1990

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SECURITIES REGULATION AND THE FIRST AMENDMENT

Aleta G. Estreicher*

The received wisdom for fifty years has been that the first amendment is inapplicable to speech relating to the operation of securities markets. The assumption that speech by actors on the securities stage is simply another aspect of regulable business activity pervades the federal system of securities regulation: advertising by corporate issuers is sharply curtailed;[1] investment advisers must obtain licenses to reach their audiences;[2] financial reporters are subject to restraints that would be constitutionally intolerable for reporters of nonfinancial information;[3] and proxy contests for corporate control involve preclearance of materials by government censors.[4] This regulatory scheme—unremarkable at a time when the Supreme Court recognized a “commercial speech” exception to the first amendment[5]—seems anomalous after the Court’s 1976 decision, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,[6] which replaced the preexisting assumption of regulability with the modern “commercial speech doctrine.”

Despite Virginia Pharmacy and its progeny, courts and commentators have continued to accept the regulation of securities-related expression virtually without constitutional demurrer.[7] In-

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* Associate Professor of Law, New York Law School. A.B., 1970, Bryn Mawr College; J.D., 1981, Columbia University School of Law. I have benefited from insightful comments by several friends and colleagues who reviewed earlier drafts of this paper, notably, David Chang, George W. Dent, Jr., Herbert Estreicher, Samuel Estreicher, Karen Gross, Richard L. Revesz and Lawrence G. Sager. Any errors that persist despite their careful attention are entirely my own.

1 See infra notes 230-63 and accompanying text.
2 See infra notes 289-98 and accompanying text.
3 See infra notes 306-44 and accompanying text.
4 See infra notes 345-64 and accompanying text.
7 See id. at 760-65.
deed, the Court has casually observed, by way of dictum in Ohralik v. Ohio State Bar Association, that "exchange of information about securities" and corporate proxy statements are examples of "communications" that can be regulated apparently without regard for the first amendment.

The failure to extend Virginia Pharmacy's teachings to securities markets is in large part due to intellectual and judicial disquiet with commercial speech doctrine. To borrow a phrase from Justice Jackson, the term "commercial speech" is a counterpane concealing a disorderly bed. There appears to be no agreement even on what it is: the label has been used to describe both product and service advertising that proposes only a commercial transaction and speech arising in the course of business activity that furthers some expressive interest of the speaker in addition to imparting information of possible value to its recipients. More importantly, the Court's doctrine lacks conceptual coherence. While prepared to extend Virginia Pharmacy to new areas—notably,Speech: A Call for Consistency, 59 St. John's L. Rev. 57, 61 n.19 (1984). There have been some recent stirrings in the other direction. See, e.g., Lowe v. SEC, 472 U.S. 181 (1985); Symposium on the First Amendment and Federal Securities Regulation, 20 Conn. L. Rev. 261 (1988); Panel on Commercial Free Speech, Second Circuit Judicial Conference, 120 F.R.D. 177, 177-82 (1987) (comments by Professor Neuborne).

After this Article was submitted for publication, Professor Neuborne's essay, The First Amendment and Government Regulation of Capital Markets, 55 Brooklyn L. Rev. 5 (1989), appeared. Similarly building on the implications of the Supreme Court's commercial speech decisions, Professor Neuborne argues for a distinctive "hearer-centered" free speech doctrine as contrasted with "speaker-centered" protections for expression "driven by religious or political conscience." Id. at 13. Despite several common intuitions, my distinction herein between "expressive" and "nonexpressive" speech better captures the case for protecting the communications media, turning as it does on the presence of speaker interests whether or not the speech is animated by matters of religious or political conscience. Moreover, I believe the justifications for government regulation of nonexpressive communication, particularly in the securities area, are somewhat more robust than does Professor Neuborne. In writing on the sociology of science, Robert Merton has observed that innovation when it comes is often heralded by the disclosures of many operating independently of one another. R. Merton, On the Shoulders of Giants: A SHANDEAN Postscript (1967). Perhaps this is true of innovation in legal doctrine as well.

10 Id. at 456.
14 The one case in which the Court appears actually to have retreated, Posadas de Puerto
restrictions on advertising by professionals—the Justices are not entirely comfortable with what they have wrought. They appear to have settled upon the view that commercial speech is entitled to lesser protection than other forms of protected expression, occupying a distinctly "subordinate position in the scale of First Amendment values." Accordingly, constitutional scrutiny takes the form of the rather open-ended, deferential balancing test of Central Hudson Gas & Electric Corp. v. Public Service Commission, resulting in a set of decisions reflecting, at best, ad hoc line-drawing.

Before securities-related expression can receive its constitutional due, commercial speech doctrine must be placed on a firmer analytical footing. To view commercial speech as some second-class species of expression is to ignore the contribution such speech makes to the societal commitment to decentralized decisionmaking. This Article will thus explore a theory of commercial speech that regards such speech as an integral part of the "system of free-

Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986), has been savaged in the literature. See, e.g., Kurland, Posadas de Puerto Rico: "'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful," 1986 Sup. Ct. Rev. 1. See infra text accompanying notes 80-99.

15 See infra text accompanying notes 216-17.

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566. See also Board of Trustees v. Fox, 109 S. Ct. 3028 (1989) (holding commercial speech doctrine requires "something short of a least-restrictive means standard").

18 See Posadas, 478 U.S. at 328 (holding regulation of casino advertising does not violate first amendment); Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) (holding ordinance regulating billboard advertisement not overbroad); Friedman v. Rogers, 440 U.S. 1 (1979) (holding prohibition of practice of optometry under trade name not unconstitutional because it prevents public from being misled); Ohralik, 436 U.S. at 447 (holding state can regulate lawyers' solicitation of clients for profit); In re Primus, 436 U.S. 412 (1978) (holding solicitation of litigants by ACLU—for whom litigation is form of political expression—is entitled to first amendment protection); Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85 (1977) (holding municipal ordinance banning use of "For Sale" sign in order to stem "white flight" violates first amendment). For a further discussion of Posadas, see infra text accompanying notes 80-99.
dom of expression."

Part I outlines the beginnings of a normative theory for protecting expression that arises out of commercial activity, and Part II applies that theory to selected provisions regulating three types of securities-related expression: (1) securities advertising (expression intended to promote and ultimately to sell securities to investors); (2) investment advice and analysis (expression about the quality, value and nature of particular investments); and (3) intracorporate proxy communications between and among management and shareholders of particular corporate enterprises. In Part III, I address the claim of Professors Blasi, Schauer and others that the inclusion of commercial speech within the first amendment's ambit of concern threatens to dilute protections presently afforded to noncommercial speech and render the constitutional guaranty less able to deal with "the worst of times."
I. Recasting the Doctrine

A. Defining Commercial Speech

The term "commercial speech" obscures more than it illuminates. Commercial speech as a distinct category should be confined to speech that seeks only the promotion of goods or services—"speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation."25 In this advertising context, the factors which have been cited to justify a diminished level of constitutional scrutiny are all present: (1) there is no expressive interest on the part of the speaker; (2) the promotion seeks to induce behavior over which government has plenary authority; and (3) the first amendment value of the message is limited to its informational value to the audience.26

Where these factors are absent, however, it clouds analysis to use the commercial-speech label simply because the expression arises in the course of commercial activity.27 Neither the presence of a commercial motive nor the fact that particular speech relates to economic activity is inconsistent with an expressive interest on the part of the speaker.28 Such commerce-related expression may not be political speech, as that term is conventionally understood, but neither can it be equated, as a constitutional matter, with product and service advertising. Thus, the Court's occasional formulation that commercial speech is "expression related solely to the economic interests of the speaker and its audience"29 should be avoided.30

26 See infra text accompanying notes 38-132.
27 See Shifrin, supra note 19, at 1215.
28 See, e.g., Thornhill v. Alabama, 310 U.S. 88 (1940) (picketing by labor is protected by the first amendment despite commercial context).
29 Central Hudson, 447 U.S. at 561.
30 When considering the messages of participants in labor disputes, for example, the Court understands that it is not dealing with "simple commercial speech." See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 598 (1988) (holding union leaflets urging boycott of mall to protest substandard wages "not . . . typical commercial speech" and thus according it greater first amendment protection). There is no reason why this insight should be restricted to speech arising in labor markets.
This is not to suggest that speech interests must always triumph over regulatory objectives, or even that commercial advertising and commerce-related speech must be treated the same way as political speech. Indeed, principled balancing, rather than absolutism, is the only sensible basis for first amendment adjudication in the real world, and such balancing may support differences in the regulatory treatment of commerce-related expression in particular settings. The real questions, then, are what is the appropriate starting point for analysis, and what is the appropriate level of judicial scrutiny of regulatory claims.

B. Commercial and Political Advertising: The Contrast Between Nonexpressive and Expressive Communication

To test the rhetoric of the subordinate-speech position, we begin with a hypothetical, comparing political campaign promotions (everyone's candidate for fully protected speech) with commercial product advertising (the focus of the Virginia Pharmacy line of analysis).

1. The Similarities. Assume Company X places an advertisement in a newspaper, offering its soap powder for sale to the public at a specified price. The advertisement makes certain performance claims about soap X indicating that, in testing under laboratory conditions, soap X removed stubborn stains in both hot and cold water, stains that other competing brands could not remove. Soap X also purports to be less expensive than its competitors.

Compare this message with Candidate Y's advertisement in the same newspaper offering Candidate Y as the best, most honest and most experienced candidate for governor. The advertisement describes the opponent's record, charging that the opponent is an incompetent administrator who will bring the state to fiscal ruin. "Tired of Charisma? Try Competence!" Candidate Y proclaims. Candidate Y asks the public to compare the candidates' records and visions for the future, and to vote for Candidate Y on election day.

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31 Balancing, however, comes in different forms. In the first amendment area, it should not consist of an unweighted, essentially ad hoc comparison of speech interest and regulatory concerns. See generally Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale L.J. 943 (1987); Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482 (1975); Henkin, Infallibility Under Law: Constitutional Balancing, 78 Columbia L. Rev. 1022 (1978).
Both messages allege facts and state opinions. The expressive process—a comparison of the speaker's product with the competitor's—appears to be identical. In each case, an independent decisionmaker, the intended recipient of the message, is faced with several alternatives from which to choose. Under our constitutional system of limited government, the state may not dictate either the correct political candidate or the correct soap powder. The speech contained in the messages is intended to assist in (and ultimately to influence) this process of private decisionmaking. Company X is attempting to generate consumer demand for its product, to sell that product and to make money from its sale. Candidate Y is attempting to generate a ground swell of political support, to win the election and to hold the office of governor for a term of years. Both messages (if successful) will cause the recipients to incur some costs that will benefit the speaker (in money if the consumers buy the product; in time and effort and the opportunity cost of having rejected the rival candidate if the voters are moved to go to the polling place and vote). In both situations, advertising is particularly important to new entrants to the political or commercial marketplace.32

Despite these similarities, the two advertisers are subject to disparate regulatory treatment. If Company X has engaged in false advertising, it faces administrative action by the Federal Trade Commission33 and possible lawsuits under the Lanham Act and

32 McChesney, A Positive Regulatory Theory of the First Amendment, 20 CONN. L. REV. 355, 363 (1988). McChesney suggests that advertising benefits some sellers more than others: those who need to increase the volume of sales, are selling their products at a discount price or have new products to introduce to the public will benefit more from extensive advertising than sellers with an established market share. Although unrestricted advertising within an industry will result in increased demand, it will also result in increased competition and lower prices. Political challengers also benefit from unrestricted advertising as they must familiarize voters with their names and records. Incumbents, on the other hand, who are already known, would benefit from restrictions on political advertising. A similar insight informs the Court's rejection of limitations on the independent expenditures of well-heeled candidates for public office. See Buckley v. Valeo, 424 U.S. 1 (1976).

33 The FTC can issue a “cease and desist” order, prohibiting Company X from making the false claim about its soap powder. Federal Trade Commission Act § 13(a), 15 U.S.C. § 53(a) (1988). This process is rarely an effective deterrent since hearings and judicial review take a long time and advertising text is changed fairly frequently—thus a text containing problematic claims is likely to have been discarded before action can be taken. See Best, Controlling False Advertising: A Comparative Study of Public Regulation, Industry Self-Policing, and Private Litigation, 20 GA. L. REV. 45 (1985). Alternatively, the FTC may order
state laws. Assume Candidate Y's advertisement also contains false statements, perhaps about the opponent's past performance as an administrator. There is no blot on the opponent's reputation; indeed, he has been an exemplary administrator. Candidate Y, however, would not be subject to any regulation or penalty; the first amendment bars any federal or state agency regulation pursuant to a "truth in campaigning" law similar to the FTCA.

Why such different regulatory frameworks yielding such potentially antithetical results if the advertising process is the same, involving the same communicative mechanism for attempting to influence private decisionmaking? Are there adequate, principled justifications for the dissimilar regulatory treatment these messages—both speech events—receive under the first amendment?

The reason most frequently given for the disparate treatment accorded Company X's advertising and Candidate Y's advertising is that the former lies near the bottom of a first amendment hierarchy of expressive values, while the latter stands at its apex. As second-class or "low value" expression, the speech of commercial actors presumably may be regulated in ways unacceptable for first-class political speech. Before outlining what I believe is the essential difference between the two promotional messages in the above hypothetical, it is important to review the justifications for the subordinate status of commercial speech.

2. Inadequate Justifications for Subordinate Status. It is com-

Company X to perform various comparative tests before making similar claims and to keep the test results on file. In the event of further difficulties, the FTC may request that evidence of prior substantiation of the performance claims be submitted to the agency. If lasting damage has been done because of the past false claims, Company X can be compelled to make corrective advertising statements in its future advertisements. Moreover, the FTC can seek to enjoin continuation of a false advertising campaign. See Federal Trade Commission Act § 13(a), 15 U.S.C. § 53(a) (1988); FTC v. Southwest Sunsites, 665 F.2d 711 (5th Cir. 1982). But see FTC v. Evans Products, 775 F.2d 1084 (9th Cir. 1985).

34 Company X may also face private lawsuits under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (1988), see infra note 131, and investigation by attorneys general under state laws similar to the FTCA.

35 Civil liability for damages in a libel action would require a showing of "actual malice"—knowing or reckless disregard of the truth. See New York Times Co. v. Sullivan, 376 U.S. 254 (1964).


mon ground that neither the text of the first amendment nor the specific intentions of the framers supports the relegation of commercial speech to some inferior constitutional status. Rather, the argument for subordination takes one of four forms: (a) protection of such speech is not required by any accepted general theory of the first amendment; (b) the motive of the speaker and the non-ideational content of the message indicate that such speech is less deserving of protection; (c) such speech seeks to induce a transaction that is subject to plenary regulation indicating that the speech itself is comparably regulable; (d) regulation is both necessary because of the harms caused by false commercial messages and relatively cost-free given the hardiness of the speech and the benign motives of the regulator. Each of these claims will be examined in turn.

(a) Single-Value General Theories of the First Amendment. Two general theories of the first amendment have dominated the literature; in both, commercial and commerce-related speech are deemed to play no important part. The first (the "effective self-government" school), heralded by Alexander Meiklejohn but given greater currency by then Professor Robert Bork, holds that the first amendment is principally concerned with safeguarding the processes of representative democracy, and that only speech which directly furthers those processes is constitutionally sheltered. The second (the "individual self-fulfillment" school), associated with

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38 "Congress shall make no law ... abridging the freedom of speech, or of the press ... ." U.S. Const. amend. I.

39 Even if one believes that the specific intentions of the framers should control modern constitutional analysis, "[t]he only firm conclusion solidly based on historical scholarship is that the framers 'had no coherent theory of freedom of speech.'" BeVier, The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle, 30 Stan. L. Rev. 299, 307 (1978) [hereinafter BeVier, An Inquiry] (quoting Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 22 (1971)).

40 See infra notes 44-60 and accompanying text.

41 See infra notes 61-71 and accompanying text.

42 See infra notes 72-107 and accompanying text.

43 See infra notes 108-32 and accompanying text.


45 See Bork, supra note 39. Professor BeVier is a leading disciple of this view. See BeVier, supra note 39; BeVier, A Comment on Professor Wolfson's The First Amendment and the S.E.C., 20 Conn. L. Rev. 325 (1988) [hereinafter BeVier, Wolfson Comment].
Professor Emerson\(^4\) and given a rather extreme formulation by Professor Baker,\(^5\) finds in the first amendment a commitment to that speech which furthers the development of the human personality. Because commercial speech is deemed to make no direct contribution to the world of ideas or the flowering of the human spirit, we are told, it lies beyond the verge of the first amendment.\(^6\)

Both of these grand theories have been subjected to extensive criticism in the literature,\(^7\) which does not need to be fully recounted here. For the purposes of this Article, it is sufficient to note that while both self-government and self-fulfillment are important values that plainly deserve constitutional protection, they are not the only concerns that animate the first amendment. Indeed, despite what then Professor Ronald Cass called the "aggressive reductionist"\(^8\) style of the grand theorists, each has had to compromise conceptual purity, or permit consideration of the asserted central value at a higher level of generality,\(^9\) in order to

\(^{4}\) See T. Emerson, supra note 19; T. Emerson, Toward a General Theory of the First Amendment (1966); Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877 (1963).


\(^{6}\) E.g., Jackson & Jeffries, Commercial Speech: Economic Due Process and the First Amendment, 65 Va. L. Rev. 1 (1979). Professors Jackson and Jeffries combine both general theories but reach the same conclusion:

In our view, the first amendment guarantee of freedom of speech and press protects only certain identifiable values. Chief among them is effective self-government. Additionally, the first amendment may protect the opportunity for individual self-fulfillment through free expression. Neither value is implicated by governmental regulation of commercial speech.

\(^{7}\) Id. at 5-6.

\(^{8}\) Particularly instructive discussion can be found in Shiffrin, supra note 19, at 1223-51. See also Cass, Commercial Speech, Constitutionalism, Collective Choice, 56 U. Cin. L. Rev. 1317 (1988).

\(^{9}\) Cass, supra note 49, at 1323.

\(^{10}\) Thus, for example, Dr. Meiklejohn in his later writings recognized that the first amendment protects all "forms of thought and expression ... from which the voter derives ... the capacity for sane and objective judgment which, so far as possible, a ballot should express," including "[e]ducation, in all its phases ... [t]he achievements of philosophy and the sciences ... [l]iterature and all the arts ... [and] [p]ublic discussions of public issues."
embrace other categories of speech whose contribution to self-government or self-fulfillment is at best indirect. Why, then, should the process of inclusion be aborted when considering speech arising in the course of commercial activity?

Consider the self-government school. Virtually all concede that the first amendment protects that speech which enables the people to participate in the process of self-government. But the ability to choose—to process information, evaluate options, and ultimately select one option over another—does not spring full-blown into existence whenever local or national elections draw near. The ability to exercise judgment must be learned over a lifetime of making one's own decisions and suffering the consequences of error. Unless the "judgment muscles" are regularly exercised, they may wither, leaving the decisionmaker dangerously vulnerable to the influences of others. Is it so plain that a constitutional guaranty that prohibits the state from denying the people the wherewithal to practice informed decisionmaking in the arena of politics is completely unconcerned with the people's capacity to function as autonomous decisionmakers in the aisles of a supermarket or on the floor of a stock exchange?

As for the "self-fulfillment" school, Professor Baker has an answer of sorts for halting the process of inclusion, for he believes that only truly uncoerced speech, free of the dictates of profit motive, is entitled to constitutional protection.\footnote{Meiklejohn, supra note 44, at 256-57. During his unsuccessful attempt to secure Senate confirmation of his appointment to the Supreme Court, Judge Bork professed a similar intellectual conversion. See Taylor, The Bork Hearings: Bork Backs Away From His Stances on Rights Issues, N.Y. Times, Sept. 17, 1987, at Al, col. 6.}

With the exception of Professor Baker, see supra note 47, the self-fulfillment school, as typified by Professor Emerson, has always advanced a somewhat broader view. Four principles, Professor Emerson writes, support freedom in the marketplace of ideas: (1) self-fulfillment, (2) the attainment of truth, (3) public participation in social and political decision-making, and (4) balancing stability and change. T. Emerson, supra note 46, at 3-15. He would draw the line, however, at commercial speech. See infra text accompanying note 54.\footnote{See Baker, Commercial Speech, supra note 47.}

\[C\]ommercial speech is not a manifestation of individual freedom or choice; unlike the broad categories of protected speech, commercial speech does not represent an attempt to create or affect the world in a way which can be expected to represent anyone's private or personal wishes. Therefore, profit-motivated or commercial speech lacks the crucial connections with individual liberty and self-realization which exist for speech generally, and which are central to justifications which in turn define the proper scope of protection under the first amendment.

\footnote{52}{See Baker, Commercial Speech, supra note 47.}
been widely followed and, in my view, betrays a naive, restrictive understanding of why people speak and why they should be protected in doing so. But for other members of the "self-fulfillment" school—notably Professor Emerson—who offer a more catholic perspective, it is difficult to understand why a self-fulfillment norm that seeks to facilitate "participation in decision making by all members of society" stops short of protecting from government restriction the flow of information affecting the meaningful exercise of economic freedom.

Analyses that would extend only minimal constitutional protection to Company X's advertisement overlook the first amendment's central role in preserving from state encroachment the autonomy of individuals engaged in the continuous process of decentralized private decisionmaking. The importance of maintaining a free flow of information, faith in the people's ability to distinguish truth from cant, and a profound skepticism about government intervention are axiomatic in the realm of political and ideological discourse. But equally important to free participants in a democracy is the right generally to make their own choices. One need not go as far as Professor Coase, who maintains that the same arguments used to support freedom in the market for ideas apply with equal force to the commercial marketplace. Within the

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Id. at 3 (citations omitted).

53 See infra text accompanying notes 61-68.

54 See supra note 46 and accompanying text.

55 T. Emerson, supra note 19, at 7. In a separate article, however, Professor Emerson notes that 


It seems to me that the arguments which Emerson uses to support freedom in the market for ideas are equally applicable in the market for goods. . . . [F]reedom to choose one's occupation, one's home, the school one (and one's children) attends, what is studied at school, the kind of medical attention one receives, how one's savings are to be invested, the equipment one uses or the food one eats are surely equally necessary for self-fulfillment—and for most people are considerably more important than much of what is protected by the First Amendment.

range of choices permitted by law, our society's commitment to a free marketplace entails a right on the part of the public to receive truthful information, commercial or otherwise, that will enable intelligent, autonomous, decentralized decisionmaking.

Under our system of limited government, decisionmaking is decentralized in the economic as well as ideological realm. Although the marketplace for goods and services is subject to plenary regulation, the state has at best a limited role to play in dictating the individual lifestyle choices that must continuously be made for society to function. Each person must choose a job, a faith, where to live, whether to join a political party, whether to run for office, which candidates to vote for, whether to join a union or trade association, which products to buy and which to reject, which investments to make, etc. These decisions, which in the aggregate amount to our free enterprise system, cannot be made—if they are to be intelligent, socially productive decisions, rather than blind grab-bag choices—in an informational vacuum. 57

It is precisely this insight that led the Court over the last two decades to broaden the focus of the first amendment to include audience interests, defining speech interests in terms of the public's right to know even where the speaker itself was unable to invoke the constitutional guaranty. 58 This right to know expanded the range of constitutionally protected expression to include the information required to maintain an educated and autonomous

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57 The demise of the doctrine of substantive due process no longer permits the judiciary, as a general matter, to preclude state intervention in the marketplace. The doctrine is not entirely dead, however, for there may well remain substantive limits on the ability of government to dictate economic lifestyle choices of the type listed in the text. In any event, even if the Constitution does not require a free marketplace of goods and services, such freedom in allocational decisions remains an important feature of our society which government has chosen (wisely) not to disturb. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976). Within the sphere of allowable choices, the public has a right to receive truthful information about those choices. Contrary to the claim of Professors Jackson and Jeffries, this is not substantive due process through the backdoor of the first amendment. See Jackson & Jeffries, supra note 48, at 30-32.

58 See, e.g., First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 775 (1978); Virginia Pharmacy, 425 U.S. at 748; see also infra notes 77-79 and accompanying text.
citizenry.

With the emerging understanding that the first amendment erects safeguards not only for the speaker but also for the receiver of the message, the theoretical barrier to protecting commercial speech was properly and fatally breached. Speech may be constitutionally protected even where it makes no direct contribution to the world of ideas and involves no expression of the inner self,60 as long as it generates truthful information concerning legally permissible activity about which the public has a right to know.60

(b) The Characteristics of Commercial Speech. Those who advocate a subordinate position for Company X's advertisement also focus on certain characteristics that allegedly render it less deserving of protection than Candidate Y's advertisement: (i) the presence of a commercial motive on the part of the speaker, and (ii) the absence of any ideational content to the message. Neither suffices to support a categorically different treatment of Company X's message.

(i) The Role of Motive. Underlying the subordinate-position view is what Professor Neuborne calls a "materialist critique."61 The view that commercial advertising is constitutionally subordinate because it is intended to benefit only private economic interests is perhaps the best explanation for Valentine v. Chrestensen62 and its progeny, cases in which the Court displayed indifference to the rights of speakers in search of profits. In the early solicitation cases, the fact that the speaker charged for his materials brought what the Court considered a decisive commercial feature into the cases, notwithstanding the protected status of the

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60 Professor Wolfson suggests that an advertisement about, say, shampoo embodies an expression of "shampoo" as an idea, not just a product. Wolfson, The First Amendment and the SEC, 20 CONN. L. REV. 265, 270 (1988). Professor Redish makes a somewhat more plausible claim that because of the creative input of designers and advertising agencies, advertising must be viewed as an aspect of self-expression. Redish, supra note 56, at 446-47 (1971). But see infra text accompanying note 139.

61 Of course, predicating first amendment rights on audience interests is a double-edged sword. If expression is protected solely because of its informational value to the listener, protection is lost if the information lacks such value. See infra text accompanying notes 133-44 & 163-69.

62 B. NEUBORNE, FREE SPEECH, FREE MARKETS, FREE CHOICE 15 (1987); see also Shiffrin, supra note 19, at 1279-82.

63 316 U.S. 52, 54 (1942) (upholding statutory ban on distribution of "purely commercial" handbills). See infra text accompanying notes 63-68.
distributed materials themselves.\(^63\)

Professor Baker suggests that if speech is prompted by economic profit motive, it is not a truly uncoerced expression of the human personality worthy of protection.\(^64\) This position, an extreme version of the antimaterialist preferences of the subordinate-position advocates, is fraught with difficulties. First, and most salient, if the first amendment addresses the informational interests of audiences as well as expressive interests of speakers, there is no reason that the constitutional status of truthful commercial information about soap powder should turn on the profit motive of its disseminator, Company X.

Second, this view would require disparate constitutional treatment for the same message depending on the subjective motivation of the speaker. Company X’s truthful, nonmisleading advertisement criticizing a competitor’s soap powder would be unprotected; Consumer Reports’ identical critique presumably would be protected, provided the members of the organization were genuinely committed to consumer welfare goals.

