "'closely drawn to avoid unnecessary abridgement'") (quoting Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam)).

71. See Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) (interpreting Central Hudson's requirement that a regulation not be more extensive than necessary to serve a state interest as requiring a "reasonable fit" between the regulation and the interest, rather than the least restrictive means).

72. Central Hudson, 447 U.S. at 570 (implying that a more limited restriction on the content of promotional advertising that served the State's interest in conserving energy might be permissible).

73. Id. at 574 (Blackmun, J., concurring) ("I seriously doubt whether suppression of information concerning the availability and price of a legally offered product is ever a permissible way for the State to 'dampen' demand for or use of the product.").

74. Id. at 576-77.


76. See id. at 340-44 (describing the last two steps of the Central Hudson test as "involv[ing] a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends").
read into the requirement that restrictions on commercial speech be no more extensive than necessary proved chimerical. The *Posadas* rendition of this criterion bowed to both the legislature and paternalism, as the Court deferred to Puerto Rico's judgment that suppressing advertisements for casino gambling was a more effective means of diverting residents from the risks of this activity than generating additional speech to discourage it.\(^77\)

In addition, the opinion contained logic that threatened to eviscerate the commercial speech doctrine itself. While *Virginia Pharmacy* viewed direct regulation of commercial activity as a constitutional alternative to suppressing speech about it,\(^78\) *Posadas* reasoned that the one subsumed the other. Under this principle, the "greater power" to prohibit completely an activity like casino gambling entails the "lesser power" to forbid advertising of that activity.\(^79\) Thus, only advertising about activities or products that themselves enjoyed constitutional protection would be immune to sweeping regulation.\(^80\)

By the end of the decade, the Court had reared back from *Posadas's* implications of wholesale deference to state regulation of commercial speech.\(^81\) Still, the Court was willing to uphold restrictions of even truthful commercial speech that were plausibly designed to further a valid interest. In *Fox*, the Court refused to invalidate a university’s rule prohibiting commercial enterprises from operating in campus facilities as a *per se* violation of the *Central Hudson* test.\(^82\) At the heart of the opinion lay the Court’s reformulation of the fourth prong of the *Central Hudson* standard. Declaring that it was aligning its formal standard with earlier results, the Court declined to require that government restrict no more commercial speech than strictly necessary to achieve its purpose.\(^83\) Instead, there need only be a "‘fit’ between . . . ends and the means . . . that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition

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77. Id. at 344.
81. Compare id. at 344 (leaving it solely “up to the legislature” to determine whether less restrictive means can effectively achieve the same end) with *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (requiring that the legislature’s choice of regulation be reasonable).
82. *Fox*, 492 U.S. at 480.
83. Id. at 476-80.
but one whose scope is ‘in proportion to the interest served.’”

In other words, the means to achieve the legislative objective would have to be “narrowly tailored” rather than “the least restrictive.”

2. Enclaves of Protection.—Decisions during the eighties did not invariably point to a weakening of the Court’s protection of commercial speech. Perhaps ironically, the bar’s chronic resistance to lawyer advertising provided the principal vehicle by which the Court expressed adherence to the anti-paternalistic spirit of Virginia Pharmacy. The Court repeatedly struck down restrictions explicitly or tacitly premised on low estimates of potential clients’ capacity to grasp accurate information about attorneys’ practices and credentials. In In re R.M.J., a unanimous Court overturned the enforcement of rules forbidding an attorney from listing areas of practice in a manner not conforming to a bar committee’s prescribed language and from listing the courts in which he was admitted to practice. The State failed to meet its burden of demonstrating that provision of this information was likely to mislead the public. Zauderer v. Office of Disciplinary Counsel ruled that a state could not prevent an attorney from soliciting business by running nondeceptive newspaper advertisements aimed at possible victims of an allegedly defective product. The advertisement at issue in Zauderer also contained a picture of the device; the Court rejected the State’s argument that illustrations inherently pose intolerable “risks that the public will be misled, manipulated, or confused.” Finally, Shapero v. Kentucky Bar Ass’n extended Zauderer’s protection to targeted direct-mail solicitation of potential clients.

84. Id. at 480 (quotations and citations omitted).
85. Id.
86. Another decision, Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 75 (1983), struck down a prohibition on mailing unsolicited advertisements for contraceptives. However, the case reveals more about the Court’s approach to distinguishing commercial from non-commercial speech than about its treatment of expression assigned to the latter category. See infra text accompanying notes 197-205 (describing the combination of factors leading the Court to classify the pamphlets in Bolger as commercial speech).
88. Id. at 204-07. The Court also rejected a limitation on the circulation of professional announcement cards. Id. at 206.
89. Id. at 205-06.
91. Id. at 647.
92. Id. at 630.
93. Id. at 648. The Court did uphold disciplinary action for violation of a disclosure provision requiring the advertisement to note that clients might be liable for litigation costs even if their lawsuits were unsuccessful. Id. at 650-53.
95. Id. at 472-78.
While recognizing that individualized review of such letters could produce a greater burden for authorities than a blanket ban, the Court invoked Zauderer's "'faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.'"\textsuperscript{96}

\textbf{C. Nineties Resurgence}

On the whole, the 1990s have thus far proved an era of relative invigoration of the commercial speech doctrine. Six of the decade's first eight decisions squarely raising the issue have thwarted government efforts to suppress the communication of truthful, nonmisleading commercial information,\textsuperscript{97} even the other two may be reasonably regarded as special cases if not outright aberrations.\textsuperscript{98} In handing down these generally protective decisions, the Court has also distanced itself from some of the deferential notions of the preceding phase.

1. \textit{Restrictions on Professional Solicitation}.—For the most part, the Court has continued to look askance at attempts to stifle advertising and other solicitation by professionals. \textit{Peel v. Attorney Registration & Disciplinary Commission}\textsuperscript{99} held that a state could not categorically bar attorneys from publicizing their certification in civil trial advocacy by the National Board of Trial Advocacy and similar specializations.\textsuperscript{100} Justice Stevens's plurality opinion expressly rejected the State's "paternalistic assumption" that recipients of Peel's letterhead were incapable of grasping that certification by a private organization did not amount to state imprimatur.\textsuperscript{101} Similarly, in \textit{Ibanez v. Florida Department of Business & Professional Regulation, Board of Accountancy},\textsuperscript{102} the Court upheld the right of an accountant recognized as a "Certified Financial Planner" by a private board to advertise this designation.\textsuperscript{103}

\textsuperscript{96.} \textit{Id.} at 478 (quoting \textit{Zauderer}, 471 U.S. at 646).
\textsuperscript{97.} \textit{See infra} notes 99-107, 114-120, 128-140.
\textsuperscript{98.} \textit{See infra} notes 108-113, 121-125.
\textsuperscript{99.} 496 U.S. 91 (1990) (plurality opinion).
\textsuperscript{100.} \textit{Id.} at 110. A majority of the Court appeared to endorse a requirement of sufficient disclosure to make such information not misleading. \textit{See id.} at 116 (Marshall, J., concurring) (arguing that the attorney's publication was potentially misleading so that a state constitutionally may require a disclaimer); \textit{id.} at 118 (White, J., dissenting) (same).
\textsuperscript{101.} \textit{Peel}, 496 U.S. at 105 & n.13.
\textsuperscript{102.} 512 U.S. 136 (1994).
\textsuperscript{103.} \textit{Id.} at 138-39. The Court also overturned disciplinary action against Ibanez for truthfully advertising her status as a certified public accountant, \textit{id.} at 143-44; she was licensed by the same state agency that sought to censure her, \textit{id.} at 138.
Again, the Court refused to indulge unsupported assumptions that potential clients would be led astray by hypothetical misconstructions of a truthfully reported credential.\(^{104}\) In *Edenfield v. Fane,\(^ {105}\) the Court even qualified its approval of *Ohralik's* ban on in-person solicitation.\(^ {106}\) The Court found the dynamics of the accounting profession sufficiently different from lawyer-client relations to invalidate a prohibition on certified public accountants' approaching potential business clients.\(^ {107}\)

A conspicuous exception to this line of cases was the Court's decision in *Florida Bar v. Went For It, Inc.*\(^ {108}\) to sustain enforcement of a prohibition on personal injury lawyers' sending targeted direct-mail solicitations within thirty days of an accident.\(^ {109}\) However, the decision appears to create a narrow precedent. The Court, limiting its holding to "the circumstances presented,"\(^ {110}\) emphasized the special state interest in shielding "bereaved or injured individuals" from a "willful or knowing affront to or invasion of [their] tranquility."\(^ {111}\) Justice O'Connor's opinion thus sought to distinguish the ban from invalid commercial speech restrictions "motivated primarily by paternalism."\(^ {112}\) In light of the Court's broader protective tendency, this 5-4 decision will probably turn out to be a rare and ephemeral victory in Justice O'Connor's generally unsuccessful campaign to reverse the course upon which the Court embarked in *Bates.*\(^ {113}\)

2. Discovery Network and Edge: *Split Decisions.*—More indicative of the direction of most recent commercial speech cases was the

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104. *Id.* at 144-46.
106. *Id.* at 765-67.
107. *Id.* at 774-76 (distinguishing between in-person solicitation by accountants and lawyers based on their professional training, characteristics of the recipient of the solicitation, and the atmosphere in which the solicitation is conducted).
109. *Id.* at 635.
110. *Id.* at 620.
111. *Id.* at 630.
112. *Id.* at 631 n.2.
113. See, e.g., *Edenfield v. Fane,* 507 U.S. 761, 778 (1993) (O'Connor, J., dissenting) (arguing that "the States have the broader authority to prohibit commercial speech that, albeit not directly harmful to the listener, is inconsistent with the speaker's membership in a learned profession and therefore damaging to the profession and society at large"); *Peel v. Attorney Registration & Disciplinary Comm'n,* 496 U.S. 91, 119 (1990) (plurality opinion) (O'Connor, J., dissenting) (arguing that states should have "considerable latitude" to enact regulations "designed to ensure a reliable and ethical profession"); *Shapero v. Kentucky Bar Ass'n,* 486 U.S. 466, 488-91 (1988) (O'Connor, J., dissenting) (arguing that restricting lawyer advertising serves to instill ethical standards in the legal profession where other methods have failed).
invalidation of a restrictive ordinance in *City of Cincinnati v. Discovery Network, Inc.* The ordinance had prohibited the distribution of "commercial" publications through freestanding newsracks located on public property. Infusing Fox's standard of scrutiny with teeth, the Court determined that the city had failed to demonstrate a "reason-able fit" between the prohibition and its asserted interests in safety and aesthetics. Since the larger number of newsracks containing non-commercial publications created harms of the same nature and arguably greater magnitude, the selective ban foundered on its blatant underinclusiveness. The Court expressly rejected Cincinnati's assertion that the intrinsic "'low value'" of commercial speech was sufficient ground for less favorable treatment of newsracks dispensing "'commercial handbills.'" Noting the absence of peculiarly "commercial harms" arising from the banned newsracks, *Discovery Network* appeared to impose on government the burden of showing that restrictions aimed at commercial speech are justified in order to prevent distinctively commercial harms.

That same term, the Court in *United States v. Edge Broadcasting Co.* upheld federal legislation barring broadcasters licensed in nonlottery states from airing lottery advertisements. While Edge was licensed in North Carolina, a nonlottery state, over ninety percent of its audience lived in Virginia, which did sponsor a lottery. Still, the Court found an adequate "fit" under *Central Hudson* and *Fox* between the ban and the federal interest in supporting the antigambling policy of states like North Carolina. The opinion explicitly relied on the rationale in *Posadas* that government may restrict the advertising of gambling to reduce demand.

115. *Id.* at 413.
116. *Id.* at 417 (quoting Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989)).
117. See *id.* at 417-18, 425-26 (noting that more dispensing devices were devoted to newspapers than handbills and that the devices had the same general appearance whether dispensing newspapers or handbills).
118. *Id.* at 428.
119. *Id.* at 426.
122. *Id.* at 436.
123. *Id.* at 423.
124. *Id.* at 429-30.
125. *Id.* at 434.
On the surface, it is difficult to reconcile the Court's opinion in *Edge*, which is avowedly paternalistic toward citizens and deferential to state regulation, with its opinion a few months earlier in *Discovery Network*, which was more protective of commercial speech. However, an unusual confluence of forces probably accounts for the apparent incongruity. First, the Court has long tolerated greater restrictions on broadcasting than on other media. Moreover, *Posadas* and *Edge* together suggest the Court's sympathy toward states' efforts to diminish the "vice" of gambling. Finally, the Court may have been eager to endorse a species of cooperative federalism.

3. Price Advertising for Alcoholic Beverages.—Two recent invalidations of statutes banning price advertising for alcoholic beverages bolster the likelihood that *Edge* represents an anomaly, not a trend. In *Rubin v. Coors Brewing Co.*, the Court struck down a federal prohibition on the disclosure of alcohol content of beer on labels or in advertising. The government had defended the statute as necessary to avert "strength wars" among competing beer companies. Carefully reviewing this justification in light of inconsistencies in the government's broader regulatory scheme, the Court was prepared to conclude that the ban did not even meet *Central Hudson*'s third requirement that a regulation of commercial speech directly advance its stated purpose. In any event, however, the restriction failed *Central Hudson*'s final test because it was "not sufficiently tailored to [the Government's] goal." The availability of less restrictive options,

126. See FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (stating that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection"); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388 (1969) ("[I]t is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.").

127. See New York v. United States, 505 U.S. 144, 167 (1992) ("[The Court has] recognized Congress' power to offer States the choice of regulating [private] activity according to federal standards or having state law pre-empted by federal regulation. This arrangement... has been termed 'a program of cooperative federalism,'..." (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981) (citations omitted))); *Hodel*, 452 U.S. at 264, 288-89, 304 (describing the Federal Surface Mining Act as a "program of cooperative federalism").

129. *Id.* at 478, 491.
130. *Id.* at 479.
131. For example, disclosure of alcohol content was permitted on labels for distilled spirits and required for wines with more than 14% alcohol. *Id.* at 488.
132. *Id.* at 486-88.
133. *Id.* at 490.
such as directly limiting the alcohol content of beer, indicated that the labeling ban was “more extensive than necessary.”

In 44 Liquormart, Inc. v. Rhode Island, the Court unanimously struck down a broader state ban on price advertising for alcoholic beverages, albeit not with one voice. In rejecting as a justification Rhode Island’s interest in restraining alcohol consumption, Justice Stevens’s plurality manifesto on behalf of commercial speech condemned this “wholesale suppression of truthful, nonmisleading information” as a violation of a protectively construed version of the Central Hudson test. Justice Thomas went even further, calling for abolition of the Central Hudson test and substitution of per se invalidity in the case of such paternalistic restrictions. On the other hand, Justice O’Connor, writing for four justices, found Rhode Island’s fit unreasonable under a more cautious reading of Central Hudson than the rigorous version advanced by Justice Stevens.

The splintered opinions in 44 Liquormart should not obscure the fact that this decision heralded a more protective attitude toward commercial speech. An attempt to direct consumers’ behavior by depriving them of accurate information failed even Justice O’Connor’s milder application of Central Hudson because in this instance the state could promote its goal by “less burdensome alternatives.” Moreover, Posadas was drained of its precedential authority: The Stevens plurality dismissed the entirety of Posadas’s main logic, and Justice O’Connor’s opinion acknowledged that rulings since Posadas had abandoned that decision’s deferential scrutiny.

D. Commentary

In extending a substantial measure of protection to commercial speech, the Court has staked a middle ground between unalloyed First
Amendment scrutiny and ordinary deference to state regulations. Commentators have approved or criticized this stance according to how they perceive commercial speech as contributing to the various functions of free speech generally.\textsuperscript{144} The Court's approach has been denounced both for providing inadequate and for bestowing excessive protection, as well as applauded (or at least acknowledged) as having generally steered a sensible course.

1. The Case Against Protection.—Numerous commentators have sounded variations of Justice Rehnquist's original protest in \textit{Virginia Pharmacy} that "a seller hawking his wares" is more the fare of commercial regulation than the concern of the First Amendment.\textsuperscript{145} As a principal theme, commentators assert that commercial speech is remote from the First Amendment's paramount goal of promoting expression regarding self-government.\textsuperscript{146} Lillian R. BeVier, for example, has argued against the First Amendment protection accorded the commercial advertising in \textit{Virginia Pharmacy} because of its irrelevance to political speech.\textsuperscript{147}

A second major objection derives from the view that the central purpose of freedom of speech is to further the liberty and self-realization of the speaker. This thesis has been most prominently associated with C. Edwin Baker.\textsuperscript{148} Applying this principle, Baker has declared

\begin{itemize}
\item \textsuperscript{144} An oft-cited summary of the values promoted by free speech establishes these categories: (1) assuring individual self-fulfillment, (2) advancing knowledge and discovering truth, (3) providing for participation in decisionmaking by all members of society, and (4) achieving a more adaptable and hence a more stable community. \textsc{Thomas I. Emerson}, \textit{The System of Freedom of Expression} 6-7 (1970); \textit{see also supra} notes 20, 23, 24-26, 29-30 and accompanying text (discussing First Amendment values in the context of \textit{Virginia Pharmacy}). \textit{See generally} Kent Greenawalt, \textit{Free Speech Justifications}, 89 \textsc{Colum. L. Rev.} 119, 130-54 (1989) (delineating and discussing both the consequentialist and the nonconsequentialist justifications for freedom of speech).
\item \textsuperscript{146} For a classic expression of the view that the overriding purpose of free speech is to foster self-governance, and that the level of First Amendment protection should reflect this principle, see \textsc{Meiklejohn}, \textit{supra} note 23, at 22-27; \textit{see also} Robert H. Bork, \textit{Neutral Principles and Some First Amendment Problems}, 47 \textsc{Ind. L.J.} 1, 27-28 (1971) (arguing that expression other than political speech should be excluded from the ambit of First Amendment protection); \textit{cf.} Vincent Blasi, \textit{The Checking Value in First Amendment Theory}, 1977 \textsc{Am. B. Found. Res. J.} 521, 554-65 (arguing that the purpose of the First Amendment is to check the abuse of governmental power).
\item \textsuperscript{147} Lillian R. BeVier, \textit{The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle}, 30 \textsc{Stan. L. Rev.} 299, 352-55 (1978).
\item \textsuperscript{148} See, \textit{e.g.}, C. Edwin Baker, \textit{The Process of Change and the Liberty Theory of the First Amendment}, 55 \textsc{S. Cal. L. Rev.} 293, 337, 341-43 (1982) [hereinafter Baker, \textit{Process of Change}] (advocating that the First Amendment "should protect the wide variety of uses of speech that are self-expressive or creative" and that such freedom facilitates progressive change); C.
that "a complete denial of first amendment protection for commercial speech is not only consistent with, but is required by, first amendment theory."\(^{149}\)

In perhaps the best-known piece of this genre, Thomas Jackson and John Jeffries incorporated the arguments from self-government and self-fulfillment into a sharp attack on the Court's decision to bring commercial speech under the aegis of the First Amendment.\(^{150}\)

In their view, regulation of ordinary business advertising like that in *Virginia Pharmacy* simply has "nothing to do"\(^{151}\) with freedom of expression properly understood, so that this decision is simply "inexplicable under traditional first amendment principles."\(^{152}\) Like Justice Rehnquist,\(^{153}\) they construed the result as judicial imposition of a plausible but constitutionally proscribed policy preference,\(^{154}\) "economic due process is resurrected, clothed in the ill-fitting garb of the first amendment."\(^{155}\)

In addition to these specific doctrinal critiques, Vincent Blasi has raised a broader teleological reservation with respect to according First Amendment status to commercial speech.\(^{156}\) From the "pathological perspective" urged by Professor Blasi, free speech issues should be resolved with a view toward "equip[ping] the first amendment to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically."\(^{157}\) This perspective suggests that diminished public respect for the First Amendment provoked by interference with established commercial speech regula-

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\(^{151}\) *Id.* at 38.

\(^{152}\) *Id.* at 25.


\(^{155}\) *Id.* at 30.


\(^{157}\) *Id.* at 449-50.
tion outweighs whatever benefits might accrue to free speech values from judicial oversight.\textsuperscript{158}

Finally, at least implicitly informing many of these arguments is skepticism toward the intrinsic worth of commercial speech generally. Some observers are quite explicit on this point. For example, Ronald K.L. Collins and David M. Skover, while reserving the question of exactly how First Amendment jurisprudence might be reshaped,\textsuperscript{159} decry the hollowness and irrationality of much advertising.\textsuperscript{160} Others have deconstructed the insidious means by which advertising is said to prey on consumers' subconscious faculties.\textsuperscript{161} On a larger scale, some apprehend global danger from the runaway consumption and growth spurred by mass advertising.\textsuperscript{162}

2. \textit{Calls for Elevation}.—An equally vociferous chorus of critics has faulted the Court for not extending its protection of commercial speech even further. In particular, many have disputed the very notion of a separate compartment of commercial expression receiving only qualified First Amendment protection. In their view, commercial speech "should be placed on par with noncommercial speech" in First Amendment jurisprudence.\textsuperscript{163} The argument for abolition of the commercial speech doctrine is based mainly on the contention that commercial expression, in its nature and its promotion of First Amendment values, cannot be categorically distinguished from non-commercial speech.\textsuperscript{164}

These proposals typically challenge \textit{Virginia Pharmacy}'s premise of commercial speech's greater "objectivity and hardiness" as "commonsense differences" between commercial and noncommercial speech.\textsuperscript{165} Noting the subjective character of much contemporary ad-

\textsuperscript{158} See id. at 488-89.
\textsuperscript{161} See, e.g., R. Moon, \textit{Lifestyle Advertising and Classical Freedom of Expression Doctrine}, 36 McGill L.J. 76, 109-12 (1991) (arguing that certain types of advertisements have little propositional content, but instead invest products with feelings or meanings that can then be transferred to the consumer by buying or using the product).
\textsuperscript{164} Id. at 223-26.
vertising, critics have challenged the proposition that commercial speech is intrinsically any more objective and hence verifiable than noncommercial speech.\textsuperscript{166} Even where relatively objective standards for assessing falsity exist, authentication may prove just as formidable an obstacle for commercial speech as for other types of expression, such as political speech.\textsuperscript{167} Moreover, it has been argued that the putative objectivity of commercial speech militates against, not in favor of, diminished protection; recipients should determine truth themselves rather than rely on government interference with expression.\textsuperscript{168}

The accuracy and relevance of commercial speech’s supposed hardiness have been similarly questioned. The profit motive that purportedly shields commercial speech from regulation’s chilling effect, it is pointed out, can also be discerned in other forms of expression that receive undiluted First Amendment protection, such as book publishing and news reporting.\textsuperscript{169} In addition, the quest for profits is not necessarily more powerful than other forces, such as religious fervor or political resolve, that motivate speech in the teeth of state re-

\begin{itemize}
  \item \textsuperscript{166} Alex Kozinski & Stuart Banner, \textit{Who’s Afraid of Commercial Speech?}, 76 VA. L. Rev. 627, 635 (1990) (arguing that commercial speech is no more verifiable than noncommercial speech in light of contemporary advertising); Redish, supra note 120, at 633 (questioning whether “the truth of commercial claims is more easily verifiable than the truth of political assertions”); cf: Leo Bogart, \textit{Freedom to Know or Freedom to Say?}, 71 Tex. L. Rev. 815, 816 (1993) (stating that it is impossible to separate the “information functions” of advertising from its “image-building aspects”); Rodney A. Smolla, \textit{Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech}, 71 Tex. L. Rev. 777, 800 (1993) (arguing that the inextricable mix of factual and fantasy components of commercial messages makes it “extremely difficult to regulate speech on the basis of the characteristics of any one communicative strain”).
  \item \textsuperscript{167} See Donald E. Lively, \textit{The Supreme Court and Commercial Speech: New Words with an Old Message}, 72 Minn. L. Rev. 289, 297 (1987) (noting that both commercial advertisements and political campaign promises can be misleading and difficult to verify).
  \item \textsuperscript{168} See Kozinski & Banner, supra note 166, at 636-37 (arguing that, even if commercial speech were objective, then listeners could verify it for themselves without the need for government protection).
  \item \textsuperscript{169} See id. at 637; Redish, supra note 120, at 633; see also Richard M. Schmidt, Jr. & Robert Clifton Burns, \textit{Proof or Consequences: False Advertising and the Doctrine of Commercial Speech}, 56 U. Cin. L. Rev. 1273, 1273-74 (1988) (arguing that “uncertainties in the federal regulation of advertising chill legitimate commercial speech and that even some false and misleading speech should be protected to provide breathing room for legitimate commercial speech”). See generally Jeffrey P. Singdahlsen, Note, \textit{The Risk of Chill: A Cost of the Standards Governing the Regulation of False Advertising Under Section 43(a) of the Lanham Act}, 77 Va. L. Rev. 339, 370-93 (1991) (concluding that the two explanations for the judicial lack of concern for the possible chilling effect of governmental regulation on commercial speech—the benefits of truthful advertising and the unique resilience of such speech—are insufficient and create inefficient uncertainty for advertisers).
\end{itemize}
strictions. In any event, it is argued, hardiness in and of itself does not constitute sufficient grounds for lesser protection.

