1990

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ARTICLES

THE REGULATION OF SPEECH INCIDENT TO THE SALE OR PROMOTION OF GOODS AND SERVICES: A MULTIFACTOR APPROACH

Charles Gardner Geyh*

Beginning with the 1975 case of Bigelow v. Virginia, when the Supreme Court first intimated that it might afford first amendment protection to purely commercial speech, the implications of recognizing a constitutional right to disseminate or receive speech incident to the sale or promotion of goods and services has attracted more than its share of scholarly commentary. With a regularity rivalling the annual effusion of cherry blossoms on the banks of the Potomac River tidal basin, virtually every Washington spring since the year Bigelow was decided has brought with it one or more Supreme Court pronouncements on commercial speech, corporate speech, or private business speech; with each new revelation, cacophonies of commentators have offered their insights.

The last thing we need, you may therefore be thinking, is another commentator with insights to offer on the regulation of commercial speech or other speech incident to the sale or promotion of goods and services. The subject is, however, worth another look because, for all

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2. In this Article, commercial speech and speech incident to the sale or promotion of goods
the cases decided and articles written, no one has yet managed to figure out what is meant by the term "commercial speech," why such speech should receive less first amendment protection than other kinds of speech, or why it should receive as little protection as the Supreme Court has seen fit to give it. Nor has there been a systematic effort to explain how, if at all, the analysis applicable to commercial speech should apply to other speech incident to the sale of goods and services.

The problem is that speech incident to the sale or promotion of goods and services has a protean quality, rendering it difficult to define or characterize. First, the line separating speech in the commercial arena from speech in the noncommercial arena is nebulous. Human speech is sometimes directed toward making the world a better place, sometimes toward making a buck, and frequently toward a combination of both. Absent resort to arbitrary distinctions that elevate form over substance, the difference between speech incident to the sale of products, which possesses ideological overtones, and speech incident to the "sale" of ideas, which encourages product sales, is often difficult to discern. The Court has, however, resorted to such arbitrary distinctions by creating a special subset of speech incident to the sale of goods and services, called commercial speech, that is arguably limited to speech taking the form of commercial advertising or solicitation. The com-

and services are distinct concepts. Commercial speech is used as that phrase has been defined by the Supreme Court. Speech incident to the sale or promotion of goods and services, on the other hand, is a broader concept, that includes not only "commercial speech," but corporate speech, labor speech, what the Court has characterized as private business speech, and any other speech incident to doing business. No effort is made to give speech incident to the sale or promotion of goods and services a precise definition, because none is necessary. The concept is used simply as a reference point for discussion and does not alone serve as a basis for restricting or expanding the constitutional protection afforded speech.

Some confusion between the two concepts is unavoidable, particularly when the discussion turns to the possibility of revising the Supreme Court's definition of commercial speech to include a greater range of speech incident to the sale or promotion of goods and services. I have, however, done my best to keep such confusion to a minimum.

3. As discussed in greater detail infra at notes 131-60 and accompanying text, the Court has effectively abandoned efforts to characterize or define commercial speech with reference to the range of issues addressed by the speech, in favor of an approach that emphasizes form or context based distinctions, such as whether the speech includes a commercial proposition, or whether the speaker is commercially motivated and the speech is in the form of an advertisement and mentions a specific product. Board of Trustees v. Fox, 109 S. Ct. 3028, 3031-32 (1989) (Tupperware parties "propose a commercial transaction" and are therefore commercial speech, notwithstanding that the parties "also touch upon subjects ... such as how to be financially responsible and how to run an efficient home"); Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 66-67 (1983) (pamphlet addressing the benefits of using condoms as a means to avoid venereal disease was commercial speech notwithstanding that it discussed important public issues, because it was commercially
commercial speech subset is simultaneously too large in that it encompasses noncommercial information dressed up as commercial advertising,\(^4\) and too small in that it fails to encompass related variations of speech incident to the sale or promotion of goods or services, such as securities marketing,\(^6\) union picketing,\(^8\) or corporate image advertising.\(^7\)

Second, even assuming that one can identify commercial speech in an appropriate definition, it is difficult to determine the amount of constitutional protection it deserves, and why. Commercial speech is a hybrid of commerce and speech. It is related both to the sale of goods and services and to ideas about those goods and services. As it relates to the sale or promotion of goods and services, it occupies the so-called marketplace of goods and services, where government regulation is regarded as presumptively valid.\(^8\) On the other hand, as it relates to

motivated, was concededly in the form of an advertisement, and mentioned a specific product).


speech and ideological expression, it occupies the marketplace of ideas, where content-based government regulation has traditionally been regarded as inherently suspect.9

In certain respects, commercial speech is thus deserving of full first amendment protection and strict judicial scrutiny, while in other respects it is deserving of no first amendment protection and minimal judicial scrutiny. The Supreme Court has endeavored to resolve the problem by splitting the difference, affording commercial speech a "limited measure" of first amendment protection and an intermediate level of judicial scrutiny.10 It has done so, however, without providing a coherent explanation. Without a clear idea of why commercial speech should receive a "limited measure" of constitutional protection, it is difficult to determine whether "limited" should be a lot, or next to none.