Third, a motive test, if taken to its logical extreme, would present potentially devastating consequences for the political or ideological speech of Candidate Y—speech Professor Baker plainly means to protect. As illustrated by the facts of *New York Times Co. v. Sullivan\(^65\)* and the communicative activities of parties in a

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63 Breard v. Alexandria, 341 U.S. 622, 642 (1951); Jones v. Opelika 316 U.S. 584 (1942), *vacated, 319 U.S. 103* (1943). In its more recent decisions, however, the Court has not been so quick to discount speech interests because of the presence of a commercial motive. See, e.g., Riley v. National Fed’n of the Blind, 108 S. Ct. 2667 (1988) (invalidating law requiring professional fundraisers to disclose to potential donors percentage of previous year’s collections actually distributed to charities).

64 Baker, *Commercial Speech, supra* note 47, at 13-14. “[C]ommercial speech is in principle separate from the speaker’s decisions about the world or investigations into its nature . . . . A standard given and enforced by the structure of the competitive market rather than the speaker’s value choice or prejudice lies at the source of commercial speech.”

65 376 U.S. 254 (1964). Although the allegedly libelous statement in *Sullivan* was a paid advertisement, the Court concluded it was not commercial in the sense that the handbills in *Valentine* were commercial:

That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold . . . . Any other conclusion would discourage newspapers from carrying “editorial advertisements” of this type, and so might shut off an important outlet for the pro-mulgation of information and ideas by persons who do not themselves have access to publishing facilities. . . . The effect would be to shackle the First Amendment in its attempt to secure “the widest possible dissemination of in-
labor dispute, disparagement of the constitutional value of expression because it advances private economic interests fails to grasp the mixed-motives characteristic of virtually all speech. In all areas of life, including the political arena, the first amendment protects expression that simultaneously serves both a public and a private interest. It would be extraordinarily naive to suggest, for example, that Candidate Y's political advertisement is entirely or necessarily altruistic. The first amendment does not distinguish between nonprofit speech and profitable speech. Both can be equally valuable or worthless from a constitutional perspective.

Finally, motive tests are always problematic. If the applicability or severity of a regulatory regime is made to depend on the presence or absence of commercial motivation, speakers desiring to come within the more permissive framework will, as was true in Valentine itself, attempt to obscure a commercial motive by including a protected public interest message. Mixed-motive cases will abound.

For all of these reasons, any disparity in constitutional status that depends on the presence or absence of a speaker's commercial motive is misconceived.

(ii) The Nonideational Content of the Message. Admittedly, Company X's advertisement makes no direct contribution to the formation from diverse and antagonistic sources."

Id. at 266 (citations omitted).

In Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762-63 (1976), Justice Blackmun referred to labor disputes as a prime example of speakers animated by economic self-interest who are nevertheless protected by the first amendment. See also supra note 30.

The Court's efforts to discern whether a "commercial element" was present in Jones, 316 U.S. at 593-98 (and other early solicitation cases) illustrate the difficulty of the enterprise. See also Douglas v. Jeanette, 319 U.S. 157 (1943) (vacating Jones). Nor was there unanimous agreement that the "commercial element" was absent simply because a religious element was present. Id. at 169-70 (Jackson, J., dissenting).

But see Chrestensen v. Valentine, 122 F.2d 511 (2d Cir. 1941) (Clark, J.), rev'd, 316 U.S. 52 (1942). "[I]f intent and purpose must be measured, how can we say that plaintiff's motives are only or primarily financial? Is he just engaged in an advertising plot, or does he really believe in his wrongs?" Id. at 516.
world of abstract ideas. However, despite the prominence of the “marketplace of ideas” metaphor in first amendment history, it is a mistake to confine the first amendment’s reach to the production and evaluation of ideas. Cases like *Cohen v. California,* and the implications of the self-fulfillment theory which underlies it, suggest that we protect speech for a number of reasons. Sometimes, as in *Cohen,* we want individuals to be able to express the intensity of their feelings even if they choose a highly offensive manner for doing so and cannot realistically hope to gain adherents or further intellectual discourse. At other times, as in the case of commercial speech, we are seeking to maintain a free flow of truthful information because of a judgment that this will better enable the public to function as autonomous decisionmakers. No particular advertisement in isolation is vital to the system of free expression; what is key is the overall structure for informing consumers of the price, quality and availability of products and services.

(c) The Regulability of the Underlying Transaction. (i) The Regulability of the Speaker. It has been argued that because Company X is a manufacturing corporation subject to pervasive state regulation, its speech is entitled to lesser first amendment protection. In *First National Bank of Boston v. Bellotti,* however, the Court rejected the notion that the state is free to restrict the mode and content of corporate ideological expression simply because corporations are heavily regulated creations of state law. The plaintiffs in *Bellotti* were corporate business and banking organizations that intended to publicize their opposition to a referendum to amend the Massachusetts Constitution to permit the imposition of a personal income tax. A state statute permitted business corpora-

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69 See *Abrams v. United States,* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (arguing that ultimate good will be reached by free trade of ideas in competition of market).
70 403 U.S. 15 (1971) (wearing jacket bearing words “Fuck the Draft” is protected by first amendment).
71 Id. at 26 (Harlan, J.) (stating that expression “conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well”). The criticism might also be made that advertising is not only bereft of ideas but is particularly pernicious because it operates through symbols and subliminal suggestion to manipulate the audience. As cases like *Cohen* illustrate, neither the use of symbols nor the subliminal dimension of such expression provides an appropriate basis for relegating truthful information to a categorically subordinate position.
73 Id. at 778 n.14.
tions to make contributions and expenditures to influence public opinion only where the question submitted to the voters was one “materially affecting” corporate property, business or assets. The Supreme Court, per Justice Powell, struck down the measure, observing that, if the speaker were a natural person, “no one would suggest that the State could silence their proposed speech.” However, it was unnecessary to decide whether the right of corporate free speech is coextensive with that of individual free speech as the message itself had inherent constitutional value, apart from the nature of its source.

Bellotti and Virginia Pharmacy together delineate a constitutionally protected expressive cycle that includes a speaker, a message and a listener. In the early ideological speech cases, analysis always began with the speaker’s rights because it was the speaker, intent on exercising the right to express controversial opinions and beliefs, who had the standing and motivation to challenge the regulation. But, as later cases have shown, constitutional analysis can also profitably begin with the first amendment rights of the recipient of the information (whether ideological or commercial), rights

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74 Id. at 784. This statute imposed on corporations a kind of expressive ultra vires doctrine. Justice White, in his dissent, suggests that the first amendment permits the states to prohibit the expenditure of corporate funds on the expression of views not “integray related to corporate business operations.” Id. at 821 (White, J., dissenting). This archaic view of proper corporate conduct would, if adopted, undo decades of progress attempting to encourage the growth of corporate social responsibility. See, e.g., Principles of Corporate Governance § 2.01 (Tent. Draft No. 2, 1984). Moreover, although the state may regulate the framework by which corporate management obtains authorization from the firm’s owners—the shareholders—and thus may insist that certain decisions require a particular level of shareholder support, it may not disable properly authorized managements from communicating corporate positions on controversial issues, nor may it interfere with the public’s right to receive truthful corporate information just because the corporation is a creature of law and its internal affairs are regulated. See infra text accompanying notes 75-78, 218-29 & 365-76.

75 Bellotti, 435 U.S. at 777.

76 This was the question framed by the Massachusetts Supreme Court. Id. at 765.

77 Id. at 775.

The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations “have” First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the Massachusetts statute] abridges expression that the First Amendment was meant to protect.

Id.
which are reflected onto the willing speaker whether or not the speaker has constitutional standing (or is inclined) to seek relief from state regulation. Bellotti suggests an analogous result where the constitutional focus is on the message itself: a message "that the First Amendment was meant to protect" can reflect protected status onto both its speaker and its recipient. Bellotti admittedly involved political speech. But there is no reason in principle why its message-centered approach to free-speech adjudication should not apply equally to corporate commercial information.

(ii) The Power to Prohibit the Transaction Includes a Power to Regulate its Promotion. In Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, then Associate Justice Rehnquist held that if the state has the power to control an activity, it must have the power to control the commercial advertising of that activity. In other words, the greater power to prohibit a transaction includes the lesser power to prohibit or regulate its promotion. This "greater includes the lesser" approach (similar to the now disfavored right-privilege doctrine once prevalent in due process jurisprudence) has thus been given new life in the commercial advertising context.

At issue in Posadas was a statute that, while permitting casino gambling in Puerto Rico, prohibited outright the advertising of such lawful activity to Puerto Rican residents. Although Puerto

78 See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Kleindienst v. Mandel, 408 U.S. 753, 762-65 (1972) (finding that "right to receive" is basis for first amendment rights on part of those wishing to hear foreign Marxist speaker, but ultimately upholding denial of visa by executive branch due to separation of powers concerns); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389-90 (1969) (holding FCC-imposed fairness doctrine for broadcasters constitutional based on paramount right of listening and viewing public); Lamont v. Postmaster Gen., 381 U.S. 301 (1965) (striking statute requiring affirmative request to post office to receive materials deemed "communist propaganda" as unconstitutional limitation of recipient's first amendment rights).

79 See Bellotti, 435 U.S. at 775; see also supra note 77.


81 Id. at 345-47.

82 See Van Alstyne, The Demise of the Right/Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968) (arguing that the Holmesian right-privilege distinction is no longer viable). Chief Justice Rehnquist appears to be particularly enamored of "greater includes the lesser" reasoning. He attempted to apply a similar approach to the procedural due process cases (really a resurrection of the right-privilege doctrine) in Arnett v. Kennedy, 416 U.S. 134 (1974), but failed to command a majority. The Court decisively rejected it in Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).

83 Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 330-32
Rican residents were not barred from the casino tables, the legislature wanted to promote such gambling only by tourists, not residents. All tourist-directed advertising had to be submitted to and approved by a local administrative board before publication. The argument that this was an unconstitutional prior restraint on truthful commercial advertising was swept aside by the Court. Justice Rehnquist explained that because the Puerto Rican legislature could have prohibited casino gambling by Puerto Rican residents altogether, a fortiori, that same legislature could regulate the advertising of an activity it could prohibit.

This argument has the superficial appeal of simplicity and certainty. One need only inquire whether the state has the power to regulate an underlying activity (e.g., the manufacture and sale of soap powder) to determine whether the state can limit concededly truthful expressions uttered in furtherance of that activity such as Company X's advertisement. Since economic activity is almost universally regulable, this rationale would render vulnerable to proscription virtually all commercial advertising, including any truthful advertising seeking to promote activity lacking affirmative constitutional protection. "Greater includes the lesser" reasoning, of the type present in Posadas, has been subject to devastating criticism elsewhere, which need not be repeated here. If adopted generally, this approach would strip the first amendment of its force, for, with the decline of substantive due process, precious little—not the process of running for political office, nor the operation of the public schools, nor the entry into the professions—is constitutionally immune to regulation. The very point of the free speech principle is that speech is protected even where the under-
lying activity is regulable.\textsuperscript{69}

If first amendment protection of the free speech principle is to retain any meaning, therefore, government's power to prohibit or withdraw funding from an activity cannot imply a lesser power to restrict expression arising out of or in connection with that activity. In the context of the modern activist state, recognition of such a doctrine would expand enormously governmental power to manipulate its citizens and to distort the flow of ideas and information, both of political and commercial import. The pernicious potential of this doctrine is vividly illustrated by \textit{Posadas} itself.

Why did the Puerto Rican legislature wish to ban admittedly truthful advertising of activity specifically authorized by law? Apparently, it believed that "[e]xcessive casino gambling among local residents . . . would produce serious harmful effects on the health, safety and welfare of the Puerto Rican citizens, such as the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime."\textsuperscript{700}

Even assuming that such evils could result from increased demand for casino gambling by Puerto Rican residents,\textsuperscript{91} and conceding for the purposes of argument that the restriction of advertising directed toward—as opposed to restriction of actual access to casino gambling by—local residents might diminish those evils, the fact remains that (for economic reasons) Puerto Rico has chosen not to prohibit casino gambling. The legislature wants to have its cake and eat it, too: it hopes to reap the economic rewards of luring tourists into its casinos, without subjecting its own citizens to the same temptations, and without incurring the political costs of excluding them from the casinos. Although the Court characterizes the advertising ban as a "less intrusive step" than would be the


\textsuperscript{700} Brief for Appellee at 37, \textit{Posadas}, 478 U.S. at 341 (No. 84-1903). It is interesting to note that the legislature was not equally alarmed by the prospect of Puerto Rican residents participating in the state-run lottery or in the other forms of gambling such as horse racing, cock fights and "picas," that, according to the Superior Court, "have been traditionally part of the Puerto Rican's roots." \textit{Id.} at 342.

\textsuperscript{91} Justice Stevens, dissenting in \textit{Posadas}, suggests that Puerto Rico is engaging in a kind of audience discrimination. \textit{Id.} at 363. It amounts to a "reverse privileges and immunities problem: Puerto Rico's residents are singled out for disfavored treatment in comparison to all other Americans." \textit{Id.} at 360.
outright prohibition of the activity,\textsuperscript{92} in fact the use of censorship to influence public behavior is more destructive of accountable self-government than any outright prohibition of the activity could be.

When the state openly prohibits casino gambling, the issue is ensured a level of prominence and public exposure that will occasion open debate over the merits of the prohibition. If the people strongly favor legalization, their representatives will either bow to the public will or risk replacement at the next election. In this manner, the state will be openly accountable to the people for its actions with regard to casino gambling.

The state's difficulty is clear: the state perceives certain activity as undesirable, perhaps even dangerous, but for one reason or another (whether because of affirmative constitutional protection, because the people will resist an outright prohibition, or because of cynically pragmatic economic motives) the activity is lawful within the state. The pattern is the same, whether it involves abortion procedures as in \textit{Bigelow v. Virginia},\textsuperscript{93} the use of contraceptives as in \textit{Carey v. Population Services International},\textsuperscript{4} or casino gambling by residents as in \textit{Posadas}. In each case, the state is attempting to keep in ignorance members of the public competent to engage in particular lawful activities,\textsuperscript{95} in the hope that what the people do not know about they will not do. The first amendment does not permit the state to manipulate public preference by mandating ignorance of underlying lawful activity, however.\textsuperscript{96} \textit{Posadas} not only cannot be reconciled with \textit{Central Hudson Gas & Electric Corp. v. Public Service Commission},\textsuperscript{97} Virginia State Board of

\textsuperscript{92} Id. at 346.

\textsuperscript{93} 421 U.S. 809 (1975).

\textsuperscript{94} 431 U.S. 678 (1977).

\textsuperscript{95} These were not attempts to protect minor children from exposure to potentially harmful advertisements, nor did they involve the special circumstances surrounding the media where access restrictions may be necessary because of likely exposure to children. \textit{See Bigelow,} 421 U.S. at 825 n.10; \textit{FCC v. Pacifica Found.,} 438 U.S. 726 (1978); infra note 157.

\textsuperscript{96} For a discussion of the status of advertising concerning socially condemned activity that the state has declined to criminalize, see infra text accompanying notes 156-62.

\textsuperscript{97} 447 U.S. 557 (1980). \textit{Posadas} contemplates the regulation of truthful speech about lawful activity with uncritical deference to the regulator, applying a sort of "rational basis combined with commercial 'bad tendency' " test under which the state baldly asserts that advertising may, by increasing local patronage of the casinos, bring about certain evils the state wishes to avoid. The Court accepted at face value the state's virtually unsupported assertions, ignored its own precedents and relieved the state of the burden of justifying a
Pharmacy v. Virginia Citizens Consumer Council, or with the first amendment's commitment to the people's right to receive truthful commercial information about lawful activity, it also demonstrates the poverty of "greater includes the lesser" reasoning as a basis for constitutional analysis.

(iii) Inducing an Imminent Transaction. An attempt to make sense of Posadas by arguing that commercial advertising may be subject to state regulation because its objective is to induce imminent action by recipients of the message is not persuasive. Quite unlike the factual settings in the criminal advocacy cases, adver-

prohibition of expression. See Kurland, supra note 14, at 6, 7 n.22, 8-12. Such a lackadaisical approach to the state's burden of proof with regard to its "substantial interest" would be unprecedented even if the activity being advertised were illegal—compare the state's burden of proof in the "clear and present danger" cases involving advocacy or incitement of illegal action. See Brandenburg v. Ohio, 395 U.S. 444 (1969).


Professors Jackson and Jeffries argue that commercial advertising has no value independent of the underlying regulable transaction:

[T]he legislature rationally might conclude that the sale of cigarettes should be allowed but that advertising should be banned to discourage new users. In such a case, according to the reasoning of Virginia Board of Pharmacy, governmental control over price advertising would offend the first amendment. This conclusion only makes sense if one assumes a first amendment value in the advertising of cigarettes independent of its role in encouraging or facilitating the sale of cigarettes. . . . If independent first amendment significance did exist . . . , it would also exist when the state has declared the underlying transaction unlawful. So, for example, some legitimate function would arise for the advertisement, "I will sell you X drug at the Y price," even where the sale is forbidden by law. That no such independent purpose in fact can be identified confirms the hypothesis that the significance of ordinary business advertising lies entirely in its relation to the contemplated economic transaction.

Jackson & Jeffries, supra note 48, at 35-36. To the extent this argument does not depend on "the greater includes the lesser" reasoning of Posadas, it simply restates the point previously refuted that commercial speech has no value because it is about transactions the state can regulate rather than ideas. Again, within the realm of legally permissible transactions, truthful product and service information is of value to its recipients, and this is simply not negated by the often remote possibility that someday the state may change its mind and prohibit the transaction altogether—a result that should occur after open debate and not through suppression of knowledge of the availability of the product or services.

See Greenawalt, Criminal Coercion and Freedom of Speech, 78 Nw. U.L. Rev. 1031
Advertising is directed at a diffuse public and typically allows its recipients time to consider the import of the message and possibly to hear competing messages.\footnote{101}

Professor Farber offers a more restrained version of the verbal-conduct claim.\footnote{102} Analogizing to \textit{United States v. O'Brien},\footnote{103} he argues that commercial speech can be separated into informational and contractual components, and that state regulation of the contractual aspects of such expression, like the prohibition of draft-card destruction in \textit{O'Brien}, would be permissible:

Similar to the language of a written contract, the language in advertising can be seen as constituting part of the seller's commitment to the buyer. Thus, advertising can function as part of the contractual arrangement between the buyer and seller. Of course, in addition to serving this contractual function, advertisements also serve an informative function to which the first amendment applies. The critical factor seems to be whether a state rule is based on the informative function or the contractual function of the language. So long as a regulation re-

\footnote{101} Although perhaps not in complete agreement with my general approach, Professor Greenawalt would concur here:

The theory of freedom of expression relies heavily on the possibility of the listener's according reasoned consideration to the message of the speaker and on the speaker's uttering what he believes to be true. In some situations the listener is literally incapable of assessing the accuracy of an assertion before he must act upon it. The often cited example of someone shouting "Fire" in a crowded theater is an illustration. The members of the audience may have to react to this factual claim before they can tell if it is true. In such circumstances, the argument that society may punish false statements is especially strong. On other occasions, most listeners, say, to an advertised health claim, may have time to check the accuracy of the claim but lack the practical means or inclination to do so. Again, they may act on the claim without being able to subject it to the kind of reasoned consideration that matters in this context, though here members of the audience are not as defenseless as in the theater example, because they could await verification of some sort before proceeding.


lates 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.\footnote{Farber, supra note 102, at 387.}

As developed below, some aspects of commerce-related expression might be viewed as a form of verbal conduct subject to state regulation,\footnote{See infra text accompanying notes 217 & 302-05.} but this does not work as a general approach for all commercial speech. Advertising, the focus of Professor Farber’s article, is typically—like Company X’s soap powder advertisement—an appeal to the general public inviting its consideration of the advertised product or service. It is, however, rarely in a form capable of acceptance in contract-law terms; it is not “situation-altering” in the sense that the words themselves actually change legal entitlements.\footnote{Professor Greenawalt writes: Given the law and the practices of social morality, the utterance of some kinds of words in some kinds of circumstances actually changes the settings in which we live. These utterances are situation-altering . . . . Agreements between people to perform certain acts often have legal force, and even when they do not, they alter moral obligations. An offer to enter into an agreement also alters the normative setting, because, unless and until it is revoked, the offer empowers the person to whom the offer is made to close the agreement by his or her consent. Simple promises also alter one’s moral responsibilities; the person who makes a promise undertakes a new obligation, or makes even stronger an obligation that already exists. Greenawalt, Criminal Coercion, supra note 100, at 1091.} That Professor Farber’s analogy to implicit contracts is inapposite is clear when one considers campaign promises by political candidates. Candidate Y promised to be honest, energetic and effective. Certainly, such an appeal is not thought to give rise to binding contracts with voters, and the state can neither enforce the promises nor punish a failure to perform them.\footnote{Cf. Brown v. Hartlage, 456 U.S. 45 (1982), where the Court struck down a Kentucky statute that prohibited a political candidate from promising to give anything to voters in exchange for their support, as applied to a campaign promise to reduce official salaries: “there are constitutional limits on the State’s power to prohibit candidates from making promises in the course of an election campaign.” Id. at 55.} Since Company X’s promises are in this sense functionally identical to Candidate Y’s, state regulation of the truthfulness of Company X’s promises must be premised on other grounds.

(d) The Argument Based on a Generic Cost-Benefit Analysis.
Judge Posner suggests that questions concerning the scope of the first amendment may profitably be analyzed by an economic model of the costs and benefits of regulating speech.\textsuperscript{108} He concludes that commercial speech is entitled to a lower level of protection because the costs of regulating such speech—both in terms of the social loss from suppressing information and the legal-error costs in attempting to distinguish harmful commercial communication from valuable expression—are lower than the harm caused by untruthful and misleading advertising (after an appropriate discount for the probability of its occurrence).\textsuperscript{109}

Judge Posner's analysis formally expresses a view that essentially consists of three propositions: (i) the social loss from suppressing commercial speech is likely to be low because such speech is particularly resistant to government overbearing (the "hardiness" claim); (ii) legal-error costs are likely to be low because distinguishing between truth and falsity will usually depend on questions of empirical fact rather than elusive value judgments and because the government is not likely to be a biased regulator (the "unbiased, competent regulator" claim); and (iii) the harm sought to be avoided is likely to be great because false and misleading commercial speech is likely to persuade consumers and unlikely to be rebutted in the marketplace (the "persistent harm" claim).

(i) The "Hardiness" Claim. There are two senses in which commercial speech is said to be an especially "hardy" form of expression. One, implied by Virginia Pharmacy,\textsuperscript{110} posits that political speech is "fragile" because it may embrace particularly unpopular minority viewpoints, \textit{i.e.}, it is susceptible to overdeterrence by overbroad statutes and layers of censorship. Accordingly, to avoid such a chilling effect, there is a need for certain protective doctrines, such as those permitting overbreadth challenges and disfavoring the imposition of prior restraints. Commercial speech, by contrast, because of the profit motive, is more likely to prove resis-


\textsuperscript{109} Posner, \textit{supra} note 108.

tant to such a chilling effect. Since the commercial speaker will continue to speak despite state regulation, why not regulate?

This contrast attempts to prove too much. As a general matter, "hardiness" is a function not of the commercial content of the message but of the economic position of the speaker. In the commercial sphere, if Company X has a strong market share, it is likely to be able to withstand even overbroad regulation and attempt to insist on an appropriate narrowing of restrictions. The same can be said of incumbent candidates and well-funded challengers in the political sphere, or of powerful newspapers and broadcasters in the libel context.

First amendment protection is most needed for the marginal speaker, the new entrant in a particular industry, the rival political candidate with limited resources, the small radical newsletter, and so on. For such speakers, the hardiness of their powerful opponents or other establishment institutions is irrelevant.111

Judge Posner offers a somewhat different version of the hardiness claim: "The creator of product-specific information ordinarily can recoup all or at least most of his investment through selling the product, and . . . in an information market that operates without substantial externalities, regulation is not so apt to carry us far away from the optimal level of production."112 The point here is that unlike the producer of ideological speech, whose main benefits of information dissemination are deemed to be external and hence is quite sensitive to anything that raises the costs of production, the commercial advertiser is capable of capturing virtually all of the benefits of the information produced. Therefore, the commercial advertiser is a more "robust" speaker, better able to withstand overbroad regulation.

This observation may well explain the Court's resistance to overbreadth challenges and tolerance of prior restraints in the advertising context, but it does not provide a basis for distinguishing Com-

111 The advocates of censorship observe that commercial advertising grew and flourished long before it received the imprimatur of first amendment protection; it continues to do so despite its second-class constitutional status. A patient may survive a dose of the wrong medicine, yet mere survival is no validation of his treatment. Moreover, what we cannot ever know is how much useful commercial information was chilled by state regulation. Regulation raises transaction costs substantially. At the margins, such additional expenses may have affected decisions whether to enter (or remain) in the market at all.

pany X's advertisement from archetypical political speech such as Candidate Y's promotional campaign for political office.113

(ii) The "Unbiased, Competent Regulator" Claim. The risks of legal error in the regulation of advertising, it is asserted, are likely to be low because the issues are likely to hinge upon matters of demonstrable fact.114 The state is more likely to be genuinely interested in keeping false, misleading information out of the marketplace than in harboring a bias in favor of one viewpoint over another.

The claim that regulatory bias is absent in the commercial speech arena is overdrawn for a number of reasons. First, it is difficult to understand the suggestion that the risk of bias is associated with the presence or absence of a commercial motivation for the message being regulated.115 From a constitutional standpoint, the Consumer Reports critique of ABC Soap Flakes and Company X's advertisement disparaging its competitor's product should be treated identically: concern about over-regulation is not a function of the likelihood of partisan bias on the regulator's part. Even if we

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113 Professor Cass writes, "In good measure, it would seem, the political advertisement is no different from any other brand-specific promotion in the degree to which the sponsoring firm can be expected to internalize the benefits of the message." Cass, supra note 49, at 1369.

114 Company X's advertisements may contain empirically verifiable propositions about the properties of its soap powder, the truth or falsity of which presumably can be ascertained. Some advertisements, however, are based on qualitative assessments by consumers or experts—subjective opinions that cannot be verified through product testing. Moreover, regulation of "misleading" advertisements or "misleading" solicitations of business by professionals presents a considerably more difficult enterprise. The issue here is how recipients of the advertisement are likely to construe its message and raises questions about the extent to which government may act out of paternalistic impulses. See Shiffrin, supra note 19, at 1219.

115 For example, Professor Shiffrin writes:

Although no one supposes the FTC is infallible, we have significantly less doubt about government's capacity to define truth when it moves against a deceptive advertiser who makes an allegedly false statement about its own or another's product, than we do when the government moves against a source that has no profit motive in the sale of a product. The first amendment will ordinarily bar the latter action even if the false statement were the same one that had been made by an advertiser. Consider, again, for example, an injunction action against a consumer magazine or an author of a book who has no financial interest in the product discussed. The first amendment would prevent such an injunction because we fear that the government has no other reason for restricting the publication except a desire to suppress a certain version of truth.