The denigration of commercial speech as an inferior class of expression has also fared poorly in the hands of critics. In his path-breaking article five years prior to Virginia Pharmacy, Martin Redish undertook to demonstrate how commercial speech promotes a variety of First Amendment interests. Others have since elaborated on Redish’s thesis that commercial speech furthers core First Amendment values as much as other expression traditionally given greater protection. Moreover, approval of restrictions on commercial speech based on advertising’s lesser value goes against the grain of First Amendment jurisprudence, which restrains courts from making such judgments.

3. Intermediate Positions.—Of course, other voices can be heard toward the middle of the spectrum between full First Amendment protection for commercial speech and none. Rejecting unitary theo-

170. See Kozinski & Banner, supra note 166, at 637 (noting that speech backed by religious feeling or artistic impulses can persist in extraordinarily hostile climates); The Supreme Court, 1975 Term, 90 HARV. L. REV. 56, 150 (1976) (noting that the criterion of durability may apply to some types of noncommercial speech, such as an author’s resolve to publish the civil rights advertisement in New York Times Co. v. Sullivan).

171. Kozinski & Banner, supra note 166, at 637 (“Profit is clearly not a factor very useful for classifying speech.”).

172. Redish, supra note 19, at 443-48 (likening commercial speech to political speech, and arguing that the former aids in the “private self-governing function” by imparting information that allows individuals to make their own decisions).

173. See, e.g., R.H. Coase, Advertising and Free Speech, 6 J. LEGAL STUD. 1, 6 (1977) (arguing, in the context of advertising as well as generally, that “regulation will often be inimical to the interests of the community as a whole”); Charles Gardner Geyh, The Regulation of Speech Incident to the Sale or Promotion of Goods and Services: A Multifactor Approach, 52 U. PIT. L. REV. 1, 71 (1990) (proposing a multifactor approach to protecting commercial speech in light of the fact that “[s]peech incident to the sale or promotion of goods and services implicates a range of values underlying the first amendment”); cf. Burt Neuborne, A Rationale for Protecting and Regulating Commercial Speech, 46 BROOK. L. REV. 437, 440 (1980) (arguing that, while commercial speech deserves less protection, “rationales for both protecting and regulating commercial speech may be found in existing first amendment theory”); Michael J. Perry, Freedom of Expression: An Essay on Theory and Doctrine, 78 NW. U. L. REV. 1137, 1172-75 (1983) (arguing that, while commercial speech does not further First Amendment values to the same extent as other types of speech, it should receive the same degree of protection because of the practical difficulty of defining such speech).

174. See Daniel A. Farber, Commercial Speech and First Amendment Theory, 74 NW. U. L. REV. 372, 374 (1979) (noting that an “obvious tension exists between present commercial speech doctrine and the principle of content neutrality”); Smolla, supra note 166, at 792-93 (“[M]odern First Amendment doctrine does not require speech to demonstrate any redeeming social value as a predicate to its protection.”).
ries of First Amendment purpose, such as self-governance and self-realization, these observers express more sympathy for the Court's halting development of commercial speech doctrine if not invariable approval of its results. They view the Court's case-by-case approach not as unprincipled groping, but as pragmatic development of doctrine in the tradition of the common law.

Two scholars who have devoted sustained attention to this theme are Frederick Schauer and Steven Shiffrin. In contrast to those who would erase the line between commercial and noncommercial speech, Schauer regards the carving out of a distinctive First Amendment subcategory enjoying limited protection as "well-conceived." As the Court began to work out the contours of the commercial speech doctrine, Schauer found "little reason to suggest that the effort is mis-

175. See Edward J. Eberle, Practical Reason: The Commercial Speech Paradigm, 42 Case W. Res. L. Rev. 411, 414-18 (1992) (rejecting a "Grand Theory" of the First Amendment as containing a core of foundational values in favor of a "Middle Ground," which supports the many values furthered by protection of commercial speech); Weinberg, supra note 52, at 736-39, 744 (arguing that the First Amendment has four purposes—political self-government, self-expression, discovery of truth, development through perception—and that commercial speech promotes all but the second of these).


177. See Baker, supra note 149, at 3 ("GIVEN the existing form of social and economic relationships in the United States, a complete denial of first amendment protection for commercial speech is not only consistent with, but is required by, first amendment theory." (footnote omitted); see also Shiffrin, supra note 176, at 1239-51 (explaining and criticizing Baker's theory that the First Amendment protects self-expression, but that commercial speech, being motivated by profit, is excluded from such protection).

178. See, e.g., Laurence H. Tribe, American Constitutional Law 904 (2d ed. 1988) (criticizing Posadas but indicating that the balancing test that evolved in the wake of Virginia Pharmacy "provided tolerable guideposts in a confounding corner of first amendment jurisprudence"); Daniel Hays Lowenstein, "Too Much Puff": Persuasion, Paternalism, and Commercial Speech, 56 U. Cin. L. Rev. 1205, 1248 (1988) (advocating a common law approach toward commercial speech, and approving the result that advertising which "serve[s] the consumer's interest in making informed purchasing decisions has been protected"); Christopher D. Stone, Theorizing Commercial Speech, 11 Geo. Mason U. L. Rev., Winter 1988, at 95, 111 (discussing the difficulty of distinguishing commercial speech, but arguing nonetheless that "the Court seems right to ally with commonsense in refusing to jettison all commercial/noncommercial distinctions and leave us with one unitary standard of review").

179. See Ronald A. Cass, Commercial Speech, Constitutionalism, Collective Choice, 56 U. Cin. L. Rev. 1317, 1382 (1988) (concluding that the Court's approach to this category of speech seems especially attractive when the proposed alternatives are considered); Schauer, supra note 8, at 1202 (suggesting that the common law development of First Amendment doctrine, out of necessity, "cannot design the edifice in advance").

COMMERCIAL SPEECH

8

In an influential article in 1983, Shiffrin discussed the Court's treatment of commercial speech as an example of the salutary "[e]clectic [a]pproach" that the Court had taken toward First Amendment methodology. Shiffrin found promise in the Court's balancing of "the impact of challenged regulations on first amendment values against the seriousness of the evil that the state seeks to mitigate or prevent, the extent to which the regulation advances the state's interest, and the extent to which the interest might have been furthered by less intrusive means."

II. ATTEMPTS AT DEFINITION

The Court's efforts to define the contours of the commercial speech category do not break down into neat rules or stages. However, certain themes and decisions have been sufficiently definite to form a discernible if not altogether vivid picture of what expression the Court is likely to regard as commercial speech. While this evolution has not been a model of consistency, it has not hindered the development of rational commercial speech doctrine.

A. Judicial Ventures

One type of expression that obviously meets any fair conception of commercial speech is that which does "no more than propose a commercial transaction." Applied to the straightforward context in which the Court invoked this characterization in Virginia Pharmacy, this sort of speech appears to bear what the Court regarded as the hallmarks of commercial speech: objectivity and hardiness. On the surface at least, speech of this nature—whatever protection it ultimately deserves—probably struck the Virginia Pharmacy Court as standing in obvious contrast to "ideological communication" that "is integrally related to the exposition of thought." This description

181. Id. at 291.
182. See, e.g., Tribe, supra note 178, at 896 (describing Shiffrin's piece as "a powerful essay").
183. Shiffrin, supra note 176, at 1251.
184. Id. at 1252.
185. See infra Parts III-IV.
187. Id. at 772 n.24. But see supra notes 166-171 and accompanying text (noting criticism of the view that commercial speech is any more verifiable or durable than other forms of speech).
188. Virginia Pharmacy, 425 U.S. at 779 (Stewart, J., concurring). Later decisions have addressed this distinction. See, e.g., In re Primus, 436 U.S. 412, 434 (1978) (comparing First
also comported with the results of decisions prior to Virginia Pharmacy that raised issues of protection in commercial contexts. To the extent that commercial speech doctrine provides only limited protection, confining its reach in this way reserves full protection for a greater amount of expression.

While continuing to affirm simple proposals of commercial transactions as falling within the “core notion of commercial speech,” the Court has also suggested that the category encompasses a considerably larger sphere of expression as well. For example, in treating trade names as a form of commercial speech, the Friedman Court did not require that the regulated expression itself constitute a specific proposal to buy or sell as long as it could reasonably be linked to one. Central Hudson tentatively codified this expanded concept of commercial speech by equating it with expression “related solely to the economic interests of the speaker and its audience.” The Court apparently regarded this definition as the logical outgrowth of “the commonsense” distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to govern-
ment regulation, and other varieties of speech.” The formulation, however, has been at best sporadically invoked in subsequent cases.

More clearly auguring future doctrine was the Central Hudson Court’s refusal to grant full First Amendment protection for advertising simply because it “links a product to a current public debate.” To avoid unnecessarily “blur[ring] . . . the line the Court has sought to draw in commercial speech cases,” the Court declared a distinction between fully protected “direct comments on public issues” and statements about public policy “made only in the context of commercial transactions.” The Court’s approach to expression containing a mixture of commercial and noncommercial elements was later refined in two major decisions addressing the problem of classification: Bolger v. Youngs Drug Products Corp. and Board of Trustees of the State University of New York v. Fox.

Bolger is less notable for its invalidation of a federal statute banning the mailing of unsolicited advertisements for contraceptives than for the means by which it determined that the advertisement in question constituted commercial speech. The drug company, Youngs, had sought to mail, inter alia, various “informational pamphlets” that promoted the use of prophylactics to prevent pregnancy and disease; some pamphlets described specific Trojan-brand condoms manufactured by Youngs, while others stated that Youngs had sponsored the pamphlet as a public service. Because the pamphlets contained discussions of “important public issues” such as venereal disease and family planning, the Court conceded that they transcended simple

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193. Id. at 562 (quoting Ohralik, 436 U.S. at 455-56).
194. Compare In re R.M.J., 455 U.S. 191, 204 n.17 (1982) (characterizing commercial speech as speech limited to the economic interests of the speaker and its audience) with Rubin v. Coors Brewing Co., 514 U.S. 476, 493 (1995) (Stevens, J., concurring) (stating that “the borders of the commercial speech category are not nearly as clear as the Court has assumed”), and City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 423 (1993) (noting that previous decisions have not simply applied Central Hudson’s “economic interests” approach). Interestingly, a narrower definition would have sufficed to reach the speech at issue in Central Hudson itself; the Court construed the Public Service Commission’s regulation as “restricted to all advertising ‘clearly intended to promote sales.’” Central Hudson, 447 U.S. at 562 n.5 (citation omitted).
195. Central Hudson, 447 U.S. at 563 n.5.
196. Id.
197. See Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 73-74 (1983) (finding that the “marginal degree” by which the prohibition advanced the government’s interest in helping parents to discuss birth control with their children did not justify the intrusion on the interests of adults willing to receive such material).
198. Id. at 62 n.4.
199. Id. at 68.
proposals of commercial transactions. Still, the Court classified the pamphlets as commercial speech because of the following factors: (1) the pamphlets were acknowledged to be advertisements, (2) they referred to a specific product of the advertiser, and (3) Youngs had an economic motivation for mailing the pamphlets. While none of these features was dispositive (or conversely, required) to regarding the pamphlets as commercial speech, "[t]he combination of all these characteristics" placed the pamphlet into this category.

Echoing Central Hudson, the Bolger Court had noted that a company has the option of addressing public issues directly if it wishes to avail itself of plenary First Amendment protection. In Fox, the Court formalized this focus on whether the noncommercial portion of hybrid expression could be effectively ventilated elsewhere. The "Tupperware parties" banished from the university in this case consisted of more than a sales pitch for the company's products. In addition, those gatherings included discussion of other topics, such as financial and domestic responsibility. The Court observed, however, that this admittedly noncommercial expression was not essential to the central purpose of the presentations: "No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares." Since the company's commercial solicitation was not "inextricably intertwined with otherwise fully protected speech," the Court reviewed the university's regulation under the standards for commercial speech.

200. Id. at 66.
201. Id. at 66-67.
202. See id. at 67 n.14 (disclaiming intention "to suggest that each of the characteristics present in this case must necessarily be present in order for speech to be commercial").
203. Id. at 66-67.
204. Id. at 67.
205. Id. at 68; see Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n, 447 U.S. 557, 563 n.5 (1980); cf. Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 496 (1982) (upholding an ordinance licensing and regulating the sale of items displayed near "literature encouraging illegal use of cannabis or illegal drugs" where the ordinance did "not prohibit or otherwise regulate the sale of literature itself" (quoting the ordinance)).
206. Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989). In Fox, the Court considered the validity of a university rule prohibiting commercial enterprises from operating in campus facilities. Id. at 480.
207. Id. at 472, 474.
208. Id. at 474.
209. Id.
211. Fox, 492 U.S. at 475.
While the Court periodically has incanted Virginia Pharmacy’s “commonsense” distinction between “speech that ‘does no more than propose a commercial transaction’ . . . and other varieties,”212 the Court in Discovery Network conceded “the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category.”213 The Court, however, did not explore the specific implications of this generalization for the issue in that case. Instead of resolving whether all of the “commercial handbills” restricted by Cincinnati’s ordinance amounted to “‘core’ commercial speech,” the Court assumed that they did and found the ordinance invalid even on that premise.214

B. Criticism

The Court’s admission that the line between commercial and noncommercial speech “will not always be easy to draw”215 has not

212. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976) (quoting Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations, 413 U.S. 376, 385 (1973)); see Rubin v. Coors Brewing Co., 514 U.S. 476, 482 (1995) (utilizing the “commonsense” distinction to hold unconstitutional a federal ban prohibiting beer labels from displaying alcohol content); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 (1985) (holding that under the “common-sense” approach, the “pure and simple” advertising at issue clearly fell within the commercial speech category); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n, 447 U.S. 557, 561-63 (1980) (recognizing that the protection available for commercial speech depends upon the speech itself and the governmental interests served by its regulation); Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447, 455-56 (1978) (noting that the Virginia Pharmacy Court maintained the “common-sense” distinction between commercial and noncommercial speech even while extending First Amendment protection to the former); Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 98 (1977) (reaffirming the “commonsense” differences between commercial and noncommercial speech); see also Florida Bar v. Went For It, Inc., 515 U.S. 618, 623 (1995) (“[The Court has] always been careful to distinguish commercial speech from speech at the First Amendment’s core.”).

213. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 419 (1993); see Zauderer, 471 U.S. at 637 (noting that the “precise bounds” of the category of commercial speech may be “subject to doubt”).

214. Discovery Network, 507 U.S. at 423-24. The opinion’s other ambiguous contribution to the definition of commercial speech was its description of Fox as “characterizing the proposal of a commercial transaction as ‘the test’ for identifying commercial speech.” Id. at 423 (emphasis added) (quoting Fox, 492 U.S. at 473-74). Any suggestion that Fox confined commercial speech to proposals of commercial transactions is undercut by Fox itself, because the Court treated the marketing activity in that case as commercial speech despite the “noncommercial aspects of these presentations.” Fox, 492 U.S. at 474. Also, the Discovery Network Court’s recitation of this test as one of several approaches indicated the absence of a single test for identifying commercial speech. See Discovery Network, 507 U.S. at 420-23.

215. In re Primus, 456 U.S. 412, 438 n.32 (1978); see Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 536 (1981) (plurality opinion) (Brennan, J., concurring) (stating that the distinction between commercial and noncommercial speech “[i]n individual cases . . . is anything but clear”).
mollified critics of the Court’s efforts to do so. Of course, those who believe that the distinction “makes no sense” would regard any attempt at compartmentalization of speech in this way as misguided. However, even numerous commentators who consider the distinction worth preserving have lamented what they regard as the erratic manner in which the Court has drawn it. Thus, while some observers have indicated appreciation of the Court’s piecemeal determination of the boundaries of commercial speech, it is common for the Court’s ap-

216. Kozinski & Banner, supra note 166, at 628; see Alan Howard, The Constitutionality of Deceptive Speech Regulations: Replacing the Commercial Speech Doctrine with a Tort-Based Relational Framework, 41 Case W. Res. L. Rev. 1093, 1096 (1991) (proposing that commercial speech doctrine be replaced by a broader “relational framework” that “distinguishes speech that primarily implicates speaker values, such as self-expression, from speech that primarily implicates listener values, such as the listener’s interest in obtaining information that will aid him or her in making decisions”); Jeffrey M. Shaman, Revitalizing the Clear-and-Present-Danger Test: Toward a Principled Interpretation of the First Amendment, 22 Vill. L. Rev. 60, 63 (1976-1977) (“[T]he categorization technique is fundamentally untenable. It is based upon the fiction that certain types of speech are not speech . . . .”); Scott Joachim, Note, Seeing Beyond the Smoke and Mirrors: A Proposal for the Abandonment of the Commercial Speech Doctrine and an Analysis of Recent Tobacco Advertising Regulations, 19 Hastings Comm. & Ent. L.J. 517, 541-50 (1997) (proposing eradication of the “illusory” distinction between commercial and noncommercial speech).

In recent years, doubts about the tenability of the distinction between commercial and noncommercial speech have been expressed within the Court as well. See 44 Liquormart, Inc., v. Rhode Island, 517 U.S. 484, 520 (1996) (Thomas, J., concurring) (noting that the Court itself has at times stressed the “near impossibility of severing ‘commercial’ speech from speech necessary to democratic decisionmaking”); Coors, 514 U.S. at 494 (Stevens, J., concurring) (asserting the “artificiality of a rigid commercial/noncommercial distinction”).

Unsurprisingly, those who favor relatively little First Amendment protection for commercial speech tend not to be much daunted by the difficulty of recognizing it. See, e.g., Jackson & Jeffries, supra note 150, at 2 & n.4 (asserting that there is “a clean distinction between the market for ideas and the market for goods and services,” and that it is not difficult to perceive the “general contours” of commercial speech). But see Collins & Skover, supra note 160, at 716-22 (expressing concern over the commercialization of putatively noncommercial modes of speech).

217. See Tribe, supra note 178, at 896 (noting that “principled accommodation of the conflicting values at stake may indeed be the most appropriate course in the commercial speech area, and [that] the Supreme Court . . . [has] generally stayed that course in recent years”); Samuel A. DiLullo, The Present Status of Commercial Speech: Looking for a Clear Definition, 90 Dick. L. Rev. 705, 730 (1986) (noting that a “case-by-case analysis may provide the only practical approach”); Schauer, supra note 8, at 1184-85 (noting that it is understandable that the Court has “conspicuously avoided saying just what [commercial speech] is”); Allan Tananbaum, Note, “New and Improved”: Procedural Safeguards for Distinguishing Commercial from Noncommercial Speech, 88 Colum. L. Rev. 1821, 1838 (1988) (rejecting a mechanical test for identifying commercial speech in favor of “the accretion of case-specific factors”); see also R. George Wright, Freedom and Culture: Why We Should Not Buy Commercial Speech, 72 Denv. U. L. Rev. 137, 157 (1994) (noting that, while a single definition of commercial speech may be impossible, there is “reason for believing that ambiguities in the idea of commercial speech will not commonly generate implausible or seriously harmful results”).
proach to be dismissed as “vague,” “cumbersome,” “unintelligible,” and “random and haphazard.”

This asserted lack of clarity and consistency in identifying commercial speech has produced repeated criticism of the uncertainty with which particular expression will be classified. The resulting inability of speakers to predict the category to which their expression will be assigned is thought to chill a significant amount of protected expression. Conversely, unsuspecting speakers might be ensnared in the net of a malleable conception of commercial speech. These

221. David F. McGowan, Comment, A Critical Analysis of Commercial Speech, 78 Cal. L. Rev. 359, 397 (1990); see Geyh, supra note 173, at 48 (criticizing “the Court’s several random stabs at a definition of commercial speech”); Howard, supra note 216, at 1119 (“The court’s inability to fashion a coherent definition of commercial speech undermines its usefulness.”); Bradley Paul Nelson, Note, Briggs & Stratton Corp. v. Baldrige: International Boycotts and the Politics of Commercial Speech, 1986 Wis. L. Rev. 367, 375 (arguing that “the Supreme Court has failed to formulate a satisfactory commercial speech definition”).
222. See Shiffrin, supra note 176, at 1222 (“It is unclear whether the Court’s locution focuses on the message, the motivations of speaker and audience, or on some other aspect or combination.”).
223. See Howell A. Burkhalter, Comment, Advertorial Advertising and the Commercial Speech Doctrine, 25 Wake Forest L. Rev. 861, 867 (1990) (noting the “conflict fostered by the Court’s ambiguous standard” in cases of mixed speech); McGowan, supra note 221, at 394 (stating that the Court’s approach has generated “uncertainty”); The Supreme Court, 1992 Term—Leading Cases, 107 Harv. L. Rev. 144, 234 (1993) (noting that “the Central Hudson test has become less of a constitutional fortification and more of a doctrinal maze”).
224. See Howard, supra note 216, at 1119 (suggesting that “[s]peakers . . . might be inclined to steer well clear of an unpredictable definitional boundary”); Burkhalter, supra note 223, at 867 (“The ambiguous ‘commonsense’ standard prevents commercial speakers from knowing whether their speech will be protected by the Court and discourages the distribution of important commercial information.”); see also Melville B. Nimmer, Nimmer on Freedom of Speech § 4.11, at 4-155 (1984) (noting that the “chilling effect” of an overbroad regulation may be of greater impact on commercial speech than on protected speech); cf. Comment, Standard of Review for Regulations of Commercial Speech: Metromedia, Inc. v. City of San Diego, 66 Minn. L. Rev. 903, 919 (1982) (arguing that an “adequate definition of commercial speech” is needed so that restrictive ordinances will not “significantly chill noncommercial expression”); Thomas W. Merrill, Comment, First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine, 44 U. Chi. L. Rev. 205, 224 (1976) (asserting that the financial incentives of a business to secure its right to advertise varies with the resources of the business and the expected return of the advertisement).
225. See Lively, supra note 167, at 295 (“The Court’s ability to devalue expression it may conveniently characterize as commercial is disquieting.”); Tarsney, supra note 9, at 573 (“The Supreme Court’s commercial speech jurisprudence is best described as a
fears are compounded where administrative agencies have substantial responsibility for regulating commercial speech.\textsuperscript{226}

The lack of guidance said to flow from \textit{Bolger}'s multifactor approach to mixed speech has been particularly called into question. Considered anywhere from "perplexing"\textsuperscript{227} to "unworkable,"\textsuperscript{228} the \textit{Bolger} test has attracted scant endorsement among commentators. To harsher critics, the immediate "misclassification"\textsuperscript{229} of Youngs's pamphlets epitomizes the broader "imprecision and confusion"\textsuperscript{230} sewn by the Court's enumeration of relevant but nonbinding factors.

The perception of the Court's having repeatedly stumbled in attempting to mark the outlines of commercial speech has inspired a wide array of alternatives to supply the deficiencies in these definitional efforts. A few take a highly expansive view—sweeping in, for example, "\textit{any} speech by a 'commercial entity'"\textsuperscript{231} or even "\textit{any} expression concerned with buying or selling."\textsuperscript{232} Others, seeking to narrow the reach of commercial speech doctrine, would confine diminished protection to expression related to the contractual aspects of commercial speech.\textsuperscript{233} Under some proposals, commercial speech cannot be reduced to a single unifying principle, but rather must yield to a more nuanced approach based on smaller, discrete categories of commercial minefield where unsuspecting litigants attempting to apply the Court's precedents find themselves victimized . . . ."

\textsuperscript{226} See Redish, \textit{supra} note 220, at 1459-60 (arguing for de novo judicial review of an agency's determination that an advertiser's claim is false); Tananbaum, \textit{supra} note 217, at 1842-43 (arguing that administrative agencies may be politically motivated in determining the category of speech).

\textsuperscript{227} TRIBE, \textit{supra} note 178, at 897.


\textsuperscript{230} Karl R. Swartz, Note, 32 U. KAN. L. Rev. 679, 696 (1984); see Simon, \textit{supra} note 218, at 237 (criticizing "the Court's attempted test and the definitional factors on which it rests . . . [as] both too broad and too narrow").

\textsuperscript{231} Richard M. Alderman, \textit{Commercial Entities' Noncommercial Speech: A Contradiction in Terms}, 1982 \textit{UTAH} L. Rev. 731, 744. Alderman defines "commercial entity" as "any business entity whose existence is based on profit, excluding entities whose business is communication or entertainment, or that exist primarily for religious, charitable or civic purposes." \textit{Id.} at 744-45.