The Court has developed a four part analysis of commercial speech restrictions that is at least relevant to ascertaining how much constitutional protection commercial speech receives: a government restriction upon (1) truthful commercial speech concerning lawful goods or services, must (2) directly further (3) a substantial government interest, and (4) be no broader than necessary to accomplish the government's objective, if the restriction is to pass muster under the first

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9. It was Holmes and Brandeis who introduced the concept of the marketplace of ideas to Supreme Court jurisprudence: "[T]he ultimate good desired is better reached by free trade in ideas—[and] the best test of truth is the power of the thought to get itself accepted in the competition of the market, and ... truth is the only ground upon which [society's] wishes safely can be carried out." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J. joined by Brandeis, J., dissenting).

Content based restrictions upon speech have long been subject to the strictest of judicial scrutiny. Police Dep't v. Mosley, 408 U.S. 92, 95-96 (1972) (government has no power to restrict expression because of its message, its ideas, its subject matter, or its content); Widmar v. Vincent, 454 U.S. 263 (1981) (the "most exacting scrutiny" is required in cases where the state undertakes to regulate speech on the basis of its content).

Whether, in a given case, the government's interest will be deemed substantial enough or the means chosen to further the government interest will be deemed direct and narrow enough, will depend in large part upon how seriously the Court takes the speech threatened by the government action at issue. The Court's four part test is thus highly malleable and may be applied to afford commercial speech considerable first amendment protection, or virtually none. Any hope for consistency returns us once again to the need for a fuller appreciation of how seriously commercial speech should be taken, i.e., why commercial speech is deserving of at least some—but only some—protection.

Section I of this Article traces the rise and unjustified decline of first amendment protection for commercial speech. The reason for the decline is that the Court has lost sight of the reasons that justify constitutional protection for commercial speech and speech incident to the sale or promotion of goods and services. Instead, the Court has begun to rely upon unsupportable reasons for limiting such protection. As a result, first amendment protection for commercial speech has declined and is at risk of being stripped of all constitutional significance. Whereas reduced judicial scrutiny of commercial speech regulation can be justified in light of a greater government interest in intervention, it cannot similarly be justified on the basis of a diminished constitutional interest in the speech itself.

In Section II, I discuss the consequences of diminished commercial speech protection. As commercial speech receives increasingly little protection, the distinction between minimally protected commercial speech and fully protected noncommercial speech becomes increasingly important. The problem, however, is that the distinction the Court has made is arbitrary. The result is that form is at risk of controlling substance: speech in the form of what the Court calls commercial speech is deemed less important and receives little protection, while speech of comparable purpose and effect is deemed more important and receives full protection because it is called noncommercial.

Finally, in Section III, I attempt to provide a more satisfactory framework for analyzing the regulation of speech incident to the sale or promotion of goods and services. Such an approach eschews the creation of artificially distinct lines separating commercial from noncommercial speech. Instead, it advocates a multifactor case-by-case analysis, in which the level of judicial scrutiny afforded the speech depends

upon the presence or absence of factors rendering government regulation more or less trustworthy or troublesome. Those factors include (1) the opportunity for timely expression of alternative viewpoints (the need for regulation may be greater where the opportunity for airing competing views is limited); (2) the extent to which truth or falsity can be objectively verified (regulation of objectively verifiable falsehoods presents less risk that the government is seeking to restrict access to truthful speech); (3) the presence of a commercial incentive to exaggerate product or service attributes (where such an incentive is present, the risk of consumer injury and the need for regulation may be greater); (4) the likelihood of audience manipulation (where speech threatens to impair the audience’s rational decision making processes, greater regulation may be appropriate); (5) the hardness of the speech (where the speaker’s financial incentive is such that the threat of regulation will not discourage the speaker from engaging in constitutionally protected expression, the consequences of regulation are less troublesome); and (6) the constitutional implications of compelling additional speech (where the audience, rather than the speaker, is the one whose first amendment interests are at issue, regulations compelling additional speech may pose less of a problem).

Through a case-by-case consideration of these factors, it should be possible to ascertain whether and how much first amendment scrutiny is appropriate for any given regulation of speech incident to the sale or promotion of goods and services—including, but not limited to, commercial speech. Although the analysis should be case-by-case in its orientation, some general observations are possible. Consistent with current Supreme Court interpretation, false speech per se is undeserving of first amendment protection, and the concerns that warrant a privilege of sorts to disseminate falsehoods outside the commercial sphere do not apply with equal force to speech within the commercial sphere (Section III A). The same may be said of deceptive speech, subject to the qualification that the definition of deception has first amendment implications, to the extent that it encompasses speech that misleads some, while conveying truthful information to others (Section III B).

The regulation of truthful speech, on the other hand, should not automatically be subject to less protection simply because it is incident to the sale or promotion of goods and services (Section III C). Content based regulations of speech in the commercial sphere, implemented for

12. *See infra* note 162.
reasons indistinguishable from those triggering strict scrutiny in the noncommercial sphere, should not receive a review any less exacting. There are, however, special justifications for government regulation of speech incident to the sale or promotion of goods and services. If applicable in a given case, such justifications may render the regulation inherently less suspect, and thus deserving of less searching scrutiny. Those special justifications, which are embodied in several of the six factors identified above, boil down to this: speech incident to the sale or promotion of goods and services, in the course of which transactions are proposed, may present unique opportunities for audience manipulation; such manipulation, in turn, impairs the audience's ability to rationally interpret information. In such cases, an assumption underlying the first amendment—that speech facilitates enlightenment—does not apply to the same extent; thus, greater regulation is justified. The four part analysis developed by the Supreme Court, providing limited scrutiny of commercial speech regulation, is properly applied in this context.