Id. at 1265.
assume a well-intentioned regulator, the regulator's conception of the public good (that of protecting the allegedly unsophisticated consumer) may give rise to a "bias" of sorts in favor of regulation rather than any particular viewpoint. The regulator's paternalistic bias may serve to impede the flow of truthful commercial information, thereby distorting the process of private, decentralized decisionmaking. Such an outcome is antithetical to the first amendment premise that the people are likely to be better informed and to make better decisions (whether affecting them privately or as a collective whole) if a free marketplace for information controls.

Secondly, there will be situations where the regulator cannot be presumed to be wholly unbiased. In some instances the bias may in fact be benign, such as the SEC's purported solicitude for the small, unsophisticated investor. In others, the "benign" regulatory purpose may mask a predisposition to favor the entrenched establishment.

Finally, fear of official bias, while it may explain some aspects of the first amendment's protective apparatus, is not the sole basis

116 The regulator may be influenced (consciously or unconsciously) by the urge to justify his existence. As Justice Brennan observed, "the censor's business is to censor, [and] there inheres the danger that he may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression." Freedman v. Maryland, 380 U.S. 51, 57-58 (1965).

117 As will be demonstrated in Part II, I am not suggesting that government cannot act to bar false or misleading commercial advertising, or that truthful information, even in the noncommercial sphere, can never be made actionable when it causes demonstrable injury to third parties. See infra text accompanying notes 163-69, 271-85 & 338-44.

118 The presence of such bias may in fact inform many of the commercial speech cases involving regulation of advertising by professionals. In these cases the rules themselves are often the product of negotiation with establishment practitioners, the regulators are drawn from their ranks, and the regulatory attitude is one of reflexive distrust of new forms of competition. Compare Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) (state may not prohibit lawyers from soliciting business by direct mailings to potential clients); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) (state may not prohibit use of illustrations in attorney advertising); In re R.M.J., 455 U.S. 191 (1982) (state may not restrict advertising by lawyers to ten limited categories of information); Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (state may not prohibit lawyers from advertising); and Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (state may not prohibit licensed pharmacist from advertising prices of prescription drugs) with Friedman v. Rogers, 440 U.S. 1 (1979) (state may prohibit practice of optometry under trade name and require regulatory board members to be members of professional organization of optometrists); and Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (state may prohibit lawyers from soliciting clients in person). See generally McChesney, supra note 32.
for constitutional protection. The *Sullivan* standard of "actual malice,"\(^{110}\) for example, is designed to encourage criticism of official conduct, and is not a response to likely bias in the courtroom. There may not be a similar need for "strategic protection for falsehoods" in the commercial area,\(^{120}\) but the societal commitment to decentralized decisionmaking in economic matters supports close scrutiny of regulations impairing the free flow of commercial information.

**(iii) The "Persistent Harm" Claim.** Although, as Justice Powell observed in *Gertz v. Robert Welch, Inc.*,\(^{121}\) there is no constitutional value in a false statement of fact,\(^{122}\) the Constitution does require the state to tolerate, up to a point,\(^{123}\) false statements of fact made in the marketplace of ideas. Commercial advertising, by contrast, is given no such latitude; false commercial information may be systematically barred by the state. Is false speech in the commercial marketplace likely to generate harms so resistant to correction that it merits, as a categorical matter, a lower level of first amendment solicitude than false statements in the marketplace of ideas?

The argument is often made that advertisers know the truth about their products and, because consumers cannot easily verify quality and performance claims (at least not without first purchasing the products being advertised), it is not unreasonable to impose liability on advertisers for false statements of fact.\(^{124}\) Because the rewards of capturing the market are great, the temptation to puff (if not to misrepresent outright) is equally great. Accordingly,

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120 Shiffrin, *supra* note 19, at 1269. Arguably, the *Sullivan* "actual malice" test may be appropriate for product-disparagement expression. See *infra* text accompanying notes 183-86.


122 Id. at 340.

123 There are instances when false statements of fact can be punished despite their occurrence in a noncommercial context. For example, perjury—the deliberate falsification of factual testimony—is a criminal offense. Moreover, *Sullivan* in no way created an absolute barrier to causes of action for libel; it merely created a "breathing space" to encourage criticism of official conduct, that might otherwise be deterred by excessive self-censorship for fear of liability for good-faith error.

the state is deemed to have a particularly strong interest in protecting the gullible and helpless consumer by aggressively policing commercial advertising for accuracy.

Assuming the state's concern for the easily misled consumer is a legitimate justification for the regulating of Company X's advertising, does not that analysis also apply to political advertising? Political candidates are also better able to assess the truthfulness of their factual campaign claims than the voters; the rewards of successful persuasion are great; and the resulting temptation to exaggerate personal successes and an opponent's failures is equally great. The public is at least as susceptible to the blandishments and misrepresentations of manipulative politicians as it is to the false claims of advertisers. The consequences of misguided decisionmaking may, in fact, be far graver in the political arena.

It is inconceivable that a political candidate could be required to utilize only a prescribed format for campaign advertisements, or to submit the text of voter solicitation materials to a "Political Exchange Commission" for approval prior to distributions. Modern society depends upon countervailing private institutions to ferret out deception in the political sector. Political campaigns today involve more than discreet editorials in local newspapers. Candidates compete for the spotlight on a national scale and increasingly are subjected to intense examination upon all the details of their lives. Their political records and life histories are scrutinized and brought into people's homes via both the print and broadcast media. Debates are televised, as are press conferences. These mechanisms serve as "truth-testers" helping the public to make informed judgments about the candidates.

Although it is perhaps unrealistic to expect that the same bright spotlight directed toward political campaigns will be turned on commercial advertising, it is wrong to assume that there are no analogous "truth-testers" in the commercial marketplace, where consumer advocates and competitors are quick to challenge false
advertising claims. Organizations like Consumers Union now play an active role in providing useful comparative information on products and services. Not surprisingly, stories of defective products, misleading advertisements, and other instances of consumer fraud generate sufficient audience interest to warrant considerable attention from the broadcast and print media. Moreover, product competitors themselves increasingly do not hesitate to challenge advertising schemes they consider misleading or false.

Government, too, plays a role in generating corrective information through consumer affairs offices.

It would seem, therefore, that the likelihood of the consumer succumbing to Company X's false advertising is not necessarily greater than the likelihood of the voter succumbing to Candidate Y's false campaign promises. Admittedly, there is often a difference in the time frame in which decisions must be made. An election campaign takes place over a period of (at least) weeks or months, during which time the press and the airwaves are filled with competing informational messages concerning the candidates in the upcoming election. Consumers, by contrast, are exposed to a barrage of commercial advertisements concerning a multitude of products on a daily basis. They may see an advertisement for Com-

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129 Indeed, groups like Consumers Union have earned the trust of the public over many years of evaluating products. In a 1982 poll by Louis Harris & Associates, the Consumers Union was found to “do[ ] a better job protecting the interests of consumers” than “the Reagan Administration, private industry, Ralph Nader, state or federal government agencies or the Consumer Product Safety Commission.” deCourcy Hinds, How Consumers Union Puts Teeth into “Let the Seller Beware”, N.Y. Times, June 11, 1988, at 37, col. 2.

130 Nearly every local television news program has a consumer “trouble shooter”; David Horowitz has his own television show; and Ralph Nader (a minor folk hero to some) is a frequent guest on popular talk shows.

pany X's soap powder mixed in with the dozens of other products being advertised, but may or may not see advertisements for competing brands of soap powder before heading for the store. Even under these circumstances, those who are so inclined can make it their business to investigate competing products, and are likely to do so where major "one-time" purchases are concerned (cars, major appliances, audio equipment, etc.). As we shall see, government has a proper, though limited, role to play in regulating false, misleading product and service advertising. But it cannot be said, as a categorical matter, that the audience for commercial messages is so unsophisticated and vulnerable to deception, the harms caused by erroneous commercial information so great and enduring, or the market for such information so incapable of generating corrective data that government must be accorded plenary authority over the content of commercial advertising and its dissemination to the public.

3. The Essential Difference: The Presence or Absence of Speaker Interests. This Article has surveyed the conventional justifications for the disparate regulatory treatment accorded Company X's soap powder advertisement and Candidate Y's political advertisement. Intuitively it seems right that there should be some difference in treatment, but is there a justification for different rules governing these two functionally identical communications that does not depend on some anterior assignment of second-class status to the speech of commercial actors?

The answer, I suggest, lies in the fact that society may wish to protect Candidate Y's self-promotion for entirely noninstrumental reasons, even if it is false and misleads voters to their detriment. Candidate Y's advertisement involves an element of speaker self-expression, whereas Company X's promotion expresses no element of the essence or ideas of the advertiser. The first amendment thus protects Candidate Y's false or misleading (though expressive) speech even if it makes no useful contribution to the marketplace of ideas; there is no comparable reason to protect Company X's false or misleading speech.

The presence of speaker interests in expressive communications is central to understanding the permissive standards that apply in

132 See infra text accompanying notes 163-214.
the marketplace of ideas. If the first amendment was not a shield to protect a speaker’s expressive interests, would it be reasonable to say, as Justice Powell declares in *Gertz v. Robert Welch, Inc.*, that no ideas are “false”? Certainly there are ideas that society condemns as false, even abhorrent—e.g., espousals of racial and ethnic hatred. We risk terrible consequences if these false ideas gain broad acceptance and take root in the community. Nevertheless, society tolerates the expression of dangerous, wrong-headed beliefs; we are left to rely on the marketplace of ideas to generate corrective true beliefs to counteract the false. It is unreasonable to say that these abhorrent ideas do not cause harm. They often do cause harm—at least in the short run—to susceptible listeners whose perceptions about self and others may be irreparably distorted, and, more importantly, to the objects of group-based vilification who must continue to confront widely-held prejudice.

Despite the risks, we tolerate the circulation of such beliefs because, under our Constitution, even if the truth of an idea could be known—if one could determine conclusively which beliefs were true and which false—the first amendment would still protect

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133 In reviewing an earlier draft of this paper, Professor Lawrence G. Sager of New York University School of Law suggested that the first amendment’s protection of false, misleading expressive communications is better viewed as a protection of “speech events” rather than speaker interests. He offered the hypothetical of a recently discovered abandoned text or film for which the original speaker could not be identified, and yet the suppression of which would not be tolerated under the first amendment. The hypothetical suggests, however, that there would typically be a “speaker interest” present—say, someone wishing to republish or exhibit the work; if not, a potential listener could rely upon the “right to receive” decisions culminating in *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). See supra text accompanying note 78.


135 Id. at 339.


137 A current example of such a “false” statement of ideas would be the disputation of the historical events commonly described as the Holocaust, notwithstanding the mountains of empirical evidence that it occurred.

No doubt part of the explanation for such tolerance is that a “true” idea is in the eye of the beholder. It is too slippery to grasp with certainty, too linked with individual opinion, and too unknowable in any empirically verifiable way. But even if we could conjure examples in which we control the variables to screen out (to the fullest extent possible) statements of elusive opinion, leaving only statements of verifiable fact, we would still treat political and commercial “falsity” differently. What accounts for this disparate treatment of false
the right of the believer in untruth to express his ideas and to try to persuade others of his beliefs. This is so because the believer in untruth, as a speaker, has expressive rights entirely independent of the truthfulness of the message. He has the right to achieve the satisfaction of speaking his mind, right or wrong, because of whatever value the expression of his personal urgings may have for the development of his sense of self—at least until he commands a sufficient following or musters the daring to translate his ideas into actions that harm others.

As for Candidate Y's advertisement, the public has no interest in receiving (and perhaps believing) false, or misleading, self-serving political promotions. There is, in fact, no audience-centered reason to erect Sullivan-type\textsuperscript{138} barriers against liability for such false statements. If the Constitution provides a "breathing space" for false, misleading political speech by Candidate Y, it is because there exists a protected interest in self-expression even where audience interests are not plausibly furthered. Often in the clash of opposing campaigns, under the glare of a vigilant media, the "truth" will emerge, but there is no assurance that this must always occur. Such falsehoods are tolerated because we are freer as a society when individuals are permitted to engage in unhindered self-expression.

It is this self-expressive component that is missing in conventional commercial advertising. However interestingly or artistically presented,\textsuperscript{139} Company X's soap powder advertisement is devoid of nonexpressive promotional advertising is the absence of protectible speaker interests on the part of the advertiser.


\textsuperscript{139} The creative presentations of commercial designers or advertising firms should not change the analysis. Notwithstanding Professor Redish's suggestion to the contrary, see Redish, supra note 56, at 446-47, an advertisement that merely proposes a commercial transaction is nonexpressive even though it may reflect the creative and artistic efforts of commercial design or advertising firms. The message cannot be analyzed except in relation to the speaker, and the speaker is not the advertising firm, it is the advertiser. Conceivably, government intervention to disable particular artists from functioning in an industry or to limit the range of materials or artistic devices to be employed might raise separate first amendment concerns. However, insofar as regulation is directed at the content of the promotional message, the involvement of creative personnel does not alter the fact that the message seeks merely to promote a transaction; therefore it does not implicate the advertiser's interests as a speaker.

Of course, advertisers might, under certain circumstances, form their own "in house" advertising departments, vertically integrating both the speaker and the artist. The creation of
any speaker's expressive interest in the communication of ideas (or sentiments).\textsuperscript{140} Advertising that "does no more than propose a commercial transaction"\textsuperscript{141} reflects no speaker interest beyond the desire to stimulate consumption of the products or services being offered, and is protected only insofar as it furthers the consumer's constitutional right to receive truthful economic information.

The test is not the motivation of the speaker but the content of the message. If the message communicates a point of view or espouses something other than a commercial transaction, it is irrelevant that the speaker hopes to generate corporate goodwill (that may someday lead to sales) in addition to imparting information.\textsuperscript{142} If, on the other hand, the message seeks directly to induce consumption of a particular product or service, it is a nonexpressive communication entitled to constitutional protection only to

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140 There may be instances when those who advertise a product or service sincerely believe they are advancing a "cause." The fact that they believe in their products in no way alters the nonexpressive content of the advertising itself, which proposes a commercial transaction.

141 Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973). Some advertisements both propose a commercial transaction and present the advertiser's views on a particular subject. Regulation of the promotional message should be treated like that of any other commercial advertising, whereas the ideological or ideational message falls under the rules governing expressive communications generally. Difficulties may arise, however, where regulation takes the form of requiring the advertisement to carry a "public interest" message, say, a warning about the health hazards of smoking. Although such a regulation could not constitutionally be applied to a purely ideological message, it may be warranted in the interests of preventing false or misleading product and service advertising. An advertiser is certainly free to separate the advertisement into two different messages. However, where the advertiser insists on including both messages in the same communication, it is not thereby immunized from requirements which permissibly apply to promotional advertising.

142 Consider the newspaper editorials by Mobil Oil Company or the Grace Corporation's controversial televised "mini-dramas" about the dangers of an unchecked economic deficit. They contain substantive messages expressing points of view to be communicated to the public. That they also remind the public about the company's name does not detract from the expressive content of the communications.
the extent it furthers audience interests, even if the advertiser is passionately committed to his product or service.

The distinction between nonexpressive promotional communications and communications charged with a speaker's expressive interests offers the courts a more meaningful tool for first amendment analysis than the hitherto clumsy distinctions drawn between so-called "commercial" and "noncommercial" speech. All speech arising in the course of commercial activities is speech. One subset of such expression—promotional advertising that "does no more than propose a commercial transaction"—differs from the rest in that it is protected only to the extent that the speaker provides the recipient with truthful information concerning lawful products or services. Other subsets of commerce-related speech (such as the speech of lawyers, investment advisers or other professionals, the intracorporate communications of shareholders, or the communications of parties to a labor dispute) may be expressive in nature despite their commercial subject matter. Under this approach, there is no category of subordinate "commercial speech," no Central Hudson intermediate level of scrutiny. Rather, speech lacking in expressive interests (purely promotional advertising) can be regulated in order to promote audience interests in the receipt of truthful commercial information; and speech imbued with a speaker's rights to self-expression can only be regulated under principles that would be applicable to any other expressive communication, whether it be political, religious, artistic or economic in content.

C. Permissible Regulation of Promotional Advertising

Because promotional advertising derives its constitutional value solely from audience interests in the flow of truthful commercial

143 Pittsburgh Press, 413 U.S. at 385.
144 See infra text accompanying notes 286-419.
146 Although the first amendment affords commercial speech a lesser protection than other speech or expression, id. at 562, state restriction of such speech must still directly advance a substantial government interest and be no more broad than necessary to advance this interest. Id. at 566.
147 That is not to say that any and all measures intended to promote accurate, nonmisleading promotional advertising would pass constitutional muster. See, e.g., infra text accompanying notes 272-85.
information, there is an appropriate, albeit limited, role for certain state regulations that would ordinarily be proscribed in the context of expressive communications.

1. Advertising May Be Prohibited When the Underlying Activity is Unlawful. One rule that informs all of the Court's commercial speech decisions is that advertising that promotes unlawful activity is beyond the protection of the first amendment. By contrast, public debate concerning unlawful activity may not be restrained by the state. Consider, for example, advertisements placed by the National Rifle Association urging the public to resist an unjust law in states where the sale and possession of handguns are prohibited. Such editorial advertisements (assuming they stop short of creating a "clear and present danger") may either contribute to the marketplace of ideas or advance the speaker's interest in self-expression; in any event, this example demonstrates that the legality of the subject matter does not always define the protected sphere of ideological expression.

Advertisements by a local mail-order house offering handguns for sale within a state that prohibits such transactions might, however, be treated very differently. This is because commercial advertising receives constitutional protection only insofar as it advances audience interests, and the public has no legitimate interest in learning about and effecting an unlawful transaction. Information contained in advertisements directly promoting the illegal sale of handguns is of no legitimate use to people forbidden to purchase and possess them and, hence, is unprotected.

The illegality of the underlying activity stripped a gender-based "help wanted" advertisement of whatever first amendment protection it might otherwise have had in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations.* This Pittsburgh Press...
rule required some qualification in view of the limited regulatory reach of a particular state’s laws, however. In *Bigelow v. Virginia*,\(^{153}\) decided two years later, an advertisement for abortion services in New York had been placed in a Virginia newspaper. Virginia prohibited abortions at the time, but New York did not. The Court explained that, unlike the gender-based offers of employment in *Pittsburgh Press*, both traveling to New York and obtaining an abortion there were entirely lawful acts in which Virginia residents were free to engage.\(^{154}\) Under *Bigelow*, then, a state may not bar advertising promoting activity lawful elsewhere in the country, even though it can and does proscribe the transactions themselves from being consummated within its borders.\(^{155}\)

Notwithstanding *Posadas’* bizarre revision of first amendment principles,\(^{156}\) the logical corollary of *Pittsburgh Press* and *Bigelow* is that, as a general matter, truthful advertising may not be barred when the underlying activity is lawful.\(^{157}\) Until the state takes the

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\(^{153}\) 421 U.S. 809 (1975).

\(^{154}\) Id. at 821-22.

\(^{155}\) Id. at 824-25. As Justice Rehnquist pointed out in *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), the activities advertised in *Bigelow* were not only lawful but constitutionally protected under *Roe v. Wade*. 410 U.S. 113 (1973). Admittedly, the Court in *Bigelow* was not required to consider “the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit.” *Bigelow*, 421 U.S. at 825. Given the geographically limited legislative jurisdiction of a state, the state cannot extend its prohibition to conduct outside of its borders. Because the people have a constitutional right to learn about the availability of products or services that are lawful elsewhere in this country, the state may not prohibit truthful, nonmisleading advertising promoting such products or services. Hence, the affirmative constitutional protection that attached to the underlying activity in *Bigelow* is a sufficient but not a necessary condition for voiding such an advertising ban.


\(^{156}\) *See supra* notes 80-99 and accompanying text.

\(^{157}\) The prohibition of cigarette and liquor advertising on the broadcast media does not compel a different view. The current regulatory scheme does not constitute an absolute ban on the advertising of liquor or cigarettes, which are still advertised in print. Indeed, for the reasons suggested in the text, if Congress were to follow Canada’s lead, and mandate a total advertising ban (without first prohibiting smoking itself), such a measure would be invalid under the first amendment. *See Burns, Canada Passes Law To Ban Tobacco Ads and Curb*
step of outlawing the particular commercial activity, it may not attempt to dissuade participation in that activity by suppressing truthful speech that would inform the public about its existence.\textsuperscript{158}

All well and good, some would say, but doesn't this criticism overlook the fact that legislatures decide to legalize certain activities for different reasons? Some activities are made lawful because they are within the zone of socially acceptable behavior. Others are legalized in order to minimize attendant evils—such as collateral criminal activity or mob influence. In the latter circumstances, the state is admitting defeat—it has failed to prevent the activity in question. The state hopes by legalization at least to address some of the curable evils associated with the activity. Surely, it is contended, the state should not be disabled from dampening demand for the underlying activity, simply because it has found it infeasible to ban that activity?\textsuperscript{159}

Yet there are reasons to be hesitant about approving the suppression of advertising a lawful activity, however much the state disapproves of it. Some activity may be noisily condemned by powerful and influential minorities who create the appearance of widespread public disapproval, even though they are unable to marshal sufficient support to outlaw the activity they disfavor. It is exceedingly difficult to determine why activity deemed harmful by some sectors of society remains lawful. Consider the controversy over


Moreover, the courts have often referred to the "unique characteristics" of the electronic media, rendering them "especially subject to regulation in the public interest." \textit{Bigelow}, 421 U.S. at 825 n.10 (quoting Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 584 (D.D.C. 1971), \textit{aff'd}, 405 U.S. 1000 (1972)); \textit{see also} FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (stating broadcasting of offensive sexual and excretory language merits limited first amendment protection); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (discussing fairness doctrine that requires public issues be presented on broadcast stations and each side be given fair coverage). The special regulatory issues that surround the broadcast media are beyond the scope of this Article. Commercial advertising, of course, does not receive a higher level of protection than other speech. If the Court is prepared to condone content-based regulation of expressive speech on television and radio in order to limit the exposure of minor children to potentially harmful programming, the same would apply to promotional advertising messages on the broadcast media.


\textsuperscript{159} For a forceful expression of this position, see Cass, \textit{supra} note 49, at 1379-80.
cigarette smoking. Despite considerable evidence about the health dangers of smoking (to smokers and nonsmokers alike), there is, as yet, no prohibition on smoking by adults.\textsuperscript{160} Do state legislatures decline to prohibit smoking because they know (remembering the disaster of Prohibition) that it would not work anyway? Or because of the power and influence of the tobacco lobby? Or because legislators suspect that the majority of citizens would reject such a proposal as an infringement on personal lifestyle choices?

How would the true motivation for permitting smoking (while prohibiting its promotion) be determined? Would it suffice for the legislature to issue a self-serving statement to the effect that, although resigned to the inevitability of some people smoking, it wishes to prevent its proliferation and therefore prohibits all advertising of tobacco products? How great must the dangers that flow from the activity be in order to justify the suppression of speech?\textsuperscript{161}

This rationale for suppressing truthful promotions about lawful activity, if it is not to curtail drastically the public's informational rights and embroil courts in difficult questions of legislative motivation, must be confined to activity that is either universally condemned or nearly so. Narcotics abuse (and possibly prostitution)\textsuperscript{162} may come within this category; tobacco and alcohol use seem less obvious candidates. In any event, this line of argument is inapplicable to the commercial activity that is the subject of typical government regulation.

2. Postexpression Remedies for Fraudulent or Misleading Advertising are Permissible. The public's first amendment right to receive information is nowhere absolute. Even with respect to non-commercial information central to self-government—criticism of official misconduct—intentional or reckless falsehoods may be made actionable.\textsuperscript{163} And negligently false statements of fact that injure the reputations of individuals who are not public figures lose

\textsuperscript{160} Various states and cities have enacted restrictions on smoking in public places, but the manufacture and sale of tobacco products are nowhere prohibited.

\textsuperscript{161} Consider that the activities being advocated in the "clear and present danger" cases were invariably unlawful.

\textsuperscript{162} Prostitution is not outlawed everywhere. It has been legalized in Nevada and abroad. See, e.g., Nev. Rev. Stat. § 201.354 (1987) (excepting licensed houses of prostitution from general prohibition).

all first amendment protection.\textsuperscript{164}

The permissible scope of state regulation of commercial advertising is broader still, because the necessity for tolerating falsehood to provide "breathing space" for self-expression drops out of the balance. Since false or misleading advertising is of no informational value to consumers engaged in the process of private decision-making, it is unprotected. Assuming the regulatory scheme currently in place to check false or misleading advertising is constitutionally permissible, its constitutionality is based on the lack of both a speaker's expressive interest and any informational value to the recipient consumer, rather than on the supposed constitutional inferiority of commercial speech.\textsuperscript{165}

(a) Misleading, Though Literally Truthful Advertising. Although there is no first amendment barrier to the regulation of false or misleading commercial advertising, it is not always easy to distinguish the true statement from the false. The fact-opinion dichotomy looms as large here as in the libel area.\textsuperscript{166} Moreover, an advertisement may contain statements which are literally true and yet convey a false message to the consumer because of its context or its omissions.

There are many ways partially truthful advertising can mislead


\textsuperscript{165} I do not dispute Professor Shiffrin's point that in some contexts we may also have less reason to fear that government regulators will be acting out of improper censorial motives. See Shiffrin, supra note 19, at 1265. The decreased likelihood of such bias may be relevant in deciding whether certain protective doctrines, such as those concerning overbreadth and prior restraints, need be extended to commercial advertising. See infra text accompanying notes 187-96. However, if advertising is viewed as fully protected speech, and the absence of government bias would not justify regulation of false or misleading noncommercial speech, then existing regulations of commercial advertising must be justified on other grounds, if at all.