\textsuperscript{233} See Farber, \textit{supra} note 174, at 387 ("So long as a regulation relates to the contractual function of the utterance, the regulation should not be subjected to the intensive scrutiny required when a regulation directly implicates the first amendment function of language."); cf. Whelan, \textit{supra} note 228, at 1145 (suggesting that an advertising statement can be considered a contractual offer subject to regulation as such).
cial communication.\textsuperscript{234} Most commonly, candidates for a functional definition of commercial speech center around the role of expression in promoting commercial interests. Some remain close to the core notion of advertising,\textsuperscript{235} while others suggest somewhat broader notions of promotion.\textsuperscript{236}

III. THE FALLACIES OF CHARGING DEFINITIONAL FAILURE

The superficial impression of the Court's floundering from case to case to patch together a dangerously vague and inconsistent definition of commercial speech does not hold up under scrutiny. Viewed as a whole, the Court's pronouncements on the nature of commercial speech possess as much clarity and coherence as can reasonably be expected in modern First Amendment jurisprudence. While the Court in some cases has arguably granted inadequate protection to commercially related expression, this failure cannot generally be attributed to the imprecision or illogic of its commercial speech definition.\textsuperscript{237} In fact, the Court's avoidance of mechanical tests and rigid categorization has promoted recognition of reasoned distinctions

\begin{footnotesize}
\textsuperscript{234} See, e.g., Richard L. Barnes, A Call for a Value-Based Test of Commercial Speech, 63 WASH. U. L.Q. 649, 682-84 (1985) (categorizing speech into sixteen permutations according to combinations of four possible purposes and four possible subjects that a message might have); Dennis William Bishop, Note, Building a House on a Weak Foundation: Edenfield v. Fane and the Current State of the Commercial Speech Doctrine, 22 PEPP. L. REV. 1143, 1165 (1995) ("[T]here are multiple types of commercial speech, each deserving of a differing level of protection.").

\textsuperscript{235} See, e.g., McGowan, supra note 221, at 401 (proposing as a definition of commercial speech "speech that does no more than propose the sale of a specific, named good or service"); Merrill, supra note 224, at 236 (proposing as a definition of commercial speech "(1) speech that refers to a specific brand name product or service, (2) made by a speaker with a financial interest in the sale . . . ., (3) that does not advertise an activity itself protected by the first amendment"); Nelson, supra note 221, at 392 (limiting the commercial speech doctrine to its "relatively simple and well accepted [place] in the commercial advertising context"); Kirk P. Watson, Comment, Regulating Commercial Speech: A Conceptual Framework for Analysis, 32 BAYLOR L. REV. 235, 235 (1980) (defining commercial speech as "advertising and soliciting of products or services for the purpose of inducing a prospective customer to participate in a commercial transaction"); see also Jackson & Jeffries, supra note 150, at 1 (regarding the "reasonably settled" meaning of commercial speech as "business advertising that does no more than solicit a commercial transaction or state information relevant thereto").

\textsuperscript{236} See, e.g., Simon, supra note 218, at 244 ("[C]ommercial speech is . . . calculated expression in the form of advertising or promotional material which is designed by the speaker to affect consumer purchases on the basis of information or impressions contained therein resulting in action which is harmful to individual consumers or to society as a whole."); Nadir N. Tawil, Comment, Commercial Speech: A Proposed Definition, 27 HOW. L.J. 1015, 1027 (1984) ("Commercial speech is an expression designed primarily to promote a commercial product, service, or a business interest.").

\textsuperscript{237} See supra text accompanying notes 75-77 and 121-125 (discussing Posadas and Edge Broadcasting as two instances where the Court's validation of regulations restricting gam-
among expression in various commercial settings. Moreover, given
the Court's recent solicitude for commercial speech, the notion that
classifying speech as commercial relegates it to a First Amendment
backwater has become increasingly antiquated. Upon closer inspec-
tion, the dire consequences sometimes hypothesized for misclassifica-
tion appear more as speculative musings than likely applications of
current doctrine. In some cases, criticism that characterization of ex-
pression as commercial speech has resulted in diminished protection
is misplaced because an entirely different doctrine supplies the rele-
vant ground for decision. Finally, while replacement of the com-
mercial speech doctrine (and therefore definition) itself with a more
generalized test may seem an alluring prospect, such standards are by
no means guaranteed to provide more certainty or even protection
than the doctrine that they would supplant.

A. Discerning a Rational Construct

While one might disagree with the scope or intensity of judicial
review under the commercial speech doctrine, the general reach of
that doctrine should not be considered nebulous or unprincipled. At
the level of doctrine, the Court has established a comprehensible
spectrum of expression with reference to commercial activities. At
one end is speech that is directly incidental to a commercial activity
that the government has chosen legitimately—from a constitutional
standpoint—to regulate. Here, the expressive element is subordinate
to the underlying commercial conduct, and government may restrict
both as the ordinary fare of economic or social legislation. While a
vendor's announcement of the street price of heroin or the sale of
banned foreign fruit might qualify as commercial speech, no one seri-
ously doubts that these lie on its unprotected periphery.

Next comes expression falling within the "core notion" of com-
mercial speech: "speech which does 'no more than propose a com-

bling advertisements possibly expressed support for state restrictions on the "vice" of gam-
blining, rather than the incoherence of the commercial speech doctrine).

238. See Shiffrin, supra note 176, at 1252 (arguing that, while the classification of speech
varies on the context, such variation is necessary in light of complex social reality); supra
text accompanying note 225 (discussing the claim that the commercial speech doctrine is a
malleable conception).

239. See supra note 237 and accompanying text.

240. For an overview of government's greater power to regulate economic activity than

(1980) (requiring that commercial speech "concern lawful activity" to qualify for First
Amendment protection).
mercial transaction."242 This includes, of course, advertisements unambiguously promoting specific products or services. Less obvious in its classification is broader promotional expression such as trade names,243 "image advertising,"244 and other commercially animated speech outside of straightforward advertising or solicitation. While the nature of such speech may be subject to conflicting characterization, it appears to be judged by the extent of its resemblance to the distinctive attributes of "core" commercial speech.245

Perhaps most problematic is hybrid expression: speech with conspicuously commercial and noncommercial aspects. As discussed below, the Court in effect has developed several discrete subcategories into which such speech may fall.246 Rather than simplistically lumping together all instances in which a commercial entity speaks or solicitation occurs, the Court has sought to determine whether the content of a communication contains an essential, inextricable dimension of fully protected expression.247 Again, while particular designations may be open to question, the outlines of this approach are fairly evident; the Court's treatment of mixed speech has not been murky, haphazard, or arbitrary.248

Indeed, while the level of protection accorded commercial speech has fluctuated over the decades, the touchstone of severability in characterizing expression has appeared with striking persistence. Chrestensen itself actually involved a two-sided handbill; the flipside of Chrestensen's announcement of his submarine exhibition displayed a

244. See infra Part III.D.1.
245. See Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66-67 (1983) (holding that the questionable pamphlets' combination of characteristics, such as being a piece of advertising, referring to a specific product, and its distribution being economically motivated "provide[ ] strong support for the . . . conclusion that the informational pamphlets are properly characterized as commercial speech"); Friedman v. Rogers, 440 U.S. 1, 10-11 (1979) (discussing the use of a trade name as a form of commercial speech because it serves to identify the attributes of the product or service for sale; is used as part of a sale; does not provide any "newsworthy fact" or information; and has a "strictly business" purpose).
246. See infra text accompanying notes 251-282 (discussing the Court's treatment of mixed speech).
248. See infra notes 254-282 and accompanying text (discussing the Court's treatment of speech involving charitable solicitation and expression by corporations).
(presumably protected) protest against the city’s refusal to allow him to moor the submarine at a city pier.\textsuperscript{249} Although Chrestensen hoped that this commentary on public policy would immunize the entire handbill, the Court dismissed the protest as a “civic appeal” cynically “append[ed]” to an unequivocally commercial advertisement.\textsuperscript{250} As noted earlier, the theme of withholding full-blown First Amendment status from mixed speech whose noncommercial component could be detached from its commercial communication was fleshed out in \textit{Central Hudson, Bolger,} and \textit{Fox.}\textsuperscript{251} While it might be argued that this standard imposes a crabbed conception of protected speech,\textsuperscript{252} it is neither unpredictable nor irrational. Of course, the validity of particular regulations of mixed speech may not always be clear; however, the uncertainty is more likely to flow from doubts about the Court’s level of protection than about the necessity of accompanying certain commercial messages with noncommercial baggage. Moreover, the Court’s concern about attempts to shield otherwise regulable commercial expression by superimposing public policy discussion\textsuperscript{253} is not an implausible one.

The Court’s ability to distinguish between mixed expression in which the commercial element predominates, and that to which fully protected speech is integral, is illustrated in a series of cases involving charitable solicitation. Viewing the solicitation of charitable contributions as “fully protected speech,”\textsuperscript{254} the Court has struck down a variety of restrictions: a prohibition on door-to-door or on-street solicitation by organizations that did not apply at least seventy-five percent of their receipts to “charitable purposes” as defined by the ordinance,\textsuperscript{255} a limit of twenty-five percent of the money collected for charities (after the deduction of certain costs) by professional fundraisers,\textsuperscript{256} and a requirement that fundraisers disclose to potential do-

\begin{itemize}
\item \textsuperscript{250} Id. at 55.
\item \textsuperscript{251} See supra notes 195-211 and accompanying text.
\item \textsuperscript{252} But see infra notes 293-301 and accompanying text (discussing examples in which the Court overturned regulation of commercial speech).
\item \textsuperscript{253} See Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 68 (1983) (refusing to allow advertisers to “immunize false or misleading product information from government regulation simply by including references to public issues”).
\item \textsuperscript{254} Riley v. National Fed’n of the Blind of N.C., Inc., 487 U.S. 781, 796 (1988); see id. at 803 (Scalia, J., concurring) (agreeing with the holding that “solicitation of money by charities [is as] fully protected as the dissemination of ideas”).
\item \textsuperscript{255} Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 622, 639 (1980).
\item \textsuperscript{256} Secretary of State v. Joseph H. Munson Co., 467 U.S. 947, 950-51, 969-70 (1984).
\end{itemize}
nors the percentage of charitable contributions collected during the previous twelve months that were actually turned over to charity.\textsuperscript{257} While the Court recognized that charitable solicitation "in the abstract" might be regarded as commercial speech, these overtures shed their "commercial character" because they were "inextricably intertwined" with fully protected speech.\textsuperscript{258} Accordingly, the Court reviewed restrictions on such solicitation in light of "the nature of the speech taken as a whole."\textsuperscript{259}

Another illustration of the Court's refusal automatically to classify solicitation as commercial speech is the difference in outcomes between \textit{Ohralik} and \textit{In re Primus}. While Ohralik's repeated approaches to an accident victim and her parents to induce their consent to a contingent-fee arrangement\textsuperscript{260} undoubtedly qualified as commercial speech, the \textit{Primus} Court declined to extend this principle to all solicitation of legal representation.\textsuperscript{261} Primus, a cooperating lawyer with the American Civil Liberties Union (ACLU), had been disciplined by the state for informing a woman who had been sterilized as a condition of receiving public medical assistance that the ACLU was willing to provide free legal representation in a suit against the performing doctor.\textsuperscript{262} To the Court, the ACLU's employment of litigation as "a form of political expression" and 'political association'\textsuperscript{263} was pivotal in removing Primus's communication from the realm of commercial speech. The pursuit of legal representation is not an undifferentiated commercial whole; Primus's attempt to "express personal political beliefs and to advance the civil-liberties objectives of the ACLU" could not be identified with Ohralik's quest for "financial gain."\textsuperscript{264}

\textsuperscript{257} \textit{Riley}, 487 U.S. at 795-801. \textit{Riley} also invalidated provisions barring "unreasonable" fees as determined by statute, id. at 787-95, and imposing on professional fundraisers a licensing requirement that allowed for indefinite delay in granting the license, id. at 801-02.

\textsuperscript{258} Id. at 796.

\textsuperscript{259} Id. That the noncommercial aspect of a charitable solicitation is not always "inextricable" from its commercial dimension is demonstrated by \textit{International Society for Krishna Consciousness, Inc. v. Lee}, 505 U.S. 672, 685 (1992) (upholding a prohibition against charitable solicitation in an airport as reasonable). \textit{See} John Dziedzic, Comment, Krishna v. Lee \textit{Extricates the Inextricable: An Argument for Regulating the Solicitation in Charitable Solicitations}, 17 U. Puget Sound L. Rev. 665, 680 (1994) (noting that the Court's treatment of face-to-face encounters involving financial exchange as subject to regulation, and those involving the dissemination of information as not, shows that "the commercial transaction is not inextricably intertwined with the protected speech of a charitable solicitation").


\textsuperscript{261} \textit{In re Primus}, 436 U.S. 412, 422 (1978).

\textsuperscript{262} Id. at 414-21.

\textsuperscript{263} Id. at 428 (quoting \textit{NAACP v. Button}, 371 U.S. 415, 429, 431 (1963)).

\textsuperscript{264} Id. at 422.
The Court’s treatment of various expression by corporations has been similarly discriminating. The Court has avoided the facile assumption that the commercial character of the entity from which corporate speech emanates renders that speech intrinsically commercial. Instead, the Court has carefully examined the content and context of corporate expression to determine whether it merits full First Amendment protection.

The contrasting classifications of the expression at issue in *Central Hudson* and *Consolidated Edison Co. of New York v. Public Service Commission*\(^{265}\) illustrate the Court’s capacity to apply the distinctions described earlier in the setting of corporate speech. In *Central Hudson*, the Court rejected the suggestion that some of the utility’s advertising of energy-saving devices was entitled to fuller First Amendment protection than commercial speech because of the advertisement’s implications for national conservation policy.\(^{266}\) Because “many, if not most, products may be tied to public concerns with the environment, energy, economic policy, or individual health and safety,” the Court refused to grant full First Amendment protection to “any advertising that links a product to a current public debate.”\(^{267}\) In this way, *Central Hudson* anticipated the theme of severability developed in later decisions.

In *Consolidated Edison*, on the other hand, the Court recognized that the commercial impetus behind the utility’s expression did not detract from its essentially political character. Consolidated Edison had included with a monthly bill an insert proclaiming the benefits and disparaging the risks of nuclear power.\(^{268}\) The Commission sought to bar Consolidated Edison from sending future inserts expressing the utility’s “‘opinions or viewpoints on controversial issues of public policy.’”\(^{269}\) However, acting on the principle that utilities “enjoy the full panoply of First Amendment protections for their direct comments on public issues,”\(^{270}\) the Court would not tolerate a restriction that “strikes at the heart of the freedom to speak.”\(^{271}\)

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267. *Id.*
269. *Id.* at 533 (citation omitted).
270. *Central Hudson*, 447 U.S. at 563 n.5 (referring to the concurrent ruling in *Consolidated Edison*).
Similarly, in *First National Bank of Boston v. Bellotti*, the obvious financial self-interest behind a corporation's message did not deter the Court from locating that message "at the heart of the First Amendment's protection." The bank had sought to spend money to publicize its opposition to a proposed state constitutional amendment authorizing enactment of a graduated personal income tax. The bank's campaign ran afoul of a state statute forbidding certain types of corporations from expending funds "for the purpose of . . . 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." In striking down the statute, the Court emphasized the importance that the First Amendment attached to speech concerning governmental affairs; the "inherent worth" of that speech did "not depend upon the identity of its source, whether corporation, association, union, or individual." Whether *Bellotti*'s ultimate view of the merits is persuasive or not, its analysis mitigates the danger that the Court will casually equate commercial motivation with commercial speech.

A final affirmation that corporate speech will be classified by its content rather than its origin can be found in Justice Powell's plurality opinion in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*. *Pacific Gas* had included with its monthly bills a newsletter that contained items ranging from political editorials to objective information about utility services and bills. In order to provide Pacific's customers with diverse perspectives, the commission sought to compel the utility also to include the newsletter of a public interest group. Treating the requirement in terms of the compulsion to speak, the plurality subjected the commission's order to stringent scrutiny and struck down this form of "compelled access."

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273. *Id.* at 776.
274. *Id.* at 769.
275. *Id.* at 768 (ellipsis in original). Questions pertaining to individual taxation were expressly excluded from the latter category. *Id.* at 768 n.2.
276. *Id.* at 777.
277. *See id.* at 809 (White, J., dissenting) (finding the prohibition justified as a means of preventing corporate wealth gained "as a result of special advantages extended by the State" from being used to "acquire an unfair advantage in the political process").
278. 475 U.S. 1, 8 (1986) (plurality opinion).
279. *Id.* at 5.
280. *Id.* at 5-7.
281. *See id.* at 16-17 (requiring the government to show a "compelling interest" for this "content-based grant of access to private property").
282. *See id.* at 9, 20 (observing that states cannot "advance some points of view by burdening the expression of others").
B. The Unimportance of Imperfection

It is unnecessary to endorse all of the Court's commercial speech decisions to conclude that imprecision in its definition of commercial speech, however understood, has done little harm to commercial speech. The great majority of the Court's decisions have involved communication that qualifies as commercial speech by virtually any definition. Where the Court has dubiously characterized ambiguous expression, little demonstrable harm has resulted from the possible misclassification. Conversely, in those decisions that have been singled out for harshest criticism, the Court's arguably inadequate protection is not attributable to an overbroad conception of the scope of commercial speech. Similarly, major issues that have occupied the lower courts by and large do not hinge on problems of classification. In addition, the spectre of creeping expansion of the lesser-protected commercial speech category—"reverse dilution"—does not appear to have materialized.

1. The Prevalence of Easy Calls.—A strong indication that the difficulty of defining commercial speech is generally more theoretical than practical is the relative rarity with which the Court has had to confront the problem. The clear-cut nature of most of the expression that the Court has labeled commercial speech was evident from the outset of the doctrine. In Virginia Pharmacy, the expression at issue consisted of no more than the proposal that "I will sell you the X prescription drug at the Y price." Whatever level of First Amendment protection one might think this message deserves, it is commercial speech if the category has any meaning and content at all. Likewise, while the prohibition of "For Sale" signs in Linmark had economic, social, and political implications that could be expected to inspire debate, it seems obvious that the constitutional dimension of that debate must take place within the framework of commercial speech doctrine. In the long line of cases about advertising by lawyers and

283. See infra Part III.B.2.
284. See Redish, supra note 220, at 1456-58 (dismissing the concern that characterizing scientific claims made for products as "commercial speech" could lead to reduced protection for scientific claims as such).
286. See Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 87-91 (1977) (noting that the ban on "For Sale" signs was intended to stop declines in white ownership of houses in integrated neighborhoods).
287. See id. at 92 (noting that the restriction concerned "commercial information" about realty).
other professionals, as well, the crucial issue was not whether the advertising amounted to commercial speech, but rather what legal significance to attach to that designation.\textsuperscript{288} The characterization of advertising of liquor prices,\textsuperscript{289} beer's alcohol content,\textsuperscript{290} casino gambling,\textsuperscript{291} and contraceptive devices\textsuperscript{292} appears similarly straightforward.

Where classification has been murkier, the Court's disputable treatment of expression as commercial speech has not inevitably led to upholding the challenged restriction. For example, while the predominance of public health discussion in the prohibited pamphlets in Bolger\textsuperscript{293} might have justified regarding them as fully protected speech,\textsuperscript{294} their characterization as commercial speech did not prevent the Court from holding that this "restriction of 'the free flow of truthful information' constitutes a 'basic' constitutional defect regardless of the strength of the government's interest."\textsuperscript{295}

\textsuperscript{288} See Florida Bar v. Went For It, Inc., 515 U.S. 618, 635 (1995) (noting that solicitation of personal injury or wrongful death clients through direct mail is "pure commercial advertising"); Ibanez v. Florida Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy, 512 U.S. 136, 142 (1994) (noting that the parties did not dispute that Ibanez's use of CPA and CFP designations was commercial speech); Edenfield v. Fane, 507 U.S. 761, 765 (1993) (noting that "it is clear that this type of [direct] personal solicitation [of clients] is commercial expression"); Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 472 (1988) (categorizing "lawyer advertising" as commercial speech); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 (1985) (describing a lawyer's newspaper solicitations as "advertising pure and simple"); Bates v. State Bar, 433 U.S. 350, 384 (1970) (characterizing the attorney's expression as "truthful advertisement concerning the availability and terms of routine legal services"). Although Justice Kennedy asserted that it would "oversimplify" to consider Went For It's approaches to accident victims and their survivors "commercial speech and nothing more," his dissent proceeded on the premise that the case was controlled by "commercial speech rules." Went For It, 515 U.S. at 636 (Kennedy, J., dissenting).

\textsuperscript{289} See Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996) (considering only the question of the state's interest in banning alcohol price advertising as a way to promote temperance).

\textsuperscript{290} See Rubin v. Coors Brewing Co., 514 U.S. 476, 481 (1995) (indicating that both parties agreed that information on the beer labels at issue constituted commercial speech).

\textsuperscript{291} See Posadas de Puerto Rico Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 340 (1986) (noting that "this case involves the restriction of pure commercial speech").


\textsuperscript{293} See Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 62 n.4 (1983) (noting that the pamphlets addressed the "use, manufacture, desirability, and availability" of condoms and the advantages of condoms in helping to prevent venereal disease).

\textsuperscript{294} See id. at 81-83 (Stevens, J., concurring) (noting the dual nature of the speech contained in the pamphlets); Barnes, supra note 234, at 663 (arguing that the "pamphlets cannot be characterized as mere proposals to enter into a commercial transaction").

\textsuperscript{295} Bolger, 463 U.S. at 75 (quoting Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 95-96 (1977)).
In *Peel*, the petitioner made a plausible argument that the appearance on his letterhead of his certification in civil trial advocacy, in and of itself, did not warrant treatment as commercial speech. However, even proceeding on the assumption that the ban on this expression should be governed by commercial speech doctrine, the plurality ruled that the suppression foundered on the principle that "disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information." Similarly, in *Discovery Network*, much of the material excluded from Cincinnati's sidewalks could readily have been considered noncommercial speech. Again, however, the Court's assumption that all of the restricted expression constituted commercial speech was coupled with invalidation of that restriction.

On the other hand, where the Court's upholding of restrictions may have been most vulnerable to charges of underprotectiveness, the

296. See *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 99 (1990) (plurality opinion) (noting Peel's argument that "absent evidence of any use of the letterhead to propose commercial transactions with potential clients," it should be treated as noncommercial speech); Steven Helle, *Attorney Advertising After Peel*, 78 Ill. B.J. 542, 546-47 (1990) (describing *Peel* as an "excellent example of the difficulty in definition").

297. *Peel*, 496 U.S. at 99-100 (noting that the use of letterhead to advertise certification is an issue that should be decided under the standards of commercial speech).

298. *Id.* at 108.

299. See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423 (1993) (noting that the material at issue could not be described as "'core' commercial speech").

300. *Id.* at 424.

301. *Id.* It might be argued that the classification of the expressions in both *Peel* and *Discovery Network* as commercial speech represented application of one of the "Ashwander rules" according to which the Court seeks to avoid passing on constitutional questions. See *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). That is, by assuming without deciding that the restricted expression constituted commercial speech, the Court reached the same result of invalidation that characterization as noncommercial speech would have produced, without having to confront the potentially thorny problem of classification. Whether the Court in these two cases would have ultimately deemed the expression commercial speech, no harm resulted from arguably mistaken classification.

Where debatable classification as commercial speech might in fact affect the validity of a restriction, another Ashwander rule may furnish an alternative ground for protection. In *SEC v. Lowe*, 725 F.2d 892 (2d Cir. 1984), rev'd, 472 U.S. 181 (1985), the Second Circuit upheld an SEC order forbidding Lowe from publishing certain newsletters. *Id.* at 902. Rejecting the dissent's vigorous argument that the newsletters did not amount to commercial speech, see *id.* at 904-07 (Brieant, J., dissenting), the court dismissed Lowe's First Amendment challenge to the order, largely on the authority of *Ohradik, Lowe*, 725 F.2d at 898-902. On appeal, the Supreme Court overruled the order as not authorized by the relevant statute without reaching the First Amendment question. *Lowe*, 472 U.S. at 188; see *Ashwander*, 297 U.S. at 348 (Brandeis, J., concurring) (setting forth the rule of "ascertain[ing] whether a construction of the [challenged] statute is fairly possible by which the [constitutional] question may be avoided" (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932))).
principal complaint against the Court’s analysis has been its alleged misapplication of the commercial speech doctrine rather than its application. A trio of widely attacked decisions involved communication that would seem to fall within readily recognizable forms of commercial speech. Posadas—which triggered a torrent of criticism—was generally condemned for its greater-includes-the-lesser reasoning and its blunt paternalism, rather than a sense that advertising of casino gambling does not really amount to commercial speech. Likewise, it was the “informational protectionism” embodied in a ban on broadcasting lottery advertising, not a contention that this qualified as noncommercial speech, that rankled critics of Edge. And while the lawyer solicitation of accident victims and their relatives in Went For It arguably had noncommercial implications, the chief defect ascribed to the Court’s decision to sustain a ban on such solicita-

302. See, e.g., Tribe, supra note 178, at 903 (predicting that adoption of the Posadas approach “would plainly upset the Court’s carefully evolved balancing test, and lead to dilution of existing protections of speech”); Philip B. Kurland, Posadas de Puerto Rico v. Tourism Company: “Twas Strange, Twas Passing Strange; Twas Pitiful, Twas Wondrous Pitiful, 1986 Sup. Ct. Rev. 1, 2 (faulting Posadas for its lack of “guidance for future decisions . . . [and] lucid reasoning”); David A. Strauss, Persuasion, Autonomy, and Freedom of Expression, 91 Colum. L. Rev. 334, 359 (1991) (faulting Posadas because its reasoning “would permit restrictions on speech in the wide range of cases in which the government could prohibit the action that the speech encourages”); Steve Younger, Comment, Alcoholic Beverage Advertising on the Airwaves: Alternatives to a Ban or Counteradvertising, 34 UCLA L. Rev. 1139, 1172 (1987) (criticizing the Court for “invest[ing] the government with overly broad powers to ban advertising”).