I. The Rise and Unjustified Decline of First Amendment Protection for Commercial Speech

In the normal course of first amendment analysis, when legislation regulating words, images or other expression because of their content is challenged as an abridgment of the freedom of speech, an important initial question is whether the words, images or other expression are of a type worthy of first amendment protection. If the answer is "yes", then the speech will be afforded full first amendment protection and the regulation will not be allowed to stand unless it is the least restrictive means available to serve a compelling government interest. This standard is so rarely met that it is tantamount to restating, for the benefit of lawyers uncomfortable with plain english, that the regulation will rarely, if ever, be allowed to stand. On the other hand, if the answer is "no"—which will be the case if the words, images or other expression can be pigeonholed into one of a limited number of categories, such as fighting words or obscenity—then the first amendment is inapplicable. In such a case, assuming the regulation of fighting words or obscenity bears a rational relationship to a legitimate government interest, the regulation will invariably survive minimal due process scrutiny,

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and be upheld. This standard is as easy to satisfy as the compelling government interest standard is difficult.\textsuperscript{14}

In short, when a content-based restriction on words, images or other expression is challenged on first amendment grounds, the question of whether the words, images or other expression constitute protectable speech is likely to be dispositive of the first amendment claim. Prior to the 1976 decision of \textit{Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council},\textsuperscript{16} commercial speech presented no special exception to this proposition. Like obscenity or fighting words, commercial speech (or at least commercial advertising) was deemed to fall outside the scope of the first amendment, presumably on the grounds that it did not implicate first amendment values to a sufficient degree, and therefore was not speech at all, was worthless speech, or was speech of such minimal constitutional worth that it should be subject to any rational government regulation.\textsuperscript{16}

Beginning with \textit{Virginia State Board of Pharmacy}, commercial speech was invited to join the first amendment club; unlike other forms of protectable speech, however, it was not permitted to become a full-fledged member. While it no longer shared a cell with snuff films, neither did it rub elbows with the Gettysburg Address. Rather, the Court's view was that commercial speech was entitled to some constitutional protection, but still remained subject to greater regulation than other forms of speech.\textsuperscript{17}

For the first time, the Court had created a specific category of truthful speech eligible for first amendment protection that could be regulated on the basis of its content without triggering strict judicial scrutiny. As the Court subsequently elaborated, laws imposing content-based restrictions upon commercial speech need not be the least restrictive means to accomplish a compelling government interest, but need

\textsuperscript{14} As reflected in the cases quoted in supra note 8, the regulation of business, i.e., nonexpressive commercial conduct, is a matter which the courts accord minimal scrutiny. To the extent a regulation is deemed to reach obscenity only, and not speech, it is simply another form of socioeconomic regulation. As one treatise puts it, in such a case "governmental regulation of obscenity would be deemed equivalent for constitutional purposes to governmental regulation of nonspeech activity, such as manufacturing or farming." I N. DORSEN, P. BENDER & B. NEUBORNE, EMERSON, HABER & DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 514 (4th ed. 1976).

\textsuperscript{15} 425 U.S. 748 (1976).


\textsuperscript{17} \textit{Virginia State Bd. of Pharmacy}, 425 U.S. at 771 n.24 ("commonsense differences" between commercial and noncommercial speech render the former subject to greater regulation).
only be no broader than necessary to further directly a substantial government interest.\textsuperscript{18}

The extent of the difference between the strict scrutiny applicable generally to content based restrictions of speech, and the intermediate scrutiny reserved for commercial speech regulation, is impossible to discern solely from the language of the two standards. Indeed, apart from the difference of unquantifiable degree between “compelling,” versus “substantial,” and “least restrictive” versus “no broader than necessary,” they are quite similar. The critical issue, therefore, is how the standards are to be construed and applied. To understand the decreased scrutiny afforded to commercial speech and the lower degree of protection it receives, it is necessary to understand why commercial speech is treated differently from other speech. Only then is it possible to assess how differently commercial speech should be treated.

Given that first amendment jurisprudence is commonly understood in terms of an accommodation between the competing interests of government and speech,\textsuperscript{19} the inferior position of commercial speech relative to noncommercial speech can theoretically be justified on the grounds that the speech interest is weaker, that the government’s interest is stronger, or both. As explained below, the first amendment should tolerate greater government interference with commercial speech than other kinds of speech on the basis of stronger government interest in regulation of commercial speech, but not on the basis of a weaker speech interest. The unjustified decline of commercial speech protection in the years following \textit{Virginia State Board of Pharmacy} is due in no small part to the unsupportable view that commercial speech is of minimal first amendment value relative to other kinds of speech and need not be taken seriously.