\textsuperscript{166} Presumably, the fact-opinion distinction recognized in Gertz would apply to commercial advertising as well. See Gertz, 418 U.S. at 339-40. Bona fide testimonials by disinterested consumers, for example, should be absolutely protected. Although the question is somewhat closer, subjective evaluations by an advertiser of its product's relative merits (which do not involve false assertions of fact) should also be protected. The difficulties inherent in disentangling opinion from fact, which pervade the noncommercial sphere as well, are considered in Best, supra note 33. See also Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc) (holding defamatory statements in newspaper column not actionable assertions of fact, but constitutionally protected expressions of opinion), cert. denied, 471 U.S. 1127 (1985); Note, The Fact-Opinion Determination in Defamation, 88 Colum. L. Rev. 809 (1988) (arguing that Ollman test underprotects speech on matters of public concern).
the consumer: by selectively omitting certain (i.e., negative) testing results, by selectively editing legitimate product testimonials, or by manipulating the context in which claims are made. Although Virginia Pharmacy\textsuperscript{167} cautions that the state may not indulge in excessive paternalism on behalf of consumers,\textsuperscript{168} an advertisement that would tend to mislead the "reasonable consumer"—someone reasonably intelligent and reasonably skeptical—is failing to perform its constitutionally protected informational function. A finding that an advertisement would be misleading to such a consumer is equivalent, from a first amendment standpoint, to a finding that it is false. Therefore, a proper final adjudication that an advertisement is misleading may subject it to state regulation without violating first amendment principles even though it contains literally truthful statements.\textsuperscript{169}

(b) The Role of Sciente. Assuming that the state is capable of identifying the false or misleading advertising statement, the question remains what the appropriate level of culpability should be before penalties may, as a constitutional matter, attach to such statements. The argument could be made that Sullivan's actual-malice sciente standard\textsuperscript{170} is a sine qua non for fully protected speech, and that if the Sullivan privilege does not extend to a particular category of speech, the status of that speech is subordinate. As the Gertz\textsuperscript{171} Court's refusal to extend Sullivan generally to "matter[s] of public or general interest"\textsuperscript{172} illustrates, however, a decision to withhold Sullivan-level protection is not an indicator of

\textsuperscript{169} See New York Times Co. v. Sullivan, 376 U.S. 254 (1963) (holding state cannot award damages to public official for defamatory falsehood unless he proves "actual malice"—knowledge or reckless disregard).
\textsuperscript{171} Id. at 346. A plurality opinion in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 44 (1971), maintained that Sullivan should be extended to defamatory statements injuring nonpublic figures, as long as they involved a "matter of public or general interest." This suggestion was rejected by the Court in Gertz, 418 U.S. at 346. See also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 756 (1985) (Powell, J., authoring plurality opinion).
the constitutional value of the speech in question.

*Sullivan* provides "strategic protection for falsehood"\(^{173}\) in the context of a particularly vulnerable category of expressive communication: criticism of the conduct of public officials and public figures. Because such expression is to be encouraged, it is protected—even at some cost to reputational interests. Without such protection, speakers might be chilled by the prospect of liability and avoid such expression altogether. Certain characteristics of promotional advertising—the strong incentives that motivate commercial advertisers, the relatively greater verifiability of claims made about products or services, and that false information, regardless of scienter, is of no value to its recipients—may justify withholding this special measure of strategic protection from promotional advertising.

Consider the FTC's regulatory authority over false, misleading advertising.\(^{174}\) When the FTC finds that an advertiser has engaged in an "unfair or deceptive act or practice in or affecting commerce" under section 5 of the FTCA\(^{175}\) by making false or misleading advertising claims, the agency will issue a "cease and desist" order prohibiting the advertiser from continuing to engage in the unlawful practice.\(^{176}\) Because such advertising has failed (and will continue to fail) to perform its informational function, thereby losing its constitutional protection, the state may order the discontinuation of a false advertising campaign whether or not the advertiser knowingly or intentionally (or even carelessly) misrepresented the truth.\(^{177}\) Put another way, there is no reason to require scienter (or

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\(^{173}\) *Shiffrin*, *supra* note 19, at 1269.

\(^{174}\) Although I offer a brief consideration of FTC regulation of false, misleading advertising, *see infra* text accompanying notes 175-84, a treatment of all of the complexities of advertising regulation would be beyond the scope of this Article.

\(^{175}\) 15 U.S.C. § 45 (1988) ("Unfair methods or competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."). The FTC is charged with "prevent[ing] persons . . . from using" unfair or deceptive acts or practices. *Id.*

\(^{176}\) *Id.* When the FTC has reason to believe that an advertiser is engaging in such a practice, it may "in the interest of the public" hold an adjudicative hearing to determine whether or not to issue a "cease and desist" order. Any advertiser who subsequently violates such an order may be subject to fines of up to $10,000 per day per violation. The FTC also has the power preliminarily to enjoin false advertisements where such action "would be to the interest of the public." *Id.*

\(^{177}\) Intent to deceive is not an element of a deceptive advertising violation. *See*, *e.g.*, Warner-Lambert Co. v. FTC, 562 F.2d 749, 763 n.70 (D.C. Cir. 1977), *cert. denied*, 435 U.S.
indeed a culpable mental state of any kind) before prospectively restricting the republication of false or misleading advertising.\textsuperscript{178}

In addition to its power to issue cease and desist orders, the FTC has the power to penalize knowing violations of its rules and orders.\textsuperscript{179} But where the agency seeks not simply to prevent republication of false, misleading advertising but to penalize the advertiser as well, there can be no strict liability for factual errors.\textsuperscript{180} As Gertz suggests, even false statements of fact may not, without some degree of fault, be made the basis of civil penalties amounting to more than the equivalent of rescission.\textsuperscript{181} Thus, the FTC itself requires there to be a knowing violation of a cease and desist order before seeking to impose financial penalties through a civil action.\textsuperscript{182}

Although the Gertz standard is sufficient protection for nonexpressive promotional advertising,\textsuperscript{183} expressive communications arising out of commercial activity—e.g., Consumer Reports' evaluations of particular product performance—should enjoy the greater degree of protection afforded by the Sullivan standard of actual malice.\textsuperscript{184} Nonpromotional publications that analyze commercial products and attempt to educate the consumer convey the speaker's opinions based on comparative analyses, expressing a

\textsuperscript{950} (1978); Beneficial Corp. v. FTC, 542 F.2d 611, 617 (3d Cir. 1976), cert. denied, 430 U.S. 983 (1977).

\textsuperscript{178} Indeed, where commercial transactions occurred on the basis of false or misleading advertising, there is no first amendment scienter requirement if the state chooses to compel the advertiser to rescind the transaction or otherwise make the consumer whole. Cf. 1933 Securities Act § 11(b), 15 U.S.C. § 77(k) (1988) (no "due diligence" defense available to issuer for misstatements or omissions of material fact in registration statement).


\textsuperscript{181} Id.

\textsuperscript{182} 15 U.S.C. § 45(m) (1988). A strict liability rule here would advance the government's regulatory interest only minimally; moreover, for marginal commercial speakers (or newcomers to the market) it would create undesirable incentives to prefer unadorned puffery to factual assertions about their products or services.


\textsuperscript{184} See Bose Corp. v. Consumers Union, Inc., 466 U.S. 485 (1984) (accepting lower court's application of Sullivan rule to products disparagement); see also infra note 186.
point of view. Such publications thus serve a function in the commercial marketplace analogous to the role of political criticism and commentary in the marketplace of ideas. They, too, may generate public benefits that cannot be entirely captured in subscription fees, and hence may be driven to avoid controversial topics if held liable; if so, they may be in need of the expressive "breathing space" the *Sullivan* privilege affords. This might also be true of comparative advertisements by commercial advertisers that evaluate the merits of their competitor's products or services, and for whom the response to liability for negligence may be to take the path of least resistance—confining their messages to laudatory assessments of their own products.\(^{186}\)

3. Prior Restraints Against False or Misleading Advertising are Permissible. The question of immunity from prior restraints\(^ {187}\) also may warrant a different answer in the commercial advertising context.\(^ {188}\) Like the *Sullivan* malice rule, the policy against prior re-

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186 See supra note 112 and accompanying text.
186 See Shiffrin, supra note 19, at 1269; Note, Corporate Defamation and Product Disparagement: Narrowing the Analogy to Personal Defamation, 75 Colum. L. Rev. 963 (1975) (urging adoption of *Sullivan* standard in all product disparagement cases).

The prior-restraint classification has been broadened beyond an initial concern with licensing of speech to include many, if not most, injunctions against protected speech. Commentators are divided in their views about the validity of applying prior-restraint doctrine to virtually all injunctions of speech, a complex issue beyond the scope of this Article. See Blasi, supra; Jeffries, *Rethinking Prior Restraint*, 92 Yale L.J. 409 (1983) (arguing doctrine of prior restraint should be retired from use in first amendment analysis); Mayton, supra.
188 Two explanations have conventionally been offered for the policy against prior restraints. One is the potential for prior restraints to inhibit lawful expression by inducing more self-censorship than would any system of subsequent punishment. "A criminal statute chills, prior restraint freezes." A. Bickel, *The Morality of Consent* 61 (1975); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 390 (1973). This view has failed to achieve a consensus among the commentators. Cf. Blasi, supra note 187, at 26 ("In some respects, licensing systems and injunctions seem preferable to criminal prohibitions and civil liability rules in terms of minimizing the deterrence of protected expression."); Mayton, supra note 187, at 261 (finding injunctions less chilling to speech than subsequent punishment because injunctions involve judicial review while self-censorship that
straint does not extend to all utterances of fully protected speech. Judicial "gag orders" and injunctions not to repeat adjudicated libels or other unlawful messages are commonplace features of our legal system. In the context of commercial advertising, the reasons that inform the rule against prior restraints—concerns about excessive speaker self-censorship and censorial government motives—apply with less force. Because commercial advertisers operate under fairly strong incentives to continue pressing their messages, and are entitled to constitutional protection only insofar as their messages advance audience interests in the receipt of truthful information, a presumption against a particular form of government intervention that is concerned only with the timing of such intervention would seem generally inappropriate.

Thus, analyzing the constitutionality of a prior restraint in the commercial advertising context need not be substantially different from analyzing the constitutionality of regulating such speech generally. Whether or not a prior restraint on commercial advertising passes constitutional muster will initially depend on the reasons for suppression: If the suppression were to occur after the message had aired, would the reasons for the suppression meet generally

results from subsequent punishment does not).

The second justification for the presumption against prior restraints is a concern over the potential risk to free expression posed by governmental bias. Where the power to silence is lodged in administrators functioning as censors, the state may be tempted to overstep the constitutionally mandated bounds of neutrality. Times Film Corp. v. City of Chicago, 365 U.S. 43, 67-68 (1961) (Warren, C.J., dissenting); see also Mayton, supra note 187, at 250.

189 See, e.g., National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 698 (1978) (holding injunction was "a reasonable method of eliminating the consequences of the illegal conduct"). Professor Jeffries believes that only official licensing schemes are true prior restraints and therefore the command "not to repeat" publication of malicious, scandalous and defamatory commentary about public officials in Near v. Minnesota, 283 U.S. 697 (1931), was not so much a prior restraint as a repackaging of the law of seditious libel. Jeffries, supra note 187, at 416.

190 In the commercial area, three familiar types of regulation raise the specter of the prior restraint: licensing requirements (such as those imposed on investment advisers under the Investment Advisers Act of 1940); administrative orders (such as cease and desist orders issued by the FTC and the SEC and enforced by court injunctions); and preclearance requirements (such as those that apply to registration and proxy materials under the securities acts). For a discussion of "prior restraint" issues particular to securities-related expression, see infra notes 265, 267, 271-85, 299-337 & 397-402.


192 See supra notes 133-47 and accompanying text.
applicable substantive standards? If this test is passed, a second level of inquiry—shorn of any presumption against prior restraints—would still be needed to ensure adequate "procedural safeguards that reduce the danger of suppressing constitutionally protected speech"; the delay inherent in the scheme or the absence of standards governing the agency's regulatory discretion must not create an undue risk of suppression of truthful commercial information. As long as the state's prior restraints upon advertising are substantively limited to demonstrably false or misleading advertising claims, and adequately provide for prompt adjudication and judicial review, no first amendment interests are impaired by the imposition of a reasonable delay for the purpose of screening the truthfulness of the message.

4. Advertising may be Compelled to Carry Certain Public Messages. The freedom to speak carries with it the freedom to refrain from speaking. The Court has not hesitated to strike down measures that attempt to compel unwilling affirmation or expression of opinions or beliefs, absent sufficiently compelling state

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193 As Professor Jeffries observes, the problem is not necessarily whether a measure regulates through the prior imposition of an injunction or subsequent prosecution and punishment; the critical element is the "substantive standard for authorizing suppression." Jeffries, supra note 187, at 416.


195 See id. at 561-62.

196 Justice Powell, writing for the majority in Central Hudson Gas & Electric Corp. v. Public Service Commission, suggested that "a system of previewing advertising campaigns" in order to determine whether the advertisements contravene important state interests would be an acceptable alternative to an outright ban on expression. 447 U.S. 557, 571 n.13. Nevertheless, when the state elects to proceed via prior restraints to attempt to prevent false or misleading nonexpressive advertising, there is no reason to tolerate blanket prohibitions as to advertising content or format. See, e.g., Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1984) (holding state cannot impose blanket prohibition on illustrations where case-by-case review is possible). For application to securities advertising, see infra text accompanying notes 271-85. Moreover, there may also be serious problems with blanket requirements that impinge upon expressive communications. For a discussion of proxy regulations, see infra text accompanying notes 365-419.


198 See supra note 197.
interests. However, this principle—which shields speakers from being forced to espouse views not their own—has only a limited role to play in the commercial advertising context. Because of the absence of speaker interests, compelled speech works no infringement of “individual freedom of mind.” Zauderer v. Office of Disciplinary Counsel offers an instructive example. In that case an attorney was sanctioned for advertising a contingency-fee arrangement in connection with Dalkon Shield litigation (“[i]f there is no recovery, no legal fees are owed by our clients”), without disclosing that the clients would have to pay “costs,” a legal term of art indistinguishable to many laymen from the term “fees.” The Court ruled that the attorney could be reprimanded for failing to disclose certain “purely factual and uncontroversial information” which the state deemed necessary to avoid misleading potential clients.

Zauderer correctly holds that the nonexpressive nature of advertising allows the state a somewhat freer hand to compel disclosure designed to ensure the flow of accurate information to the public whose interests the first amendment protects. Nevertheless, the state’s power to compel speech is not unlimited even here. The state may compel disclosure to further the public’s right to receive truthful commercial information, but nothing more. Moreover, the mandated disclosure should be reasonably designed to cure a false or misleading implication of the advertisement. Thus, assum-

199 See, e.g., PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) (prohibiting shopping center from excluding those wishing to engage in political speech on its premises).

200 Barnette, 319 U.S. at 637 (1943). Since the advertiser is not engaged in an expression of its views or any other revelation of its personality, forcing the advertisement to carry a message not its own does not violate the integrity of the expressive, thinking self as did the regulations struck down in Barnette, id., and Wooley, 430 U.S. at 705 (automobile license case). There are, however, limits to the extent that product and service advertising may be pressed into service as a medium for third parties. See infra text accompanying notes 201-14.


202 Id. at 633-34.

203 Id. at 651.

204 Professor Wolfson rejects any distinction between mandatory disclosure and outright prohibition, whether in the context of political-ideological-artistic expression or in expression arising in the course of commercial activity. See Wolfson, supra note 59, at 278-79. It is revealing that, although his criticism is leveled at the Court’s regulation of nonexpressive advertising, he illustrates his point with examples drawn from the realms of politics and the arts, involving ideological and political expression, not the nonexpressive factual disclosures the Court is addressing in Zauderer, 471 U.S. at 626, and other advertising cases.

205 But see infra text accompanying notes 403-11.
ing the mandated Surgeon General’s warnings on cigarette packages are constitutionally permissible, the mandate is constitutional because it is in response to a history of misleading messages from tobacco companies suggesting that smoking poses no health hazard or, indeed, is consistent with a robust lifestyle.\textsuperscript{208} Even where there is no history of misleading advertisements, the state may compel advertisers to warn that their products’ intended uses pose dangers to public health or safety. This is routine in the case of poisons and hazardous chemicals.\textsuperscript{207} The state has a compelling interest in ensuring that the public is aware of the known dangers attendant to the lawful decisions the advertising seeks to promote. And the advertiser has no constitutional ground for complaint since his nonexpressive promotional message is constitutionally protected only to the extent the public’s informational rights are being served.\textsuperscript{208}

The advertiser may complain, however, if the state strays beyond this corrective measure to compel the advertiser to serve as a medium for another person’s ideological communications. In such circumstances, the advertiser’s expressive interests—here, the right not to speak—are being infringed.

A recent example is \textit{Pacific Gas & Electric Co. v. Public Utilities Commission of California}.\textsuperscript{209} The case involved the attempt of a state regulatory agency ("Commission") to compel Pacific Gas to allow a ratepayers’ watchdog group (TURN—Toward Utility Rate

\textsuperscript{208} Companies once made express claims about the healthfulness of smoking their (as opposed to their competitors’) brand of cigarettes. See \textit{generally} Calfee, \textit{The Ghost of Cigarette Advertising Past}, \textit{Regulation}, Nov.-Dec. 1986, at 35. In the 1940s, the FTC began a campaign to prohibit health claims by cigarette companies as deceptive to the public. \textit{Id.} at 37. In the 1960s, the FTC was able to negotiate an industry-wide, self-imposed ban on assertions concerning tar and nicotine on the ground that such claims contained implicit health claims. \textit{Id.} at 42. In 1965, Congress enacted a provision requiring warning labels to be included on all packages of cigarettes. At the present time, the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. \S\S 1331-1340 (1988), requires such printed warnings and prohibits all broadcast advertising of cigarettes.

\textsuperscript{207} See, e.g., \textit{United Steelworkers v. Auchter}, 763 F.2d 728 (3d Cir. 1985) (discussing OSHA’s “right to know” regulations).

\textsuperscript{208} There are, however, limitations on the size and format of the required warnings. The state cannot require a warning that overwhelms the commercial message. Nor can it require the advertiser to endorse the warning if contrary to the advertiser’s own views. Thus, for example, it is significant that the cigarette advertisement and package warnings occupy a small area within the advertisement and state the Surgeon General’s—not the advertiser’s—views.

\textsuperscript{209} 475 U.S. 1 (1986).
Normalization) to mail its own communications (containing political views antagonistic to those of Pacific Gas) to Pacific Gas' ratepayers using the "extra space" in Pacific Gas' billing envelopes. The Supreme Court invalidated the Commission's order as an impermissible attempt to force Pacific Gas to assist in promulgating its opponent's views.

Pacific Gas thus involved an attempt to compel a public utility to disseminate ideological and political beliefs that were not its own. Justice Powell's opinion for the majority had little difficulty distinguishing such infringement of expressive rights from compelled disclosure involving billing, ratemaking or other matters related to the utility and its dealings with its ratepayers. Justice Marshall, concurring in the judgment, stressed the difference between ordering communication of political views not shared by the utility company and ordering communication of information "relevant to commercial transactions between the ratepayer and the utility." Compelled distribution of messages in the latter category are constitutionally acceptable because such mandatory disclosures impart factual information pertaining to the purchase of energy by the ratepayers and implicate no expressive interest.

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210 Id. at 5-7. Pacific Gas had for many years mailed a monthly newsletter to its ratepayers in their billing envelopes. TURN challenged the right of Pacific Gas to utilize the "extra space" in those mailing envelopes to distribute political views, alleging that the extra space actually belonged to the ratepayers. The ratepayers' fees paid for the postage, although the utility owned the envelopes, the newsletter and the billing inserts. Id. at 17. The Commission concluded that the ratepayers owned the empty space. Id. at 5. The Pacific Gas Court rejected the notion that this odd "ownership" of the empty space could compel the utility to use its envelopes to spread someone else's unwelcome message. Id. at 17-18. For a contrast with shareholder proxy solicitations, see infra text accompanying notes 403-11.


212 Id. at 15 n.12.

213 Id. at 23 n.2. (Marshall, J., concurring in the judgment).

214 Justice Stevens, dissenting, saw no substantial difference between compelling Pacific Gas to carry its ratepayers' message and the various federal disclosure requirements pertaining to "credit card bills, loan forms, and media advertising" as well as mandatory disclosures required under the federal securities acts. Id. at 38 (Stevens, J., dissenting).

Justice Stevens overlooks the substantial difference between requiring a business not to mislead the customers with whom it is engaging in commercial transactions and requiring a business to disseminate the views of its opponents. Moreover, his analogy to the proxy rules is inapposite, particularly the suggestion that SEC Rule 14a-8, 17 CFR §240.14a-8 (1989), is analogous to the Commission's ruling. 475 U.S. at 39-40, 40 n.8 (Stevens, J., dissenting). Rule 14a-8 requires corporate management, under certain circumstances, to include in its proxy statement the proposals of dissenting shareholders. As a general matter, the proxy rules regulate a state-created mechanism enabling the agents who manage a corporation to
D. Permissible Regulation of Expressive Commerce-Related Speech: Selected Issues

Expressive speech arising in the context of commercial activity is not fundamentally different from expressive speech arising in any other area of human endeavor. The presence of a commercial motivation does not negate the fact that the speaker is engaged in self-expression at the same time he imparts information to his listeners. Presumptively, then, the first amendment rules that restrain state regulation based on the content of the message and that require considerable tolerance for erroneous communication should apply. The commercial context does, however, sometimes involve unique issues of regulatory justification not often present in other settings.

1. The State May Regulate the Verbal Conduct of Professionals. Professionals functioning in the commercial arena, whether lawyers, accountants or investment advisers, pose a knotty problem for first amendment analysis. These professionals ply their trade primarily through words, thereby implicating the speech-conduct distinction that is a major premise of Professor Emerson's work on the first amendment. Although the advice and other services they furnish involve expressive communication, their role as intermediaries in the commercial marketplace renders them subject to regulatory controls; they cannot claim a complete immunity from regulation simply because the tools of their trades are words and symbols.

The professional-client relationship (involving in-person communication with a client or prospective client who places his affairs in the professional's control) implicates speaker and audience interests protected by the first amendment. The state nonetheless justi-
fies its fairly extensive regulation of this relationship because of the obvious disparities in knowledge and power between the speaker and the listener. Moreover, because the professional is rendering a service which, by law, only someone with an official license can render, the state has a strong interest in ensuring the competence and integrity of individuals so licensed.

When a professional addresses the general public, however, speaker interests rise to the fore and outweigh regulatory concerns. The newsletter publisher may be offering advice, but it is not advice tailored to the particular circumstances of a client or prospective client. Under these circumstances, the risk of undue influence is minimal despite the professional's greater expertise, because listeners are aware that this is at best general advice; they are therefore better able to elicit other views, evaluate and, if necessary, discount what they hear.

2. The State May Regulate the Process by Which Corporate Managers (Agents) Obtain Authorization from Shareholders (Their Principals). As discussed above, the Court in Bellotti rejected the notion that corporations are entirely without first amendment protection because of their status as creatures of state law. Nevertheless, corporations are not natural beings; when a corporation "speaks" it speaks through the voice of its officers and directors, who are agents exercising derivative power on behalf of their widely dispersed shareholder-principals. The state has created a structure to facilitate this delegation of authority so that the enormous aggregation of power and wealth that is the modern corporation can function efficiently, without paralyzing diffusion of decisionmaking. The same state that enables corporations to operate through centralized management has a substantial interest in ensuring that the manager-agents are in fact chosen by and act on behalf of their principals. There is, then, an appropriate role for reasonable state regulation intended to ensure that the agents act with requisite authorization, even if the regulation involves some interference with the expressive communications between manage-

218 See supra text accompanying notes 72-78.
220 Id. at 778 n.14.
221 For a discussion of the proxy machinery regulated under section 14(a) of the Securities Exchange Act of 1934 and authorized by state law, see infra text accompanying notes 346-64.
ment and principals.\textsuperscript{222}

The state may, therefore, establish a procedure requiring management to obtain the authorization of the principals before implementing certain decisions. Moreover, it may also require corporations to provide minority, or dissenting, shareholders with reasonable access to their fellow shareholders.\textsuperscript{223} The state must, however, at all times respect the corporate speaker’s expressive interests and, therefore, may not indirectly pursue its own paternalistic policies or attempt to censor the ideational content of corporate expression.

The proxy system is, in effect, a long-distance substitute for the in-person shareholders’ meeting.\textsuperscript{224} Because shareholders can vote by proxy, it is possible for the numerous, widely dispersed shareholders of publicly held corporations to satisfy statutory quorum requirements and engage in essential decisionmaking. But, in the proxy system, the state has authorized a drastic departure from the traditional norm of shareholder attendance at a meeting, where an agenda would be presented for the consideration and vote of all shareholders present. Whereas at one time a concerned shareholder could attend a meeting and, by speaking out, reach a full complement of voters, that option is no longer available for today’s shareholders as the proxies of absent shareholders are executed and mailed to the corporation long before the meeting occurs. The requirement that management transmit certain shareholders’ proposals together with management proxy materials is therefore nothing more than a practical concession to the nature of voting by

\textsuperscript{222} For Professor Brudney, the question is not only whether the first amendment protects corporate speech, but more precisely “who, within the corporation, may authorize it to utter that speech.” Brudney, \textit{Business Corporations and Stockholders’ Rights Under the First Amendment}, 91 \textit{Yale L.J.} 235, 248 (1981) (emphasis in original). He thus believes that the state may properly require unanimous shareholder authorization of such noncommercial expression, at least to the extent that such speech may amount to a waste of corporate assets. See id. at 241 n.32.

I would agree that the first amendment is not offended where shareholders freely choose such a rule for the corporate charter or bylaws. This would simply be an instance of the law giving effect to private choice. The state also may give effect to dissenting views. See, e.g., \textit{Communications Workers v. Beck}, 108 S. Ct. 2641 (1988) (upholding right of dissenting union members to receive rebate of portion of their dues utilized for union political speech). But Professor Brudney’s proposal would be the corporate equivalent of a statutory prohibition of union political activity in the absence of unanimous member authorization.

\textsuperscript{223} See infra text accompanying notes 403-11.

\textsuperscript{224} See infra text accompanying notes 366-69.
By contrast, in *Pacific Gas*, the dissident ratepayer group was not composed of co-owners of the utility company or the members of the regulated organization. The group seeking access to the billing envelopes consisted of third parties, participants in a consumer-supplier relationship that was not substantially different from that of any other consumer. That the state has the power to require disclosures that further the full flow of relevant factual information to the ratepayers in no way suggests that it can compel the utility to transmit the views of third parties to those ratepayers. The state may regulate expressive intracorporate communications only in the interest of establishing a framework for ensuring that the agency has been authorized by and is responsive to its widely dispersed principals.

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225 Proxy materials serve both a mechanical function (in facilitating long-distance voting) and an informational one. It is clear that the state has the power to regulate the proxy mechanism, and to require a certain uniform format and the disclosure of particular relevant information. It is possible, however, that the proxy rules, formulated before the Court recognized the protected status of communications that arise in the course of business activity, are constitutionally overbroad. See infra text accompanying notes 377-95.


227 Although the argument below was, in part, that the ratepayers paid for the postage and therefore owned the empty space, see supra note 210, they were not owners of the company. A similar analysis might well be appropriate (or even required) if the business entity were a utility or insurance company organized on a mutual basis. In those circumstances, the government might be justified in imposing rules assuring ratepayer and policyholder access to the mechanism for firm-wide communication.