303. Posadas de Puerto Rico Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 354 n.4 (1986) (Brennan, J., dissenting) (“I do not agree that a ban on casino advertising is ‘less intrusive’ than an outright prohibition of such activity.”); see Tribe, supra note 178, at 903 (describing this reasoning as “singularly inappropriate in the first amendment context”); Kurland, supra note 302, at 10-15 (characterizing the greater-includes-the-lesser argument as a “per-version of First Amendment law”).

304. See Posadas, 478 U.S. at 358 (Brennan, J. dissenting) (disagreeing with the majority’s belief that Puerto Rico may constitutionally prevent its citizens from receiving nondeceptive commercial speech concerning lawful activities because it fears the effect of the information); Kurland, supra note 302, at 8-10 (noting that Puerto Rico wished to protect its own citizens from the very activity it advertised to tourists); Strauss, supra note 302, at 353 (questioning the government’s ability to persuade people not to do “harmful things”); Younger, supra note 302, at 1166-73 (pointing out that even the majority thought it was “highly suspect” that the ban was only directed at residents of Puerto Rico).


306. See, e.g., Tarsney, supra note 9, at 561-62 (noting the dissenting opinion’s belief that the government was using “ignorance” to manipulate the “consumer choices” of its residents).

307. See Florida Bar v. Went For It, Inc., 515 U.S. 618, 636 (1995) (Kennedy, J., dissenting) (warning against oversimplifying the considerations before the Court by ignoring speech that may be “vital to the recipients’ right to petition the courts for redress of grievances”).
tion was its failure to comply with the Court's own test for the regulation of commercial speech.\textsuperscript{308} Even in a case such as Metromedia, Inc. v. City of San Diego,\textsuperscript{309} where sticky issues concerning the distinction between commercial and noncommercial speech might be anticipated, the Court's willingness to uphold a problematic statute did not turn on an expansive conception of commercial speech. Metromedia upheld portions of an ordinance that generally prohibited commercial billboards outside of the premises of the billboard's sponsor.\textsuperscript{310} At the same time, the Court struck down the ordinance's ban on most types of noncommercial advertising.\textsuperscript{311} While the decision enshrines a distinction between commercial and noncommercial speech, the case did not call upon the Court to elucidate this distinction. Indeed, Justice Brennan's objection to sustaining the ban on commercial billboards was grounded not in the Court's reliance on a particular definition of commercial speech, but in the ban's procedural mechanism. Although Brennan noted the difficulty of distinguishing commercial from noncommercial speech,\textsuperscript{312} his ultimate complaint was that the ordinance left this determination to city officials in the first instance.\textsuperscript{313}

It is true that there are a number of cases in which arguably insufficient protection might be linked to dubious classification as commercial speech; the dissenters' reliance on other grounds, however, suggests that if the Court stumbled in these cases it was not over a faulty characterization of the speech involved. For example, even if

\textsuperscript{308} See id. at 635-42; Ronald D. Rotunda, Professionalism, Legal Advertising, and Free Speech in the Wake of Florida Bar v. Went For It, Inc., 49 ARK. L. REV. 703, 720-29 (1997) (criticizing the Court's application of the Central Hudson test and the research on which the Court relied).

\textsuperscript{309} 453 U.S. 490 (1981) (plurality opinion).

\textsuperscript{310} Id. at 493-96, 507-12.

\textsuperscript{311} Id. at 512-21.

\textsuperscript{312} Id. at 536, 539 (Brennan, J., concurring).

\textsuperscript{313} Id. at 536-40. Of course, a broad definition of commercial speech poses no threat to commercial expression under a law that favors that type of expression, see Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) (plurality opinion) (upholding city's refusal to permit political advertising on city transit vehicles while allowing commercial advertising), whatever other First Amendment problems such a law may raise, see id. at 317-18 (Brennan, J., dissenting) (describing the city's policy as content-based discrimination); cf. Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 121-32 (1973) (upholding the FCC's refusal to compel broadcasters to sell time for editorial advertising); William E. Lee, The Problems of "Reasonable Access" to Broadcasting for Noncommercial Expression: Content Discrimination, Appellate Review, and Separation of Commercial and Noncommercial Expression, 34 U. FLA. L. REV. 548, 549 (1982) (discussing the problems that accompany a policy to provide candidates for federal office "reasonable access" to air time).
Friedman was wrongly decided, it does not follow that the Court's premise that trade names in optometrical practice are a form of commercial speech was also wrong. Justice Blackmun did not object to this premise; his dissent was aimed at what he perceived as an unjustified departure from the principle of Virginia Pharmacy. Dissenting again in Fox, Justice Blackmun neither endorsed nor disputed the treatment of Tupperware parties as commercial speech. Instead, he asserted the facial overbreadth of the university's regulation, and described a variety of protected expressive activities that he believed the regulation would reach.

San Francisco Arts & Athletics, Inc. v. United States Olympic Committee has been held out as an example in which commercial speech classification proved fatal to speech deserving of protection, even here, however, Justice Brennan's dissent did not hinge on this contention. In this case, the Court upheld a statute granting the United States Olympic Committee the right to prohibit certain uses of the word "Olympic" as it applied to the promotion of an athletic competition called the Gay Olympic Games. Treating the statute as restricting only commercial speech, the Court enforced the Olympic Committee's "legitimate property right" in the exclusive use of the word "Olympic" in the promotion of athletic events. Justice Brennan's dissent focused principally on the statute's facial defects rather than its application to the facts at hand. He attacked what he viewed as the statute's overbreadth in suppressing a substantial

314. See Thomas B. Draper, Note, Reuniting Commercial Speech and Due Process Analysis: The Standard for Deceptiveness in Friedman v. Rogers, 57 Tex. L. Rev. 1456, 1484-88 (1979) (concluding that Friedman employed a faulty analysis but reached the right result).
316. Id. at 28 (Blackmun, J., dissenting); see Robert B. Reich, Preventing Deception in Commercial Speech, 54 N.Y.U. L. Rev. 775, 802 (1979) (considering trade names as commercial speech, and arguing that the result in Friedman was inconsistent with the Court's prior decisions).
317. Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 487 (1989) (Blackmun, J., dissenting) (arguing that the regulation would prohibit "a wide range of speech that receives the fullest protection of the First Amendment").
319. See Kozinski & Banner, supra note 166, at 649 (characterizing the commercial speech classification in San Francisco Arts as providing "a convenient avenue for denying protection to speakers who may have had something unpopular to say").
320. San Francisco Arts, 483 U.S. at 525, 548.
321. Id. at 535-41.
322. Id. at 541.
323. Id. at 560-73 (Brennan, J., dissenting) (discussing ways in which the statute is "overbroad on its face"). Justice Brennan did state, however, that the statute's operation in this case suppressed the unique formulation of a protected message: that homosexual men and women belong in the mainstream of their communities. Id. at 568-70.
amount of noncommercial speech, and its lack of content neutrality, and its inadequate tailoring to governmental interests even if confined to commercial speech. The latter argument in particular suggests that the Court's commercial speech doctrine more generally, not the problem of misclassification, was the underlying cause of the result in the case.

2. The Lower Courts and Emerging Issues.—Since Virginia Pharmacy, the lower courts have wrestled with application of the Court's commercial speech doctrine, but generally have not had to anguish over the distinction between commercial and noncommercial speech. For example, a number of courts have addressed the problem of media liability for harm resulting from advertisements. These cases have tended to turn on the media defendant's ability to foresee the damage to which the advertisement led, or the extent to which the defendant could be charged with endorsing a defective product, rather than any question as to whether the advertisement constituted commercial speech. Even an advertisement for a "hired gun," however

324. Id. at 561-68.
325. Id. at 570-71.
326. Id. at 571-73.
327. Of course, the question does occasionally arise. See infra Parts III.D.5-6 (discussing the difficulty of classifying product placements and products that carry health claims under the commercial speech doctrine).
328. See, e.g., Eimann v. Soldier of Fortune Magazine, Inc., 880 F.2d 830, 836 (5th Cir. 1989) (noting that the magazine had "no realistic method for gauging the likelihood that a particular ad will foster illegal activity"); Braun v. Soldier of Fortune Magazine, 749 F. Supp. 1083, 1085 (M.D. Ala. 1990) (finding that the language of an advertisement was such that the "publisher could reasonably recognize the offer of criminal activity as readily as its readers obviously did"), aff'd, 968 F.2d 1110 (11th Cir. 1992); Goldstein v. Garlick, 318 N.Y.S.2d 370, 376 (Sup. Ct. 1971) (stating that a newspaper is liable for a false advertisement only if it publishes it "maliciously or with intent to harm another or acts with total reckless abandon").
329. See, e.g., Pittman v. Dow Jones & Co., 662 F. Supp. 921, 922 (E.D. La. 1987) (stating that there is no duty by a newspaper to investigate the accuracy of advertisements unless the newspaper "undertakes to guarantee the soundness of the products advertised"), aff'd, 834 F.2d 1171 (5th Cir. 1987); Walters v. Seventeen Magazine, 241 Cal. Rptr. 101, 103 (Ct. App. 1987) (refusing to create a new tort of negligently failing to investigate the safety of an advertised product); Yuhas v. Mudge, 322 A.2d 824, 825 (N.J. Sup. Ct. App. Div. 1974) (holding that a magazine has no duty to test inherently dangerous products advertised in its publication "unless it undertakes to guarantee, warrant or endorse the product").
unusual or sinister, does not appear to present definitional difficulties. Likewise, there seems little likelihood that a court weighing First Amendment protection will fail to distinguish between an advertisement to raise funds for civil rights demonstrators and one to induce the purchase of fireworks.

Other issues that courts have confronted or that loom in potential litigation have also generally sidestepped the quagmire of hard boundary questions. For example, issues have arisen from proposals to restrict television advertising directed at children. While it is possible to imagine questions about the classification of this type of restriction, constitutional debate has centered around the fundamental propriety of such proposals, not obstacles to discerning the content of their targets. Similarly, although restrictions on commercial telephone solicitations and other presumably undesirable overtures could conceivably raise questions about classification, they typically do not.

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331. See New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (noting that the advertisement at issue "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern").

332. See *Yuhas*, 322 A.2d at 824 n.1 (noting an advertisement that read: "PYROTECHNIC Casings [sic], stars, devices of all types"); Lisa F. Firenze, *Publishers' Liability for Commercial Advertisements: Testing the Limits of the First Amendment*, 23 Colum. J.L. & Soc. Probs. 157-58 (1990) (agreeing with the decision in *Yuhas* not to impose a duty on newspapers to investigate advertisements because this would "impose open-ended liability on the press").


334. Compare Molly Pauker, *The Case for FTC Regulation of Television Advertising Directed Toward Children*, 46 Brook. L. Rev. 513, 544-46 (1980) (asserting that such restrictions are justified under the First Amendment as time, place, and manner regulations in furtherance of substantial governmental interests) with Laurence Field, Comment, *The New Commercial Speech Doctrine and Broadcast Advertising*, 14 Harv. C.R.-C.L. L. Rev. 385, 444 (1979) (arguing that a ban on children's advertising would probably be unconstitutional) and Note, *Can't Get Enough of that Sugar Crisp: The First Amendment Right to Advertise to Children*, 54 N.Y.U. L. Rev. 561, 564 (1979) (arguing that the proposed ban on children's advertising violates the First Amendment). Cf. Bad Frog Brewery, Inc. v. New York State Liquor Auth., 134 F.3d 87, 101 (2d Cir. 1998) (invalidating a prohibition on a beer bottle label displaying a frog making a vulgar gesture because the prohibition was not narrowly tailored to the state's interest in protecting children from vulgar and profane advertising).

335. See, e.g., *National Funeral Servs., Inc. v. Rockefeller*, 870 F.2d 136, 141 (4th Cir. 1989) (noting the agreement of both parties that solicitation of prospective purchases of
Restrictions on billboards produce an even stronger divergence between theoretical and practical concerns. One might have expected that Metromedia's approval of San Diego's restrictions on commercial billboards would spawn endless controversy over the appropriate classification of individual signs. However, while courts have split on the sufficiency of cities' justifications for billboard regulations, they apparently have not routinely had to grapple with billboards of ambiguous character. Even where an ordinance's effort to distinguish commercial and noncommercial signs was pointedly found not to be a "model of clarity," it did not founder on its failure to draw a brighter line.

336. See Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 540 (1981) (plurality opinion) (Brennan, J., concurring) (predicting that "those who seek to convey commercial messages will engage in the most imaginative of exercises to place themselves within the safe haven of noncommercial speech, while at the same time conveying their commercial message").

337. Compare Southlake Property Assocs., Ltd. v. City of Morrow, 112 F.3d 1114, 1116 (11th Cir. 1997) (affirming that the goals of aesthetics and traffic safety are sufficient to support a prohibition on commercial billboards), and Naegele Outdoor Adver., Inc. v. City of Durham, 844 F.2d 172, 173-74 (4th Cir. 1988) (finding that an interest in preserving aesthetics is sufficient in itself to justify a billboard ban), and Georgia Outdoor Adver., Inc. v. City of Waynesville, 833 F.2d 43, 46 (4th Cir. 1987) (same), with Desert Outdoor Adver., Inc. v. City of Moreno Valley, 103 F.3d 814, 819 (9th Cir. 1996) (finding that the city failed to show that a restriction on commercial billboards promotes asserted interests), cert. denied, 118 S. Ct. 294 (1997), and National Adver. Co. v. Town of Babylon, 900 F.2d 551, 555-57 (2d Cir. 1990) (same), and City of Rochester Hills v. Schultz, 568 N.W.2d 832, 835 (Mich. Ct. App. 1997) (per curiam) (finding that the city's ban on "home occupation" signs did not directly serve its aesthetic interest).


339. Id. at 409-10 (finding that the city could distinguish adequately between commercial and noncommercial speech in light of "Supreme Court decisions [that] have provided ample guidance"). Similarly, the Fourth Circuit, in Major Media of the Southeast, Inc. v. City of Raleigh, 792 F.2d 1269, 1272-73 (4th Cir. 1986), sustained restrictions on commercial billboards notwithstanding the ordinance's absence of a definition of commercial or non-
Similar observations can be made about statutes forbidding access to criminal justice records by those seeking to use the records for commercial purposes. It is easy to fashion scenarios in which the designation of both the user's actual purpose and classification of that purpose might be subject to serious doubt. Again, however, while courts have treated such statutes in various ways, they have typically reviewed challenges in which the commercial nature of the proposed use was either obvious, or irrelevant because of the statute's facial invalidity.

For all the recent controversy over cigarette advertising, as well, the topic appears to have aroused little debate over the commercial character of the messages affected by current and proposed restrictions. While courts and First Amendment commentators have variously approved and attacked such restrictions, they have generally proceeded from the common premise that the issue will be resolved within the commercial speech framework. A recent critique of pro-commercial speech. The court explained: “Although an occasional marginal case might arise raising the question of whether on the particular facts the definition of commercial speech would be correct, such an infrequent possibility should not in itself justify a generalized charge that the ordinance itself is vague . . . .” Id.

340. See, e.g., Lanphere & Urbaniak v. Colorado, 21 F.3d 1508, 1512 (10th Cir. 1994) (rejecting a First Amendment claim made by lawyers and a substance abuse treatment center seeking names and addresses of individuals facing prosecution for traffic violations for the purpose of solicitation and advertising).

341. See, e.g., United Reporting Publ'g Corp. v. Lungren, 946 F. Supp. 822, 827-29 (S.D. Cal. 1996) (finding a statute limiting only a commercial user's access to records of arrestees invalid on its face because the statute failed to “directly and materially” advance the state's interest in minimizing costs and protecting citizens' privacy), aff'd, 146 F.3d 1133 (9th Cir. 1998); Speer v. Miller, 864 F. Supp. 1294, 1301 (N.D. Ga. 1994) (declaring a state statute prohibiting the examination of arrest records for commercial purposes facially invalid because the statute primarily prevented solicitation rather than access to records).


343. In a decision eight years prior to Virginia Pharmacy, the D.C. Court of Appeals upheld an FCC requirement that radio and television stations carrying cigarette advertising also devote a significant amount of time to presenting the case against smoking on the assumption that the affected expression "barely qualifies as constitutionally protected 'speech.'" Banzhaf v. FCC, 405 F.2d 1082, 1101 (D.C. Cir. 1968). There are more recent endorsements of government authority to restrict tobacco advertising as regulable commercial speech. See Penn Adver. of Baltimore, Inc. v. Mayor & City Council of Baltimore, 862 F. Supp. 1402, 1405-14 (D. Md. 1994) (upholding an ordinance barring cigarette advertising on billboards in certain areas readily visible to minors), aff'd, 101 F.3d 332 (4th Cir. 1996); Daniel Helberg, Comment, Butt Out: An Analysis of the FDA's Proposed Restrictions on Cigarette Advertising Under the Commercial-Speech Doctrine, 29 LOY. L.A. L. REV. 1219, 1247-54 (1996) (arguing that cigarette advertisers challenging tobacco regulation will find the greatest support in the Central Hudson requirement that "restrictions on commercial
posed legislation to settle litigation against the tobacco industry, for example, was framed almost exclusively against the backdrop of the Court's commercial speech decisions. Restrictions on advertising for other potentially harmful activities such as consumption of alcoholic beverages or casino gambling also appear self-evidently subject to commercial speech analysis.

Perhaps the most prominent example of the unambiguous character of advertising with which courts ordinarily deal is litigation under section 43(a) of the Lanham Act. This provision creates a private cause of action for false advertising. Since the principal proscriptions of section 43(a) apply expressly to commercial expres-

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speech be no more extensive than necessary”); Erica Swecker, Note, Joe Camel: Will “Old Joe” Survive?, 36 WM & MARY L. REV. 1519, 1531, 1557 (1995) (arguing that the promotion of Camel brand cigarettes through advertisements featuring the cartoon character Joe Camel constitutes commercial speech that the government should not regulate).

For challenges to such restrictions based on commercial speech principles, see Redish, supra note 34, at 598 (discussing First Amendment principles threatened by regulation of tobacco advertising); Joachim, supra note 216, at 541 (predicting a “snowball effect of paternalism under the guise of protectionism”).


346. See, e.g., Valley Broad. Co. v. United States, 107 F.3d 1328, 1336 (9th Cir. 1997) (finding that the government failed to justify a total ban on casino gambling advertisement by broadcast media), cert. denied, 118 S. Ct. 1050 (1998); Greater New Orleans Broad. Ass’n v. United States, 69 F.3d 1296, 1302 (5th Cir. 1995) (finding that a federal statute banning the broadcast of information concerning “lottery, gift prize, or similar scheme” is constitutional), vacated, 117 S. Ct. 39 (1996); Players Int’l, Inc. v. United States, 988 F. Supp. 497, 507 (D.N.J. 1997) (finding that a federal ban on broadcast advertisement of casino gambling was overly broad and thus violated the First Amendment).


349. Section 43(a)(1)(B) provides liability for “false or misleading representation[s] of fact . . . in commercial advertising or promotion.” 15 U.S.C. § 1125(a)(1)(B); see Alfred Dunhill Ltd. v. Interstate Cigar Co., 499 F.2d 232, 237 (2d Cir. 1974) (noting that section 43(a) is “limited to false advertising as that term is generally understood”); Skil Corp. v. Rockwell Int’l Corp., 375 F. Supp. 777, 783 (N.D. Ill. 1974) (setting forth elements of a cause of action under section 43(a)); Arlen W. Langvardt, Section 43(a), Commercial Falsehood, and the First Amendment: A Proposed Framework, 78 MINN. L. REV. 309, 315 (1993) (arguing that section 43(a) has potential application “outside the registered mark setting”);
sion, the Lanham Act might seem fertile ground for squabbling over the character of the speech against which the statute is invoked. Although such disputes occasionally do arise, plaintiffs generally can "easily satisfy [their] burden of proving that the complained-of representation was made in 'commercial advertising or promotion' by pointing to paid advertisements by a commercial defendant on television or radio, or in newspapers or magazines." Much more commonly, litigants argue over whether the unquestionably commercial speech at issue contains any misrepresentation at all. To the extent that First Amendment concerns enter this area, they tend to involve the potential deterrent effect of uncertainty about which admittedly commercial speech will ultimately be deemed false.

Other efforts by government to "insure that the flow of truthful and legitimate commercial information is unimpaired" have similarly raised substantive questions of policy and doctrine, not classification. Some issues arise because the government's "[i]nterest in [t]ruth" in the commercial realm is not always satisfied by simply halting or penalizing affirmative misrepresentations. For example,

Singdahlsen, supra note 169, at 341 (asserting that section 43(a) is effectively a strict liability tort because the plaintiff is not obligated to show negligence on the advertiser's part). See 15 U.S.C. § 1125(a)(1)(B) (prohibiting infringement of trademarks and tradenames in the context of "commercial advertising or promotion").

1. See, e.g., Gordon & Breach Science Publishers S.A. v. American Inst. of Physics, 859 F. Supp. 1521, 1543 (S.D.N.Y. 1994) (concluding after extended analysis that nonprofit scientific societies' publication, which rated nonprofit journals as superior in value, did not constitute "commercial advertising or promotion" under the Lanham Act).

2. Id. at 1532.

3. Cf. Langvardt, supra note 349, at 341 (noting that "[s]ection 43(a) now sweeps in claims from a broad range of commercial falsehoods"); Singdahlsen, supra note 169, at 347-61 (arguing that the consumer's interpretation of an advertisement varies according to the experience and knowledge she has about a particular product).

4. See Langvardt, supra note 349, at 388-90 (describing section 43(a) as an "indirect regulation" that could have a "chilling effect" by rendering makers of commercial representations liable for falsehoods); Schmidt & Burns, supra note 169, at 1273-74, 1289 (arguing that uncertain regulations chill legitimate commercial speech and that some false and misleading speech should be protected to provide breathing room); Singdahlsen, supra note 169, at 347-58 (exploring explicit and implicit advertising claims, and concluding that requiring advertisers to scientifically support their claims will have the adverse affect of increasing advertising costs and exposing the advertiser to an evaluation of its proof); see also Shiffrin, supra note 176, at 1269 (arguing for "some strategic protection for falsehoods" in commercial defamation law). But see Nan Kalthoff McKenzie, Ambiguity, Commercial Speech and the First Amendment, 56 U. Cin. L. Rev. 1295, 1310 (1988) (opposing a higher standard of proof for implied misrepresentations).


6. Developments in the Law—Deceptive Advertising, 80 Harv. L. Rev. 1005, 1010 (1967) (arguing that "there is a clear public interest in regulating the accuracy of representations made by advertisers").
the Federal Trade Commission (FTC) has ordered "corrective advertising" where an advertisement is not misleading in isolation, but arguably becomes misleading in light of past advertising;\textsuperscript{357} whether such compelled disclosure is warranted or not, it has undoubtedly occurred in a commercial context.\textsuperscript{358} The same is true of FTC actions to suppress advertising whose alleged deception takes place through visual rather than verbal means.\textsuperscript{359} Attempts to restrain comparative advertising—advertisements asserting the superiority of the sponsor's product over a competitor's—also appear not to implicate definitional issues.\textsuperscript{360} In some instances of compelled disclosure, no deception in the ordinary sense has occurred at all; instead, the government believes that the required information will help consumers to make more informed and reasoned decisions.\textsuperscript{361}

\textsuperscript{357} See, e.g., FTC v. Figgie Int'l, Inc., 994 F.2d 595, 601, 607 (9th Cir. 1993) (per curiam) (discussing the district court's order that a manufacturer engage in "corrective advertising" to remedy the manufacturer's misrepresentations); Southwest Sunsites, Inc. v. FTC, 785 F.2d 1431, 1439 (9th Cir. 1986) (requiring land development companies to disclose to past and future buyers the financial risk and suitable use of land); Warner-Lambert Co. v. FTC, 562 F.2d 749, 770-71 (D.C. Cir. 1977) (requiring advertisements for mouthwash to disclose that the product would not prevent or mitigate colds or sore throats in light of previous advertising to that effect).

\textsuperscript{358} See generally Ronald A. Milzer, Note, Corrective Advertising and the Limits of Virginia Pharmacy, 32 STAN. L. REV. 121, 137 (1979) (concluding that corrective advertising may actually deter truthful advertising and that Virginia Pharmacy limited corrective advertising orders to those that promote economic efficiency).