\textbf{A. Commercial Speech and First Amendment Protection}\textsuperscript{20}

There have been numerous attempts by notable scholars to isolate


\textsuperscript{20} I am going to do my best not to bog this Article down with a protracted discussion of the purposes served by the first amendment, or by picking an argument with those commentators and the minority of the Court who contend that commercial speech serves none of those purposes and should therefore be returned to its rightful place alongside obscenity and fighting words. It is not that an incisive discussion of first amendment values and a careful defense of commercial speech against the charge that it deserves no constitutional protection are irrelevant or unimpor-
the primary purpose of the first amendment and to delineate its outer boundaries in light of that purpose. Some have argued that the first amendment serves to facilitate government decision making and that speech having an insufficiently close relationship with the political decision making process is outside the scope of the first amendment.\textsuperscript{21} Others have contended that the purpose of the first amendment is to further self-realization, self-expression or self-fulfillment, and that speech irrelevant to that purpose is equally irrelevant to the first amendment.\textsuperscript{22} Others have urged that the purpose of the first amendment is to foster a marketplace of ideas, from which truth emerges victorious after a healthy competition among differing viewpoints.\textsuperscript{23} Still others regard the first amendment in functional terms, as a device that promotes social stability by "maintaining the precarious balance between healthy cleavage and necessary consensus."\textsuperscript{24} Finally, it has
dant; it is merely that they have already been undertaken in an extraordinary article by Professor Steven Shiffrin that I could not hope to improve upon. Shiffrin, supra note 3. Rather than try, I will simply refer the reader to his essay, and summarize here the reasons for concluding that commercial speech falls within the ambit of the first amendment.


\textsuperscript{22} Two of the most significant efforts to characterize the values underlying the first amendment as relating to self-realization or self-expression, have been propounded by Professors Baker and Redish. Professor Baker's approach, summarized \textit{infra} in notes 41-45 and accompanying text, has been developed over the course of several articles: Baker, \textit{The Process of Change and the Liberty Theory of the First Amendment}, 55 \textit{S. CAL. L. REV.} 293 (1982); Baker, \textit{Realizing Self-Realization: Corporate Political Expenditures and Redish's "The Value of Free Speech"}, 130 \textit{U. PA. L. REV.} 646 (1982); Baker, \textit{Press Rights and Government Power to Structure the Press}, 34 \textit{U. MIAMI L. REV.} 819 (1980); Baker, \textit{Scope of the First Amendment Freedom of Speech}, 25 \textit{UCLA L. REV.} 964 (1978) [hereinafter Baker, \textit{Freedom of Speech}]; Baker, \textit{Commercial Speech: A Problem in the Theory of Freedom}, 62 \textit{IOWA L. REV.} 1 (1976) [hereinafter Baker, \textit{Commercial Speech}]. Professor Redish's approach is described in Redish, \textit{The Value of Free Speech}, 130 \textit{U. PA. L. REV.} 591, 593 (1982). Although Professors Baker and Redish assign comparable names to their respective theories, their approaches are fundamentally different: whereas Redish views self-realization as an all encompassing value that subsumes the values advanced by politically based, marketplace and other approaches, Baker regards self-expression as a limiting concept that operates to exclude from first amendment protection speech that may be protectable under other theories. The focus of Professor Shiffrin's concern is upon the intolerance of unified theories toward first amendment values underlying competing unified theories, and the inability of any one approach to demonstrate that the values undergirding all the others are wrong. It is therefore Professor Baker's version of self-realization that exercises Shiffrin and is the focus of his criticism.


\textsuperscript{24} T. EMERSON, \textit{THE SYSTEM OF FREEDOM OF EXPRESSION} 7 (1970). This has been referred to as the "safety valve" function of the first amendment. M. NIMMER, NIMMER ON \textit{FREEDOM OF SPEECH} § 1.04 (1984).
been argued that seeking out the purpose or purposes of the first amendment is a fruitless undertaking, and that freedom of speech should be viewed as an end in itself.\textsuperscript{25} What then of commercial speech, or for the sake of a more concrete example, commercial advertising? Advertising may do no more than tell the audience what is being sold and at what price. But, it may also educate and inform the public on issues of science, technology, health, safety, law and government. It may comment upon social wants or needs and attempt to influence them; it may communicate conscious or sub-conscious reflections of popular culture. Often, advertising may provide the only practicable way for people of limited means to become aware of where they can buy the "necessities" of life at an affordable price—a parochial mission perhaps, but one that is, from the perspective of those struggling to pay the bills, prerequisite to pursuing any of the loftier objectives of speech.

In \textit{Virginia State Board of Pharmacy}, the Court implicitly brought several approaches to bear in justifying the recognition of limited first amendment protection for commercial speech. First, said the Court, commercial speech is relevant to government decision making: it is integral to the success of a free market economy, and as long as the United States employs a free market economy, understanding its operation is critical to the making of informed decisions concerning how it should be regulated.\textsuperscript{26} As critics have noted, however, it may be that economic efficiency is facilitated by the exchange of information concerning the wares for sale in the marketplace, but it cannot seriously be suggested that the promotion of economic efficiency and free enterprise are values underlying the first amendment.\textsuperscript{27} It is one thing to say that speech about the operation of a free market economy is relevant to informed government decision making, and quite another to say that speech incidental to the operation of the economy is similarly relevant (for the same reason that speech about obscenity serves to inform the electorate, while speech, or at least words, comprising an obscene utterance does not). The better point may be simply that commercial speech uttered in the context of buying and selling products and services often touches upon a variety of public issues relevant to political decision making. As the Court has noted, however, hinging constitutional pro-

\begin{itemize}
\item \textsuperscript{25} L. Tribe, \textit{supra} note 13, at 785.
\item \textsuperscript{26} Virginia State Bd. of Pharmacy v. Virginia Citizens Consumers Council, 425 U.S. 748, 765 (1976).
\item \textsuperscript{27} Shiffrin, \textit{supra} note 3, at 1226-27; Jackson & Jeffries, \textit{supra} note 21, at 11.
\end{itemize}
tection upon the presence or absence of “public” issues serves only to encourage speakers to add a “public” component to their speech, when they would not otherwise do so.28