229 It may be argued that this approach to proxy contests can be logically extended to political elections, where, after all, the public at large is being asked to choose its agents for a term of years. But, as Chief Justice Warren recognized in the somewhat analogous context of union representation elections, there is a critical difference between contests where "what is basically at stake is the establishment of a nonpermanent, limited relationship between the employer, his economically dependent employee and his union agent," and "the election of legislators or the enactment of legislation whereby that relationship is ultimately defined
II. Securities Regulation: The Impact of the First Amendment

Securities are written instruments, as are contracts for goods or services, legal briefs and pleading forms, financial statements, disclosure documents, and proxy forms and materials. That the market for capital formation proceeds through the verbal conduct of professionals in no way detracts from the state's plenary power to regulate either the market or the activities of those professionals. There are, however, certain aspects of the regulatory system that may unreasonably interfere with constitutionally protected securities-related expression.

A. Regulation of Nonexpressive Communications: Securities Advertising Under the Securities Act

1. The Statutory Scheme. The Securities Act of 1933\(^\text{230}\) (the "1933 Securities Act") regulates the primary distribution\(^\text{231}\) of securities in large part through the requirement that a registration statement\(^\text{232}\) must be filed with the Securities and Exchange Commission ("SEC") prior to offering securities for sale.\(^\text{233}\) No offer to sell or offer to buy securities can be made until the registration statement has been filed; no sale can take place until after the registration statement has been declared effective (the "effective date").\(^\text{234}\)

Advertising of securities is strictly regulated. From the filing of the registration statement until the effective date—the so-called


"waiting period"—virtually no advertising is permitted except through distribution of the statutorily defined "prospectus" and all solicitations of offers to buy registered securities must be made by prospectus only. An important exception written into this rule of advertising by prospectus only is contained in the definition of "prospectus," which makes it possible to utilize certain advertisements (so-called "tombstone advertisements") that do little more than identify

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235 It generally takes up to twenty days for a registration statement to be declared effective. § 8(a), 15 U.S.C. § 77b (1988). The period between the filing of a registration statement and its effective date is commonly referred to as the waiting period. See, e.g., L. Loss, supra note 155, at 89.

236 A prospectus is "any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security." § 2(10), 15 U.S.C. § 77b(10) (1988). The section authorizes two limited exceptions to this blanket definition: (a) a post-effective date communication is not a "prospectus" (not subject to the statutory requirements described below) if it was preceded or accompanied by a written "prospectus"; and (b) a so-called "tombstone" advertisement, limited to specific information as prescribed in 17 C.F.R. § 230.134 (1989), is not a "prospectus." See infra note 238.

The Act contemplates the use of three permissible types of prospectuses: (1) the preliminary prospectus, with appropriate legend, which lacks price-related information and can be distributed during the waiting period, see 17 C.F.R. § 230.430 (1989) (outlining proper form for prospectus); (2) the summary prospectus, also permissible during the waiting period, which omits some portions and summarizes other portions of the prospectus, see 17 C.F.R. § 230.431 (1989) (outlining form for summary prospectus); and (3) the final prospectus, containing all pricing information in final form, which is distributed after the effective date. For a thorough analysis of the chronology and regulation of public offerings under the 1933 Securities Act, see generally L. Loss, supra note 155, at 87-120; R. Jennings & H. Marsh, Securities Regulation 63-109 (6th ed. 1987).

237 See § 10, 15 U.S.C. § 77j (1988) (outlining prospectus requirements). Because a prospectus is defined as a written communication, oral offers during the waiting period are permissible. See L. Loss, supra note 155, at 89 (such offers are permissible even if communicated by interstate telephone).

Prospectuses are first submitted to the SEC in preliminary form, and later finalized. Summary prospectuses may be used by qualified registrants (subject to §§ 12 or 15(d) of the 1934 Exchange Act, 15 U.S.C. §§ 78a-78l) under appropriate circumstances. See 17 C.F.R. § 230.431 (1989); see also Instructions as to Summary Prospectuses in Forms S-1 and S-2, 2 Fed. Sec. L. Rep. (CCH) U 7126, 7146 (1983) (outlining proper method for recordation of S-1 and S-2 form summary prospectus).

Many offerings that qualify for exemptions under the Securities Act are nevertheless subject to significant restrictions with respect to their advertising. See, e.g., 17 C.F.R. § 220.256 (1989) (limiting written advertising of offerings under Regulation A to "offering circulars" and tombstones); 17 C.F.R. § 230.502(c)(1989) (prohibiting advertising of offerings under Regulation D by way of general solicitations or general advertising, including but not limited to "[a]ny advertisement, article, notice or other communication published in any newspaper, magazine, or similar media or broadcast over television or radio").

the issuer and the security, state its price and advise interested

239 Tombstone advertisements convey limited information; they are "intended to be limited to announcements identifying the existence of a public offer-

240 Their primary function is to identify investors seriously interested in upcoming offerings and to fa-

241 Even after the effective date, all written or broadcast advertising for a public offering of nonexempt securities must be preceded or accompanied by a statutory prospectus.242

Effectively prevented from independently locating and attracting interested investors through a general advertising campaign, issuers typically market their offerings through the efforts of middlemen—the underwriters—who distribute information (also via statutory prospectuses) to potential purchasers.243


243 Underwriters, like issuers, are prohibited from engaging in direct writing campaigns or any media advertising. They can, however, utilize


Before the 1954 amendments to the 1933 Securities Act, a "tombstone" advertisement could appear only after the effective date and could contain only the identity of the security, its price, from whom a prospectus could be obtained and by whom orders would be exec-
uted. Although bare-bones tombstones are still utilized today, the current rules now also provide for somewhat expanded advertisements (sometimes referred to as "identifying statements") that can contain fourteen categories of information; each tombstone must, however, make it clear that no money or offer to buy can be accepted until the effective date. § 2(10), 15 U.S.C. § 77b(10) (1988); 17 C.F.R. § 230.134 (1989) (detailing permissible content of tombstone advertisements).

As a practical matter, tombstones are rarely published during the waiting period. See R. JENNINGS & H. MARSH, supra note 236, at 87. Of course, tombstones may appear after the effective date as well, in which case they sometimes inform the public that the issue has already been sold. In such circumstances, it has been suggested, their purpose is to advertise the underwriters, rather than the securities. L. Loss, supra note 155, at 107 n.34.

The 1933 Securities Act contemplates the use of supplementary selling literature after the effective date; however, such literature must be preceded or accompanied by a full prospectus. § 2(10)(a), 15 U.S.C. § 77b(10)(a) (1988). The Act does not require the filing of these materials, although the National Association of Securities Dealers (NASD) does. See L. Loss, supra note 155, at 114 n.49 (citing NASD Rules of Fair Practice, Art. III, § 35(a)-

(c), CCH NASD Manual ¶ 2195).

The issuer typically turns to underwriters (firms of broker-dealers) who maintain established lists of potential customers. The preliminary negotiations and agreements between issuers and underwriters are permitted under the 1933 Securities Act. § 2(3), 15 U.S.C. §§ 77b(3), 77e(c) (1988).
their substantial lists of established customers to advertise orally, conditioning the market and attempting to solicit offers to buy through personal telephone calls \(^{244}\) throughout the waiting period. \(^{245}\) Their activities during the waiting period, then, are limited only by the prohibition on "free writing" (advertising unaccompanied by prospectus) and the antifraud provisions of the securities acts. \(^{246}\)

As the above thumbnail sketch makes clear, no promotion of an upcoming offering is possible until the registration statement, including the preliminary prospectus, has been filed for review with the SEC. As originally conceived, the "waiting period" between filing and effectiveness was intended to enable the agency to preclear the registration statement—to review and demand the correction of misrepresentations or omissions in the statement while at the

\(^{244}\) The loophole in the definition of prospectus, see supra note 236, that permits oral solicitation is certainly anomalous: although impersonal advertisements, whether in print or in the broadcast media, are strictly prohibited, in-person solicitations are not. The Supreme Court has often indicated that the risks of overreaching and fraud are far greater when there is a direct one-on-one encounter between professional and client or prospective client. Compare *In re Primus*, 436 U.S. 412, 434-35 (1978) (finding transmittal of informational letter does not afford significant opportunity for overreaching or coercion) with *Ohrulik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457 (1978) (upholding regulability of direct, in-person solicitation because such communications exert pressure and often elicit immediate response without opportunity for comparison or reflection); see also *Lowe v. SEC*, 472 U.S. 181, 210 (1985).

Underwriters generally have both the customer lists and the telephone lines to undertake an organized and efficient telephone advertising campaign. Issuers can also take advantage of the "oral" communications loophole, but, lacking a known pool of potential customers, would probably be limited to contacting existing shareholders, customers and employees. *See Schoeman, The First Amendment and Restrictions of Advertising Under the Securities Act of 1933, 41 Bus. Law. 377, 390 (1986)* (concluding that 1933 Securities Act’s regulation on advertising is too restrictive and Act’s objective of providing full disclosure prior to purchase can be served by requiring delivery of the prospectus). Although underwriters can attempt to solicit offers to buy during the waiting period, they must take care not to make offers to sell that might (under principles of contract law) be accepted by investors prior to the effective date. *See L. Loss, supra* note 155, at 101-02.

\(^{246}\) It is, therefore, partly the established track record of underwriters, typically working in syndicates, in locating potential investors that justifies the additional expense of their commission. However, one commentator has observed that, while the underwriting syndicate may be adequate to the task of marketing the offerings of well-known, substantial issuers, smaller issuers (or issuers of more speculative securities) may be locked out of this network entirely if major underwriters are either unable or unwilling to represent them. *See Schoeman, supra* note 244, at 390.

same time ensuring sufficient time for the information contained in the statement to be communicated to market professionals for careful consideration.\textsuperscript{247} Once the registration statement has been filed with the SEC, the prospectus, in preliminary form, with appropriate legends, can be distributed.\textsuperscript{248}

The agency's review of the registration statement during the waiting period is limited to the determination whether the mandatory disclosures are complete and in the correct format. If any inadequacies are discovered, the staff informs the issuer, who will then have the opportunity to file corrections or clarifications.\textsuperscript{249} The SEC lacks the power, however, to disapprove of any security or interfere with its sale because it lacks value or merit.\textsuperscript{250} Indeed, every prospectus must bear a printed caption to the effect that the SEC has not approved or disapproved of the securities being offered for sale.\textsuperscript{251} The SEC does have the power to refuse to permit a registration statement to become effective or to issue a stop order, effectively prohibiting the sale of a securities offering, until the disclosure documents are amended to comply with regula-

\textsuperscript{247} See Landis, The Legislative History of the Securities Act of 1933, 28 Geo. Wash. L. Rev. 29, 34-35 (1959) (describing legislative history of Securities Act from drafter's point of view); see also Securities Act Release No. 4697, supra note 246. "It is a principal purpose of the so-called 'waiting period'... to enable dealers and, through them, investors to become acquainted with the information contained in the registration statement and to arrive at an unhurried decision concerning the merits of the securities." Id.

\textsuperscript{248} The preliminary prospectus must have the so-called "red herring" legend, to the effect that the registration statement is not yet effective, and the preliminary prospectus is not an offer (or the solicitation of an offer) to buy or to sell securities. See 17 C.F.R. § 229.501(c)(8)(1989) (requiring such message to be printed on outside front cover in red ink together with caption "Preliminary Prospectus").


\textsuperscript{250} This is in contrast to the so-called "Blue Sky" laws of some jurisdictions which require the state securities administrators to review securities for fairness and merit. See, e.g., Cal. Corp. Code § 25140 (West 1977) (authorizing Commissioner of Corporations, under certain conditions, to refuse to issue permits to sell securities in the state unless "the proposed plan of business of the applicant and the proposed issuance of securities are fair, just, and equitable, [and] that the applicant intends to transact its business fairly and honestly"). For an interesting discussion of the contrast between a regulatory structure based on merit and one based on disclosure, see L. Loss, supra note 155, at 25-35.

\textsuperscript{251} "THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE." 17 C.F.R. § 229.501(c)(5)(1989) (emphasis in original).
In addition to the advertising restrictions and preclearance requirements described above, the SEC administers a complex mandatory disclosure system applicable to all issuers of registered securities. Although the system recently has been considerably streamlined, the SEC still requires the filing of many documents, including the registration statement. Under the new integrated

1933 Securities Act § 8(b), (d), 15 U.S.C. §§ 77h(b), (d) (1988). It has been argued that prior agency review, although it cannot shield an issuer from all litigation, creates "precautionary overdisclosure" to avoid litigation. See Easterbrook & Fischel, Mandatory Disclosure and the Protection of Investors, 70 Va. L. Rev. 669, 704 (1984).


The original proposals for what later became the Securities Act contemplated both considerable mandatory disclosure (a registration statement and a shortened prospectus to be distributed with all written and oral offers or advertisements of future offerings) and the possibility of general advertising. See Hearings on H.R. 4314 Before the House Comm. on Interstate and Foreign Commerce, 73d Cong., 1st Sess. 1-9 (1933) [hereinafter House Hearings]; Hearings on S. 875 Before Senate Comm. on Banking and Currency, 73d Cong., 1st Sess. 1-8 (1933) [hereinafter Senate Hearings]. The initial proposal for a standardized advertising format requiring certain specific disclosures met with considerable criticism. Although a bill permitting general advertising albeit with mandatory disclosures was initially approved by the Senate Committee, S. REP. No. 47, 73d Cong., 1st Sess. (1933), the House Committee approved only the use of tombstones, H.R. Rep. No. 5480, 73d Cong., 1st Sess. (1933). Schoeman, supra note 244, at 383.


An important difference between a company reporting under § 13(a) of the 1934 Exchange Act and a company reporting under § 15(d) of the 1934 Exchange Act is that the 15(d) company is not subject to the proxy rules so it does not have to distribute annual
system of disclosure, it is often possible to incorporate by reference into the registration statement the information contained in the various periodic filings that issuers of registered securities must make under the securities laws. \(^{255}\)

The integrated disclosure system not only mandates what information (about the issuer and the transaction) must be disclosed; it also controls the format for presenting that information. Regulation S-K specifies what nonfinancial and financial information is to be provided under the securities acts,\(^{256}\) and Regulation S-X, the general accounting regulation, stipulates the proper SEC form and content of any required financial statements.\(^{257}\)

reports to its shareholders. See 1934 Exchange Act § 14(a).

\(^{255}\) While the basic disclosures required about the offering itself remain essentially unchanged, see Regulation S-K, 17 C.F.R. § 229 (1989), issuers already “in the Exchange Act reporting system” for a specified period of time and meeting other financial criteria for particular transactions may qualify to use Form S-2 (deliver copies of their annual reports to potential investors along with a prospectus) or S-3 (prepare a streamlined prospectus incorporating by reference existing periodic disclosure reports). Issuers without a proven disclosure record, however, or which do not for other reasons qualify for the S-2 or S-3 forms, must prepare the basic Form S-1, which consists of a full prospectus (Part I) plus additional information about the issuer (Part II). See generally L. Loss, supra note 155, at 144-64.

In addition to the registration statements and periodic filings, issuers having equity securities registered under the Exchange Act (and hence subject to its proxy rules) must generate and distribute to their shareholders a statutory annual report containing standardized financial statements and other information, in narrative form, concerning matters such as the identity and activities of the directors and officers and the nature of the business. See 17 C.F.R. § 240.14a-3(b)(11) (1989).

\(^{256}\) 17 C.F.R. § 229 (1989). Regulation S-K details, for example, the SEC’s policy favoring the inclusion of “management’s projections of future economic performance that have a reasonable basis and are presented in an appropriate format.” 17 C.F.R. § 229.10(b) (1989). It also details how to determine which format is appropriate, and cautions against presentations that might be “susceptible of misleading inferences through selective projection of only favorable items.” 17 C.F.R. § 229.10(b)(2) (1989). Indeed, the rule goes so far as to suggest certain presentations “generally would be misleading.” Id. Regulation S-K stresses the importance of facilitating investor understanding of any projections presented, suggesting the disclosure of the key assumptions upon which the final results depend. 17 C.F.R. § 229.10(b)(3) (1989).

\(^{257}\) 17 C.F.R. § 210 (1989). In an effort to achieve uniformity of presentation, the agency has promulgated its own accounting standards, the details of which are beyond the scope of this paper. See generally L. Loss, supra note 155, at 157-64; see also Kripke, The SEC, The Accountants, Some Myths and Some Realities, 45 N.Y.U. L. REV. 1151 (1970) [hereinafter Kripke, Myths and Realities] (urging SEC to use statutory powers to determine accounting matters). Professor Kripke’s piece was prophetic in that it urged the SEC to abandon its policy refusing to countenance the disclosure of forward-looking financial statements and to permit the use of earnings projections. See supra note 256 & infra text accompanying notes 268-70.
In addition to specifying what "hard" data had to be disclosed and in what format, the Commission in the past prohibited the disclosure of certain types of "soft" information—notably, projections and securities ratings (which are now permitted under certain circumstances), and certain types of presentations, such as photographs and trademarks (also now permitted).

Without further description of the regulatory scheme, it is sufficient to observe that the SEC, in administering the Securities Act and the Exchange Act, prohibits general advertising in the offering of securities, and requires prior submission of mandatory disclosure documents, the content and format of which it rigidly prescribes.

2. Constitutional Issues. Preliminarily, it seems fairly clear that the prior submission and preclearance of the registration statement as to form and content, as well as the mandatory disclosures themselves, present no substantial constitutional issues. The restrictions on securities advertising are, however, problematic.

(a) Prior Submission and Preclearance. The documents comprising the registration statement submitted for prior SEC review (notwithstanding their detail and complexity) are essentially promotional materials, designed to induce investor demand. Such communications lack any cognizable speaker's interest in self-expression and are constitutionally protected only insofar as they supply the public with truthful, nonmisleading information that...

258 See 17 C.F.R. § 230.175 (1989). This "safe harbor" rule concerning forward-looking statements was promulgated in 1979. See also supra note 257.


260 Adoption of Amendment of Registration Guide No. 8, Security Act Release No. 5171, [1970-71 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,155 (July 20, 1971). An absolute prohibition of all illustrations or graphic presentations, whether or not deceptive or misleading, plainly would be constitutionally problematic. Even under its current commercial speech doctrine, the Supreme Court has refused to countenance a state provision regulating attorney advertising that absolutely prohibited the use of illustrations. See Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985), discussed supra text accompanying notes 201-08. In order to justify such a prohibition, the state would have to show that all graphs, photographs, or other visual aids are per se false or misleading. Of course, if a particular illustration is deceptive or misleading the state is free to require its elimination or correction. But a flat prohibition of a potentially useful (perhaps more readily comprehensible) technique for imparting information should not pass constitutional muster.

261 For a good general source, see L. Loss, supra note 155, at 405-38.


facilitates the making of private investment choices. Undoubtedly, the preclearance scheme—including the review procedure, policing of the documents' contents and format, and the required cautionary legends—constitute a prior restraint. But prior restraints pose no independent first amendment problem in the context of nonexpressive, promotional speech, unless they are imposed for some purpose other than ensuring full disclosure of material information and avoidance of fraud or deception, or the procedures themselves raise an effective barrier to dissemination of the promotional message.

Aside from the advertising ban, the preclearance procedures themselves do not hinder the flow of information to investors; prospectuses, in preliminary form, can be disseminated prior to the effective date. Thus, again setting aside the advertising ban, the delay caused by the prior restraint itself affects only sales to the public. Accordingly, given the nonexpressive nature of the registration materials, prior submission for agency review is consistent with the first amendment value of protecting informed private decisionmaking.

(b) Mandatory Disclosure. When a consumer purchases goods, the information he needs about the product can be found on its label, the accompanying promotional and warranty literature or by firsthand examination of the product. When an investor selects a security, however, she is buying a piece of paper that represents an interest in a business enterprise. When the SEC compels issuers to comply with disclosure requirements, it is, in a sense, insisting on the provision of the equivalent to up-to-date product information. The SEC is attempting to prevent fraud and to ensure full and accurate disclosure concerning the real-world enterprise a securi-

264 See supra text accompanying notes 133-47.
265 See supra text accompanying notes 187-96.
266 See supra notes 236-37 and accompanying text.
267 It has been suggested that in its registration process, involving prior clearance and mandatory disclosure, the SEC "wields tools of censorship akin to those long ago found intolerable in the English licensing system ... Editorial review ... is at the heart of the SEC's regulatory function." Lively, Securities Regulation and Freedom of the Press: Toward a Marketplace of Ideas in the Marketplace of Investment, 60 WASH. L. REV. 843, 848-49 (1985) (citations omitted). This condemnation of the SEC fails to consider, however, the difference between the SEC's editing of nonexpressive promotional materials and speech charged with speaker's interests. See supra text accompanying notes 133-47 & 164-65.
ties offering represents.268

Again, because we are dealing with nonexpressive, promotional speech, regulations requiring additional disclosure in the service of a more complete, accurate picture of the business enterprise offering its securities do not violate the first amendment, provided that the extent of the mandatory disclosure does not overwhelm the promotional message.269 Government may act to enhance audience interests as long as its regulation does not hinder the dissemination of truthful, nonmisleading information to the investing public.270

(c) Restrictions on Advertising. The problem, from a first amendment perspective, arises not because the government requires timely and full disclosure of what it deems material information prior to any sale of securities, nor because it demands uniformity (and, hence, accessibility) in presentation of that information.271 Rather, the constitutional difficulty occurs at the

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268 Professor Kripke has long been an outspoken critic of the SEC's disclosure system. See, e.g., Kripke, The Objective of Financial Accounting Should Be to Provide Information for the Serious Investor, in CORPORATE FINANCIAL REPORTING (A. Rappaport & L. Revine eds. 1972); Kripke, Myths and Realities, supra note 257. Kripke has suggested that the entire regulatory goal—the provision of adequate and accessible securities information to the layman investor—is misconceived. Writing at a time when the use of financial projections was prohibited and the SEC required the issuer to "put[] one's worst foot forward," he described the registration process as "a useless, but lucrative [for attorneys], bit of paper work." Kripke, The Myth of the Informed Layman, 28 BUS. LAW. 631, 631 & n.1 (1973) [hereinafter Kripke, Informed Layman]. He urged the SEC to provide "[a]ll the information to the people straight and [to] let them make their own judgments in their own way .... [T]hose who try to use disclosure rationally are going to use professional help in doing so anyway." Id. at 637.

The SEC ultimately followed some of Professor Kripke's advice by authorizing the use of "forward-looking" financial statements that are made in good faith and for which there is a reasonable basis. See supra notes 256-58.

269 See supra text accompanying notes 204-08.

270 There may be constitutional difficulties with the SEC's rigid restrictions on the format of mandatory disclosures. See supra note 260. If the advertising ban were removed, however, and dissemination of truthful commercial information could occur outside of the required format, these difficulties might be overcome. See infra text accompanying notes 282-86.

271 Professor Dooley suggests that the extension of first amendment protection to securities-related expression will imperil the uniformity of financial information: "the market for financial information is very different from the 'free marketplace of ideas.' Whereas the latter demands diversity, the former depends upon some measure of uniformity to function at all." Dooley, The First Amendment and the SEC: A Comment, 20 CONN. L. REV. 335, 339 (1988). This view overstates the constitutional limitations applicable to regulation of nonexpressive communications. Financial data may well require uniformity of presentation in or-
beginning of the offering process, when, in a uniquely restrictive approach to advertising, the government prohibits the use of any and all printed or broadcast advertisements (however truthful and nonmisleading) unless accompanied by a mandatory prospectus.

It is in this respect that the regulation of securities advertising differs markedly from schemes imposed on other forms of commercial advertising. Unless accompanied or preceded by a statutory prospectus, ordinary advertisements such as those pervading the marketplace for other goods or services are strictly prohibited, however truthful and nonmisleading their messages may be.

That the scheme is different does not necessarily mean it violates the first amendment. We must ask what constitutional interest is infringed by limiting the advertising of securities to the bone-dry tombstone and the statutory prospectus. On the premise that nonexpressive promotional materials lack a cognizable speaker's interest, the first amendment injury is not, at least in the first instance, sustained by the advertiser. And if the investor can ultimately obtain the full disclosure documents, who is injured by the scheme?

On reflection, however, the prohibition on general written or broadcast advertising does work an injury to the investing public. Although many individual investors choose their investment portfolios solely through the advice of broker-dealers (sometimes in

der to make it accessible to the investor audience.

272 The Martin Act, for example, which requires registration of offering circulars promoting real estate syndications, permits the use of truthful, nonmisleading advertising that is not inconsistent with the contents of the offering circulars. See N.Y. Gen. Bus. Law § 362-e.1(c) (McKinney 1984). See also Interstate Land Sales Full Disclosure Act (ILSFDA), 15 U.S.C. §§ 1701-1720 (1988). As Schoeman points out, the sales of vacant lots were often subject to fraudulent sales practices. Schoeman, supra note 244, at 386. The ILSFDA requires registration and delivery of a sales prospectus (“property report”) before any sales can take place. 15 U.S.C. § 1703(a)(1)(B), (C) (1988). However, truthful, nonmisleading advertising is permitted so long as it is not inconsistent with the information required to be disclosed prior to sale. 15 U.S.C. § 1703(a)(1)(D) (1988). The registration and disclosure scheme otherwise resembles that of the Securities Act, even to the point of requiring a cautionary message: (1) advising interested parties to send for the property report, and (2) reminding them that no governmental authority has approved or disapproved the property in question. 24 C.F.R. § 1715.50(a) (1989).

their role as underwriters for new offerings), those investors who evaluate offerings directly are deprived of the opportunity to benefit early in the offering process from additional promotional information. In much the same way that other competitive merchandising catches the eye of prospective buyers, enabling them to focus their inquiries on specific products that seem well suited to their needs, so would general advertising by competing issuers attract the attention of at least some investors.

By withholding from the public at this initial stage relevant, truthful information about particular offerings, the state imposes costs on investors who may needlessly expend time and effort investigating offerings that do not meet their needs. Moreover, if general advertising—which (unlike a general distribution of prospectuses) is a practical technique for generating investor interest—were available, the public might receive information they would otherwise overlook about upcoming issues of the smaller, less widely known and/or first-time public issuers, i.e., those less likely to attract the interest of a substantial underwriting syndicate. Therefore, the effect of prohibiting truthful and nonmisleading securities advertising is a diminished flow of useful information to those members of the public engaged in the process of choosing and rejecting securities for investment.

In light of the constitutional implications of the advertising prohibition, what justifications can be found for subjecting securities advertising to such a unique regime?