\textsuperscript{359} See, e.g., FTC v. Colgate-Palmolive Co., 380 U.S. 374, 395 (1965) (enforcing a FTC cease-and-desist order barring the company from using a simulation of sandpaper to demonstrate the softening ability of its shaving cream); Sterling Drug, Inc. v. FTC, 741 F.2d 1146, 1158 (9th Cir. 1984) (upholding an FTC order banning the company from making misrepresentations about its analgesic products); Standard Oil Co. of Ca. v. FTC, 577 F.2d 653, 663 (9th Cir. 1978) (prohibiting television commercials for gasoline additive which used a deceptive visual demonstration); Volvo N. Am. Corp., 115 F.T.C. 87, 90 (1992) (prohibiting Volvo from airing deceptive monster truck commercials which led consumers to believe that unaltered cars were used as part of a demonstration).

\textsuperscript{360} See generally Nancy S. Greiwe, Note, Antidilution Statutes: A New Attack on Comparative Advertising, 61 B.U. L. REV. 220, 228 (1981) (discussing the application of antidilution laws to comparative advertising in order to protect the selling power of a trademark from being diminished in ads which name competitors).

\textsuperscript{361} See Robert Pitofsky, Beyond Nader: Consumer Protection and the Regulation of Advertising, 90 HARV. L. REV. 661, 664 (1977) (noting as examples of governmentally "required or induced disclosure" information concerning light bulbs' durability, tar and nicotine content of cigarettes, automobiles' mileage per gallon, and care labeling of textile wearing apparel). Another example of speech that, while not strictly false, has been subject to regulation, is the use of individuals' names or likenesses in commercial advertisements without their permission. While the Supreme Court has not addressed the constitutionality of such causes of action, it seems evident that the commercial speech doctrine is the appropriate framework for consideration. See Theodore F. Haas, Storehouse of Starlight: The First Amendment Privilege to Use Names and Likenesses in Commercial Advertising, 19 U.C. DAVIS L. REV. 539, 551 (1986) (arguing that name and likeness claims implicate the commercial speech doctrine more when they arise from a description of the product themselves be-
Finally, while it is certainly not difficult to locate "fishy" lower court decisions based on commercial speech doctrine, these are generally not attributable to misapprehension of the nature of the restricted speech. Restrictions that courts have dubiously upheld include a ban on advertising concerning the availability of service from a particular airport, a prohibition of commercial advertising on vehicles or watercraft not engaged in the owner's usual business, the exclusion of "barkers" engaged in commercial advertising from certain areas of a city, a ban on leasing advertising space on shopping carts to beer manufacturers, broad prohibitions on advertisements for alcoholic beverages, and a ban on newspaper advertising of brothels in a state where prostitution was legal in some counties. Although the merits of each of these decisions can reasonably be contested, the pertinence of commercial speech analysis cannot.

3. The Case Against "Reverse Dilution."—In Ohralik, the Court expressed a fear that abolishing the distinction between commercial and noncommercial speech could compromise the protection afforded core expression: "To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." Somewhat ironically, some commentators who support robust protection of commercial speech have also voiced concern about the corrosive effect that the Court's treatment of commercial speech could have on noncommercial expression. Under a process of "reverse dilution," the rationales used to sustain regulation of commercial speech might seep into the

cause the claims concern the commercial transaction); cf. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 578-79 (1977) (holding that the First Amendment does not require a state to protect an entertainer's right of publicity when a news show broadcasts his entire act).

362. Simon, supra note 218, at 236.
364. Supersign of Boca Raton, Inc. v. City of Fort Lauderdale, 766 F.2d 1528, 1532 (11th Cir. 1985).
366. Actmedia, Inc. v. Stroh, 830 F.2d 957, 968 (9th Cir. 1986).
369. See, e.g., Supersign, 766 F.2d at 1550 n.1 (stipulating that the ordinance at issue was a regulation of commercial speech).
Court’s review of restrictions on noncommercial speech as well. 371 In particular, an insufficiently rigorous definition of commercial speech is said to threaten the protection of other types through a “general watering down of first amendment jurisprudence.” 372

However, the phenomenon of reverse dilution is suspect in theory and unsupported in practice. Relatively lenient review of one type of legislation is not usually regarded as a virus threatening to infect more stringent scrutiny of another kind. Rational relationship review for ordinary economic regulation 373 has not undermined strict scrutiny for racial classifications, 374 nor has a balancing test for state burdens on interstate commerce 375 eroded the Court’s skeptical stance toward discrimination against such commerce. 376 Similarly, as discussed earlier, the existence of qualified protection for commercial

371. See Redish, supra note 220, at 1457-58 (criticizing the dilution fear—that equation of commercial and noncommercial expression will reduce protection afforded traditionally protected speech—as illogical).

372. Simon, supra note 218, at 232; see Kozinski & Banner, supra note 166, at 653 (“[Y]ou can find a commercial aspect to almost any first amendment case. Today’s protected expression may become tomorrow’s commercial speech.”).


374. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (finding “all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny”); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) (finding strict scrutiny necessary in order to prevent “illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool”); Loving v. Virginia, 388 U.S. 1, 10 (1967) (stating that strict scrutiny is required in order to prevent “arbitrary and invidious discrimination”).

375. Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986) (requiring a balancing test which weighs the legitimacy of the state’s interest in the regulation and its benefits to the state against its detrimental effects in interstate commerce); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (“Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”); Southern Pac. Co. v. Arizona, 325 U.S. 761, 770-71 (1945) (measuring “the relative weights of the state and national interests involved” in legislation in conjunction with the Commerce Clause).

376. Fulton Corp. v. Faulkner, 516 U.S. 325, 346 (1996) (striking down a state tax because it “facially discriminates against interstate commerce” without justification); C & A Carbone, Inc., v. Town of Clarkstown, 511 U.S. 383, 392 (1994) (“Discrimination against interstate commerce in favor of local business or investment is per se invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest.”); City of Philadelphia v. New Jersey, 457 U.S. 617, 624 (1978) (“[W]here simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected.”).
speech has not resulted in indiscriminate application of commercial speech standards to all expression with some commercial element.\textsuperscript{377} Likewise, \textit{Metromedia} did not lead to the Court's wholesale approval of restrictions on signs,\textsuperscript{378} and \textit{Posadas}'s greater-includes-the-lesser reasoning—even when it presumably had currency—was not extended to settings for which it was not intended.\textsuperscript{379}

More broadly, if the absence of a "precise working definition" of commercial speech has produced an "apparent dilution of first amendment protection in other areas of speech,"\textsuperscript{380} that dilution is exceedingly difficult to detect. On the contrary, the Court's current solicitude toward speech has been a striking feature of an era largely characterized by retrenchment in the protection of individual rights and liberties.\textsuperscript{381} The roll call of unpopular expression shielded by the Court in recent years includes flag desecration,\textsuperscript{382} cross burning,\textsuperscript{383}

\textsuperscript{377} See supra notes 254-282 and accompanying text (discussing the Court's treatment of mixed speech).


\textsuperscript{379} See City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 762-64 (1988) (refusing to extend the greater-includes-the-lesser reasoning to a case involving the licensing of publishers); Meyer v. Grant, 486 U.S. 414, 420 (1988) (finding that the \textit{Posadas} standard did not apply to issues of political expression).

\textsuperscript{380} Simon, supra note 218, at 245.


\textsuperscript{382} United States v. Eichman, 496 U.S. 310, 312 (1990) (invalidating the Flag Protection Act of 1989 as inconsistent with First Amendment rights); see Texas v. Johnson, 491 U.S. 397, 415 n.10 (1989) (distinguishing Texas's impermissible attempt to punish Johnson for burning a flag as a means of political protest from the validity of prohibiting certain commercial uses of the flag).

“indecent” communication on the Internet, and vicious lampooning of a nationally known minister. Although the Court has not invariably acted as a bulwark of free speech, it is hard to make the case that the Court’s sensitivity to expression has declined since the inception of modern commercial speech doctrine. Indeed, some critical race theorists, radical feminists, and civic republicans have complained that judicial elevation of free speech has slighted other values—equality in particular—embodied in the Constitution. On balance, then, Professor Shiffrin’s expectation a decade-and-a-half ago that “any damage wrought by the subordination of commercial advertising [is not] likely to create any pressure to carve out pockets of non-protection for political speech” appears vindicated.

C. The Meagre Threat from Misclassification

To the extent that the Court continues to regard commercial speech as occupying a “subordinate position in the scale of First


386. See, e.g., Burson v. Freeman, 504 U.S. 191, 195 (1992) (plurality opinion) (upholding a prohibition on soliciting votes and displaying campaign materials within one hundred feet of an entrance to a polling place on election day); Connick v. Meyers, 461 U.S. 138, 154 (1983) (upholding the dismissal of an assistant district attorney for distributing a questionnaire soliciting views within his office concerning personnel policies and the district attorney’s performance); Brown v. Glines, 444 U.S. 348, 353 (1980) (upholding a requirement that members of the Air Force obtain approval from their commanders before circulating petitions on air force bases); FCC v. Pacifica Found., 438 U.S. 726, 738 (1978) (upholding a ban on broadcast of “‘obscene, indecent, or profane language’” as applied to a comic monologue about “Filthy Words”) (quoting 18 U.S.C. § 1464 (1976)).


388. See generally CATHARINE A. MACKINNON, ONLY WORDS (1993) (discussing the various forms of defamation, sexual and racial harassment, and inequality of speech resulting from the Court’s putatively gender-biased interpretation of the First Amendment).


390. For a powerful response to these claims, see Gey, supra note 240, at 198 (lamenting that “[t]he political and legal circles that only a decade ago could be counted upon to defend First Amendment values are now increasingly willing to qualify their support for free speech, if not to abandon the cause altogether”).

391. Shiffrin, supra note 176, at 1282.
Amendment values," vigilance against misassignment to this secondary sphere would seem understandable. In practice, however, the Court has not sought to introduce the commercial speech framework into commercial areas that have their own distinct constellation of issues and considerations. By extension, the Court has also recognized that within commercial expression lie discrete problems that must be addressed in accordance with their peculiar features and problems. Moreover, the Court's recent heightened protection of commercial speech has diminished the danger of misclassification.

1. Maintenance of Commercial Boundaries.—The Court has displayed no intention to sweep all commerce-related expression under a spreading tent of commercial speech doctrine. On the contrary, the Court has apparently shared Professor Schauer's recognition of "a universe of communication relating only to business activity, having no explicit political or artistic or ideological content, and yet differing substantially from the kind of widespread public hawking of wares represented by the Virginia Pharmacy archetype." Indeed, Virginia Pharmacy itself took pains to distinguish Virginia's ban on advertisement of prescription drug prices from speech restrictions "in the special context of labor disputes." Since then, the Court has continued to resolve labor issues, particularly those involving unions, without reference to commercial speech analysis—perhaps tacitly endorsing the view that trying to pigeonhole speech in the union context into a standard category of expression is a "witless exercise."

Nor has commercial speech doctrine threatened to swallow other principles developed for reviewing regulation of speech in commercial settings. For example, regulation of aspects of corporate govern-

393. Schauer, supra note 8, at 1183; see Note, Freedom of Expression in a Commercial Context, 78 Harv. L. Rev. 1191, 1192 (1965) (noting the impossibility of "formulat[ing] a single rule of first amendment protection for economic speech" in diverse commercial areas).
395. See, e.g., Sure-tan, Inc. v. NLRB, 467 U.S. 883, 896-98 (1984) (finding that Sure-tan had not suffered any "legally protected injury" caused by its illegal-alien employees that would provide a First Amendment defense for its retaliatory employment practices); International Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212, 225 (1982) (finding that it "would create a large and indefinable exception" to the provisions of the NLRA if "political" boycotts by labor unions were exempted from the statute's provisions on First Amendment grounds); NLRB v. Retail Store Employees Union, Local 1001, 447 U.S. 607, 616 (1980) (finding that while it would be improper to impose a broad ban on picketing by union members, secondary picketing which "spreads labor discord by coercing a neutral party to join the fray" does not enjoy First Amendment protection).
396. Shiffrin, supra note 176, at 1272.
ance, such as proxy solicitation, may raise interesting First Amendment questions, but it seems well understood that these are to be addressed outside the commercial speech framework.\textsuperscript{397} Similarly, the Court appears disinclined to import commercial speech doctrine into its review of limitations on communication under securities regulation.\textsuperscript{398} Antitrust law as well, while sometimes impinging on what might be viewed as commercial speech, is also generally examined under doctrines and standards peculiar to that area.\textsuperscript{399} Indeed, on at least one occasion, the Court has indicated that all of the above types of legislation implicate regulatory authority governed by standards distinct from those to which commercial speech is subject.\textsuperscript{400}

\textsuperscript{397} See TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 440 (1976) (noting that the SEC’s proxy rules govern the use of “proxy statements that are false or misleading”); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 384 (1970) (discussing what constitutes a material misstatement or omission in a proxy statement); see also Henry N. Butler & Larry E. Ribstein, Corporate Governance Speech and the First Amendment, 43 U. Kan. L. Rev. 163, 170 (1994) (explaining that corporate governance speech is most appropriately recognized as “hybrid” speech, rather than attempting to force it into either the commercial or political speech matrix); Shiffrin, supra note 176, at 1231 (pointing out the variations in government regulations designed to prevent use of misleading statements in union and corporate elections).

\textsuperscript{398} See Basic, Inc. v. Levinson, 485 U.S. 224, 232 (1988) (discussing preliminary merger discussions); Dirks v. SEC, 466 U.S. 646, 661-64 (1983) (discussing insider trading); Herman & MacLean v. Huddleston, 459 U.S. 375, 377 (1983) (discussing a claim of false and misleading statements to purchasers of securities under section 10(b) of the Securities Exchange Act of 1934 and section 11 of the Securities Act of 1933); SEC v. Wall Street Publ’g Inst., Inc., 851 F.2d 365, 373 (D.C. Cir. 1988) (“[S]ecurities regulation is a form of regulation distinct from the more general category of commercial speech, and Ohralik suggests that the First Amendment protections provided by the commercial speech doctrine do not detract from the government’s regulatory power over the securities market.”); see also Allen D. Boyer, Free Speech, Free Markets, and Foolish Consistency, 92 Colum. L. Rev. 474, 481-82 (1992) (reviewing Nicholas Wolfson, Corporate First Amendment Rights and the SEC (1990)) (explaining that securities regulation falls outside the scope of the commercial speech doctrine because a false financial statement creates “immediate real-world risks, particularly when it forms the basis of a representation upon which funds are exchanged” while political, religious, or artistic statements pose more abstract risks); cf. Burt Neuborne, The First Amendment and Government Regulation of Capital Markets, 55 Brook. L. Rev. 5, 17 (1989) (noting that while religious, political, aesthetic and scientific commentary receive First Amendment protection, “[s]peech involving topics with no discernable link to the self-expressive development of the human personality receives no protection at all”).


\textsuperscript{400} To support its holding in Ohralik under the commercial speech doctrine, the Court noted: “Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, corporate proxy statements, the exchange of price and production information among
If anything, the Court appears to go out of its way to avoid classifying expression in commercial contexts as commercial speech where other treatment is plausible. For example, credit reports obviously bear a close relationship to the proposal of commercial transactions. Nevertheless, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,\(^4\) at least seven justices agreed that the reports themselves did not constitute commercial speech.\(^3\) Similarly, attempts to dissuade individuals from engaging in certain commercial transactions might be regarded as a negative form of commercial speech. The Court was confronted with this possibility when a mall owner challenged a union’s distribution of handbills to customers exhorting them to refrain from patronizing the mall’s stores until the owner pledged that all mall construction would be performed by contractors paying fair wages.\(^4\) While the Court ruled that the provision of the National Labor Relations Act invoked by the owner was inapplicable to the union’s message,\(^4\) it also indicated its inclination to regard the handbill in question as outside the realm of commercial speech if the constitutional issue were forced.\(^4\)

2. The Emergence of Subdistinctions.—Even where expression—aptly or arguably incorrectly—is classified as commercial speech, it is a fallacy to assume that the speech has been assigned to a black hole of uniformly “subordinate” constitutional protection. The Court has displayed its understanding that various types of regulations present particular considerations, so that commercial speech defies treatment as

competitors, and employers’ threats of retaliation for the labor activities of employees.” *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978) (citations omitted). Quoting this passage in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (plurality opinion), after a discussion of the commercial speech doctrine, the plurality referred to such regulations as examples drawn from “[o]ther areas of the law.” *Id.* at 758 n.5 (emphasis added).

401. 472 U.S. 749 (1985) (plurality opinion).

402. *See id.* at 762 n.8 (“We also do not hold . . . that the [credit] report is subject to reduced constitutional protection because it constitutes economic or commercial speech.”); *id.* at 792 (Brennan, J., dissenting) (“Credit reports are not commercial advertisements for a good or service or a proposal to buy or sell such a product.”); *see also* Scott Shorr, *Note, Personal Information Contracts: How to Protect Privacy Without Violating the First Amendment*, 80 CORNELL L. REV. 1756, 1799-1800 (1995) (explaining that credit reports fail to meet the traditional definition of commercial speech because “consumers and report users, rather than credit bureaus and credit reports, propose commercial transactions[,]” and “credit reports relate to the economic interests of report subjects, as well as to the economic interests of the speaker and its audience”).


404. *Id.* at 575.

405. *Id.* at 576.
a "single class susceptible to unified regulation." A perhaps extreme manifestation of this insight was the pronouncement in Metromedia that the case dealt with "the law of billboards."Whatever the merits of this decision, it at least sought to take into account "[t]he uniqueness of each medium of expression."

A more fully developed branch of the commercial speech doctrine arises from the lawyer advertising cases, which form their own mini-jurisprudence. The distinct analytical niche occupied by these decisions stems from the Court's recognition of the special tension at work in judicial supervision of advertising restrictions in this area. On the one hand, the Court has repeatedly noted that a combination of factors renders lawyer advertising peculiarly susceptible to deception, thus justifying regulation inappropriate for typical product advertising. On the other hand, the Court—at least implicitly skeptical of the motives that may animate restrictions on attorney advertising—has swept aside restrictions that do not demonstrably further the state's interest in guarding against abuses endemic to such advertising. Whether invalidating or occasionally upholding restrictions on

406. Stone, supra note 178, at 113.
408. Id. at 501 n.8.
409. See In re R.M.J., 455 U.S. 191, 202-03 (1982) ("The public's comparative lack of knowledge, the limited ability of the professions to police themselves, and the absence of any standardization in the 'product' renders advertising for professional services especially susceptible to abuses that the States have a legitimate interest in controlling."); Bates v. State Bar, 433 U.S. 350, 383 (1977) ("[B]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriae in legal advertising."); see also Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 487 (1988) (O'Connor, J., dissenting) (attributing error in the Court's attorney advertising cases to "a deceptive analogy between professional services and standardized consumer products and a correspondingly inappropriate skepticism about the States' justifications for their regulations"); supra note 113 (discussing Justice O'Connor's repeated objections to the course of protection that commenced in Bates). See generally John M. Blim, Comment, Free Speech and Health Claims Under the Nutrition Labeling and Education Act of 1990: Applying a Rehabilitated Central Hudson Test for Commercial Speech, 88 Nw. U. L. Rev. 733, 763 (1994) (noting the potential for misleading implied assertions in advertising of legal services).
410. See Bates, 433 U.S. at 379 ("It is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort."); cf. K.N. Llewellyn, The Bar's Troubles, and Poultices—and Cures?, 5 Law & Con temp. Probs. 104, 109-17 (1938) (explaining that prohibitions on solicitation and advertising operate to the advantage of established lawyers and diminish access to legal services by those in need).
411. See, e.g., Bates, 433 U.S. at 368-79 (rejecting as justifications for a ban on advertising of routine legal services the damage to professionalism, the intrinsically misleading nature of attorney advertising, the instigation of unnecessary litigation, increases in the cost of
lawyer advertising, the Court looks largely to precedents and principles within this particular genre of commercial speech.\textsuperscript{412}

Even where such sub-boundaries have not been demarcated, the Court's review of commercial speech regulation has been a far cry from the crude "two-level" theory\textsuperscript{413} of expression. The Court has recognized that classification of regulated expression as commercial speech does not exempt courts from "the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation."\textsuperscript{414} In 44 Liquormart, the plurality went so far as to chastise the state for concluding that all commercial speech regulations are subject to a similar form of constitutional review simply because they target a similar category of expression. The mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them.\textsuperscript{415}

Although a majority of the Court did not embrace this sentiment, it does reflect broader opposition to a simplistic and mechanical operation of the commercial speech doctrine. Most importantly, as already noted,\textsuperscript{416} the Court has generally distinguished carefully between restrictions grounded in pure paternalism and those in which other considerations come into play.\textsuperscript{417}

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\textsuperscript{412} See Florida Bar v. Went For It, Inc., 515 U.S. 618, 624-35 (1995) (upholding Florida's 30-day restriction on direct mail client solicitation of injury victims under the Central Hudson test); Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91, 100 (1990) (plurality opinion) (quoting In re R.M.J. for the standards applicable to lawyer advertising); see also Kozinski & Banner, supra note 166, at 630 (noting that lawyer advertising has "developed into its own distinct area of common law").

\textsuperscript{413} See The Supreme Court, 1989 Term—Leading Cases, 104 Harv. L. Rev. 129, 242 (1990) (explaining that "[s]peech is classified either as 'high value,' enjoying the 'strict scrutiny' extended to 'core' political speech, or as so utterly worthless that it enjoys no first amendment protection at all and is subject to a mere 'minimum due process standard'").

\textsuperscript{414} Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 502 (1981) (plurality opinion) (quoting Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 91 (1977)); see id. at 503 (noting that the Court is obligated to conduct "a particularized inquiry into the nature of the conflicting interests at stake . . . beginning with a precise appraisal of the ordinance as it affects communication").

\textsuperscript{415} 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996) (plurality opinion).

\textsuperscript{416} See supra notes 108-113, 126-127 and accompanying text.

\textsuperscript{417} See Kathleen M. Sullivan, Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart, 1996 Sup. Ct. Rev. 123, 128 ("[W]hat is crucial is not whether we are in the world of commercial speech, but what aspects of commercial speech—its message or its harms—government seeks to regulate.").
3. The Potent Scrutiny of Commercial Speech Restrictions.—The most obvious yet easily overlooked factor in mitigating concern over a lack of thorough precision in the Court's classification scheme is the relatively privileged status that commercial speech now enjoys. The trend of this decade's decisions\textsuperscript{418} signals a "remarkable revival" of the protection of commercial speech in the wake of the ominous implications of \textit{Posadas}.\textsuperscript{419} In addition to these results, pronouncements emanating from the Court register an intent to subject restrictions on commercial speech to searching scrutiny.\textsuperscript{420} Thus, earlier concerns that an insufficiently rigorous definition of commercial speech would expose expression so classified to a porous "mid-level standard"\textsuperscript{421} now appear virtually antiquated.

While commercial speech doctrine will presumably continue to entail some modification of ordinary standards,\textsuperscript{422} these later cases

\begin{itemize}
  \item \textsuperscript{418} See supra Part I.C.
  \item \textsuperscript{419} Sullivan, \textit{supra} note 417, at 123.
  \item \textsuperscript{420} Even a persistent advocate of greater protection for commercial speech has acknowledged that recent Court decisions, especially \textit{Discovery Network}, have shown appropriate concern for the value of commercial speech. See Redish, \textit{supra} note 34, at 637 ("[U]nder \textit{Discovery Network} government may not justify its regulation of commercial speech on the basis of non-unique rationales that would be constitutionally unacceptable as justifications for the regulation of noncommercial expression, simply on the assumption that commercial speech is somehow less valuable than other subjects or forms of expression.").
  \item \textsuperscript{421} Simon, \textit{supra} note 218, at 217.
  \item \textsuperscript{422} See Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 496-97 (1982) (finding that "the overbreadth doctrine does not apply to commercial speech"); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 571 n.13 (1980) ("We have observed that commercial speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it."); \text{Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 462 n.20 (1978) ("Commercial speech is not as likely to be deterred as noncommercial speech, and therefore does not require the added protection afforded by the overbreadth approach."); Bates v. State Bar, 433 U.S. 350, 380 (1977) ("[T]he justification for the application of the overbreadth analysis applies weakly, if at all, in the ordinary commercial context."); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 772 n.24 (1976) (noting that the hardness and objectivity of commercial speech "may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker"); see also Thomas J. Meeks, Note, \textit{Commercial Speech: Foreclosing on the Overbreadth Doctrine}, 30 U. Fla. L. Rev. 479, 485 (1978) (explaining that because advertising is motivated by economic competition, the Court will not extend the overbreadth doctrine to commercial speech). \textit{But see Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 481-82 (1989) (allowing a party seeking to engage in proscribed commercial speech to challenge a restriction on grounds of its alleged application to protected noncommercial speech). In addition, Justice Stevens, who is a strong advocate of commercial speech, has in effect conceded the validity of compromising commercial speakers' right not to speak by indicating his approval of compelled disclosures. See Rubin v. Coors Brewing Co., 514 U.S. 476, 492 (1995) (Stevens, J., concurring) (noting that, in the commercial context, the government may "require[] affirmative disclosures that the speaker might not make voluntarily").}
make clear that, on the whole, commercial speech occupies a rather lofty plane. In contrast, for example, both to obscenity, which has been banished altogether from the realm of expression,\(^\text{423}\) and to limited public forums, from which expressive activity can be excluded subject to exceedingly relaxed review,\(^\text{424}\) attempts to suppress truthful, nonmisleading commercial speech now typically encounter skepticism and hostility. The theme that sounds through most recent decisions is the Court’s unwillingness to accept justifications for such restrictions that are not amply supported by concrete, credible evidence. While only a plurality in \textit{44 Liquormart} expressly endorsed the “rigorous review” advocated by Justice Stevens,\(^\text{425}\) that description fairly characterizes the majority’s approach in this and other cases. For example, in striking down the prohibition on personal solicitation by accountants in \textit{Edenfield}, the Court refused to indulge “mere speculation or conjecture” in support of the ban.\(^\text{426}\) The \textit{Discovery Network} Court cited Cincinnati’s failure to mount a record showing the need for a selective ban on commercial newsracks.\(^\text{427}\) Similarly, in \textit{Ibanez}, the Court refused to “allow rote invocation of the words ‘potentially misleading’ to supplant the [government’s] burden to ‘demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.’”\(^\text{428}\) To the extent that the \textit{Central Hudson} test persists as the Court’s formal standard, it is a more muscular version than the one that prevailed in the previous decade. For example, the bur-

\(^{423}\) See \textit{Paris Adult Theatre I v. Slaton}, 413 U.S. 49, 54 (1973) (“This Court has consistently held that obscene material is not protected by the First Amendment as a limitation on the state police power by virtue of the Fourteenth Amendment.”); \textit{Miller v. California}, 413 U.S. 15, 23 (1973) (noting that “obscene material is unprotected by the First Amendment”).