Second, the Court emphasized that commercial speech is of central importance to the economic well-being of both speaker and listener. Thus, it arguably furthers some kind of self-fulfillment or self-realization.29 The fact that commercial speech is important because it may be integral to the economic survival of both the speaker and the audience does not of itself mean that it is important for reasons having anything to do with the first amendment. It is self-fulfillment derived from expression that is at issue. One approach to the self-expression theory posits that the self-expressive value to speech is lost if the speech is not a bona fide expression of self; that is to say, unless speech is freely chosen by the speaker, it is not legitimate self-expression.30 Under this approach, because commercial speech is essential to the speaker’s economic survival, it is a product of economic necessity rather than self-expression. It would, therefore, be undeserving of first amendment protection. A contrasting approach to self-expression or self-realization takes the self-fulfillment of the audience into account and recognizes the value inherent in receiving as well as imparting information.31 The latter approach would afford constitutional protection to commercial speech because of self-fulfillment the audience derives from receiving information, but not because of the economic value of the expression.

Third, concluded the Court, commercial speech makes a relevant contribution to the pursuit of the truth, or public enlightenment, in a marketplace of ideas.32 To the extent one subscribes to marketplace theory or one of its variations, it is difficult to argue that truthful commercial advertising does not communicate information of public interest that can make a meaningful contribution to the exchange of ideas.33

Assume for the moment that the Supreme Court has tried to prove too much in suggesting that commercial speech is protectable under all of these unified theories, and that first amendment protection can be justified under some theories, but not others. The all-important ques-

30. See Baker, Commercial Speech, supra note 22.
31. See Redish, supra note 22.
32. Virginia State Bd. of Pharmacy, 425 U.S. at 769-70.
33. Shiffrin, supra note 3, at 1256-57.
tion, for purposes of deciding whether the first amendment freedom of speech should apply to commercial speech thus becomes: which unified theory is correct? The answer, concludes Professor Shiffrin, is all and none. All are correct in identifying important purposes served and values furthered by the first amendment freedom of speech.\textsuperscript{34} None, on the other hand, is correct to the extent that particular purposes or values are extolled to the exclusion of all others.\textsuperscript{35}

In an effort to demonstrate the inherent inadequacy of unified first amendment theories predicated upon the proposition that there is an exclusive primary purpose or value underlying the freedom of speech, Professor Shiffrin undertakes a critique of two such theories that would counsel against affording commercial speech constitutional protection: the politically based approach, and at least one variation of the self-realization approach.

1. The Politically Based Approach

Articles by Judge Robert Bork and Professors Jackson and Jeffries argue that only political speech is protected under the first amendment freedom of speech.\textsuperscript{36} This approach postulates that the first amendment's specific reference to the protection of speech requires that the proper scope of speech be defined by reference to values uniquely related to speech.\textsuperscript{37} In other words, because speech (and not other conduct, activities, or undertakings) is singled out for special mention, there must be something about speech and speech alone that makes it deserving of constitutional recognition. To the extent that a value furthered by speech is also furthered by some other activity, that value neither justifies the special protection afforded speech nor explains why similar protection is not extended to the other activities that further the same value. Only political speech, these theorists argue, furthered values uniquely related to speech, because only political speech has no substitutes for the role it plays in facilitating informed decision making in a representative democracy. Artistic, cultural, scientific, and commercial speech may be valued by society, but the same is true of physical exercise, the practice of one's profession, and other forms of nonexpressive conduct. In other words, the values that adhere to nonpolitical speech are not uniquely related to speech; they are also advanced by certain

\textsuperscript{34} Id. at 1251-54.
\textsuperscript{35} Id.
\textsuperscript{36} Bork, supra note 21; Jackson & Jeffries, supra note 21.
\textsuperscript{37} Bork, supra note 21, at 23.
kinds of conduct. Their protection under the first amendment therefore necessitates the application of unprincipled value choices by judges.\footnote{38} Professor Shiffrin's response is two-fold.\footnote{39} First, accepting the premise that political speech alone is deserving of first amendment protection, commercial speech regularly contains information relevant to the political process. Commercial speech logically encompasses not only commercial advertising (which may itself address public issues of importance to the political process), but also speech arising in the context of labor disputes, securities marketing, and related forums in which issues pertaining directly to the economic future of the nation may be implicated. These issues clearly fall within all but a pointlessly narrow definition of political speech.

Second, and perhaps more important, Professor Shiffrin takes issue with the premises underlying a politically based approach. In Shiffrin's view, it is nonsensical to deny constitutional protection to nonpolitical speech for no better reason than that the nature of the judicial role may make it difficult for judges to apply the values underlying such speech in a "principled" way. Rather than the first amendment defining the proper scope of the judicial role, the politically based approach would have the proper judicial role define the scope of the first amendment. The net effect is that theoretical constructs of the judicial role achieve primacy in first amendment interpretation at the expense of both precedent and the concerns of the first amendment's framers. Moreover, Shiffrin continues, the model of the judicial role favored by the politically based approach is fatally flawed: there is nothing "unprincipled" about judges making value choices; indeed, value choices are unavoidable. For that matter, the politically based approach imposes its own value choices in concluding that the majority, i.e., the legislature, should have the right to direct the fate of all but political speech, a value choice that favors majoritarianism for its own sake.