The argument has been made that securities are somehow fundamentally different from goods or services offered for sale. Securities are “claims to the future income of firms,” intricate merchandise and written instruments reifying bundles of rights and interests in a business. Their value depends upon the success or

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274 See Schoeman, supra note 244, at 390.
275 Easterbrook & Fischel, supra note 252, at 673.
276 Kripke, Informed Layman, supra note 268, at 632. Indeed, Professor Kripke rejects the “myth” that prospectuses should be intended for “the man in the street” since neither the issuing companies, their financial postures nor the complex securities they intend to market are comprehensible except to the most sophisticated market professionals. It is the assertedly futile effort to render this information palatable to the layman that, in his view, has rendered the prospectus “fairly close to worthless.” Id. at 632-33. See supra note 268.
277 Much can, has been and no doubt will be written about precisely what a statutorily defined “security” is. See 1933 Securities Act § 2(1), 15 U.S.C. § 77b(1) (1988) (defining “securities” for purposes of Act); 1934 Exchange Act § 3(a)(10), 15 U.S.C. § 78c(a)(10)
failure of an ongoing enterprise. If a consumer purchases a car, refrigerator or audio equipment, examination of the goods will yield a considerable amount of information; labelling and accompanying sales literature will supply additional details. If, however, an investor purchases a security, the investor holds in her hands only a symbol representing her interest in something else. The investor can tell nothing about the future value of that security by examining it. The mandated disclosures are needed to inform the investor not only about the terms of the particular security, but, equally if not more importantly, about the financial health and viability of the enterprise itself. Investors are therefore required to deal with fairly lengthy and detailed disclosure documents containing financial statements and other highly technical information.278

Few dispute the importance to investors (and even to those advising them) of accurate and timely disclosures concerning the enterprise making a securities offering. Indeed, the unsophisticated or inexperienced individual attempting to choose among many alternatives needs either accessible information, expert advice, or arguably both. However, modern consumers are not infrequently faced with comparably subtle and difficult decisions concerning the purchase of goods and services.279 But (certainly after Virginia Pharmacy)280 the regulatory response to the vulnerability of the inexpert consumer should not be the suppression of truthful advertising, pending the receipt of a weighty, somewhat inaccessible full-disclosure document.281 Is there some justification for the flat advertising ban of the securities laws other than the alleged vulnera-


278 Judge Easterbrook and Professor Fischel suggest that the SEC's current regulatory structure based on mandatory disclosure may not be beneficial, but that the system first in line to replace it—based on fraud and material omission rules, enforced in state courts—would be no better. See Easterbook & Fischel, supra note 252, at 714-15.

279 Any decision is difficult for an uninformed decisionmaker, whether it involves choosing the right electrician, the right camera or the right investment. Indeed, there is arguably more expert advice available (at a price) to the securities investor than to consumers at large. For a discussion of the role of investment advisers, see infra text accompanying notes 289-344.


281 These prohibitions found in what has been called the "truth in securities act" have no counterparts in the "truth in advertising act." See supra text accompanying notes 174-82. Obviously, there could be no "truth in political campaigning act."
bility of unsophisticated investors?

It could be argued that the justification for this prohibition, as for the antifraud and mandatory disclosure rules, lies in the overarching need to maintain investor confidence in the integrity of the market. The Securities Act was enacted in the Depression that followed the Crash of 1929. It was considered essential that government somehow restore investor confidence and erase the widely held perception of the market as an institution manipulated by well-placed investors with informational advantages. But the goal of insuring investor confidence does not seem particularly well-advanced by the proscription of truthful advertising; the general strategy of the legislation is, after all, the provision of more useful information, rather than less. The elimination of all general advertising is neither necessary to restore investor confidence in the stock market nor a sufficient reason for depriving the investing public of available, truthful information.

282 Both the Securities Act and the Exchange Acts contain antifraud provisions. See 15 U.S.C. §§ 77q, 78r (1988). This Article does not question the constitutionality of such provisions, particularly in light of the Supreme Court's scienter requirements in Aaron v. SEC, 446 U.S. 680 (1980) (requiring SEC to establish scienter as element of civil enforcement action to enjoin violations of § 10(b) of 1934 Exchange Act); and Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) (requiring private party to establish scienter as element of private action for damages for violations of § 10(b) of 1934 Exchange Act). See also the discussion of prohibitions against false and misleading advertising at supra text accompanying notes 148-96.

283 See Statement of President Roosevelt of March 29, 1933, quoted in J. Seligman, The Transformation of Wall Street 56 (1982); 77 Cong. Rec. 2918 (1933) (remarks of Rep. Rayburn). "The purpose of this bill is to place the owners of securities on a parity, so far as is possible, with the management of the corporations, and to place the buyer on the same plane so far as available information is concerned, with the seller." Id. See also Ernst & Ernst, 425 U.S. at 195 (noting that primary principle of 1934 Exchange Act is to protect investors against manipulation of stock prices).

284 See L. Brandeis, Other People's Money 92 (1914). "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." Id; see also L. Loss, supra note 155, at 32; J. Seligman, supra note 283, at 42; Werner, The S.E.C. as a Market Regulator, 40 Va. L. Rev. 755 (1984).

285 Even under the Supreme Court's recently narrowed, deferential test for the regulation of commercial speech, any regulation interfering with truthful advertising concerning lawful activity must directly advance a substantial state interest and must be no broader than reasonably necessary in doing so. See Board of Trustees v. Fox, 109 S. Ct. 3028, 3033-35 (1989); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980). Clearly, general securities advertising concerns lawful activity and those advertisements that are not misleading therefore merit protection. Although the prevention of fraud and deception in securities markets is certainly a substantial interest, it is difficult to understand how
B. Regulation of Expressive Communications: Investment Advisers and Proxy Solicitation

There are aspects of securities regulation not directly concerned with the sale of securities that have a significant impact on securities-related expressive communications. Two such areas are the regulation of investment advisers under the Investment Advisers Act of 1940, and the regulation of intracorporate proxy communications under the Exchange Act.

Neither of these types of expression fits neatly into the category of commercial speech that does no more than propose a commercial transaction. Indeed, much of the speech generated by investment advisers more closely resembles communications of opinion (professional judgments concerning aspects of the economy, the market generally and specific investment strategies and choices) than it does promotional advertising. Similarly, intracorporate proxy communications combine factual disclosures to shareholders with other clearly expressive elements (including debates among management and shareholders as a prelude to the election of directors and voting on proposed corporate actions requiring shareholder approval).

The presence of speaker interests in both the investment adviser and proxy solicitation contexts precludes reflexive reliance on the principles that justify regulation of purely promotional speech. Neither the commercial context in which such expressive communications arise, nor the commercial motive informing their utterance, provides a basis for treating them differently from any other protected speech. If such communications may be regulated, the justifications for regulation, while responsive to the securities context, must be reconcilable with general first amendment principles. The task in this section of this Article is to evaluate the regulatory schemes in place for such expressive communications in light of

an outright ban on all advertising directly advances that goal or how such an approach is "narrowly tailored to achieve its desired objective." Fox, 109 S. Ct. at 3035. For a discussion of cases invalidating flat bans on truthful advertising concerning lawful activity, see supra text accompanying notes 80-99.

See supra text accompanying notes 27-30 & 61-71.
the presumptive applicability of conventional first amendment safeguards.

1. Regulation of Investment Advisers under the Investment Advisers Act.

(a) The Statutory Scheme. Like the Exchange and the Securities Acts, the Investment Advisers Act was intended to prevent abuses in the securities industry that had contributed to the Crash of 1929 and the Great Depression.\(^{289}\) It has two major objectives: the registration of investment advisers and the prevention of fraud in their dealings with clients.\(^{290}\)

Under section 203(a) of the Investment Advisers Act,\(^ {291}\) it is unlawful for any “investment adviser”\(^ {292}\) to utilize the mails or any means or instrumentality of interstate commerce “in connection with his or its business as an investment adviser” without first being registered with the SEC.\(^ {293}\) The registration process involves certain mandatory disclosures\(^ {294}\) about the investment adviser’s education and qualifications, the nature and scope of the business, compensation and whether or not he or any associate is “subject to


\(^{290}\) The Investment Advisers Act, like the Securities and the Exchange Acts, see supra note 282, makes it “unlawful for any investment adviser by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly” to defraud a client or a prospective client. Investment Advisers Act § 206, 15 U.S.C. § 80b-6 (1988). The antifraud section prohibits (1) the use of any “device, scheme, or artifice to defraud any client or prospective client”; (2) “any transaction, practice or course of business which operates as a fraud or deceit upon any client or prospective client”; and (3) without first obtaining a client’s informed consent, acting as a principal in a transaction with a client, or acting as a broker for a third party in a transaction with a client. Id.


\(^{292}\) An investment adviser is “any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities.” 15 U.S.C. § 80b-2(a)(1)(11) (1988). The definition of investment adviser contains an exception for “the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation.” 15 U.S.C. § 80b-2(a)(1)(11)(b) (1988). Such an exception is almost certainly required by the first amendment. See infra text accompanying note 309.


\(^{294}\) § 207, 15 U.S.C. § 80b-7 (1988), prohibits any person from “willfully . . . mak[ing] any untrue statement of a material fact in any registration application or report filed with the Commission . . . or willfully . . . omit[ting] to state in any such application or report any material fact which is required to be stated therein.”
any disqualification” that might be a basis for suspending, revoking or denying registration under the Investment Advisers Act. The effect of the registration requirement is that no one can hold himself out to be an investment adviser and sell advice to clients unless that person has obtained a license from the state. If, for some misconduct, an adviser’s license is suspended or revoked, the adviser must cease all advisory activities. Any violation of the Act may be either enjoined or criminally prosecuted.

(b) Constitutional Issues. (i) Licensing. The licensing aspect of the Investment Advisers Act, standing alone, does not raise a serious first amendment question, even though the scheme inescapably involves the licensing of speech. Like lawyers and doctors, investment advisers may not render professional opinions to clients without first registering with a governmental body and obtaining a license. As a general matter, advisers must conduct their professional practice in conformity with state requirements. This license, embodying the state’s certification of competence, confers on the professional speaker the benefits of special prestige (and therefore commercial desirability). In the Investment Advisers Act context, it allows investment advisers to hold themselves out to the public as experts within the securities industry, adjudged by the state to be worthy of that title.

295 Id.
296 The Act requires all investment advisers utilizing the mails and instrumentalities of interstate commerce to “make and keep . . . records” and to file and distribute them as the SEC requires. 15 U.S.C. § 80b-4 (1988).
297 The SEC has the authority, under § 203(e) of the Act, to “censure, place limitations on the activities, functions, or operations of, suspend [for a period of months] or revoke the registration of any investment adviser if it finds . . . that such censure, placing of limitations, suspension or revocation is in the public interest. . . .” 15 U.S.C. § 80b-3(e) (1988). See also § 203(f), 15 U.S.C. § 80b-3(f) (1988) (authorizing similar bar or suspension from association with an investment adviser).
299 That the speaker is holding himself out as someone of unique expertise in possession of a state-endowed credential creates a justification for regulation of expressive speech that is not present in the case of speakers not seeking this official imprimatur of expertise. Thus, for example, although the expressive speech contained in an attorney’s brief is not entirely bereft of first amendment protection, an attorney can be required to cite opposing authority in the jurisdiction; and doctors may be required to comply with state law requirements as to the form of patient release forms and required warnings. See generally Aman, SEC v. Lowe: Professional Regulation and the First Amendment, 1985 Sup. Ct. Rev. 93.
Althought a licensing scheme confers considerable benefits on the license holder, it, conversely, disables individuals who are unable to qualify or are stripped of their registration. The state is free, within broad limits, to specify the qualifications of a licensed professional and, therefore, to exclude from the practice of a profession those who fail to qualify or to maintain minimum standards of conduct. This is easily understood and presents few constitutional problems if the profession involves physical work. But when lawyers or investment advisers lose their professional licenses, their exclusion from the profession disables them from performing certain verbal conduct which constitutes the practice of their profession. Obviously, there is considerable tension here between the legitimate regulatory goals of the state as licensor of professionals and the first amendment’s protection of free expression.

200 It seems reasonably clear, however, that the licensing and registration of professionals increase the cost of obtaining their services. Licensing reduces the number and availability of professionals, therefore driving fees upward. It is this inevitable result that accounts in large part for the “interest group” explanation for state regulation of professionals—a recurring theme of the so-called “public choice” literature. Although the state and the courts claim to engage in regulation to protect the public, the big winners, so this theory goes, are the professional special interest groups. See generally McChesney, Commercial Speech in the Professions: The Supreme Court’s Unanswered Questions and Questionable Answers, 134 U. PA. L. REV. 45 (1984).

201 Of course, the state is not free to be arbitrary or discriminatory in the application of its standards. For example, no state would be able to refuse to license women or Democrats, or to reject applicants because they had advocated the right to life or the passage of gun control laws. See Lowe v. SEC, 472 U.S. 181, 232 n.10 (1985) (White, J., concurring in the judgment); see also Kreimer, supra note 88. Nevertheless, reasonable requirements as to education and achievement, as well as standards of integrity in the performance of professional duties, are plainly permissible.

202 For example, a surgeon who does not qualify for (or who is stripped of) her license may not operate on patients; a pilot who loses his license may not fly airplanes.

203 By “verbal conduct,” I do not mean to suggest that such communications necessarily lack cognizable speaker interests. Indeed, much of a professional’s verbal work involves expressive speech, including the exercise of analytical judgment and the expression of an individual’s opinion based on research, training and experience. Perhaps the most obvious example is to be found in the legal profession, where advocates of particular ideologies or points of view pursue their own social agenda (at times pro bono) through the practice of their professions. One need not look to ideologues in order to recognize that a professional practice can (although it need not) serve as an outlet for creativity and self-expression. Although the state may not prevent the defrocked professional from expressing his or her views on any subject, it may bar the rendering of personalized services to clients. See infra text accompanying notes 304-37.

204 As we shall see shortly, the first amendment protects the right of defrocked “speaking professionals” to express their views on any subject. Lowe, 472 U.S. at 220 (White, J., concurring in the judgment). They may, however, be prevented from holding themselves out as
There is a heated debate over the wisdom of regulating the professions (or at least over the advisability of certain regulatory measures). But the first amendment, as a general matter, is not a guarantor of wise regulation of professional conduct. The conventional form of state monitoring of the quality of professional services and the integrity of those who, wrapping themselves in a cloak of "professionalism," persuade people to place their trust (as well as their money) in professional hands raises no serious constitutional question. A surgeon who operates unnecessarily or injures more than he cures can be stripped of his medical license. A lawyer who embezzles clients' funds or suborns perjury can be disbarred, and an investment adviser who abuses the trust of clients can have his registration revoked by the SEC. That the speaking professions entail verbal work does not alter the state's responsibility and power to punish professional misconduct.

(ii) Subscription Newsletters. But what if our disbarred lawyer wants to go into the business of publishing a magazine concerning recent developments in the law, or is hired by a local newspaper to write a "what's new in the law" column? What if our disqualified investment adviser decides to continue to publish subscription newsletters? Can the SEC charge the adviser with giving investment advice without a license and enjoin all future publications? This was the issue posed to the Supreme Court in Lowe v. SEC.300

Christopher Lowe, whose registration under the Investment Advisers Act had been revoked by the SEC, nevertheless continued to publish financial advice through subscription newsletters and a telephone hotline.307 The SEC sought an injunction against these activities, viewing them as simply the continuation, through the printed (and the tape-recorded) word, of a profession Lowe was no longer entitled to practice. The district court denied the injunction against the newsletters,308 concluding that, because subscription
newsletters were protected by the first amendment, the Investment Advisers Act had to be narrowly construed to permit Lowe's registration for the purposes of publishing such newsletters.\footnote{309}

On appeal, the Second Circuit reversed.\footnote{310} Judge Oakes, writing for the majority, characterized Lowe's publications as "potentially deceptive commercial speech."\footnote{311} Given the past misconduct that had led to the revocation of Lowe's license as investment adviser, Judge Oakes concluded that the SEC was acting appropriately to try to prevent harm to investors before it occurred. The court assumed that if the first amendment applied at all, it was through the application of the commercial-speech doctrine,\footnote{312} and that the SEC could bar Lowe's newsletters under that analysis.\footnote{313}

\footnote{309} Lowe, 556 F. Supp. at 1369. This approach seems misconceived. Judge Weinstein mistakenly assumes that because Lowe has a right to publish his newsletter, the SEC is obligated to register him as a professional investment adviser under the Investment Advisers Act, at least for the limited purpose of publication of such newsletters. The two, however, are quite distinct. Lowe's right to publish does not entail a right to a state license. Moreover, the right to publish may itself not be subject to licensing requirements. In fact, the first amendment would bar even Judge Weinstein's proposed limited-purpose registration. It is highly doubtful that the state can require licensing of individuals engaged in the publishing and distribution of publications offered and sold to the general public. \textit{See}, e.g., Lovell v. City of Griffin, 303 U.S. 444, 451-52 (1937) (discussing unconstitutionality of city licensing ordinance requiring permit for distribution of handbills); \textit{see also} Grosjean v. American Press Co., 297 U.S. 233, 245-46 (1936) (discussing unconstitutionality of state tax imposed upon owners of newspapers for privilege of selling advertising); T. Emerson, \textit{supra} note 19, at 650-52; Mayton, \textit{supra} note 187, at 247-49.

\footnote{310} 725 F.2d 892 (2d Cir. 1984).

\footnote{311} Id. at 901.

\footnote{312} Id.

\footnote{313} Judge Brieant, dissenting, characterized the newsletters as the publication of investment opinion (analogous to \textit{Prevention Magazine} in the health care field) that did not require registration on the part of the publisher. \textit{Id.} at 903. While rejecting the commercial speech label, he concluded that even if commercial speech were involved, the SEC's attempt to enjoin publication was a prior restraint: "Investment opinion, in my opinion, is as much speech protected from prior restraint as is political opinion, philosophy or gibberish . . . ." \textit{Id.} at 907.
The Supreme Court granted certiorari to decide "the important constitutional question whether an injunction against the publication and distribution of [Lowe's] newsletters is prohibited by the First Amendment." Nevertheless, the majority opinion, written by Justice Stevens, avoided the constitutional issue by engaging in rather strained statutory interpretation. The Court distinguished between personalized and impersonal investment advice, and concluded that Congress intended to include impersonal advisory publications, such as Lowe's newsletters, within the statutory exemption for "bona fide" publications "of general and regular circulation." Justice White, concurring in the judgment, believed the constitutional issue was unavoidable since, in his view, Congress intended to include newsletters like those Lowe published within the definition of investment adviser. Justice White was prepared to bite the bullet: "the Act may not constitutionally be applied to prevent persons who are unregistered (including persons whose registration has been denied or revoked) from offering impersonal investment advice through publications such as the newsletters published by [Lowe]."

Unless Congress amends the Investment Advisers Act to overrule Lowe and include impersonal subscription advisers, the Court may have placed the regulation of subscription newsletters beyond the regulatory reach of the SEC. Nevertheless, a difficult and important constitutional question hangs in the air and needs to be addressed: at what point does regulation of the verbal work of advisory professionals in the securities industry become a restriction upon protected expression?

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314 472 U.S. 181, 189 (1985). Lowe did not challenge the district court's injunction as to the use of the telephone "hot line" for those seeking personalized service. Id. at 189 n.23.

315 Professor Aman, among others, deplores the Court's decision to engage in "statutory gymnastics" rather than confront the difficult and inescapable constitutional questions. Aman, supra note 299, at 96.


317 472 U.S. at 223 (White, J., concurring in the judgment).

318 Id. at 236. In Justice White's view, "at some point, a measure is no longer a regulation of a profession but a regulation of speech or of the press; beyond that point, the statute must survive the level of scrutiny demanded by the First Amendment." Id. at 230.

319 Whether other antifraud measures, such as remedies under § 10(b) of the Exchange Act and SEC Rule 10b-5, promulgated thereunder, or actions under the federal mail and wire fraud statutes are in fact available, as the majority suggested in Lowe, 472 U.S. at 209 n.56, is, as Justice White remarked, "in some doubt." Id. at 225 n.9. (White, J., concurring in the judgment). See infra text accompanying note 342.
Although they followed different analytical paths, the opinions of Judge Weinstein, Judge Brieant (dissenting from the Court of Appeals ruling), and Justices Stevens and White all drew a distinction between Lowe's impersonal subscription newsletters and personalized investment advice. In evaluating whether this is a viable, constitutionally defensible line, it is necessary to consider the competing interests of the speaker, the audience (the investing public) and the state.

Let us begin from the perspective of the investing public. The Investment Advisers Act is premised on the principle that investor-clients need to be protected from possible abuse of trust by investment advisers. When an investment adviser communicates with a client, a fiduciary relationship is created. The client has certain expectations based, in part, on the adviser's avowed expertise and license; he is seeking an investment strategy tailored to his particular financial circumstances and goals. A relationship based on the adviser's superior knowledge and the element of trust, plus the confiding of personal and financial information, creates an atmosphere where "[t]he dangers of fraud, deception, or overreaching that motivated the enactment of the statute" come into play.

Is the recipient of an impersonal subscription newsletter equally in need of state protection? Although certain susceptible individuals may be unduly influenced by its contents, the first amendment, in my view, requires that the state act from the standpoint not of the exceptionally gullible but of the reasonably intelligent and skeptical recipient of a standardized subscription newsletter. Such a recipient knows that whatever recommendations are contained in the newsletter were not drawn to fit his or her particular financial posture and goals. Although publishers of such newsletters may have to answer for fraud, the recipient takes a chance by acting upon such general recommendations.

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556 F. Supp. at 1365.
725 F.2d at 903 (Brieant, J., dissenting).
472 U.S. at 211.
Id. at 222-33 (White, J., concurring in the judgment).
Lowe, 472 U.S. at 210.
Id.
An exception would be regulation directed to the protection of minors or the intellectually handicapped. See supra note 157.
For a discussion of the proper scienter standard, see infra note 337.
Professor Aman disagrees:
The state, however, approached Lowe’s refusal to stop publishing from what Professor Aman calls a purely “regulatory perspective.” Lowe had repeatedly engaged in misconduct in the past and his license to render investment advice had been revoked. The SEC, therefore, was attempting to fulfill its mission as guardian of professional standards by prophylactic regulation—preventing Lowe from providing any (even impersonal) investment advice in the future, whatever the medium of communication. To that end, the SEC asked a court to tell Lowe that he could never again publish a newsletter concerning securities investment.

[The newsletters] did not arrive in an individual’s home unannounced or uninvited. They were personally subscribed to by individuals who found his advice useful and relevant to their own circumstances. While Lowe may not have dealt personally with each of his subscribers, his views certainly were capable of being treated and relied on as personal advice by his subscribers. They knew of Lowe, and, presumably, they knew what kind of advice they wanted. That is why they were willing to pay the subscription price in the first place. To say this is not personal advice is to view this only from Lowe’s perspective. The advice was very personal indeed to those who used it.

Aman, supra note 299, at 135-36. It is hard to see, under this view, why a subscription to any specialized periodical would not be transformed into a “personal” communication of advice. Indeed, even a newspaper of general circulation can be subscribed to, received daily at home, and its various columns (including Jean Dixon’s horoscope, Dear Abby, Dr. Joyce Brothers and any other “advice” columns by known individuals) relied upon by the reader. However great the desire to rely upon such impersonal advice, undue reliance thereon would be unreasonable.

See generally id. at 101-09, observing there are three perspectives through which Lowe could have been decided: (1) a “regulatory perspective” holding the SEC action a presumptively legitimate regulatory response to past misconduct; (2) a “first amendment perspective” holding the SEC action a presumptively unconstitutional prior restraint of free expression; and (3) a “commercial speech perspective”—a constitutional middle ground—involving a somewhat deferential balancing of competing interests.


Like the SEC, Professor Aman believes that such newsletters constitute “the actual practice of . . . [the investment adviser’s] profession” and therefore “the government’s interest is not just the future well-being of consumers but the integrity of the profession itself.” Aman, supra note 299, at 146.

Judge Oakes in the Court of Appeals at great pains explained that Lowe was not prohibited from publishing a newspaper of general interest and circulation. Nor is he prohibited from publishing recommendations in somebody else’s bona fide newspaper as an employee, editor, or writer. What he is prohibited from doing is selling to clients advice and counsel, analysis and reports as to the value of specific securities or as to the advisability of investing in, purchasing or selling or holding specific securities.

SEC v. Lowe, 725 F.2d 892 (2d Cir. 1984). It is unclear, however, why the propriety of giving specific recommendations should turn on whether or not Lowe is a publisher or the em-
Under the first amendment, however, neither the SEC nor any other arm of government has the power to prevent willing speakers from addressing the general public with recommendations on any subject, if they can find subscribers willing to pay the fee. The Constitution commands us to find an accommodation between the individual's right to express (and be paid) for his views and the state's regulatory jurisdiction over the conduct of professionals. The point at which such accommodation is reached should depend on the personalized or general nature of the information imparted, as well as the nature of the relationship between the disseminator and recipient of the information.

At some point during the relationship between a professional investment adviser and a client, a particularized course of conduct will be advocated by the professional. The client relying on such personalized advice is singularly at risk of harm from professional malpractice; on occasion, he may feel pressured to follow the retained expert's recommendations, or to overcome reservations and make a decision with little opportunity to reflect. The state may justifiably concern itself with such personalized encounters not because the communications lack first amendment protection, but because they present opportunities for abuse of the professional's position of trust, overreaching, and fraud.

ployee of a publisher, unless, as Judge Brieant points out, the majority assumes that the owner will exercise control sufficient to prevent fraud. Id. at 908 (Brieant, J., dissenting). However, as the Winans affair revealed, even so prestigious and well-run a publication as the Wall Street Journal was unable to prevent one of its reporters from engaging in a fraud. See infra text accompanying note 339. Fraud, when it is discovered, can be dealt with either under existing provisions or by enacting narrowly tailored laws to that end. What cannot be tolerated is for a court to tell a speaker-publisher what subjects he may or may not discuss in the future in the pages of his generally available (for a price) publication.

333 The attorney solicitation cases by and large support this view. In Ohralik v. Ohio State Bar Ass'n, the Court upheld state bar association disciplinary regulations that prohibited in-person solicitation for remunerative employment by attorneys. 436 U.S. 447 (1978). Although the Court reiterated its prior holdings that advertising by attorneys was constitutionally protected (albeit second-class "commercial speech"), the decisive factor in Ohralik was the increased likelihood that fraud could occur during an in-person solicitation. See also Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 641 (1985) ("In-person solicitation by a lawyer . . . was a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud."). Contrasting in-person solicitation with print advertising, Justice White explained in Zauderer that print advertising "in most cases . . . will lack the coercive force of the personal presence of a trained advocate. . . . [It] is not likely to involve pressure on the potential client for an immediate yes-or-no answer." Id. at 642.
The immediacy of the interaction, then, coupled with the fiduciary nature of the relationship, justifies the state’s involvement. However, as the immediacy of the relationship (and hence the vulnerability of the recipient of the advice) diminishes, the protected nature of the adviser’s expressive communications begins to tip the balance away from the protective goals of regulation. At that point, the state’s interest in prophylactic regulation of the expression of nonpersonalized investment advice is outweighed by the speaker’s first amendment interests.

Moreover, to the extent that unregistered publishers of generalized investment advice do not hold themselves out to be licensed investment advisers, the state’s interest in the integrity of its professional licensing scheme is unimpaired. The public will be put on notice that the publishers of such newsletters have not qualified for licenses from the government, and should consider the caliber of the source in deciding whether and to what degree to rely on the advice contained in such publications.