\(^{427}\) \textit{City of Cincinnati v. Discovery Network, Inc.}, 507 U.S. 410, 429 (1993) (finding “no justification for that particular regulation other than the city’s naked assertion that commercial speech has ‘low value’”).

den on government to show substantial alleviation of a "real" harm purports to be a gloss on Central Hudson's requirement that a regulation of commercial speech "directly advance[ ] the governmental interest asserted."\textsuperscript{429}

Three other developments help to refute the notion that classification as commercial speech dooms expression to precarious protection. First, the Court has minimized the gap between commercial and noncommercial speech. In Discovery Network, the Court faulted the city for "seriously underestimat[ing] the value of commercial speech,"\textsuperscript{430} while in Edenfield, the Court affirmed the value of commercial speech for its promotion of "societal interests in broad access to complete and accurate commercial information."\textsuperscript{431} Second, treatment as commercial speech is now understood to confer privilege on otherwise unprotected activity. For example, when the Court recently upheld a marketing order requiring agricultural producers to help fund generic advertising of their products, the dissenters argued that the order should be reviewed and struck down under commercial speech standards.\textsuperscript{432}

Finally, justices have sought either to distance themselves from decisions less protective of commercial speech or to rationalize those decisions as consistent with the prevalent hard scrutiny. The pervasive repudiation of Posadas in 44 Liquormart\textsuperscript{433} is obviously the most conspicuous example of this phenomenon. In addition, the Court in Edenfield went to some length to confine Ohralik's reach to a specific set of circumstances.\textsuperscript{434} Moreover, not only should the Court's assent to


\textsuperscript{430} Discovery Network, 507 U.S. at 419.

\textsuperscript{431} Edenfield, 507 U.S. at 766; cf. Moser v. FCC, 46 F.3d 970, 973 (9th Cir. 1995) (construing tests for time, place, and manner regulations of noncommercial speech and commercial speech as "essentially identical").

\textsuperscript{432} See Glickman v. Wileman Bros. & Elliott, Inc., 117 S. Ct. 2130, 2149 (1997) (Souter, J., dissenting) (arguing that the compelled advertising schemes at issue were not "purely economic conduct" but instead "commercial speech" subject to the Central Hudson test on the ground that "laws requiring an individual to engage in or pay for expensive activities are reviewed under the same standard that applies to laws prohibiting one from engaging in or paying for such activities"); id. at 2156 (Thomas, J., dissenting) ("[I]t is incongruous to suggest that forcing fruit-growers to contribute to a collective advertising campaign does not even involve speech, while at the same time effectively conceding that forbidding a fruit-grower from making those same contributions voluntarily would violate the First Amendment.").

\textsuperscript{433} See supra notes 142-143 and accompanying text.

\textsuperscript{434} See Edenfield, 507 U.S. at 773-77 (noting that Ohralik did not support the notion that all bans on personal solicitations by professionals would be deemed constitutional, only those posing the same risks inherent in personal solicitation by lawyers).
the restrictions in *Edge* and *Went For It* be viewed as special cases, but some justices have indicated a willingness to narrow or even overturn these decisions.

**D. The Parade of Phantom Horribles**

A spectre frequently invoked against the Court's imprecise parameters for commercial speech, or against any discrete category of commercial speech at all, is that of inappropriate exposure of certain types of advertising to the inferior safeguards of commercial speech doctrine. These include "mood" or "image" advertisements, "issue" advertisements, factual assertions with public affairs overtones in criticism of a commercial practice, promotion of a product through the vehicle of protected expression, and claims about a disputed factual issue that are apparently designed to further a commercial aim. To a considerable extent, the Court's willingness to grant substantial protection to and draw sensible distinctions from commercial speech, as discussed earlier, should generally alleviate concern that commercial speech doctrine will serve as an instrument for running roughshod over deserving expression. In addition, however, the theoretically interesting threats to the specific kinds of advertising described above for the most part dissolve upon realistic inspection. While some hard cases and debatable decisions remain, this problem is not peculiar or fatal to commercial speech doctrine.

**1. Nonfactual Advertising.**—It is commonplace to observe that much if not most contemporary advertising does not consist of verifiable representations about a specific product or service. Many advertisements simply make a vague or transparently hyperbolic claim about whatever the sponsor seeks to sell: "When you say Budweiser, you've said it all." As a variation, an advertisement might offer a condensed drama in which the sponsor's product is prominently featured, but which does not expressly convey any of the product's objective or purported attributes. In other instances an advertise-

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437. *See id.* at 526 n.7 (Thomas, J., concurring) (questioning the viability of the holding in *Edge*).
438. *See supra* Parts III.A, III.C.
439. For example: Three women are working in an office when one woman notices the time. The women race to the window to watch with obvious appreciation a construction worker who has just taken a break. The construction worker is shirtless and is drinking a Diet Coke to cool off.
ment does not refer to any individual product or service at all, but rather seeks to project a favorable impression of the sponsoring corporation; this is generically known as "corporate image advertising." In particular, "direct image advertising" is that branch which "treats the company as a product and attempts to differentiate the image of the sponsor from those of its competitors."

That this type of advertising, like much political and public affairs advertising, is not susceptible to objective proof or refutation appears to agitate some critics of the Court's scheme for classifying commercial speech, but it is hard to see why. These advertisements may pose intriguing questions of epistemology, but there seems little evidence that they have been chilled or otherwise adversely affected by the regulatory latitude afforded government under commercial speech doctrine. While the propositions that "America is turning 7-Up" and that Burger King sells tastier hamburgers than McDonalds may elude scientific determination, presumably the television commercials containing these claims have not been the target of official censorship. And even if the FCC were to descend on sponsors or broadcasters of these sorts of boasts, it is difficult to construct a rationale that would sustain this suppression under current commercial speech doctrine.

440. See C.C. Laura Lin, Note, Corporate Image Advertising and the First Amendment, 61 S. Cal. L. Rev. 459, 461 (1988) (defining such advertising as that which "describes the corporation itself, its activities or its views, but does not explicitly describe any products or services sold by the corporation" (quoting an FTC Memorandum)). While the pamphlets in Bolger have been mentioned as an example of corporate image advertising, see Whelan, supra note 228, at 1136, the Court indicated that the pamphlets' reference to a specific product removed them from this category. See Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67 n.14 (1983) (declining to express an opinion as to whether commercial speech requires reference to a particular product or service).

441. Lin, supra note 440, at 461; see Burkhalter, supra note 223, at 870 (describing "advertorials" as advertising that "attempts to advance the corporation's reputation or goals . . . [through] ads which do not focus on specific products, but '[aim] to 'tell' rather than 'sell'" (second alteration in original) (quotation omitted)).

442. See Lin, supra note 440, at 477-79 (arguing that the current method of classifying commercial speech permits potentially false and/or misleading image advertising on which consumers will rely).

443. See Kozinski & Banner, supra note 166, at 635 (noting that such statements about a product's popularity, taste, or effectiveness are subjective and not verifiable).

444. The same is true of the dairy industry's print advertising campaign in which various appealing sweets are shown over the stark caption "Got Milk?" Whatever the uncertainty over the precise characterization of these advertisements, they are hardly endangered by the prospect of governmental suppression. See Joachim, supra note 216, at 542-43 (explaining that the lack of an "express invitation to purchase the produce" makes it difficult to categorize advertisements such as the "Got Milk?" advertising campaign as commercial speech). The list of advertisements whose "message" is less susceptible to articulation and confirmation than "cucumbers cost sixty-nine cents," but which nevertheless flourish in
an apartment dweller’s frantic quest for a Diet Pepsi to accommodate an attractive neighbor constitutes commercial speech\footnote{See Kozinski & Banner, supra note 166, at 639-41 (noting that while product display and visual persuasion clearly indicate that it is an advertisement for Diet Pepsi, the commercial may also be considered a short film independent of any commercial purpose).} seems beside the point in the absence of a realistic threat to forbid such stories. Likewise with corporate image advertising: It is difficult to imagine a company’s being deterred from airing an advertisement conveying its warm and caring nature by the prospect that an employee’s alleged failure to live up to this portrayal will provoke a successful action, public or private, for misrepresentation.

2. Corporate Commentary.—Another source of concern is the putatively ambiguous position of issue or advocacy advertising, i.e., advertising expressing the views of a corporation or other business on a matter of public concern.\footnote{See Robert B. Holt, Jr., Comment, Corporate Advocacy Advertising: When Business’ Right to Speak Threatens the Administration of Justice, 1979 Det. C.L. Rev. 623, 623-27 (recognizing that in addition to serving as a direct marketing tool, advocacy advertising enhances the corporate image, promotes corporate responsibility, and boosts profits).} It has been remarked that this type of advertising does not fall neatly under the heading of either commercial or noncommercial speech.\footnote{See Burkhalter, supra note 223, at 870 (“Because the information is often expressed as the opinion of the advertiser and because tangible commercial benefit flowing from the ads is difficult to demonstrate, advertorials cannot be readily classified as commercial or noncommercial speech.”); Mark David Lurie, Note, Issue Advertising, Commercial Expressions, and Freedom of Speech: A Proposed Framework for First Amendment Adjudication, 28 B.C. L. Rev. 981, 983 (1987) (arguing that “issue advertising constitutes a unique category of speech... sharing certain features of both core first amendment speech and commercial speech”).} The question of classification may be especially problematic where the commentary is offered “on behalf of entities with an economic interest in one side of the debate.”\footnote{Kozinski & Banner, supra note 166, at 644.}

Anxiety over the protection of this type of expression, however, is even more misplaced than for image advertising. First, the Court has given scant indication that it would regard issue advertising as commercial speech. Indeed, implicit in both \textit{Bolger}\textsuperscript{449} and \textit{Fox}\textsuperscript{450} was the premise that the severable noncommercial elements of the mixed speech at issue would be fully protected if removed from the setting of commercial solicitation. \textit{Bellotti}\textsuperscript{451} provides even more encourage-

\footnote{See Kozinski & Banner, supra note 166, at 635; Smolla, supra note 166, at 802 (characterizing the lines in the Gatorade commercial “Like Mike [i.e., basketball superstar Michael Jordan]! If I could be like Mike!” as innocuous “invitations to fantasy”).}

\footnote{See supra notes 197-205 and accompanying text.}

\footnote{See supra notes 206-211 and accompanying text.}

\footnote{See supra notes 272-277 and accompanying text.}
ment. In this case, the Court considered banks' publicizing their opposition to a state income tax as a part of the freedom to discuss "all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." 452 In addition, the Court stated that Massachusetts could not base its tolerance of corporate speech on whether the public issue addressed by the corporation materially affected its property or business. 453

Moreover, even in the event that a genuine issue advertisement was treated as commercial speech, this characterization would still furnish little ground for censorship. After all, the government would still presumably have to demonstrate that the advertising contained false or misleading statements. As in defamation, the burden of showing factual misrepresentation remains regardless of the characterization of the speech as commercial. 454 Thus, where a company offers its viewpoint on a matter of public concern, it would be rare for the government to try to squelch the company's message, much less succeed in doing so. The longstanding "advertorializing" of Mobil Corporation in the New York Times 455 attests to the vitality of this form of expression.

Conversely, a frequently cited example of the difficulty of classifying this type of speech illustrates that the problem tends to be more philosophical than practical. A few years ago the Philip Morris Company conducted an advertising campaign observing the bicentennial of the Bill of Rights and "encourag[ing] viewers to become ac-

453. Id. at 784 (finding that the "materally affecting" requirement "amounts to an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues and a requirement that the speaker have a sufficiently great interest in the subject to justify communication"). The opinion implied that, if anything, a corporation's greater stake in the outcome of a controversy increased the presumption of First Amendment protection. Id. at 793. The Court apparently assumed that the corporate speech already protected by Massachusetts—expression "materally affecting" the business of the corporation—was entitled to full-scale First Amendment recognition. See id. at 776 ("The speech proposed by [the banks] is at the heart of the First Amendment's protection.").
454. In Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990), the Court refused to recognize a distinction in defamation between protected statements denominated as "opinion" and actionable statements of "fact." Id. at 17-21. Instead, the Court held that a constitutionally permissible defamation action may lie where the expression at issue could reasonably be taken to convey, including by implication, an assertion of objective fact. Id. at 18-19.
455. See, e.g., Mobil Corp., Climate Change: A Degree of Uncertainty, N.Y. Times, Dec. 4, 1997, at A31 (calling for delegates at an international conference to resist recommendations that could economically burden companies); Mobil Corp., It's Time to Pass the Trade Bill, N.Y. Times, June 30, 1998, at A23 (urging passage of trade bill before Congress at that time).
quainted with its provisions. Because these ostensible commentaries on a topic at the heart of our system of self-government also carried heavy overtones of promotion of Philip Morris and its products, the advertisements in the abstract might arguably be viewed as either political or commercial in nature. However, it would take an exceedingly strained reading even of Bolger to assign Philip Morris's campaign to the commercial speech category; the appearance of the Philip Morris logo at the end of each advertisement does not remotely resemble the hawking of a specific product that the Court reasonably discerned (but nonetheless protected) in the "informational" pamphlets in Bolger. Moreover, even if a court might carelessly characterize the company's paean to the Bill of Rights as commercial speech, it is again hard to construct a scenario in which the Court would sustain an attempt to restrict such advertising. Perhaps this is why the government apparently did not try.

3. Criticism of Commercial Practices.—Another area in which questions have been raised about the definition and protection of commercial speech is a business's criticism of a competitor's practice that implicates an issue of public concern. In this type of advertising, a company would promote its own product by denigrating ethical underpinnings of another company's product or practices. For example, a company might urge consumers to purchase its product over that of

456. Kozinski & Banner, supra note 166, at 645.
457. See id. at 645-66 (arguing that the product identification resulting from Philip Morris's sponsorship of the Bill of Rights anniversary is no different from consumer recognition associated with the Marlboro Man); Burkhalter, supra note 223, at 872-73 (characterizing the advertisements as attempts by Philip Morris "to protect its commercial interests by promoting the 'right' to smoke as a political debate beyond the reasonable scope of regulation by state agencies"); Joachim, supra note 216, at 544 (explaining how Philip Morris's Bill of Rights advertisement circumvented the ban on televised cigarette advertisements).
459. See Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 n.13 (1983) (pointing out that the name brand "Trojan" was prominently displayed in the informational pamphlets promoting safe sex).
460. See Sarah Booth Conroy, Fired Up Over Philip Morris: Consumer Group Blasts 'Bill of Rights' Ad Campaign, WASH. POST, Nov. 10, 1989, at D1 (reporting that research discloses no governmental effort to interfere with the campaign other than a request by the chairman of the House Government Operations Committee to the General Accounting Office to investigate whether the National Archives, with whose cooperation Philip Morris conducted the campaign, had the authority to allow a private company to use its name, and whether its facilities should be rented to a private company).
a competitor because the product was prepared in an offensive manner or the competitor does business with an abhorrent regime.

That the explorations of this question just cited took place through hypothetical illustrations suggests, once again, that those concerned with the proper classification of such advertising are wrestling with issues that are primarily theoretical rather than practical and legal ones. Assuming the truth of the factual statements in these scenarios, the advertisers would appear to have little cause for anxiety regardless of how the accusations of their competitors' moral shortcomings are categorized. Research does not disclose statutes that penalize truthful disparagement of an economic rival. Moreover, it is difficult to conceive of any rationale for such a statute, much less one that would pass the Court's revitalized commercial speech doctrine.

Admittedly, these hypothetical statements would be actionable if they turned out to be false, but this would not be a function of a court's decision to designate them as commercial speech. A false statement that harms another's reputation is the very essence of defamation, and the potential for libel or slander is not heightened by a

461. See Joachim, supra note 216, at 543 (discussing a hypothetical advertising campaign by chicken producers publicizing their humane chicken-raising practices in implicit contrast to their competitors' methods).

462. See Kozinski & Banner, supra note 166, at 645 (discussing a hypothetical advertisement by a seller telling consumers to buy its product because its competitor "support[s] apartheid").

463. Section 43(a) of the Lanham Act, for example, applies only to false advertising. See supra notes 348-354 and accompanying text; see also Paul T. Hayden, A Goodly Apple Rotten at the Heart: Commercial Disparagement in Comparative Advertising as Common-Law Tortious Unfair Competition, 76 IOWA L. REV. 67, 92 (1990) (noting that the Court "clearly has approved state regulation of such speech [at issue in commercial disparagement cases] when it is misleading or deceptive"); Arlen W. Langvardt, Free Speech versus Economic Harm: Accommodating Defamation, Commercial Speech, and Unfair Competition Considerations in the Law of Injurious Falsehood, 62 TEMPLE L. REV. 903, 938-46 (1989) (discussing First Amendment protection of commercial speech in the context of injurious falsehood law). Moreover, punishment for truthful, non-misleading disparagement would raise serious constitutional questions. See Bose Corp. v. Consumers Union of United States Inc., 466 U.S. 485, 513 (1984) (applying the New York Times requirement of actual malice to a claim of product disparagement, because otherwise "any individual using a malapropism might be liable simply because an intelligent speaker would have to know that the term was inaccurate in context, even though he did not realize his folly at the time"); Lisa Magee Arent, A Matter of "Governing' Importance': Providing Business Defamation and Product Disparagement Defendants Full First Amendment Protection, 67 IND. L.J. 441, 445 (1992) (arguing that "statements that have been traditionally classified as business defamation and product disparagement" should receive the highest level of First Amendment protection in order to promote "the free flow of criticism of products, businesses, and business figures").

464. See DAN B. DOBBS ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 773 (5th ed. Supp. 1988) (defining defamation as "that which tends to injure 'reputation' in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the
commercial setting. In some cases a dispute might arise as to whether a statement in fact conveyed a false assertion through implication; again, however, resolution of this issue would be governed by defamation law and doctrine.

4. Camouflaged Promotion.—A more subtle form of promotion thought vulnerable if classified as commercial speech is a favorable, or at least prominent, appearance of a product or company in the setting of otherwise fully protected expression. To take a notable (and arguably insidious) example, a newscast might give extended and laudatory coverage to the activities of a sponsor or a corporate parent. An even broader conception of commercial speech might encompass a news or feature story whose description of a commercial enterprise might stimulate the economic interest of some of its intended audience.

The prospect of restrictions on these kinds of expression as commercial speech operates yet again in the realm of improbable speculation. For example, the Disney Company’s acquisition of the American Broadcasting Company may have aroused apprehensions of favorable or inordinate coverage of Disney’s activities by ABC News, but it plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him’).

465. See Fred T. Magaziner, Note, Corporate Defamation and Product Disparagement: Narrowing the Analogy to Personal Defamation, 75 COLUM. L. REV. 963, 978 (1975) (arguing that in the interest of protecting free speech, only those defamatory statements that cause significant harm should be punished in commercial settings).

466. For example, an issue might develop as to whether the assertion that a business competitor “support[s] apartheid” would be reasonably understood as no more than an accurate reference to the competitor’s selling its product to a nation organized on apartheid principles. See supra note 462.

467. See Milkovich v. Lorain Journal Co., 497 U.S. 1, 18 (1990) (refusing “to create a wholesale defamation exemption for anything that might be labeled ‘opinion[ ] . . . [because] expressions of ‘opinion’ may often imply an assertion of objective fact”); see also Kathryn Dix Sowle, A Matter of Opinion: Milkovich Four Years Later, 3 WM. & MARY BILL RTS. J. 467, 530 (1994) (suggesting that “the common law test of falsity applies to all communications, regardless of their form”).


469. See Marc S. Charisse, Brothels in the Marketplace of Ideas: Defining Commercial Speech, 12 COMM. & THE LAW, Sept. 1990, at 3, 15 (examining, and discarding, the criterion of context as a means to define commercial speech).

470. See Monica Collins, TV Shrinks as it Grows: Mergers and Acquisitions Put Limits on Originality, BOSTON HERALD, July 18, 1996, available in 1996 WL 5341783 (commenting that in the age of media mergers, “Disney has been the most egregious offender—using its sitcoms (‘Roseanne’) and news programs (‘Good Morning America’ and ‘Prime Time Live’) to further its agenda”); see also Frank Rich, Media Amok, N.Y. TIMES, May 18, 1996,
does not appear to have provoked serious efforts to regulate ABC's broadcasts to prevent such bias. Nor would even the most expansive reading of either *Central Hudson* or the Court's tolerance of content-neutral regulation of the electronic media offer much encouragement that these efforts would prevail. And however intriguing the connection between a *Cosmopolitan* article on a Las Vegas brothel and the economic interests of the magazine's readers, it would be far-fetched to expect the government to seize on this connection to try—much less successfully—to curtail the content of such a piece.

5. **Product Placements.**—A closer case (and more plausible possibility) is presented by potential restrictions on product placement: the practice in which manufacturers, for either a fee or by donating their products to the studios, arrange to have the products appear in films. Here, serious efforts have actually been mounted to impose restrictions. Moreover, while a strong argument exists that a product placement shares the fully protected character of the film into which it is interwoven, the prior transaction by which the placement is arranged may enjoy a less certain status.

The lack of an unequivocal a priori resolution of restrictions on product placement under current commercial speech doctrine, however, does not discredit that entire framework. First, at this point the threat to commercial speech still appears to be only hypothetical. More importantly, it is not at all clear that an economic transaction

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§ 1, at 19 ("If a parent corporation can use its influence to inject self-serving infomercials into news broadcasts, can't it also use its influence to keep news that might harm the corporation (or its political patrons) off the air?").

471. See supra note 126 and accompanying text.

472. See Charisse, supra note 469, at 14.

473. See William Benjamin Lackey, Comment, Can Lois Lane Smoke Marlboros? An Examination of the Constitutionality of Regulating Product Placement in Movies, 1993 U. CHI. LEGAL F. 275, 275 (arguing that product placement "has created the impression that Hollywood is more interested in producing feature length advertisements than in making films").

474. See Kenneth R. Clark, Group Goes After Brand-Name Film Props, CHI. TRIB., June 10, 1991, available in 1991 WL 9385677 (explaining how one group petitioned the FTC either to ban product placement in the film industry, or in the alternative to require a disclaimer informing moviegoers that the film they are watching contains paid advertising); Film "Ads" for Smoking Under Fire—Lawmaker Would Ban Pay-for-Scene Practice, ORANGE COUNTY REGISTER, Mar. 3, 1989, at A26, available in 1989 WL 6192006 (describing the Protect Our Children from Cigarettes Act of 1989 which would ban tobacco related product placement).

475. See Snyder, supra note 219, at 324 ("A film containing product placement is not speech related solely to the economic interests of the speaker and the audience, and is therefore not commercial speech under the *Central Hudson* test."). But see Lackey, supra note 473, at 276 (contending that product placement constitutes commercial speech).

476. See Snyder, supra note 219, at 335 (reserving judgment as to the status of product placement before a film is made).
integrally related to a creative work would be classified as commercial speech or, even if it were, that it would survive the Court's commercial speech standards. An agreement to include a particular product in a film is not intrinsically false or misleading, and the special circumstances that furnished grounds for upholding restrictions on nondeceptive speech in *Edge*\textsuperscript{477} and *Went For It*\textsuperscript{478} are not present here. Conversely, if the Court were ever confronted with this issue and were inclined to sustain a prohibition on this transaction, it would not have to rely on commercial speech designation to do so. For example, the Court might treat a ban on product placement for consideration as an economic regulation, leaving a filmmaker free to include the product of her choice without compensation. Indeed, if the Court thought the rationale for restricting product placement sufficiently compelling, even classification as noncommercial speech would not necessarily save it; after all, where concern over the untoward influence of money has arisen, the Court has tolerated some restrictions even on contributions as central to the First Amendment as political campaigning.\textsuperscript{479} Thus, a ban on product placement could raise snarly issues, but these would not be resolved—nor product placement immunized—simply by revising or eradicating the conception of what constitutes commercial speech.