It is inadequate to assert that only political speech possesses qualities that are unique to speech and that are not shared by various forms of activity or conduct. First, there is no reason to conclude that the first amendment, which protects the "freedom of speech" generally, protects only that speech furthering values uniquely related to speech. Second, nonpolitical speech may be regarded as unique, either because it simultaneously furthers a range of values in ways that conduct does not, or

\footnote{38. Id. at 25.}
\footnote{39. The following summary of Professor Shiffrin's critique of the politically based approach is drawn from Shiffrin, supra note 3, at 1225-39.}
because speech is more susceptible to unwarranted government regulation.  

Third, the values underlying political speech are no more unique to speech than the values underlying artistic, scientific or other speech. Various forms of political activity, such as licking envelopes or setting up chairs at a political convention, can further some of the same values as political speech.

2. The Self-Expression Approach

One variation of the self-expression approach to freedom of speech propounded by Professor C. Edwin Baker, places commercial and corporate speech outside the scope of the first amendment.  

Professor Baker's approach is grounded in a world view that places ultimate priority on human liberty and the individual's ability to choose her own way of life. Freedom of speech, in his view, is a vehicle for speakers to advance their pursuit of liberty through self-expression, provided that their speech is freely chosen. Commercial and corporate speech, under this theory, is not freely chosen. Rather, it is dictated by financial considerations and is therefore undeserving of first amendment protection.

Baker's argument for excluding corporate and commercial speech from constitutional protection focuses upon the value of the speech to the speaker, and takes no account of the first amendment interests of the listener. This is best explained in light of Baker's criticism of marketplace theory, which focuses upon the value of speech to the audience as a means to achieve enlightenment. In Baker's view, the notion that freedom of speech facilitates competition among ideas in which truth ultimately prevails is fundamentally flawed: objective truth, according to Baker, is unknowable. The marketplace theory implicitly concedes this by premising the need for a free market of ideas upon the notion that objective truth is unknowable to government. In addition, Baker chafes at marketplace theorists' suggestion that freedom of speech can properly be compromised by a balancing of interests. Rather, whenever speech facilitates self-expression and personal liberty, its value is to be

40. Art and music, for example, may fairly be characterized as furthering expressive values for both author and audience in ways that, say, manufacturing aluminum siding does not, professionally satisfying though it may be.
42. Id. at 7; Baker, Freedom of Speech, supra note 22, at 974-75.
respected as a matter of principle and is properly regulated only to the extent that it is coercive, thereby diminishing rather than enhancing liberty. Accordingly, the suggestion that commercial and corporate speech facilitates the listener's ability to pursue truth in the marketplace of ideas does not form a legitimate basis for affording such speech first amendment protection. Thus, the interest of the audience is not factored into Baker's analysis.

Shiffrin begins his critique of Baker's approach by arguing that Baker rests his theory on tenuous empirical foundations. Shiffrin critiques Baker's rejection of first amendment protection for commercial and corporate speech based upon the premise that the market, not the speaker, dictates the substance of such speech, and that the speech is thus not freely chosen. Although corporate and commercial speech is not likely to be antithetical to the speaker's economic interest, the speech may nonetheless be motivated by, or at least coincident with, the freely chosen views of the speaker or the speaker's shareholders. At the same time, if the basis for excluding speech from first amendment coverage is that the speech is not freely chosen, much of what is now considered to be noncommercial speech would, by virtue of being motivated by the speaker's concern for her economic well being, fall outside the scope of the first amendment.

The better starting place, Shiffrin suggests, would be to say that corporate or commercial speech is not designed or structured as a vehicle for self-expression. Even accepting, however, that corporate and commercial speech is not customarily viewed as a vehicle for self-expression from the speaker's perspective, Baker is ultimately unsuccessful in his effort to exclude such speech from first amendment protection under alternative approaches to the first amendment. Commercial and corporate speech are of general public interest for reasons touching upon a variety of first amendment theories, including self-fulfillment derived from the receipt of information, self-expression facilitated by the acquisition of information that may then be imparted to others, and the pursuit of truth.

As Professor Shiffrin points out, Baker's protestations that the absence of objective truth renders truthseeking an illegitimate first amendment objective, ring uniquely hollow in the context of speech on

46. Except as noted, the following summary of Shiffrin's critique of Baker, is drawn from Shiffrin, supra note 3, at 1245-51.
47. Id. at 1256.
the order of: "Wheat Chex stay crunchy in milk." And while one might respond that this is not the kind of "objective" truth with which the first amendment is concerned, such an argument implicitly draws an untenable, content based dichotomy between ideas and facts, with the former alone eligible for first amendment protection. No credible first amendment theory, including Baker's, regards this dichotomy as either practicable or desirable. Shiffrin is equally unsympathetic to Baker's criticism of balancing methodology, noting that balancing is nothing more than a process of accommodating competing values, and that everyone, including Baker, must engage in balancing. Moreover, Baker's brand of balancing has its own uniquely troubling facets, such as its sanctioning of defamation, public bestiality, and any other injurious speech or conduct, provided it is expressive and non-coercive.