Finally, let us turn to the expressive rights of the defrocked professional. The speaker’s interest in expressing his opinions to the public is, if anything, magnified by the general distribution of those views. Unlike an investment adviser engaged in one-to-one consultations with a series of clients, the writer of a subscription newsletter has, as it were, joined the ranks of the press. The publication of his opinions about investments (including specific securities) should be treated no differently from the publication of his opinions about the relative merits of particular restaurants, artists, books, political candidates or any other subject. The state cannot, consistent with the first amendment, require the publishers of newspapers or specialized periodicals to obtain a license in order to publish; neither can it impose such a requirement on anyone inclined to publish an advisory newsletter about securities.

334 See Investment Advisers Act § 205, 15 U.S.C. § 80b-5 (1988), prohibiting investment advisory contracts that: (1) provide for certain formulae for calculating compensation; (2) do not include a “no assignment” clause, unless consent of the client has been obtained; (3) do not require notice to the client of any change in partnership membership of the investment adviser, if appropriate. See also § 206, 15 U.S.C. § 80b-6 (1988) (requiring adviser to obtain informed consent of client to any transactions in which adviser acts as principal or broker of third party).

335 Newsletter publishers may be held accountable, of course, for fraudulent representations contained in their publications. See infra note 337.
Of course, the publisher cannot misrepresent personal qualifications (i.e., by falsely claiming to be a licensed investment adviser). And the speaker is subject to the same post-expression liability for fraud or libel as would apply to publications of general circulation.

(iii) "Scalping" and Trading on Nonpublic Information. As a result of Lowe's exemption of publishers of standardized subscription newsletters from the scope of the Investment Advisers Act, the antifraud provision of that statute is no longer available to police their fraudulent advisory practices. The state is thus left with a difficult regulatory problem: how to control the improper use of such newsletters (and the financial press in general) to manipulate stock prices.

Consider the following scenario. The publisher of an advisory newsletter may buy shares of a particular security intending to recommend it to readers for investment in the immediate future. The favorable recommendation, if believed, is likely to result in increased trading that will cause the price of the shares to rise. The adviser waits until the price has risen and then sells, making a profit. The actual investment advice concerning the particular security may be completely truthful and nonmisleading. What the adviser has omitted to tell the readers, however, is that the advice serves the adviser's purpose at least as much as their own: he is trading for his own account in the same securities and using his

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336 Presumably, any unregistered newsletter publisher who falsely holds himself out as a registered adviser is engaging in false advertising and can be prohibited from continuing to do so. It would therefore be permissible to compel such an offender to carry a corrective disclaimer.

337 The liability of newspapers of general circulation for misrepresentation, as opposed to libel, remains unsettled. The issue comes up in the context of public reliance on weather reports, restaurant reviews, and the like. Certainly, intentional fraud working concrete injury should be actionable. Whether a lesser standard of culpability should suffice is unclear. As developed above, see supra text accompanying notes 170-73 & 183-86, the "actual malice" rule, derived from New York Times Co. v. Sullivan, 376 U.S. 254 (1964), is designed at least in part to protect particularly fragile speech that society wishes to encourage. Arguably, subscription newsletters, like newspaper restaurant reviews, are produced under sufficiently strong incentives to preclude Sullivan protection solely on these grounds. However, it can be argued that liability for negligent publication raises first amendment questions even where speech is relatively hardy. Given the absence of injury to reputational interests, the attenuated claim of reasonable reliance on the part of the reader, and a particular first amendment concern (evidenced in part by the press clause) with shielding the press from liability, there would appear to be a strong case for insisting on either intentional or reckless misrepresentation before damages may be assessed or fines imposed.
clients' reliance on his advice to drive up the price for his private and secret gain. This practice is commonly referred to as "scalping." 338

Financial reporters in newspapers of general circulation are able to engage in similar manipulation. 339 A reporter knows which companies and securities are going to be the subject of columns, whether or not those columns will be favorable and when those columns are going to appear in print. The reporter is able, therefore, to purchase securities scheduled for favorable review before the good news reaches the public. When the stock rises, the reporter will sell and make a profit. As with scalping by subscription advisers, the investment information may be entirely accurate.

Scalping resembles insider trading in that one in possession of material nonpublic information 340 (and privy to the timing of its

338 Courts have upheld attempts to penalize scalping under the Investment Advisers Act and the Exchange Act. See, e.g., SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 181 (1963) (scalping operates as a "fraud and deceit" within the meaning of Investment Advisers Act); Zweig v. Hearst Corp., 594 F.2d 1261, 1269 (9th Cir. 1979) (scalping constitutes violation of rule 10b-5). Not surprisingly, the greater the number of advisees, the more successful the scheme. Therefore, the publishers of widely distributed newsletters will be better able to "scalp" than those who advise a small number of clients on a personalized basis.


339 A recent (and notorious) example of manipulation by the financial press involves R. Foster Winans, a reporter for the Wall Street Journal's "Heard on the Street" column. Winans was aware of the subjects and dates of future columns and (with coconspirators) was able to manipulate to his own advantage the likely effect on the market of the column he was writing. Winans and his codefendant were convicted of violating § 10(b) of the 1934 Exchange Act, 15 U.S.C. § 78j(b) (1988) and rule 10b-5, 17 C.F.R. § 240.10b-5 (1989); and of violating federal mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343 (1988). United States v. Winans, 612 F. Supp. 827 (S.D.N.Y. 1985), aff'd sub nom. United States v. Carpenter, 791 F.2d 1024 (2d Cir. 1986), aff'd, 484 U.S. 19 (1987) (Court split 4-4 on "misappropriation" theory of 10b-5 liability).

340 A working definition of "nonpublic" information is (a) "information that investors may not lawfully acquire without the consent of the source" and (b) "information which, although it may lawfully be disseminated, is not yet generally available." Brudney, Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws, 93 Harv. L. Rev. 322 & n.2 (1979). In the case of scalping, the nonpublic information typically concerns
Disclosure) trades prior to that disclosure. In fact, financial reporters and newsletter publishers could be engaging in two forms of securities fraud: (1) scalping (by withholding information about their trading positions in the securities they are recommending), and (2) unlawfully trading on nonpublic information concerning the securities themselves, in anticipation of the price increase after its disclosure. After *Lowe*, subscription advisers who scalp have been exempted from the antifraud provisions of the Investment Advisers Act. The *Lowe* majority suggested, however, that SEC rule 10b-5 and the federal mail and wire fraud statutes would still be available to punish those who scalp.

The adviser's personal interest in the securities he is recommending to the public, whereas in the insider trading context, the nonpublic information concerns the securities themselves. The first amendment issue is identical whether the SEC seeks to penalize a reporter for "outsider" trading on nonpublic information about securities or for trading on the effect of his recommendations without informing his readers. This Article will, therefore, discuss "scalping" only, unless there is some distinction between the two types of nondisclosures.

For technical reasons, rule 10b-5, 17 C.F.R. § 240.10b-5 (1989), may not be available. Reporters and subscription advisers are not corporate "insiders" within the common meaning of the term. Corporate insiders are typically members of the board of directors, officers, and controlling shareholders. In addition, under current interpretations of rule 10b-5, individuals who have a special or fiduciary relationship with the shareholders, see, e.g., Chiarella v. United States, 445 U.S. 222, 230 (1980), and tippees who know or should know that the confidential information they have received from an insider was disclosed in breach of a fiduciary relationship, see Dirks v. SEC, 463 U.S. 646 (1983), must either disclose that information or refrain from trading upon it. It is not at all clear, however, that financial reporters (or publishers of newsletters exempted from the Investment Advisers Act) have the requisite fiduciary relationship with their readers to subject them to liability except under the theory (not yet accepted by the Supreme Court) that they have misappropriated information not belonging to them (the "misappropriation theory"). This possibly explains why the SEC withdrew its claim that Winans had breached a duty to his readership. Note, *The Inadequacy of Rule 10b-5 to Address Outsider Trading by Reporters*, 38 Stan. L. Rev. 1549, 1555 n.35 (1986). Indeed, by the same reasoning, the continuing vitality of *Zweig v. Hearst* may be in doubt. 594 F.2d 1261 (9th Cir. 1979). See generally Peskind, *Regulation of the Financial Press: A New Dimension in Section 10(b) and Rule 10b-5*, 14 St. Louis U.L.J. 80 (1969).

*Carpenter* suggests, however, that federal wire and mail fraud statutes can be used to reach financial reporters employed by newspapers. 484 U.S. at 28. The Court held that Winans' conduct in leaking information about the columns to coconspirators and in trading on that information before it appeared in the *Journal* constituted a scheme to defraud the
Whatever the applicable regulatory mechanism (either existing or to be enacted), would the first amendment rights of advisory newsletter publishers or financial reporters be violated if the state were to impose liability for their trading, without disclosure to their readers, on the securities discussed in their investment recommendations?

There is no serious basis, in my view, for contending that a disclosure requirement imposed upon members of the financial press would violate the editorial integrity of the press by analogy to *Miami Herald Publishing Co. v. Tornillo*. The Tornillo addressed a right-of-reply statute that required a newspaper to choose between printing views with which it disagreed or being completely silent on the issue. Thus, unlike our hypothetical regulation, the regulation in *Tornillo* was directed at speech rather than conduct: the “or else” was to refrain from *speaking*. By contrast, the “disclose or abstain” rule to reach scalping suggested above leaves a newspaper’s editorial judgment unimpaired. It merely requires a newspaper to disclose certain facts to its readers or else to refrain from *trading*. The rule does not require the newspaper (or reporter) to choose between disclosure and publishing. Therefore, the statute in *Tornillo*, with its commandment to “allow others to speak or else be silent” poses a direct speech-related burden not present in the scalping context.

2. The Regulation of Expressive Speech: Proxy Solicitation. In
addition to factual information concerning matters such as upcoming meetings, board nominees, and directors' and executives' compensation, proxy statements also set forth and purport to evaluate the solicitor's (and sometimes opposing shareholders') proposals for shareholder action, with the purpose of persuading the shareholder-voters to vote their proxies in support of those proposals. Despite the expressive nature of much of what transpires in the solicitation process, proxy solicitors are subjected to a regulatory scheme that (1) requires prior filing with the SEC of all solicitation materials; (2) mandates disclosure of such materials (including compelled dissemination of certain shareholder proposals management opposes); and (3) punish false or misleading statements.

(a) The Statutory Scheme. In section 14(a) of the Exchange Act, Congress sought to prevent corporate management (the most frequent solicitor) from soliciting proxies without first fully informing shareholders about the matters to be decided at the meeting. The provision seeks to protect shareholders' rights to control the decisions entrusted to them by state law.

Accordingly, under the authority of section 14(a), the SEC promulgated a regulatory scheme based on full disclosure, anal-

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345 The solicitor is most often the management of the corporation, but discontented shareholders may mount independent proxy contests. Moreover, qualified shareholders can sometimes compel management to include their (the shareholders') proposals for action in the corporate proxy materials. See infra text accompanying notes 403-11.

346 The statute provides, in pertinent part:

> It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any [registered, nonexempt] security. . . .


347 Prior to the passage of the Exchange Act, "[t]he stockholder was merely invited to sign his name and return his proxy without being furnished the information essential to the intelligent exercise of his right of franchise." 2 L. Loss, Securities Regulation 858-59 (1961). See also H.R. Rep. No. 1383, 73d Cong., 2d Sess. 13-14 (1934); S. Rep. No. 792, 73d Cong., 2d Sess. 12 (1934). To the extent shareholders were kept uninformed about corporate policy decisions ostensibly to be made by them, they were denied "fair suffrage." H.R. Rep. No. 1383, at 13-14.

gous to the registration and disclosure scheme required for distributions of securities under the Securities Act. Regulation 14A\(^{349}\) contains detailed rules concerning the steps to be followed in order to solicit\(^{350}\) a shareholder's proxy.\(^{351}\) Prior to (or at the time of) solicitation, each person to be solicited must have received a proxy statement,\(^{352}\) and the statement (together with the form of proxy and supplemental materials) must have been filed with the SEC.\(^{353}\) Until recently, all proxy statements had to be filed first in preliminary and then later in definitive form.\(^{354}\) However, the SEC has


\(^{350}\) A "solicitation" is defined very broadly, to include, in pertinent part:

(i) Any request for a proxy whether or not accompanied by or included in a form of proxy;

(ii) Any request to execute or not to execute, or to revoke, a proxy;

(iii) The furnishing of a form of proxy or other communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy.


\(^{351}\) The word "proxy" is herein used as shorthand for the definitional triad "proxy, consent or authorization." A proxy is defined to include "every proxy, consent or authorization within the meaning of section 14(a) of the [Exchange] Act. The consent or authorization may take the form of failure to object or to dissent." 17 C.F.R. § 240.14a-1(e) (1989).

\(^{352}\) 17 C.F.R. § 240.14a-3(a) (1989). A proxy statement is a document containing all the information required by Schedule 14A, 17 C.F.R. § 240.14a-101 (1989). The SEC has recently applied the principles of its more flexible integrated disclosure system to proxy statements. See Disclosure of Certain Relationships and Transactions Involving Management, Exchange Act Release No. 18,878, [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) 183,236 (July 9, 1982); Proxy Rules—Comprehensive Review, Exchange Act Release No. 23,789, [1986-87 Transfer Binder] Fed. Sec. L. Rep. (CCH) 1 84,044 (Oct. 10, 1986). However, a considerable amount of information must still be disclosed, including details about the meeting, the revocability of the proxy, dissenters' rights of appraisal, the identity of the solicitor, personal interests of various parties in the matters to be voted upon, and detailed information about any and all matters to be acted upon at the meeting and for which proxies are being solicited (such as proposed slates of directors, management compensation, independent accountants, issuance or alteration of outstanding securities).

\(^{353}\) 17 C.F.R. § 240.14a-6 (1989).

\(^{354}\) See 17 C.F.R. § 240.14a-6(a) (1989) (preliminary filing ten days prior to distribution of definitive copies); 17 C.F.R. § 240.14a-6(b) (1989) (preliminary filing of additional materials two days prior to distribution of definitive copies); 17 C.F.R. § 240.14a-6(c) (1989) (definitive copies filed with SEC not later than date of distribution to shareholders). In addition, materials to be used in personal solicitations (such as instructions for telephone solicitations or personal letters) must be filed with the SEC five days before they are distributed to the individuals who will be making the solicitations. 17 C.F.R. § 240.14a-6(d) (1989).

Perhaps in anticipation of first amendment challenges to come, speeches, press releases and radio or television scripts need not be filed with the SEC prior to the date of actual first
eliminated the filing in preliminary form proxy statements concerning meetings at which only certain routine matters are to be decided. Where applicable, the preliminary filing requirements apply to all solicitations, whether by management or shareholders intent on waging a proxy contest.

If management is the solicitor, and the meeting at which the proxies are to be voted is the annual meeting (or a meeting in lieu of the annual meeting) at which the board of directors is elected, each proxy statement must be accompanied or preceded by a copy of the corporation’s annual report to the shareholders. Moreover,

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355 The affected meetings are those where “the only matters to be acted upon are the election of directors; the election, approval or ratification of auditors; and/or shareholder proposals. . . . This exclusion does not apply if the registrant comments upon or refers to a solicitation in opposition in connection with the forthcoming meeting in its proxy material.” Proxy Filing-Shareholder Proposals, Exchange Act Release No. 25,217, [1987-88 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,211 at 88,951 (Dec. 21, 1987) [hereinafter Final Rules]. The shareholder proposals pursuant to Rule 14a-8, mentioned above, are subjected to a separate review procedure. See infra text accompanying note 358.

The SEC has eliminated preliminary filings where meetings deal with ordinary matters in order to “relieve registrants and the Commission of unnecessary administrative burdens and preparation and processing costs associated with the filing and processing of proxy material that is currently subject to selective review procedures, but ordinarily is not selected for review in preliminary form.” Final Rules, supra, at 88,951. From a first amendment perspective, however, these changes effect no cure because matters that are the subject of debate and controversy among shareholders remain subject to the preliminary filing requirement under the current uneven (but generally overly inclusive) interpretation of “solicitation.” See infra text accompanying notes 377-95.

356 Rule 14a-2 provides certain exemptions from the rules for, inter alia, solicitations involving securities in the solicitor’s name, or of which he is the beneficial owner. Newspaper advertisements (analogous to the tombstone security advertisements, see supra text accompanying notes 236-41), that do no more than provide information concerning a source from which proxy statements, proxy forms and other material can be obtained are also exempt. 17 C.F.R. § 240.14a-2(a)(6) (1989).

There is also a subset of exempt solicitations (to which, however, rule 14a-9, 17 C.F.R. § 240.14a-9 (1989), the general antifraud rule, applies) involving: (1) the solicitation of no more than ten shareholders, or (2) the provision of disinterested voting advice by an adviser with whom the shareholder has a business relationship. 17 C.F.R. § 240.14a-2(b)(1), (2) (1989).

357 17 C.F.R. § 240.14a-3(b) (1989). The annual report must contain financial information including balance sheets and income statements for two and three years, respectively, prepared in compliance with Reg. S-X, 17 C.F.R. § 210 (1989), and management’s discussion and analysis of financial condition and results of operations, description of business, and other information. 17 C.F.R. § 240.14a-3(b)(1) (1989). It must also offer to provide a copy of the 10-K annual report to each person solicited, without charge. 17 C.F.R. § 240.14a-3(b)(1) (1989). Copies of the annual report must be submitted to the SEC either on the date the report is sent to security holders or on the date preliminary copies of the proxy statement
the corporation must include within its proxy statement certain qualifying shareholder proposals, whether or not it approves of them. The content and format of the annual report, the proxy statements and the form of proxy itself are prescribed. Moreover, virtually all solicitations are subject to a general antifraud

are filed with the SEC, whichever is later. 17 C.F.R. § 240.14a-3(c) (1989). The report is "solely for [the SEC's] information" and is not deemed "soliciting material" or "filed" so as to subject the corporation to liability under § 18 of the Exchange Act (liability for making and filing misleading statements), 15 U.S.C. § 78r (1988).

The annual report, although much of it is essentially nonexpressive descriptive historical information involving minimal editorial discretion, also contains analytic and evaluative elements that closely resemble expressive speech, such as the management's discussion and analysis of financial condition. See 17 C.F.R. § 229.303(a) (1989) (setting forth contents of annual report). The SEC also "encourage[s], but [does] not require[]" corporations to include "forward-looking" information, such as is covered by safe harbor rules under both the Exchange and the Securities Acts. Id. at instruction 7. See supra text accompanying notes 256-55.

See 17 C.F.R. § 240.14a-8 (1989). Rule 14a-8 permits shareholders who have been, for at least one year, record or beneficial owners of at least one percent (or $1,000 market value) of the voting securities to request the corporation to include within the corporate proxy statement an appropriate proposal and supporting statement not to exceed five hundred words in length. This rule enables shareholders to propose certain actions to their fellow shareholders (but not to solicit proxies from them) without having to undertake the considerable expense and effort of an independent proxy solicitation. Management is permitted to include its own (unlimited as to size) statement in opposition to the proposal.

The rules specify categories of proposals that management may omit from its proxy statements including, inter alia, proposals for actions “not a proper subject for action by security holders” under state law; proposals for illegal action; proposals that are false or misleading under rule 14a-9; proposals dealing with personal grievances or claims; proposals relating to the ordinary business of the corporation; proposals not significantly related to corporate business; proposals beyond the power of the corporation to effectuate; and proposals duplicative of another proposal. 17 C.F.R. § 240.14a-8(c)(1)-(13) (1989). Shareholders may not utilize this procedure to nominate candidates for election to the board. See rule 14a-11, 17 C.F.R. § 240.14a-11 (1989); Schedule 14B, 17 C.F.R. § 240.14a-102 (1989). If the corporation intends to omit a proposal under these exclusions, it must notify the SEC (and the shareholder) of its intention to do so. The SEC will typically notify the corporation by letter whether it contemplates taking “no action” in the event the proposal is omitted from the corporate proxy statement. The constitutionality of the shareholder proposal provision is considered infra text accompanying notes 403-11.

See supra note 357.

See supra note 352.

See 17 C.F.R. § 240.14a-4(a)-(e) (1989). The rule requires identification of the solicitor (in bold-face type); a space for the date; description of each matter to be decided (together with boxes enabling the person solicited to choose between approval, disapproval or abstention); and the names of nominees for the board (together with a means to withhold votes for any and all of them). The proxy must also indicate that it will be voted on at the meeting. Id.

See supra note 350.
provision, and violations of the regulations are punishable by both civil and criminal penalties.

(b) Constitutional Issues. (i) Regulating Expressive Communication in the Service of Shareholder Voice. The federal system of proxy regulation has gone virtually unchallenged on first amendment grounds since its inception. The regulatory scheme presents difficult constitutional questions, however, because the expressive interests of corporate management and shareholders are plainly at stake.

Although proxy contests are waged through the exchange of protected speech, it is not always possible to know definitively who the speaker is. Typically, the voice we hear is that of a majority of the incumbent managers; it is their corporate proxy statement, their proposed slate of directors, their set of proposals for shareholder action. And yet, the final slate of directors and the approved corporate actions must reflect the will (or at least the acquiescence) of the majority of the shareholders.

The federal proxy system reflects the reality that, although at

563 Rule 14a-9 provides in pertinent part:

(a) No solicitation subject to [Regulation A] shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.


565 See, e.g., Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447, 456 (1978) ("Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as... corporate proxy statements."). The legislative history of the Exchange Act is devoid of debate concerning the first amendment implications of proxy regulation. Moreover, until recently, the cases assumed virtually without discussion that the scheme was constitutional. See, e.g., SEC v. May, 229 F.2d 123, 124 (2d Cir. 1956) (finding petitioners' claims that proxy regulations "are unconstitutional as unauthorized delegations of legislative power and otherwise... have no merit") (emphasis added). The "and otherwise" referred to the argument that the regulatory scheme, insofar as it interfered with free "campaign" debate during a proxy contest, violated the first amendment. See L. Loss, supra note 155, at 454; Spear, Einhorn & Walsh, Do Proxy Clearance Procedures Violate the First Amendment?, Nat'l L.J., Sept. 19, 1983, at 29 & n.1, col. 4.
common law there was no mechanism for voting by proxy,\textsuperscript{366} in the modern corporate world of centralized management and widely dispersed shareholders, shareholder voting by proxy has become indispensable.\textsuperscript{367} Indeed, as Professor Loss has observed, the separation of ownership from management "puts the entire concept of the stockholders' meeting at the mercy of the proxy instrument."\textsuperscript{368} In addition to enabling interested shareholders to communicate with widely dispersed fellow shareholders,\textsuperscript{369} the regulatory system also compels corporate managers to communicate with their shareholders. In short, the proxy system provides the primary vehicle for communication between corporate managers and their absentee shareholder-principals, and for ensuring accountability in management.

But what about the corporate speaker's interests? Under the


\textsuperscript{367} Although shareholders do not under state law "manage" the day-to-day operations of these corporations, see, e.g., Del. Code Ann. tit. 8, § 141 (1988), they do elect the members of the board of directors and typically vote to approve or disapprove various fundamental matters such as mergers, amendment of the articles of incorporation and bylaws, voluntary dissolution and sale of corporate assets. Proxy solicitations involve those matters entrusted by state law (or management) to shareholder decisionmaking.

\textsuperscript{368} L. Loss, supra note 155, at 449. See also Ruder, supra note 365, at 249-50 (stating that "control of the proxy machinery means control of the corporation").

It has been said in the past (with some validity) that shareholders do not read, let alone reflect upon, the issues raised in proxy materials as long as dividends are paid. See Liberty Fund, Inc. Symposium on the First Amendment and Securities Regulation, 20 Conn. L. Rev. 383, 395-397 (1988) (exchange between Professors BeVier and Wolfson). There are, however, indications that this pattern of shareholder passivity is changing. Cherno & Zelenty, Solicitations in Proxy Contests, 17 Rev. Sec. Reg. 965 (1984). Not all shareholders must read these disclosure materials in order to affect the decisionmaking process, particularly in light of the disproportionate potential for influence of a relatively small number of institutional investors having substantial holdings.

\textsuperscript{369} See infra text accompanying notes 403-11 (discussion of shareholder proposals and solicitations of other shareholders' proxies).

Because proxies are signed prior to the actual meeting, shareholders wishing to contest a board election or to oppose a proposal for corporate action "can only address the assembled proxies which are lying at the head of the table." Securities and Exchange Commission Proxy Rules: Hearings on H.R. 1493, H.R. 1821, and H.R. 2019 Before House Comm. on International & Foreign Commerce, 78th Cong., 1st Sess. (1943) (statement of SEC Chairman Purcell). The distribution of solicitation materials enables shareholders to communicate with each other prior to the execution of proxies.
proxy regulations, the corporation must disclose particular information,\(^{370}\) include within its own proxy statement shareholder proposals with which it disagrees,\(^{371}\) second guess itself with regard to communications that might be deemed misleading by the SEC\(^{372}\) and file its proxy materials with the SEC prior to their distribution.\(^{373}\) Given the expressive nature of so much proxy-related speech, why isn’t the entire regulatory system an impermissible infringement of free expression?\(^{374}\)

For reasons suggested above,\(^{375}\) the overall system of proxy regulation does not impinge upon free speech principles. Government may establish processes for ensuring that agents act with the authority of their principals. In the context of shareholder decision-making undertaken by means of proxy solicitation, the corporate speaker’s expressive interests have not yet become fully cognizable. We cannot be completely certain that the corporate voice we hear is that of management acting on behalf of (and with the informed consent of) the shareholders, and not that of a wayward agent. Congress perceived a real danger that, in fact, corporate management could use the legally created proxy mechanism to deceive and manipulate the votes of trusting and uninformed (because physically absent) shareholders.\(^{376}\)

Yet even if government may act to ensure “fair corporate suffrage,” that does not mean all of the SEC’s regulatory apparatus is necessarily constitutionally permissible. As with other schemes impacting upon protected expression, there comes a point at which

\(^{370}\) See supra text accompanying notes 359-61.

\(^{371}\) See supra text accompanying note 358.

\(^{372}\) See supra text accompanying notes 357 & 363.

\(^{373}\) See supra text accompanying notes 353-55.

\(^{374}\) For a view to this effect, see Wolfson, supra note 59, at 281. See also Wolfson, Use First Amendment to Call Off the SEC Censors, Wall St. J., Aug. 9, 1988, at 26, col. 3. “The SEC can get an injunction from a court to halt any disclosure it and the court deem erroneous, and it can request the Justice Department to start criminal proceedings. In effect, this means that the SEC has a monopoly on the content of financial information.” Id.

\(^{375}\) See supra text accompanying notes 365-69.

\(^{376}\) S. REP. No. 1455, 73d Cong., 2d Sess. 77 (1934).

[The [proxy] rules and regulations will protect investors from promiscuous solicitation of their proxies, on the one hand by irresponsible outsiders seeking to wrest control of the corporation away from honest and conscientious officials; and on the other hand, by unscrupulous corporate officials seeking to retain control of the management by concealing or distorting facts.