6. Commercial Speech and Science.—Some of the most troubling questions about the decisive effect of commercial speech classification concern sellers' health claims about particular products. Where a claim involves a matter of scientific debate, regulation of a company's or association's advertisement as commercial speech may, it is feared, curb legitimate debate on a public issue.\textsuperscript{480} Two of the most widely noted instances of this perceived danger, *National Commission on Egg Nutrition v. FTC*\textsuperscript{481} and a restriction on cigarette advertising by R.J. Reynolds,\textsuperscript{482} arose from actions brought by the Federal Trade Com-

\textsuperscript{477} See supra notes 126-127 and accompanying text.

\textsuperscript{478} See supra notes 108-112 and accompanying text.

\textsuperscript{479} See Buckley v. Valeo, 424 U.S. 1, 143 (1976) (per curiam) (upholding certain limitations on contributions to political campaigns).

\textsuperscript{480} See Redish, supra note 220, at 1452-53 ("[T]o characterize everything a manufacturer says about the scientific properties of its product as commercial speech effectively revokes a corporation's "full panoply of protections available to its direct comment on [that] public issue[ ]" (second and third alteration in original) (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 68 (1983))).

\textsuperscript{481} 570 F.2d 157, 159 (7th Cir. 1977) (upholding an FTC order prohibiting a trade group from continuing to run certain advertisements designed to refute the public health claims linking egg consumption to high cholesterol and increased risk of heart disease).

\textsuperscript{482} See In re R.J. Reynolds Tobacco Co., 111 F.T.C. 539 (1988):
While the dispositions of these suits raise valid issues, they do not demonstrate the general failure of commercial speech definition.

The National Commission on Egg Nutrition (NCEN) was a trade association within the egg industry formed to counter the decline in egg consumption, which NCEN attributed to the propagation of the notion that eggs are unhealthy. Accordingly, NCEN sponsored a series of advertisements promoting the nutritional value of eggs. Some of these advertisements asserted that "there is no scientific evidence that eating eggs increases the risk of... heart [and circulatory] disease..." The Seventh Circuit found that these advertisements amounted to commercial speech, which it determined to include "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 court enforced the FTC's order forbidding NCEN from continuing the advertisements without disclosing that the association was presenting one side of a controversy among experts.

The Reynolds litigation was directed at an advertisement entitled "Of Cigarettes and Science." In essence, the advertisement represented that a government study known as "MR FIT" undermined popular beliefs about the link between cigarette smoking and health risks. In an interlocutory order, the Commission ruled that the advertisement qualified as commercial speech under the factors dis-

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[I]t is possible to determine whether a specific advertisement that includes information connected to public issues nonetheless addresses the concerns of a purchaser of the advertiser's product or service. To conclude otherwise would allow sellers of certain products to avoid the proscription against false and misleading advertising merely by linking their product to a public issue.

Id. at 546.

483. Cf. David G. Adams, FDA Regulation of Communications on Pharmaceutical Products, 24 Seton Hall L. Rev. 1399, 1416 (1994) (suggesting that a broad assertion of authority by the Food and Drug Administration to regulate information about therapeutic products may ultimately generate issues similar to those in FTC litigation).

484. See Egg Nutrition, 570 F.2d at 159 ("Despite its official-sounding title, NCEN was formed by members of the egg industry, to counter-act what the FTC described as 'anti-cholesterol attacks on eggs which had resulted in steadily declining per capita egg consumption.'").

485. Id.

486. Id. (alteration and ellipsis in original).

487. Id. at 163.

488. Id. at 164.


490. Id. at 539-40 (alleging that the Reynolds advertisement misled the public by falsely asserting that the government study contained "credible scientific evidence" refuting public health warnings of smoking-related health hazards, such as coronary heart disease).
cussed in Bolger and therefore was subject to FTC jurisdiction.\textsuperscript{491} Ultimately, the FTC dismissed its complaint in return for Reynolds's agreement to withdraw all advertising that portrayed the "MR FIT" study as rebutting theories about smoking's adverse effects on health.\textsuperscript{492}

The classification and curtailment of the advertisements in these two cases are certainly open to question, but this simply demonstrates that businesses' dubious health claims are a field ripe for gray areas and debatable resolutions. While it is plausible to argue that Egg Nutrition "effectively excluded one sector of society from participating in the public debate" about the impact of eggs on heart disease,\textsuperscript{493} it is also tempting to applaud the Seventh Circuit's refusal to "be hesitant to prevent an advertiser from misleading consumers under the veil of important public debate."\textsuperscript{494} Similarly, while Reynolds's advertisement can be viewed as a "direct comment on a matter of public concern,"\textsuperscript{495} this comment took the form of purchased advertising designed to promote the commercial sale of the speaker's products.\textsuperscript{496} Although the case against commercial speech classification is probably stronger in Reynolds than in Egg Nutrition, the former case can be built on the Court's commercial speech jurisprudence rather than discarding it.\textsuperscript{497} Barring abolition of the commercial speech category altogether, inevitably there will be times when the line between protected editorial and commercial advertising in claims about the danger or innocuousness of an advertiser's product will be hard to discern.

\begin{itemize}
\item \textsuperscript{491} Id. at 547-48.
\item \textsuperscript{492} In re R.J. Reynolds Tobacco Co., 113 F.T.C. 344, 348-49 (1990).
\item \textsuperscript{493} Kozinski & Banner, supra note 166, at 643 (referring to the exclusion of the NCEN).
\item \textsuperscript{494} Barry S. Roberts, Toward a General Theory of Commercial Speech and the First Amendment, 40 Ohio St. L.J. 115, 146 (1979); see also Farber, supra note 174, at 390 (noting that NCEN's advertisements were regulable as commercial speech because of their effect on later contract of sale); Frederick F. Schauer, Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter, 64 Va. L. Rev. 263, 297 (1978) (discussing the difficulty presented by Egg Nutrition in the context of a broader meditation on the relationship between choice of language and factual truth).
\item \textsuperscript{495} In re R.J. Reynolds, 111 F.T.C., at 564 (Oliver, C.C., dissenting); see also Howard, supra note 216, at 1143-47 (highlighting the political nature of the speech deemed by the majority as commercial).
\item \textsuperscript{496} See In re R.J. Reynolds, 111 F.T.C., at 547; see also Thomas H. Nienow, Comment, In re Reynolds Tobacco Co., Inc.: The "Common Sense" Distinction Between Commercial and Non-commercial Speech, 14 Hastings Const. L.Q. 869, 871, 887 (1987) (pointing out that the advertisement generally advanced the fiscal goals of the advertiser).
\item \textsuperscript{497} See In re R.J. Reynolds, 111 F.T.C. at 555-65 (Oliver, C.C., dissenting) (adopting this approach).
\end{itemize}
7. Other Contexts.—A review of other lower court decisions entailing a choice of characterization does not reveal a tendency to trample on expression under the banner of commercial speech classification. On the contrary, it is not difficult to find courts that reject colorable assertions of commercial speech status: e.g., a “Future Millionaires” home video course, fortune-telling for a fee, allegedly false advertisements by the insurance industry aimed at restraining civil lawsuits and jury awards, and a buyer’s disparaging comments about a seller’s office equipment. Conversely, one can locate relatively straightforward determinations of regulated commercial speech, such as group sales demonstrations in a university’s dormitory rooms. In addition, courts have been able reasonably to parse commercial from noncommercial speech where the state has sought to regulate a speaker who has arguably engaged in both.

498. State ex rel. Corbin v. Tolleson, 773 P.2d 490, 495, 500 (Ariz. Ct. App. 1989). The state had sought an injunction against sale of Tolleson’s video on the grounds of consumer fraud and racketeering. The court denied the injunction at the summary judgment stage because the state had failed to demonstrate that the commercial portions of the video were not “inextricably intertwined” with its non-commercial aspects. Id. at 495, 500.


501. J.Q. Office Equip. of Omaha, Inc. v. Sullivan, 432 N.W.2d 211, 214 (Neb. 1988) (characterizing the comments as noncommercial speech that “falls under the full protection of the first amendment and the prohibition against prior restraints”).

502. American Future Sys., Inc. v. Pennsylvania State Univ., 752 F.2d 854, 862 (3d Cir. 1984) (holding that where speech “is essentially an advertisement of AFS’s wares, it specifically refers to AFS’s products, and AFS’s motivation for engaging in the speech is purely economic. . . the speech in question is commercial as a matter of law”); see also Association of Nat’l Advertisers, Inc. v. Lungren, 44 F.3d 726, 728 (9th Cir. 1994) (characterizing the messages regulated by a statute that required truthful claims about a product’s impact on the environment as commercial speech); In re Orthopedic Bone Screw Prods. Liab. Litig., No. MDL 1014, 1997 WL 186325 *16 (E.D. Pa. Apr. 16, 1997) (categorizing as commercial speech seminars for instruction in the use of a device, inserted in some patients after surgery, that included an allegedly deceptive “sales pitch” for the device).

503. For example, in Texans Against Censorship, Inc. v. State Bar, 888 F. Supp. 1328 (E.D. Tex. 1995), aff’d, 100 F.3d 953 (5th Cir. 1996), the court distinguished between two parts of an attorney’s newsletter. The court considered the portions about consumer and public safety issues to be protected noncommercial speech, and the portion that contained a passage beginning “TELL YOUR FRIENDS ABOUT US” and inviting the reader to “give our toll free number to someone who might need our services” as commercial speech. Id. at 1345-46. The court analyzed the newsletters as “commercial communications,” however, because it found that these portions were not “inextricably intertwined.” Id. at 1346. Compare Leoni v. State Bar, 704 P.2d 183, 185-86 (Cal. 1985) (in bank) (characterizing as commercial speech an attorney’s allegedly deceptive letter-writing campaign aimed at
Inevitably, of course, some controversial determinations of commercial speech will occur; but consideration of two that have attracted attention—Briggs & Stratton Corp. v. Baldrige and Fargo Women’s Health Organization, Inc. v. Larson—suggests that these decisions tend to be neither frequent nor obviously wrong. Briggs involved an effort by the United States to thwart American companies’ abetment of an Arab trade boycott of Israel. To police the boycott, some Arab countries sent questionnaires to companies that they suspected of violating the boycott, asking them about, inter alia, their relationship with Israeli firms. Failure to return the questionnaires typically resulted in blacklisting by the participating Arab nations. Briggs & Stratton wished to answer the questionnaires to avoid this possibility; Commerce Department regulations, however, prohibited a response. In sustaining the regulations, the Seventh Circuit ruled that the proposed answers to the boycott questions constituted commercial speech because they were intended only to advance the purpose of continuing commercial dealings with the Arab world.

Briggs’s characterization of the forbidden questionnaire responses has been subject to critical scrutiny. In particular, the court’s focus on the economic motivation behind the company’s desire to provide responses has been called into question. This misplaced reliance—if it was a mistake—resulted from overlooking or misapplying Supreme Court pronouncements, not flaws in commercial speech jurisprudence itself. Moreover, this was hardly an open-and-shut case; the “inherently political and social aspects” of the boycott questionnaire did not necessarily eclipse the proposed responses’

individuals in pending creditor lawsuits and providing information on both debtors’ legal rights and availability of attorney’s services) with Jacoby v. State Bar, 562 P.2d 1326, 1338 (Cal. 1977) (viewing attorneys’ cooperation with news media’s coverage of the opening of their clinic as “discussion of an important issue rather than solicitation”).

504. 728 F.2d 915 (7th Cir. 1984).
505. 381 N.W.2d 176 (N.D. 1986).
506. Briggs, 728 F.2d at 916.
507. Id.
508. Id.
509. Id.
510. Id. at 917-18.
511. See Kozinski & Banner, supra note 166, at 645 (presenting hypothetical scenarios in which responding to similar questionnaires “could well be the manifestation of a sincere political or religious belief”); Nelson, supra note 221, at 378 (arguing that the communication did more than merely promote products because it also concerned the relationship between Briggs and “other companies and governments”).
512. See Nelson, supra note 221, at 378-81 (criticizing Briggs as inconsistent with several Supreme Court commercial speech decisions).
513. Id. at 381.
close connections to commercial transactions, much less confer a First Amendment right to return a completed questionnaire. Just as a city's policy against gender discrimination may legitimately include a ban on job advertisements that promote such discrimination\textsuperscript{514}—even if the advertisements were the "manifestation of a sincere political or religious belief"\textsuperscript{515} in the unsuitability of men or women for certain positions—so a national policy against the Arab trade boycott might justify restrictions on communications that abet this politically inspired commercial boycott. In short, \textit{Briggs} was not an easy case, and any framework that did not automatically concede the company's constitutional right to supply the Arab countries with the information that they were seeking would have called for a thoughtful inquiry and sensitive judgment.

Similarly, \textit{Fargo}, also cited as an illustration of the Court's problematic classification scheme,\textsuperscript{516} demonstrates instead that some cases simply present a delicate balance of rights and interests. The court upheld an injunctive order prohibiting the defendants, who can be collectively referred to as the "Women's Help Clinic," from "falsely and deceptively advertising that they provide elective abortions and financial assistance for such services."\textsuperscript{517} The Help Clinic, a medical clinic that offered pregnancy tests, had sponsored advertisements prominently referring to "ABORTION" and the availability of "financial assistance," but omitting mention that the Clinic provided anti-abortion counseling services and did not perform abortions.\textsuperscript{518}

Rejecting the absence of fees for the Clinic's services and the Clinic's aim of advocating a pro-life position as grounds for extending full protection,\textsuperscript{519} the court treated the Help Clinic's advertisements as commercial speech.\textsuperscript{520} Both this characterization of the advertisements and the result in \textit{Fargo} are highly defensible. If these advertise-

\begin{itemize}
\item \textsuperscript{514} Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 379-81 (1973).
\item \textsuperscript{515} Kozinski & Banner, \textit{supra} note 166, at 645 (offering such belief as a possible explanation for responding to the boycott questionnaire in \textit{Briggs}).
\item \textsuperscript{516} \textit{See} Terry Kirk, \textit{Note, Alternative Approaches to the Distinction Between Commercial and Noncommercial Speech: Fargo Women's Health Organization v. Larson}, 36 \textit{DEPAUL L. REV.} 583, 605-06 (1987) (offering three alternative approaches to the "arbitrary classification of speech as commercial or noncommercial").
\item \textsuperscript{517} \textit{Fargo Women's Health Org., Inc. v. Larson}, 381 N.W.2d 176, 178 (N.D. 1986) (quoting the order).
\item \textsuperscript{518} \textit{Id.} at 177, 179. In addition, the plaintiff, a medical clinic which operated in the same city as the Help Clinic and performed abortions, alleged that the Help Clinic had adopted a name designed to produce confusion of the two clinics. \textit{Id.} at 177.
\item \textsuperscript{519} \textit{Id.} at 180-81.
\item \textsuperscript{520} \textit{Id.} at 182.
\end{itemize}
ments do not represent quintessential commercial speech, neither would it make sense to pigeonhole them as pure social or political discourse either. The commercial speech designation captures as well as any category the nature of the state interest here: precluding the harm caused by “commercial messages that do not accurately inform the public about lawful activity or are more likely to deceive the public than to inform it.”\textsuperscript{521} Whatever the drawbacks of categorization in general\textsuperscript{522} and one’s disagreement with the decision in \textit{Fargo}, it is not an indictment of current commercial speech classification that it could be invoked to avert the possibility of individuals relying to their detriment on the misleading advertisements in that case.

8. \textit{The Romantic Fallacy}.—Finally, transcending and often underlying the previous specific objections to commercial speech classification is resistance to the very idea of commercial speech. In modern broadcasting, it seems, virtually any ostensibly commercial advertisement carries deeper overtones. From this perspective, a series of Taster’s Choice coffee television commercials do not describe the taste or aroma of the product, they tell the story of a budding romance. Commercial speech may also employ religious and cultural symbols to make comments that are no less trenchant than political speech. A series of Benetton advertisements in magazines features provocative images, such as a white hand and a black hand handcuffed together and a young man dying of AIDS in his father’s arms. There is no Benetton clothing pictured . . . only a small Benetton logo at the bottom of the page.\textsuperscript{523} Similarly, organized resistance by libertarians and others to government regulation of cigarettes can be thought to transmute a widely seen advertisement with the word “Marlboro” from commercial speech to a phase of a “political crusade.”\textsuperscript{524}

The problem with this line of reasoning is not that it is illogical but that it proves too much. It converts the unexceptionable observation that at least some noncommercial message can be teased out of

\textsuperscript{521} Id.

\textsuperscript{522} \textit{See infra} notes 575-596 and accompanying text (arguing that the categories created by the Court offer a meaningful and prudent framework for analyzing commercial speech).

\textsuperscript{523} \textit{The Supreme Court, 1992 Term—Leading Cases, supra} note 223, at 232 (footnotes omitted).

\textsuperscript{524} Joachim, \textit{supra} note 216, at 544.
all commercial speech\textsuperscript{525} into an instrument for prying lofty but contrived commentary out of any advertisement. A television advertisement consisting of three frogs croaking the name of the sponsor’s beer could be construed as an Aristophanic satire,\textsuperscript{526} while a good-natured basketball sharpshooting competition between Michael Jordan and Larry Bird for a McDonald’s Big Mac hamburger could represent a hopeful meditation on the state of racial relations in American society.\textsuperscript{527} While those musings over the fundamental content of television’s twenty-and thirty-second oeuvres might stimulate the imagination of philosophers, they do little to advance First Amendment analysis. If, in the examples offered earlier, the “story of a budding romance” had portrayed Taster’s Choice coffee as possessing nonexistent therapeutic qualities, or if one of Benetton’s “provocative images” had falsely implied that demonstrable victims of racism or disease would receive a discount on the company’s clothing, then the artistic merits or social implications of the advertisements should not immunize these misrepresentations from restriction as commercial speech. Conversely, as discussed previously,\textsuperscript{528} if the advertisements cannot be shown to mislead consumers in harmful ways, then they are not threatened by abstract classification as commercial speech.

\section*{E. Alternative Controlling Frameworks}

Even where legitimate issues of proper characterization of regulated expression may be raised, the case should not necessarily turn on classification. In some instances, another First Amendment question is more central to the case and should determine the outcome. Two areas in the commercial context where dwelling on classification can be a misplaced exercise are charges of defamation and assertion of a right not to speak.\textsuperscript{529}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{525} See Nowak & Rotunda, supra note 9, at 1067 (noting “the expression of ideas and values such as materialism or capitalism” is inherent in every speech designated as commercial).
\item \textsuperscript{526} See Aristophanes, Frogs 69-76 (Kenneth Dover ed., Clarendon Press 1993) (describing the political criticism expressed in Aristophanes’ comedy).
\item \textsuperscript{527} At the time of this writing, Jordan, who is black, and Bird, who is white, are two of the most celebrated players in the history of professional basketball.
\item \textsuperscript{528} See supra Part III.D (arguing that the extension of the commercial speech doctrine to certain types of advertising is not contrary to the goals of the doctrine).
\item \textsuperscript{529} There are, of course, other examples in which a case involving regulated expression should be decided by a doctrine other than that of commercial speech. In some cases, commercial and noncommercial speech may even be comparably susceptible to restriction. See, e.g., Moser v. FCC, 46 F.3d 970, 973 (9th Cir. 1995) (construing tests for time, place, and manner regulations of noncommercial speech and commercial speech as “essentially identical”); Marcus v. Jewish Nat’l Fund (Keren Kayemeth Leisrael), Inc., 557 N.Y.S.2d 886,
\end{itemize}
\end{footnotesize}
1. **Supersession by Defamation Doctrine: A Cautionary Example.**—As suggested earlier, a plaintiff’s allegation that the defendant made defamatory statements can render the question of whether the statements were part of commercial or noncommercial expression in effect irrelevant. Defamation cases typically hinge on issues of the defendant’s status and intent independent of the commercial speech framework. A conspicuous example of failure to grasp this analysis, however, appeared in the Third Circuit’s opinion in *U.S. Healthcare, Inc. v. Blue Cross.* In this case, two health care organizations accused each other of misrepresenting the relative quality of the organizations’ services in the course of an advertising war. While several causes of action were brought, the central portion of the opinion was devoted to a First Amendment review of the defamation claims. This review unnecessarily imported the difficulties of ascertaining whether the advertisement at issue amounted to commercial speech into the determination of the applicable standard for establishing defamation. As a threshold matter, the Supreme Court has placed a heavy and often decisive premium on the designation of defamation plaintiffs other than public officials as either public or private figures. Yet, the Third Circuit, in its concededly “inverted analysis,” reserved the question of status because it believed that under the circumstances presented resolution of that question “depends on whether the speech at issue can properly be characterized as commercial speech.”

- 889 (App. Div. 1990) (finding solicitation of charitable contributions, even if noncommercial speech, not “exempt from having to comply with the strictures against false advertising and other deceptive practices”); see also Timothy J. Moran, Format Restrictions on Televised Political Advertising: Elevating Political Debate Without Suppressing Free Speech, 67 Ind. L.J. 665, 689-90 (1992) (proposing issue-oriented format requirements for political advertisements in order to promote meaningful discussions of issues).

530. See supra notes 464-467 and accompanying text.


532. 898 F.2d 914 (3d Cir. 1990).

533. Id. at 917.

534. Id. at 927-39.


tisements did constitute commercial speech, the court was mistaken in asserting that this conclusion bore on the parties' status under defamation doctrine. More specifically, the court misread Gertz in suggesting that the commercial nature of the parties' speech transformed them from public into private figures. Whatever reluctance the Supreme Court has displayed toward designating defamation plaintiffs as public figures, Gertz and its progeny do not support the notion that plaintiffs who would otherwise become public figures by having "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved" elude that status when either the defendant's comments or their own qualify as commercial speech. Thus, the refusal in U.S. Healthcare to apply the actual malice standard imposed on public figures did not result from a dangerously malleable conception of commercial speech, but rather from the inappropriate role assigned to commercial speech classification in determining the plaintiff's status under defamation law.

537. Id. at 933-37.
538. See id. at 938-39 (arguing that, notwithstanding "strong indicia" that parties were limited purpose public figures under "traditional defamation analysis," Gertz's "express analysis" is "not helpful in the context of a comparative advertising war").
539. In none of the four cases in which the Court issued an opinion assessing the plaintiff's status was the plaintiff deemed a public figure. See Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 167-69 (1979) (holding that the plaintiff's failure to appear before a lower court in a contempt hearing before a grand jury and subsequent citation received because of this failure were not determinative in assessing his status as a public figure); Hutchinson v. Proxmire, 443 U.S. 111, 134-36 (1979) (holding that the plaintiff was not a public figure despite his successful application for federal funds for research projects, the news stories reporting the grants, and the reported responses that the plaintiff made to the alleged libel); Time, Inc. v. Firestone, 424 U.S. 448, 454-56 (1976) (holding that the process of divorce of wealthy individuals in a judicial proceeding does not necessarily render them public figures); Gertz, 418 U.S. at 351-52 (holding that an individual's participation as an officer in civic and professional groups did not elevate him to the status of a public figure). Like U.S. Healthcare, all of these cases involved defendants' assertions that the plaintiff was a limited public figure. For an overview, see John B. McCrory & Robert C. Bernius, Constitutional Privilege in Libel Law, in COMMUNICATIONS LAW 1995 731, 983-1034 (PLI Pats. Copyrights Trademarks & Literary Prop. Course Handbook Series No. G-420, 1995).
540. Gertz, 418 U.S. at 345.
541. See U.S. Healthcare, 898 F.2d at 939 (suggesting that neither party could be considered to have injected itself into a public controversy about health care because the impetus for the advertisements at issue was commercial).
542. See id. at 938-39.
543. At least one court appears to have recognized the fallacy of U.S. Healthcare's reasoning. In National Life Insurance Co. v. Phillips Publishing, Inc., 793 F. Supp. 627, 649-50 (D. Md. 1992), the court found the plaintiff insurance company to be a limited public figure. Although ruling that the allegedly defamatory investment reports did not constitute commercial speech, id. at 643-45, the court went on to note that the level of fault that a defama-
2. The Right Not To Speak.—One area in which casual classification could in theory threaten protected expression is the right not to speak. It is well-established that the First Amendment’s guarantees "include[] both the right to speak freely and the right to refrain from speaking at all."544 The latter right extends to general freedom from compelled subsidization or other support for expressive activities with which one prefers not to be associated.545 The Court has typically recognized the right to refrain from speaking where resistance to the compelled expression stemmed from ideological objections.546 At the same time, the power of government to compel some kinds of disclosure about consumer products to keep consumers adequately informed appears widely accepted.547 Thus, it is at least conceivable that political or other ideological expression could be foisted on an unwilling speaker under the erroneous guise of commercial speech.