Instead of embracing a single, unified theory of the first amendment, which would inevitably be incomplete and inadequate, Professor Shiffrin has adopted an eclectic approach. Such an approach is consistent with the Supreme Court's first amendment jurisprudence, and rests upon the recognition that there are several philosophical justifications for the freedom of speech, each of which has some value, though none of which is without flaw. Because marketplace theory would offer commercial speech first amendment protection for reasons Shiffrin finds persuasive, he spares it the attack levelled at these other two less tolerant approaches. In rejecting all unified theories, however, Shiffrin implicitly recognizes that marketplace theory alone is likewise inadequate to explain or justify all relevant application of the first amendment. Apart from the previously discussed question of whether the marketplace is capable of ascertaining objective truth, which as Shiffrin notes is a concern of limited relevance to speech in the commercial sphere, critics of marketplace theory have correctly identified a number of market imperfections that impair the market's potential to facilitate enlightenment. One such flaw, addressed in detail in section III, is the capacity for audiences to be manipulated by speech for reasons independent of the rational, persuasive force of what is said. In Shiffrin's view, because commercial speech contributes to pursuit of truth in a marketplace of ideas (and because it contributes to the self-realization of the listener), commercial speech is properly included within the ambit of the first amendment.

48. Id.
49. Id. at 1251-56.
50. Id. at 1251-53.
B. Justifying Diminished Constitutional Protection for Commercial Speech on the Grounds of a Stronger Government Interest

Accepting that commercial speech is entitled to first amendment recognition for the foregoing reasons, how much recognition does it deserve, and why? In the normal course of first amendment analysis, such a question would prompt the well settled reply that if it is speech protected by the first amendment, it is fully protected and may not be prohibited because of its content, unless prohibition is the least restrictive means to accomplish a compelling government interest. Such is not the case, however, with commercial speech, and for good reason. But understanding why content-based regulation of commercial speech need not be subjected to scrutiny as exacting as comparable regulation of noncommercial speech is essential to assessing the level of scrutiny that commercial speech regulations are properly due.

The regulation of commercial speech occupies a gray area between the presumptively invalid regulation of speech, and the presumptively valid regulation of goods and services. The regulation of speech content generally gives rise to a suspicion that the purpose or effect of the government's action is improper or unjustifiable, a suspicion that is almost impossible to dispel. Conversely, while regulation of commercial


52. See Virginia State Bd. of Pharmacy, 425 U.S. at 760 (quoting Bigelow v. Virginia, 421 U.S. 809, 826 (1975) ("the 'relationship of speech to the marketplace of products or services does not make it valueless in the marketplace of ideas' ")). The debate over whether commercial speech is deserving of any first amendment protection has tended to focus upon whether commercial speech is more akin to commercial conduct that does not implicate first amendment values, see, e.g., Bork, supra note 21, at 25; Jackson & Jeffries, supra note 21, at 18, or to speech presenting information of public interest sufficient to justify constitutional protection, as the Court concluded in Virginia State Board of Pharmacy.

53. Ordinarily, when the government decides that a speaker may not speak because members of the audience may find the speaker's message persuasive and act upon it to their detriment, the government puts itself in an almost indefensible position. The government must believe either that it would not be in the public's interest to accept and act upon the speaker's message; or that it would not be in the government's interest for the public to accept and act upon the speaker's message, regardless of where the public interest may lie. In the former case, the suppression of speech is grounded upon the unstated premise that the public cannot be counted upon to weigh differing viewpoints rationally and to decide for itself what is in its best interest and is better left in ignorance. In the latter case, naked self-interest motivates the government to silence viewpoints contrary to its own. In either case, the reasons for regulation are anathema to just about everything for which the first amendment stands.

The assumptions underlying skepticism embodied in the first amendment toward government regulation of speech content are at least two-fold. One assumption is that more information rather
speech and other speech incident to the sale or promotion of goods and services gives rise to the same suspicion, it is a suspicion that is easier to dispel. First, there is less reason to worry that government regulation is for the wrong reasons; second, there is less reason to be concerned about the consequences of government regulation.

1. The Reasons for Government Regulation of Speech Incident to the Sale of Goods and Services are Less Troublesome and Easier to Verify

a. Limited Opportunity for Competing Views

The reason for government regulation of speech incident to the sale of goods and services is limited for two primary reasons. First, there is a lesser opportunity for competing viewpoints to be presented. Second, the government has no monopoly on truth, and so has no legitimate business limiting access to information as a means to manipulate the public's thinking and protect the public from itself.

Second, the government has no monopoly on truth, and so has no legitimate business limiting access to information as a means to manipulate the public's thinking and protect the public from itself. Red Lion Broadcasting Co. v. Federal Communications Comm'n, 395 U.S. 367, 390 (1969) ("It is the purpose of the first amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the government itself or a private licensee."); Shiffrin, supra note 3, at 1256-61; J.S. Mill, On Liberty 18 (D. Spitz ed. 1975) (1859) ("[T]he opinion which it is attempted to suppress by authority may possibly be true. Those who desire to suppress it, of course deny its truth; but they are not infallible. They have no authority to decide the question for all mankind, and exclude every other person from the means of judging.").