Id.]
regulatory concerns are outweighed by speaker interests. Accordingly, the state must confine itself to those measures narrowly tailored to further its compelling interest. In this respect, several aspects of the regulatory scheme do raise very substantial first amendment concerns.

(ii) Definition of “Solicitation.” The basic definition of “solicitation” includes “the furnishing of a form of proxy or other communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy.” This language has been construed to encompass any writings (whether or not they mention or explicitly solicit a proxy) that are “part of a continuous plan ending in solicitation and which prepare the way for its success.”

This expansive definition leads to overregulation: the imposition of the regulatory scheme on expressive communications far removed from the SEC’s legitimate regulatory concern for the impact on shareholders, such as messages concerning corporate management and policy that are directed to the general public, and make no mention of proxies, proxy contests or upcoming shareholder meetings.

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378 SEC v. Okin, 132 F.2d 784, 786 (2d Cir. 1943) (finding that letter mailed to shareholders after meeting scheduled, asking them not to sign any proxies for utility company or to revoke proxies already signed, is a “solicitation” within meaning of the Public Utility Holding Company Act). Judge Learned Hand, writing for the court, explained that expansion of the rules to include even communications received prior to formal solicitation by the solicitor was necessary to carry out Congress’ regulatory goals. Otherwise, “one need only spread the misinformation adequately before beginning to solicit, and the Commission would be powerless to protect shareholders.” Id. at 786.
379 See, e.g., Long Island Lighting Co. v. Barbash, 779 F.2d 793 (2d Cir. 1985) (question of fact whether advertisement addressed to general public urging that utility company be publicly owned, and that appeared during proxy fight between company and proponents of public ownership, was proxy solicitation and therefore subject to proxy rules); Trans World Corp. v. Odyssey Partners, 551 F. Supp. 1311 (S.D.N.Y. 1983) (communications to press and financial community “in an effort to influence shareholder opinion” subject to proxy rules). See infra text accompanying notes 382-95. See also Cherno & Zelenty, supra note 368. The decisive factor, from the SEC’s perspective, is whether the ultimate purpose of the communication is to influence shareholder decisionmaking. See Brief of the SEC, Amicus Curiae, at 8, LILCO v. Barbash, 779 F.2d 793 (2d Cir. 1984) (No. 85-7890) (factors to be considered in determining purpose of communication include content, audience to whom addressed, timing with regard to related proxy contest, and connection or common interest between speaker and proxy contestants). See also Brown v. Chicago Rock Island & Pac. R.R., 328 F.2d 122 (7th Cir. 1964) (finding advertisement that did not mention future proxy solicitation and did not solicit proxies was not solicitation under § 14(a) of the 1934 Exchange Act).
Although corporate managements may be closely regulated when they seek to elicit authorization from the firm's widely dispersed owners, it is doubtful, especially after the Supreme Court's decision in *Bellotti*, whether the state—even in the service of corporate suffrage—may bar communications directed to the public at large. The proxy rules themselves reflect some sensitivity to the dangers of regulating these public communications. Such piece-meal limitations on the applicability of particular rules, however, inadequately protect the first amendment right to communicate to the general public through the vehicle of the paid editorial advertisement, which is put at risk by the SEC's expansive interpretation of the "solicitations" governed by its proxy rules.

A good example of the problem is *Long Island Lighting Co. v. Barbash (LILCO)*. *LILCO* involved a political advertisement, published during a proxy contest, that criticized the management of LILCO and advocated its replacement. The advertisers included a candidate for public office (whose campaign was openly critical of LILCO) who was also a LILCO shareholder engaged in the proxy contest for control of the board. No mention of proxy solicitation or of the upcoming shareholders' meeting appeared in the advertisement; indeed, the advertisement was directed to LILCO's ratepayers and suggested that they would be better off if a state-run agency replaced current management.

LILCO, alleging that these advertisements were false and misleading, sought to enjoin further solicitation of proxies. Chief Judge Weinstein, for the district court, granted summary judgment to the defendant advertiser/solicitor on the ground that an advertisement appearing in a newspaper of general circulation that was


*Rule 14a-6(h) provides that solicitation "in the form of speeches, press releases and radio or television scripts... need not... be filed... prior to use or publication." 17 C.F.R. § 240.14a-6(h) (1989). Although prefiling is not required, definitive copies of the material must be filed no later than the date they are used or published. Moreover, the SEC has always permitted corporate spokespersons to answer questions from the press, so long as the questions were not "planted" by someone seeking proxies. See L. Loss, supra note 155, at 45.*

*779 F.2d 793 (2d Cir. 1985).*

*Id. at 794. Another group of defendants, the Steering Committee of Citizens to Replace LILCO, was attempting to replace LILCO with a municipally owned utility company. Id.*

*Id.*
not directly addressed to shareholders could not be a "solicitation" subject to the proxy rules. On appeal, the Second Circuit disagreed, concluding that the rules can apply to general and indirect communications to shareholders, and remanded for a determination whether or not this particular advertisement was a "solicitation" under the SEC regulations.

Although the constitutional issue was not reached in LILCO, any attempt by the SEC to apply its proxy rules to the political advertisement would seem highly problematic. LILCO involved a public utility company embroiled in political controversy; the advertisements themselves were "addressed solely to the public...mak[ing] no mention either of proxies or of the [upcoming] shareholders' meeting"; the issues were "quintessentially matters of public political debate...published in the middle of an election campaign in which LILCO's future was an issue" and the advertisers were critics of management (not entrenched incumbents or controlling shareholders able to exert undue influence on shareholders).

Even when corporate management is the speaker, state regulation of advertisements addressed to the public, making no reference to proxy solicitations, is in tension with Bellotti and Pacific Gas. Corporations are full-fledged speakers free to communicate their views to the public on any subject; the state may not seek to suppress these communications out of concern that they will be received by (and perhaps influence) shareholders in the audience. The first amendment necessarily restrains excessively paternalistic regulatory impulses. Reasonably skeptical shareholders among the public may be expected to distinguish even spirited general com-

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386 LILCO, 779 F.2d at 796.
387 Id. at 798 (Winter, J., dissenting).
388 Id.
389 Opponents of management cannot be afforded greater expressive latitude under the rules than supporters of the incumbent board of directors. Such disparate treatment would itself distort the dynamic of the debate and the flow of information to the shareholder electorate. Cf. NLRB v. Magnavox Co., 415 U.S. 322 (1974) (incumbent union cannot agree to limits on organizational literature because their rivals cannot be similarly restrained).
mentary from targeted messages that seek to motivate specific shareholder action.\textsuperscript{392} In my view, a communication that is directed to the general public (not corporate shareholders as such), that does not refer to proxies, board elections, shareholder meetings, proposed actions or the like, may not constitutionally be subjected to regulation as a "solicitation" within the meaning of the Exchange Act.

Some line-drawing is necessary to distinguish between communications directed to the general public and those which are part of a campaign to sway shareholders. Because of the presence of speaker expressive interests and the strong first amendment interest in shielding communications to the public from government scrutiny, the test should be as objective as possible, eschewing direct inquiry into motive. At least two factors present themselves. The first is the scope of the putative audience. If the audience for the message is limited to shareholders, this will ordinarily be strong evidence of a "solicitation" regulable by the SEC.\textsuperscript{393} The second is the timing of the communication.\textsuperscript{394} When a meeting has been scheduled, specific proposals and nominees are being considered, and opposing forces have engaged in a struggle for control—this is the time when shareholders' opinions will imminently influence decisionmaking, and it is essential that those shareholders have complete and accurate information. They are entitled to know precisely who is addressing them, and whether the speaker has an interest in the eventual decision\textsuperscript{395}—information of the sort required to be dis-

\textsuperscript{392} An analogy might be made to the distinction between publishers of subscription advisory newsletters and personalized investment advice. See supra text accompanying notes 320-28.

\textsuperscript{393} The issue cannot be decided by the choice of medium alone. Editorial advertisements, when published in media of general circulation, whether newspapers or other publications, or broadcast over television or radio, should be presumed not to be "solicitations" as long as they refrain from referring to proxies or shareholder votes. So, too, for direct mailings to populations which may include but are not limited to shareholders. However, letters—even if explicitly addressed to "Residents of Long Island" or "LILCO ratepayers"—may nevertheless be deemed solicitations if they are in fact sent only to shareholders.

\textsuperscript{394} It has been suggested that the SEC recognize a presumptive "safe harbor" from proxy regulation for shareholder communications if, for example, no specific shareholder meeting is pending within two months. Cherno & Zele my, supra note 368, at 972.

\textsuperscript{395} The rules already recognize that small groups of shareholders may consult each other without subjecting themselves to regulation. See 17 C.F.R. § 240.14a-3 (1989) (exempting from regulation—except for the rule against fraud—solicitations of not more than ten shareholders). The rule applies to nonmanagement solicitations only, and facilitates the align-
closed by the proxy rules. At this stage, the state’s justification for intruding upon the dissemination of expressive speech is at its strongest.

By contrast, when no meeting has been scheduled, the issues are only beginning to take shape, and the speaker is seeking to influence views on corporate affairs rather than induce impending shareholder action, the state is shorn of the corporate suffrage justification for regulating intracorporate communications. It has no cause for concern that an uninformed (or misinformed) vote will take place in reliance on the communications. When the meeting is scheduled, the parties (if they decide to do combat in the proxy arena) will have ample opportunity for campaigning under the watchful eye of the SEC; government will then be able to ensure that appropriate disclosures are made, at a time when a vote is imminent.

(iii) Preliminary Filing Prior to Distribution. In the securities advertising context, we concluded that prior restraints do not necessarily violate the first amendment.399 With the regulation of proxy solicitation, however, the state is burdening the rights of speakers engaged in expressive communications,397 and first amendment concerns cannot be so easily dismissed.

The SEC rules require those engaged in the solicitation of proxies to file all relevant materials in preliminary form and await SEC approval before they distribute copies to shareholders or engage in any “solicitations.”398 The waiting period before distribution permits the SEC to review the materials for compliance with disclosure requirements and to detect and challenge any false or misleading communications before they reach the shareholders. The government’s justification for imposing a prefiling requirement is undermined by the current selectivity of preliminary review,399


Although there may be little reason to fear that the SEC will be acting out of hostility to any particular point of view, Shiffrin, supra note 19, at 1265-67, there is cause for concern that the bureaucratic imperative of the agency will lead to excessive regulation of protected speech. See supra text accompanying notes 114-20.

Although the prefiling requirement persists, the actual review practice has been substantially changed. Since 1980, routine examinations of all preliminary materials have
however, and is weakened still further by the array of postexpression remedial weapons at its disposal in the event incomplete, false or misleading solicitation materials are distributed.\footnote{See L. Loss, supra note 155, at 459. The SEC recently amended the preliminary filing requirement to eliminate solicitations involving routine annual meetings partly in recognition that no substantive review is undertaken anyway. See supra text accompanying note 355. Moreover, where proxy contests are under way, definitive material is still subject to review. Indeed, the SEC may review definitive materials when it reviews the Form 10-K if it discovers material deficiencies or if opposing solicitations begin after the definitive materials have been filed. Amendments to the Proxy Rules, Exchange Act Release No. 25,217, [1987-88 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,211 (Dec. 21, 1987).}

Nevertheless, given the unique nature of the proxy mechanism,\footnote{See supra text accompanying notes 365-69.} justifying as it does substantial state regulation on behalf of shareholders vulnerable to long-distance, informational manipulation, these minimally intrusive prefiled requirements increase the regulatory burden on expressive speech only slightly.\footnote{This conclusion would not follow to the extent the agency's regulatory apparatus applies to instances where speaker interests outweigh more attenuated corporate suffrage concerns, i.e., expressive communications concerning corporate policy questions, but not directed at shareholder action at an upcoming shareholder meeting. See supra text accompanying notes 380-95. The rules already exempt speeches, press releases and broadcasting scripts. See supra text accompanying note 381.} Prefiling requirements of communications intended to influence shareholder action at a particular upcoming shareholder meeting, standing alone, do not violate the first amendment.

\textit{(iv) Rule 14a-8: Compulsory Inclusion of Shareholder Proposals.} Apart from the objective information disclosure requirements that are the backbone of the securities acts, the proxy rules contain one most unusual provision: rule 14a-8.\footnote{See supra note 355.} This rule, which requires corporations to include within the corporation's proxy statement (and, therefore, subsidize the dissemination of) disfavored proposals by qualifying shareholders,\footnote{For the view that rule 14a-8, 17 C.F.R. § 240.14a-8 (1989), is inconsistent with the SEC's regulatory mission and imposes costs on issuers (and the SEC) that outweigh its ben-} presents an interesting constitu-
tional issue concerning the speaker's right to refuse to distribute expressive messages with which it disagrees. Unlike nonexpressive disclosure documents, these shareholder proposals plainly involve expressive speech—often expressing heated political and ideological concerns of shareholders regarding issues of corporate governance.

Justice Stevens, dissenting in *Pacific Gas*, analogized the agency order in that case (compelling Pacific Gas to insert a third-party's adversarial communications into its billing envelopes) to the workings of rule 14a-8. In his view, the proxy rule is a clearly constitutional mechanism for providing access "for certain limited and approved purposes" to the shareholders.406

Should the first amendment (fiercely resistant, outside the sphere of advertising, to measures that attempt to compel an unwilling speaker to disseminate the views of others407) tolerate this rule mandating disfavored expressive speech in the shareholder proxy context? Justice Powell identified part of the answer in *Pacific Gas* when he observed that proxy contests involve intracorporate speech ("speech by a corporation to itself"408). When management speaks to shareholders, and shareholders speak to management and each other, all the speech is generated by members of a single enterprise. But more important, from a constitutional perspective, is the state's interest in ensuring that shareholders (who cannot reach their co-owners by simply attending the meeting) have access to the voting machinery. While it is true that any shareholder can undertake an independent proxy solicitation, such a process involves substantial expenditures of time, effort and money409 far beyond the resources of most shareholders.

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406 Justice Stevens is on the right track when he distinguishes these shareholder proposals from speech of a "commercial character." Id. at 39 n.8. However, it is the expressive nature of the compelled messages (rather than political content) that distinguishes these proposals from more commonplace nonexpressive informational notices concerning transactions, such as billing or credit terms and warning labels on dangerous products.

407 See supra text accompanying notes 197-200.

408 Pacific Gas, 475 U.S. at 14 n.10 (emphasis in original).

409 By contrast, a shareholder need have only one percent or $1,000 in market value of voting securities in order to qualify to submit a proposal under rule 14a-8, 17 C.F.R. § 240.14a-8 (1989). See supra text accompanying note 358.
The rule is, moreover, quite sensitive to the expressive rights of corporate management. Inclusion of a shareholder proposal in the proxy statement does not represent management endorsement of the proposal; it is, rather, a means of placing the item on the "ballot," as it were, for shareholder consideration. The corporation is not required directly to undermine its own position on any issue. No proposal concerning an election contest or in opposition to a current management proposal must be included, and management is free to urge shareholders to vote "no" on the shareholders' proposals. Finally, no shareholders' proposals can overwhelm the corporate management's message.

Given the rule's sensitivity to management's own expressive rights, its requirement that only bona fide shareholders who have demonstrated a minimum level of commitment to the enterprise may insist on inclusion of their proposals, and the state's legitimate regulatory interest in "fair corporate suffrage," rule 14a-8 should survive scrutiny.

(b) Scienter. Under current case law, corporate liability for violating rule 14a-9 has been premised on negligent conduct. However, Judge Friendly, writing for the majority in *Gerstle v. Gamble-Skogmo*, a leading case in the area, explicitly "left to another day" the question whether under certain circumstances strict liability for a false or misleading proxy statement would be permissible.

In my view, the level of culpability required for violations of the proxy rules should depend upon the remedy being sought. To the extent that shareholders were deceived or misled into executing proxies, a court should be able to enjoin the use of those proxies,

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410 See *supra* note 358.
411 See limitations on number and length of shareholder proposals, at *supra* text accompanying note 358.
413 478 F.2d 1281 (2d Cir. 1973).
414 Id. at 1301 (citing R. JENNINGS & H. MARSH, SECURITIES REGULATION: CASES AND MATERIALS 1358 (3d ed. 1972)). But see *Shidler v. All Am. Life & Fin. Corp.*, 775 F.2d 917 (8th Cir. 1985) (rejecting strict liability for innocent misstatements).
order a resolicitation with corrected materials, perhaps even "undo the deal" upon the simple showing that the original solicitation materials were materially false or misleading, irrespective of management's state of mind in issuing the material misstatement. After all, the state's purpose is to safeguard the shareholders' exercise of their franchise. Authorization obtained through such misstatements, however innocent, is meaningless and may be voided.415

Where civil or criminal penalties are sought against the solicitor, Gerstle seems to require at least a showing of negligence. Whether such a showing should be constitutionally adequate to impose liability is a close question. Expressive "fragility," the theoretical foundation of the Sullivan scienter standard,418 typically is not a significant factor in the context of proxy solicitations.417 On the other hand, factors arguing against liability on a lesser showing of culpability include the fact that reputational interests are rarely implicated,418 and the government is empowered to require resolicitation of proxies or rescission of the underlying transaction. On balance, however, proxy solicitation does not appear to be the kind of expression for which the first amendment demands the "strate-

416 An analogy might be drawn here to the NLRB's prior practice of overturning union representation elections marred by misrepresentation. Such elections were considered invalid because material misrepresentation violates the "laboratory conditions" thought necessary for ensuring rational employee votes for or against union representation. In 1982, the NLRB announced that it would no longer set aside the elections because of misrepresentations. See Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127 (1982).


418 Fragility of speech may be a problem in some cases involving solicitation by shareholders critical of incumbent corporate management or expressing minority views on controversial public issues. However, the rules cannot be different for promanagement and antimanagement factions. See supra note 389. In the more typical situation, since incumbent management and their often well-heeled challengers both seek to win a prize of great commercial value to the victor, their expression is likely to prove hardy.

419 The rules are not insensitive to reputational interests. See rule 14a-9(b), 17 C.F.R. § 240.14a-9(b) Note b (1989): "Material which directly or indirectly impugns character, integrity or personal reputation, or directly or indirectly makes charges concerning improper, illegal or immoral conduct or associations, without factual foundation" is an example of language which "depending upon particular facts and circumstances . . . may be misleading within the meaning of [the antifraud] section."

In the event libelous statements are circulated concerning contestants in a proxy battle, state law actions for libel (which, after Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), require at least some showing of fault) are available to redress injury.
gic protection for falsehood" provided by a Sullivan-type malice standard for liability.419

III. Is It Worth The Candle?

Professor Blasi suggests that, when considering the first amendment, courts should adopt "the pathological perspective."420 By this he means that the first amendment disputes of today should be resolved with the judicial eye firmly fixed upon the uncertain future. Someday, he reasons, we may find ourselves in a period of extreme ideological intolerance; at such a time, even the core values of the first amendment (e.g., the freedom to disagree with state policy, the freedom of the press from licensing and censorship) may be under attack. We will need a full-strength first amendment to protect us from the force of governmental censorship directed at those core expressive values. In order to ensure that the first amendment retains its full vigor in "the worst of times,"421 Blasi suggests, we must avoid diluting its impact today. Presumably, we risk such doctrinal dilution whenever we complicate, fragment and extend the scope of first amendment doctrine.422 Blasi considers the Court's current commercial speech doctrine (regarding commercial advertising)423 and the four-part test set forth in Central Hudson424 to be just such dilution and therefore "undesirable from the standpoint of the pathological perspective."425

Professor Schauer has expressed somewhat similar concerns

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419 Criminal penalties for negligent speech raise a much more difficult question and the imposition of such penalties would be controlled by general principles that limit the state's power to punish criminally offenses of negligence.

420 Blasi, supra note 24, at 449.

421 Id. at 450.

422 For this reason, Professor Blasi is disapproving of the gradual doctrinal development of the first amendment. Although he recognizes that "simplicity of analysis is not easily achieved in the realm of first amendment adjudication," he deplores the proliferation of "talk of levels of scrutiny and ambits of application." Id. at 471. See also Schauer, Codifying the First Amendment: New York v. Ferber, 1982 Sup. Ct. Rev. 285, 309 (suggesting that first amendment doctrine rivals in complexity the Internal Revenue Code).


425 Blasi, supra note 24, at 485. Professor Blasi believes that either full protection or no protection of commercial speech would be preferable to the Court's "middle of the road" approach in Virginia Pharmacy and Central Hudson. However, "no first amendment doctrine protecting commercial speech could be either uncomplicated or historically grounded." Id. at 477.
about the proper "architecture" of rules addressed to the first amendment. He "assert[s] rather than argu[es]" that, however it may be defined, commercial speech "lies outside the core or cores of the freedom of speech protected by the first amendment." He thus endorses Professor Blasi's admonition: "some existing first amendment rule [might] lose some of its strength because of the number of unacceptable applications it would generate when its new applications were added."

This somewhat pessimistic, risk-averse approach to first amendment doctrine strikes me as an inappropriate way to think about speech. This imagery of the "core" surrounded by periphery, presupposes a theory of the first amendment capable of generating an irreducible core without slighting other important values. Unless we are very sure of the validity of our reductionist theories, we risk diminishing the promise of the first amendment. By excluding from protection commercial and commerce-related expression, we risk depriving the public of necessary and valuable information concerning the unavoidable decisions of everyday life. Indeed, it seems reasonable to ask whether the political speech of various sparsely populated fringe groups really is more important to society than the handbills of labor picketers in DeBartolo, the law-

\[426\] Schauer, supra note 24, at 1181. Rulemakers should ask whether rules concerning particular substantive areas of law should operate in linear progression, as a flow chart or decision tree, or should the rules instead resemble a messy collection of potentially relevant concerns, available for use or nonuse depending on the circumstances of the case? Should the rules be set forth in advance of the occurrence of the problems with which they are to deal, or should the rules be worked out as, and only as, the problems actually arise?

\[427\] Id. at 1185. Professor Schauer's first amendment "has not one but several cores, [centering on expression] with respect to which government has demonstrated such a proclivity toward overregulation that compensatory underregulation is now necessary." Id. He would include in these cores political, religious (and other ideological), artistic, literary, scientific and academic communication. Commercial expression, he believes, "is not a central theoretical concern of the first amendment." Id. at 1186-87. If commercial speech is to be protected, however, it should be treated differently so that the full strength of the amendment can be retained for "core" expression. The "architectural" risk of this approach is the proliferation of subdivisions within the first amendment—a process that may undermine even core areas in the future. Moreover, increased doctrinal complexity may render first amendment principles "incomprehensible" to "non-legally trained front line soldiers in the defense of the important first amendment." Id. at 1200.

\[428\] Id. at 1194.

\[429\] Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485
yer's solicitation of Dalkon Shield victims in \textit{Zauderer},\textsuperscript{430} editorial advertisements directed to LILCO's ratepayers in \textit{LILCO}\textsuperscript{431} or the prescription drug pricing information in \textit{Virginia Pharmacy}.\textsuperscript{432}

Moreover, even if we agree that, for example, political expression and freedom of the press are paramount, these arguments concerning doctrinal dilution are based on a debatable empirical premise that we can most effectively protect such expression by refusing to extend the first amendment to new areas. It is by no means certain that the best way to implement the "pathological perspective" is narrowly to describe the circle of protected speech today.

Such a zone of doctrinal purity may not be the only, or even the optimal, buffer zone possible. By gradually expanding the "protected zone," we may foster in the American people a broader and deeper acceptance of first amendment principles. A society that takes as given the protected nature of a broad zone of expression might prove the most effective guardian of what Professors Blasi and Schauer consider "core" expression.\textsuperscript{433} And if that core is attacked, lines drawn some distance from the nerve center will be no less effective than fortifications just outside the gate. What, then, can be accomplished by withdrawing from that protected zone today, in advance of the first rifleshot?

Like the judgment muscles,\textsuperscript{434} the muscles that exercise and protect the freedom of expression may atrophy from disuse. People who habitually receive all varieties of information, and have developed expectations based on a robust and pervasively vigilant defense of their informational freedoms will feel most acutely the loss when those freedoms are threatened. Courts and social institutions accustomed to respecting the expressive rights of others in diverse contexts may be our best defense against repression in the worst of


\textsuperscript{431} Long Island Lighting Co. v. Barbash, 779 F.2d 793 (2d Cir. 1985).


\textsuperscript{433} Schauer, \textit{supra} note 24, at 1202; see also M. Redish, \textit{Freedom of Expression: A Critical Analysis} 7-8 (1984). Professor Schauer suggests that, if his architectural concerns are misplaced, "it would be important to move the lines of battle far away from the core, recognizing that possibly weaker defenses one hundred miles away from headquarters are often better than stronger defenses only three miles from headquarters." Schauer, \textit{supra} note 24, at 1202.

\textsuperscript{434} See \textit{supra} text accompanying notes 51-52.
times.

A better response to the danger of doctrinal dilution than a kind of first amendment triage is rededication to first principles, and to the goal of analytic clarity. When the Court arbitrarily limits the reach of the first amendment by establishing categories of second-class speech, we invite the very dangers Professors Blasi and Schauer rightly deplore. First amendment adjudication must follow the rule of principled justification. If we restrict truthful speech concerning lawful commercial activity today, we may one day reclassify as "low value" (and, accordingly, freely regulate) other subsets of hitherto fully protected expression.

Yes, in a Blasi-Schauer world the people have the right not to be disabled by state censorship in the course of lawful private decisionmaking—but not necessarily in the commercial arena. The first amendment protects the public's right to receive truthful information concerning lawful activity, but we can carve out substantial exceptions to the rule and casually countenance the withholding of such information in particular contexts.

If the first amendment is to be strong in the worst of times, it must be "in training" today and tomorrow. If it is to protect speakers and listeners from repressive government, the habit of vigilance must be deeply ingrained in both our people and our legal system. A truly "fit" and robust first amendment doctrine will suffer no diminution from being worked, and worked hard, to protect all the speech citizens in a system of limited government need to function as autonomous decisionmakers.

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No one values needless doctrinal clutter or complexity, and to the extent that Professors Blasi and Schauer deplore the proliferation of meaningless classifications of speech and open-ended, toothless balancing tests, I applaud their efforts. Indeed, analytical clarification, including the abandonment of rigid categorization of speech, is the goal (however imperfectly realized) of this Article. But to the extent that the pathological perspective and concern for doctrinal dilution imply that courts cannot deal with variations on a theme—apply general principles to specialized circumstances that justify special outcomes—I must disagree. Professors Blasi and Schauer criticize the spread of doctrinal "clutter" (meaning unnecessary complexity and detail), but they include within that concept complex, multicontextual first amendment analysis. The former should be avoided; the latter is unavoidable. And if our judges cannot be trusted to understand that speech in the context of the armed forces is different from speech uttered in a proxy contest, which is different from speech in a public school, which is different from speech by public employees, etc.—and to take into account the special justifications that may or may not exist for regulation—then they are unqualified for the bench.