In practice, however, this danger does not seem to have materialized. The Court’s considerable body of jurisprudence in commercial speech does not include a successful effort to mandate association with a disagreeable view by pigeonholing ambiguous expression as commercial speech. Indeed, the one case that probably came closest to posing this danger, Glickman v. Wileman Bros. & Elliott, Inc.,548 saw both sides in a 5-4 decision intimating or assuming that the right not to speak deserves a substantial measure of protection even when that

545. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233-36 (1977) (holding that, under the First Amendment, a governmental employees union cannot compel a member to subsidize ideological activities unrelated to collective bargaining).
546. See, e.g., Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 566 (1995) (upholding under the First Amendment a veteran group’s right to exclude respondent organization from the group’s St. Patrick’s Day parade based on its disagreement with the organization’s message); Abood, 431 U.S. at 235-36 (holding that government employees are entitled to withhold that portion of union fees used for expressive political activities unrelated to collective bargaining); Wooley, 430 U.S. at 715 (upholding right of Jehovah’s Witness to cover state motto “Live Free or Die” on vehicle license plates); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (invalidating law requiring children in public schools to salute and pledge allegiance to the United States flag).
547. See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996) (plurality opinion) (recognizing that a state may "regulate[] ] commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices"); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985) (holding that “an advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers”).
speech is commercial.\textsuperscript{549} The Court upheld marketing orders promulgated by the Secretary of Agriculture that required producers of certain California fruits to contribute to the costs of generic advertising of those fruits.\textsuperscript{550} Although the Ninth Circuit had ruled that the orders failed the \textit{Central Hudson} test,\textsuperscript{551} the Court held that the First Amendment’s protection of speech did not even pertain to this “question of economic policy.”\textsuperscript{552} Instead, the Court treated the orders as a “species of economic regulation” subject to the “strong presumption of validity” to which legislative judgments are ordinarily entitled.\textsuperscript{553} Moreover, the Court indicated that if this type of order were to implicate the First Amendment at all, the relevant analysis would be provided by the Court’s decisions dealing with compelled speech.\textsuperscript{554} In the Court’s interpretation, those precedents embodied the principle that “assessments to fund a lawful collective program may sometimes be used to pay for speech over the objection of some members of the group” where the expressive activities are germane to the program’s purpose.\textsuperscript{555}

If the Court erred in this case, it was not in characterizing the marketing orders as a regulation of commercial speech; it was in \textit{failing} to regard the orders in that way. The principal dissent by Justice Souter focused on the Court’s “treating these compelled advertising schemes as regulations of purely economic conduct instead of commercial speech.”\textsuperscript{556} In Justice Souter’s view, the compelled-speech cases required that this compulsory support of commercial speech be

\textsuperscript{549} See \textit{id.} at 2139 (recognizing the extensive protection offered under “compelled speech case law” but refusing to extend such coverage to the regulation at issue); \textit{id.} at 2144 (Souter, J., dissenting) (discussing the notion “that compelling cognizable speech officially is just as suspect as suppressing it, and is typically subject to the same level of scrutiny”).

\textsuperscript{550} \textit{Wileman Bros.}, 117 S. Ct. at 2134, 2142.


\textsuperscript{552} \textit{Wileman Bros.}, 117 S. Ct. at 2138.

\textsuperscript{553} \textit{id.} at 2142.

\textsuperscript{554} \textit{id.} at 2138-41 (discussing the issue in light of compelled speech cases and rejecting the court of appeals’s decision to apply the \textit{Central Hudson} test).

\textsuperscript{555} \textit{id.} at 2140 (citing \textit{Lenhert v. Ferris Faculty Ass'n}, 500 U.S. 507, 529 (1991)) (asserting that it is permissible to assess teachers for costs of union activities that concern teaching, education, and related matters); \textit{see} \textit{Keller v. State Bar}, 496 U.S. 1, 13-14 (1990) (upholding mandatory dues for members of an integrated bar to the extent that the funds supported activities germane to the state's interest in the caliber of attorneys and quality of legal services); \textit{Abood v. Detroit Bd. of Educ.}, 431 U.S. 209, 217-32 (1977) (upholding compulsory payment of union dues to support the union’s collective bargaining activities).

\textsuperscript{556} \textit{Wileman Bros}, 117 S. Ct. at 2149 (Souter, J., dissenting); \textit{see also id.} at 2155 (Thomas, J., dissenting) (describing the Court’s refusal to treat the marketing orders as an issue involving speech as “a complete repudiation of our precedent”).
judged by the *Central Hudson* standard for restrictions on such speech; he found that the government had failed to show that the compelled advertising programs directly advanced a substantial interest or were narrowly tailored to the government's interests.\(^5\) Thus, a more expansive conception of commercial speech could have saved, not defeated, the First Amendment challenge in this case.\(^5\)

### F. The O'Brien Alternative

Some who regard the Court's commercial speech classification scheme as rigid and artificial have proposed incorporating review of expression with commercial elements into a more generalized standard.\(^5\) Specifically, they have looked to the test laid down by the Court in *United States v. O'Brien*.\(^6\) This test allows government regulation to impinge on speech if the regulation is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.\(^6\)

557. *Id.* at 2149-55 (Souter, J., dissenting); cf. *International Dairy Foods Ass'n v. Ames-toy*, 92 F.3d 67, 72-74 (2d Cir. 1996) (holding that, even assuming that a state statute requiring dairy manufacturers to label products from hormone-treated cows was a regulation of commercial speech, this compelled disclosure violated the manufacturers’ right not to speak).

558. Of course, the majority might still have sustained the marketing orders even if it had been inclined to view them as a regulation of commercial speech. This, however, would have been a function of the majority's interpretation of the compelled-speech cases rather than a rejection of a presumptive right not to support others' commercial speech. The major precedents cited by the Court upheld, in part, compulsory subsidies of noncommercial expressive activities. *See supra* note 555.

559. *See Farber, supra* note 174, at 386-96 (proposing a framework of contractual analysis that would "provide a helpful guide in considering commercial speech problems"); Kozinski & Banner, *supra* note 166, at 628-29 (asserting that "the commercial/noncommercial distinction makes no sense" and advocating its elimination); Comment, *supra* note 224, at 923 (recommending that the Court "abandon[ ] the theory that commercial speech is less valuable than political speech and that this difference justifies the stricter regulation of commercial speech").

560. 391 U.S. 367 (1968); *see Farber, supra* note 174, at 387-88 (proposing to distinguish between the informative and contractual aspects of advertisements, and to apply the *O'Brien* test to the latter); Kozinski & Banner, *supra* note 166, at 651-52 (arguing that a securities regulation statute, compelling disclosure of corporate information, would meet the *O'Brien* test by providing an accurate flow of information to the market); Comment, *supra* note 224, at 923-24 (arguing that regulation of deceptive advertising would pass the *O'Brien* test for the validity of content-neutral regulations).

Whatever its utility in other contexts, however, the O'Brien test would not clarify the regulation of speech in commercial settings; it would not necessarily extend more protection to this speech; ultimately, it probably would not even eliminate the issues of classification.

1. O'Brien and Contractual Analysis.—The O'Brien standard was originally formulated to address the problem of symbolic conduct: i.e., instances in which "speech" and "nonspeech" elements are combined in the same course of conduct.\(^{562}\) However, O'Brien sometimes also has been invoked outside the realm of nonverbal expression.\(^{563}\) In the area of speech connected with commercial transactions, the O'Brien test has been recommended for review of the contractual aspect of regulation of advertising.\(^{564}\) This aspect, which forms part of the seller's commitment to the buyer, contrasts with the "informative" function of advertising, the regulation of which would receive normal First Amendment protection under this approach.\(^{565}\) The approach is said to "avoid[ ] the definitional problems inherent in the current commercial speech doctrine."\(^{566}\)

2. O'Brien's Illusory Promise.—Whatever the utility of O'Brien's analysis for reviewing regulation of commercially related expression, it is not evident what would be gained by replacing the Court's established commercial speech jurisprudence with this analysis. Anxiety that the current lack of rigorous precision in identifying commercial speech may chill protected expression should hardly be assuaged by the indefinite terms of O'Brien, e.g., the requirement that the govern-

\(^{562}\) Id. at 376 (upholding a ban on destruction of draft registration certificates as applied to a defendant who burned his certificate as a protest against the Vietnam War); see also Barnes v. Glen Theatre, Inc., 501 U.S. 560, 567-72 (1991) (plurality opinion) (upholding under the O'Brien test the enforcement of a ban against nude dancing despite the ban's incidental limitations on some expressive activity); Texas v. Johnson, 491 U.S. 397, 410 (1989) (overturning a conviction for flag burning as a suppression of free expression outside the scope of the O'Brien test).

\(^{563}\) See, e.g., Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994) (upholding a requirement that cable systems carry full power local broadcast stations); United States v. Albertini, 472 U.S. 675, 689 (1985) (sustaining a conviction for reentry onto military base in violation of statutorily authorized letter from commanding officer forbidding the defendant to reenter the base without officer's permission); see also John Hart Ely, Comment, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1483 (1975) (concluding that the Court's analysis in O'Brien "will be seen to argue rather strongly against the constitutionality of such [flag desecration] laws").

\(^{564}\) Farber, supra note 174, at 386-89.

\(^{565}\) Id. at 387; see Comment, supra note 224, at 924-30 (discussing Farber's contractual theory of commercial speech).

\(^{566}\) Comment, supra note 224, at 926.
mental interest served by the regulation be "unrelated to the suppression of free expression." 567 Nor can encouragement regarding O'Briens clarity be derived from the results that the test has yielded; a standard that produces 5-4 decisions 568 is hardly self-executing. Even proponents have acknowledged that the O'Brien cum contractual function framework (like alternative definitions of commercial speech 569) does not automatically resolve the more difficult issues raised when regulation of commercial activity and restriction of speech intersect. 570 Such concessions are unavoidable, for O'Brien tells us no more unequivocally than present doctrine how to deal with advertorials, health claims, product placement, and other sometimes problematic forms of corporate expression; the tensions that regulation of these forms may raise would simply be shifted to another formal framework.

Besides failing to assure more predictable results, the O'Brien approach also would not necessarily prove more protective of speech. With the conspicuous exception of the flag-burning cases, 571 O'Brien's requirements have not operated as a notably potent instrument for invalidating restrictions on expression. 572 Moreover, a Court bent on condoning regulation of what it now calls "commercial speech" could take a similarly indulgent view of the same restrictions under the rubric of the O'Brien test. Indeed, in upholding the prohibition on unauthorized use of the word "Olympic" under the Central Hudson test, the Court indicated that application of the O'Brien test would have produced the same result. 573 Similarly, when the Court in Fox sus-

569. See, e.g., Simon, supra note 218, at 238, 245 n.174 (proposing to define commercial speech in terms of the harm caused by the advertisement at issue, but conceding that the lack of a narrow definition of harm is a "bothersome weakness"); Merrill, supra note 224, at 236 (conceding that the author's proposed definition of commercial speech is "not without difficulties").
570. See, e.g., Farber, supra note 174, at 398 (noting that a "test based on information content may also be difficult to apply with any degree of consistency and objectivity").
571. Eichman, 496 U.S. at 314 (striking down a federal statute prohibiting mutilation or destruction of "any flag of the United States"); Johnson, 491 U.S. at 420 (overturning Johnson's conviction for flag burning because he was "engaging in expressive conduct").
572. See Michael C. Dorf, Incidental Burdens on Fundamental Rights, 109 Harv. L. Rev. 1175, 1201-08 (1996) (arguing that most challenged laws will survive the O'Brien test, so that cases litigated under this test would not benefit free speech); Ely, supra note 563, at 1484-89 (arguing that the framework created in O'Brien is incomplete and is therefore limited in its application); supra note 568 (citing cases decided under O'Brien).
573. San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 537 n.16 (1987) (stating that the Central Hudson test and the test for a "time, place, or manner restriction under O'Brien . . . [are] substantially similar" as applied to the facts).
tained a ban on commercial solicitation in university dormitory rooms, it compared the level of scrutiny adopted in that decision to the review conducted in *O'Brien*.574

If, then, the *O'Brien* standard and prevailing commercial speech doctrine roughly converge, the question becomes whether one approach offers a peculiar advantage. As with most essentially equitable standards, the *O'Brien* test seems to afford greater latitude for individual analysis and doing justice in the particular case. The final section of this Article contends, however, that the threshold classification of some expression as commercial speech performs a useful analytical sorting function. Like other First Amendment categories, the commercial speech grouping spares courts endless reconstruction of established principles and needless ad hoc balancing. As with other categories, commercial speech doctrine retains its value and vitality only so long as it is not permitted to ossify into a rigid abstract doctrine or to drift from its proper Moorings.

IV. THE CATEGORY OF COMMERCIAL SPEECH: A FINAL OVERVIEW

The Court’s ongoing delineation of a sphere of commercial speech continues to navigate between criticism of its imprecision and calls to abolish the concept altogether. In adhering to a discrete but inexact notion of commercial speech, the Court in a sense remains pragmatically perched between these two critiques. In the broader sweep of First Amendment theory, the Court’s version of commercial speech represents a categorical approach that affords scope for the individualized adjustments associated with balancing tests.575 Whatever the Court’s occasional missteps on the merits of particular cases, this combination of coherence and flexibility offers a constructive framework for dealing with an intrinsically untidy area.

No extravagant claim need be made to justify the existence of a distinct doctrine of commercial speech. Rather, commercial speech

574. See Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 478 (1989); see also Comment, supra note 224, at 927 n.120 (characterizing the *O'Brien* test as "similar to the *Central Hudson* test for content-based regulations of commercial speech").

classification operates as shorthand recognition that the expression at issue, while deserving of First Amendment solicitude, has commercial elements that ordinarily trigger the Court’s tolerance of government regulation. While it is true that courts should “disregard mechanical formulas” in assessing regulation of expression, identification of commercial speech can serve as a helpful introductory signal that ordinary assumptions governing freedom of expression may not entirely obtain. As with other categories where some sort of intermediate scrutiny has governed—e.g., time, place, and manner restrictions—commercial speech designation reflects a certain constellation of considerations that neither automatically condemn nor sustain the challenged regulation. That a range of expression is initially designated commercial speech no more renders courts unable to distinguish between a “literally false” claim about a product and a prohibition on a certified public accountant’s holding himself out as such than time, place, and manner classification has impelled courts to equate a city’s restriction on the noise level at public concerts with a broad ban on the distribution of leaflets in public streets.

Even though some cases do not present “a clean distinction between the market for ideas and the market for goods and services,” the problem of characterization in these instances does not prove the superiority of wholly ad hoc regimes. The body of doctrine that the Court has built up under the heading of commercial speech is suffi-
ciently coherent, if imperfect, that a threshold determination of commercial speech seems more efficient than compelling courts endlessly to rehash *de novo* the considerations that entered into *Virginia Pharmacy* and its progeny. If the Court had embarked on this line of cases without promulgating a formal construct of commercial speech, it seems likely that the results eventually would have crystallized into more-or-less what we know as the commercial speech doctrine anyway. As for ambiguous classification, First Amendment jurisprudence abounds with concepts whose uncertain application in some cases is generally not thought to compromise their utility as tools of analysis: content neutrality,\textsuperscript{584} public figure,\textsuperscript{585} overbreadth,\textsuperscript{586} and prior restraint\textsuperscript{587}—to name but a few. Indeed, the aggregate of commercial speech decisions arguably forms a more coherent body of doctrine than any of these other frameworks for assessing First Amendment rights. As this Article has sought to demonstrate, the Court's philosophy of treating commercial speech as a distinct conceptual arena has by no means proved "unworkable."\textsuperscript{588}

On the other hand, efforts to fix the Court's approach by substituting a "categorical definition"\textsuperscript{589} or a definition "presumptively applicable in all cases"\textsuperscript{590} do not ensure improvement over the Court’s handiwork either. To begin with, any such definition clashes with jurisprudential resistance to the very premise of effective all-encompassing general propositions.\textsuperscript{591} In the specific context of commercial

\textsuperscript{584} See Williams, *supra* note 578, at 621 (analyzing the historical applications of the content discrimination doctrine and arguing for a "broader interpretation of the content discrimination principle").

\textsuperscript{585} See generally Nat Stern, *Unresolved Antithesis of the Limited Public Figure Doctrine*, 33 Hous. L. Rev. 1027, 1031-40 (1996) (providing a history and evaluation of the limited public figure doctrine as applied by the judiciary).

\textsuperscript{586} See generally Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853, 858-77, 893-903 (1991) (offering a comprehensive review of the nebulous doctrine of overbreadth and developing a theory of its proper use); Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 846 (1970) (analyzing the development of the overbreadth doctrine and asserting that it "is a principled response to the systematic failure of other methods of adjudication to protect first amendment rights adequately").


\textsuperscript{588} Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985) (rejecting the previous test for the validity of federal regulation of state governmental entities under the Commerce Clause).

\textsuperscript{589} Simon, *supra* note 218, at 239.

\textsuperscript{590} McGowan, *supra* note 221, at 393.

speech, attempts to devise a comprehensive definition that conforms to the rationale for freedom of speech are vitiated by the multifaceted purposes of that guarantee.\textsuperscript{592}

The novel and variegated forms of expression that implicate legitimate regulatory interests thwart a single definition that captures every possible contingency. For example, it is tempting to address the aim of curbing inducement of commercial activity through deception by adopting a stripped-down version of commercial speech that is confined to simple proposals of commercial transactions. However, the potential for deception lurks in communications other than such proposals, and the government's interest should not be defeated because the message at issue does not readily qualify as a commercial advertisement or similar direct overture. The Bolger criteria,\textsuperscript{593} in particular, manifest a valid determination not to straitjacket analysis by a narrow, rigid \textit{a priori} conception of commercial speech.

Nor can multiple criteria or compartments be expected to resolve unequivocally every possible question of commercial speech classification. Experience with the explicit standards for obscenity\textsuperscript{594} and the proliferating permutations of defamation doctrine\textsuperscript{595} refute the notion that greater detail inevitably produces more clarity and protection. Ultimately, the Court's articulation of the basic parameters of commercial speech, coupled with a willingness to consider unanticipated candidates for such designation, may be the best that can be expected at this stage. After all, the commercial speech doctrine is still—historically speaking—relatively young. The continuing evolution of the doctrine "case-by-case via the common law method, with all

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\bibitem{592} See Tribe, supra note 178, at 785 (discussing the differing fundamental approaches to the definition of free speech); Geyh, \textit{supra} note 173, at 12-13 (attempting to decipher which First Amendment theories should be included in the commercial speech doctrine); Schauer, \textit{supra} note 8, at 1186 (proposing that First Amendment ought to "be the phrase encompassing several different justifications not reducible to any single principle"); Shiffrin, \textit{supra} note 176, at 1212 (arguing that the development of commercial speech doctrine has been slowed by commentators' misguided preoccupation with abstract theories).
\bibitem{593} See \textit{supra} notes 86, 197-205 and accompanying text (analyzing the implications of Bolger).
\bibitem{595} See \textit{supra} note 531.
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its potential for false starts, ambiguities, and uncertainties, may well produce further refinements of its scope. It seems preferable to allow these insights to accumulate gradually than prematurely to squeeze commercial speech into a conceptual Procrustean bed.

V. CONCLUSION

The Supreme Court's inability to encase commercial speech within unwavering definitional boundaries is not the product of inaptitude, but rather the unavoidable incident of commercial speech's position at the blurry crossroads of expressive and economic activity. Whether viewed as "[s]peech-plus-conduct" or some similar hybrid, commercial speech "stubbornly declines to fit comfortably within our general rules for free speech." Admittedly, the attempt to reconcile heightened protection for free speech with legitimate deference to economic regulation has generated strain and untidiness in commercial speech doctrine. On the other hand, the course of commercial speech doctrine cannot fairly be described as random or capricious. On the whole, the justifications for restrictions that the Court has struck down have implicated reasons for ordinary skepticism of suppression of speech under the First Amendment, while permissible regulation has resembled other, presumptively valid efforts to bring rationality and fairness to the economic marketplace.

Unsurprisingly, the Court's efforts to define the arena in which this sometimes difficult balance is struck have disclosed a mix of self-evident core and ambiguous periphery. While speech that does "no more than propose a commercial transaction" is readily recognized, not all other expression "linked inextricably to commercial activity" fits neatly within the commercial speech category. From the standpoint of theoretical elegance, this zone of indeterminacy can be unsettling. However, this Article has attempted to show that the Court's inexact scheme for identifying commercial speech has not resulted in

596. Shiffrin, supra note 176, at 1223.
597. Eberle, supra note 175, at 462.
598. Farber, supra note 174, at 372.
599. See Tribe, supra note 178, at 903 ("The entire commercial speech doctrine, after all, represents an accommodation between the right to speak and hear expression about goods and services and the right of government to regulate the sales of such goods and services.").
600. See supra Part II.B.
601. See supra Part II.A (reviewing the Court's rationale in cases where state regulations have been either overturned or upheld).
603. Friedman v. Rogers, 440 U.S. 1, 10 n.9 (1979).
significant harm, and has produced some good in lending coherence to what would otherwise be a welter of loosely connected decisions.

A substantial portion of this Article has sought to respond to criticism of the very idea of a separate realm of commercial speech. In a sense, support or rejection of the commercial speech category rests on belief or doubt that the generalizations upon which commercial speech’s qualified First Amendment status are built obtain in a sufficient number of instances to justify distinctive treatment. Obviously, this Article has accepted the premise that there are a sufficient number of cases in which commercial speech is different enough to justify a distinctive analytical framework. Whatever the imprecision within and overlap between this and other categories, our jurisprudence rightly perceives that the latter do not involve the same balance of regulatory prerogative and First Amendment solicitude. A Klan leader’s vague but heartfelt threat to consider vengeance against racial minorities\(^604\) may be more alarming than a slight misstatement of the nutritional content of retail cereal, but it is the latter that is subject to regulation and penalty. The shouts and condemnation hurled by pro-life demonstrators at a patient of an abortion clinic\(^605\) may be more intimidating than an attorney’s attempts to foist his services on a reluctant client, but it is the attorney who suffers the more sweeping degree of prohibition.\(^606\) And while it may be more profoundly false and destructive for a presidential candidate to insinuate that his opponent favors the early release of convicted murderers\(^607\) or the abolition of Medicare\(^608\) than for an advertisement to convey a somewhat misleading impression of an automobile’s fuel efficiency, only the car company will be accountable to more than the marketplace of ideas.

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\(^{604}\) See Brandenburg v. Ohio, 395 U.S. 444, 446 (1969) (per curiam) (striking down a conviction under a state’s criminal syndicalism statute for speech in which the defendant declared that if government “‘continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance taken’”).

\(^{605}\) See Madsen v. Women’s Health Ctr., Inc., 512 U.S. 753, 757 (1994) (upholding the provision of an injunction establishing 36-foot “buffer zone” around abortion clinic’s entrances and driveway and restricting noise within vicinity of the clinic, but invalidating other provisions under the First Amendment).

\(^{606}\) See Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447, 467 (1978) (upholding a prohibition of in-person solicitation for lawyers); see also supra text accompanying notes 53-57 (discussing Ohralik).

\(^{607}\) See Paul Taylor, See How They Run: Electing the President in an Age of Mediocracy 191-93, 212-15 (1990) (describing a political television advertisement that allegedly distorted presidential candidate Governor Michael Dukakis’s policy on prison furloughs).

\(^{608}\) See Dena Bunis, Campaign 96/Where 2 Camps Stand on Medicare, Newsday, Oct. 18, 1996, at A47, available in 1996 WL 2540735 (reporting accusation that campaign of presidential candidate Bill Clinton was distorting candidate Bob Dole’s position on Medicare).
These examples reflect relative confidence in mechanisms for detecting and redressing the danger of certain expression in commercial contexts. Thus, it is not a paradox—or at worst is a paradox enshrined by the longstanding exaltation of political speech—that expression capable of misleading consumers of commercial products is viewed through a different lens than speech with comparable potential to mislead political "consumers." Even the varying consideration of the same expression in different settings does not discredit the idea of commercial speech; the principle that context matters is a familiar one in First Amendment jurisprudence. Here, for example, the government's ability to regulate a representation of American origin is surely greater in a commercial setting than in an artistic one. The principle holds even where the expression conveys identical information in commercial and noncommercial formats. The government's latitude to regulate the statement that a particular beer "contains 4.73% alcohol by volume"—e.g., to insist on its accuracy or visibility—may well depend on whether the statement appears on the beer's label or in an editorial promoting temperance.

Of course, in the case from which this last example is drawn, the statement's appearance on a bottle's label correctly reported the alcohol content of the beer contained in the bottle. And while Justice Stevens chided the Coors majority for what he viewed as its facile characterization of the label as commercial speech, the Court did unanimously invalidate the government's prohibition on the display of this information. The pattern reflected by this result suggests that commercial speech doctrine has not been relegated to its feared status as the "stepchild of first amendment jurisprudence". On the contrary, the modern doctrine has extended substantial protection where little existed before. In venturing into what is still relatively novel territory, the Court has not rigidly imposed finality on the province of expression to which this still-evolving doctrine will apply. However disappointing as a matter of analytical purity, this epistemologically modest
stance allows the constitutional common law of commercial speech to unfold in a way that is sensitive to both the hazards of the marketplace and the demands of free speech.