54. In the following section, and for that matter throughout this Article, generalizations are made about the characteristics of speech incident to the sale or promotion of goods and services, and I am comfortable with the accuracy of those generalizations. On the other hand, the scope of speech incident to the sale or promotion of goods and services is broad—broader than commercial advertising and broader than what the court has identified as "commercial speech." Given the expansive character of such speech, my generalizations will often, if not invariably, have exceptions.
sale of goods and services is often the same as for the presumptively valid regulation of goods and services themselves. The sale of goods and services is commonly regulated to prevent economic and physical injury to the public caused by dangerous or defective products and services, products or services that do not meet consumer expectations, and anti-competitive product sales practices.\textsuperscript{55} Speech incident to the sale of goods and services can precipitate the same kind of consumer injury. For example, a soft drink bottle that explodes in the consumer's hands causes the same injury, whether the bottle explodes spontaneously, or because the consumer shakes the bottle before opening it, as recommended by the manufacturer in its advertising.

In general, with respect to the regulation of speech, the fact that the government may properly ban a particular activity, such as the violent overthrow of government, does not mean that it may properly ban speech about that activity, notwithstanding that both bans may be motivated by the same concerns, e.g., keeping the peace and protecting the public from injury.\textsuperscript{56} But speech incident to the sale of goods and services is different from general speech. One assumption underlying skeptic

focussed upon at any length in this piece, but which does not conform to several of the generalizations I have made, is speech that implements, rather than proposes a commercial transaction. In such cases—as, for example, the reporting of commercial credit information—the speaker's economic motivation enhances rather than hinders the prospects for accurate communication, as compared to speech proposing commercial transactions, where the speaker has a financial incentive to exaggerate product or service attributes. Similarly, speech implementing commercial transactions is not necessarily a call to action, and so does not engender the risk of precipitous audience action that speech proposing transactions may. At the same time, other generalizations such as the hardness of the speech and the absence of opportunity for opposing views may apply as much or more so to speech implementing commercial transactions.

In assessing the propriety of restrictions upon the content of speech possessing some but not all of the characteristics justifying greater government regulation, applicable characteristics should be taken into account in deciding whether reduced judicial scrutiny is appropriate, while the inapplicable should be ignored.


\textsuperscript{56} Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (invalidating criminal syndicalism statute, on the grounds that the advocacy barred by the statute was not properly limited to that likely to incite or produce imminent lawless action).
ticism toward government regulation of speech is that the public is capable of deciding what is in its best interest. Another is that freedom of speech will, in the absence of regulation, encourage robust debate generating information sufficient to permit the public to make the right choice, e.g., to eschew violent overthrow of government as a poor idea. The nature of speech incident to the sale of goods and services is such, however, that there is often little opportunity or incentive for the airing of more than one point of view before the listener reaches a decision and takes action.

Commercial advertising, for example, is by its nature a call to action. Often it will contain specific time parameters within which the listener must act. To the extent that an advertiser provides listeners with inaccurate, misleading or incomplete information, the capacity of the "marketplace" to generate alternative or supplemental views is greatly circumscribed. The listener is being explicitly or implicitly encouraged to respond promptly to the advertiser's call to action, and may do so before an alternative view can be presented. Moreover, the

57. See supra note 53 and accompanying text.
58. Commercial speakers have every incentive to emphasize the good things about their products while ignoring the bad, which is no less true of noncommercial speakers who are seeking to "sell" their ideas. Unlike the noncommercial sphere, however, where as previously noted, it is ordinarily assumed that incomplete or wrongheaded speech will ultimately be corrected by more speech, see supra note 53 and accompanying text, an almost contrary assumption pervades the regulation of speech in the commercial arena. Thus, for example, the Federal Trade Commission has long prohibited half truths or material omissions as deceptive. P. Lorillard Co. v. Federal Trade Comm'n, 186 F.2d 52, 58 (4th Cir. 1950) ("To tell less than the whole truth is a well known method of deception; and he who deceives by resorting to such method cannot excuse the deception by relying upon the truthfulness per se of the partial truth by which it has been accomplished."); Katherine Gibbs School, Inc. v. Federal Trade Comm'n, 612 F.2d 658 (2d Cir. 1979) (failure to disclose material information may cause an advertisement to be deceptive even though it does not make false statements as such); Sterling Drug, Inc. v. Federal Trade Comm'n, 741 F.2d 1146 (9th Cir. 1984); Simeon Management Corp. v. Federal Trade Comm'n, 579 F.2d 1137 (9th Cir. 1978). A half truth is capable of deceiving, however, only to the extent that the listener is not exposed to the other half of the truth. Implicitly then, the Federal Trade Commission's regulation of such speech proceeds under the assumption that listeners will not have sufficient access to alternative viewpoints to allow for the truth to emerge before action is taken.
59. "When I write an advertisement, I don't want you to tell me that you find it 'creative.' I want you to find it so interesting that you buy the product. When Aeschines spoke, they said, 'How well he speaks.' But when Demosthenes spoke, they said, 'Let us march against Philip.'" D. Ogilvy, Ogilvy on Advertising 7 (1985).
60. Indeed, the listener may be prompted to act before the government has an opportunity to intercede and silence the speech, let alone prepare and disseminate a competing viewpoint. For that reason, the Federal Trade Commission, for example, is empowered to obtain preliminary injunctions in federal court, pending administrative actions for cease and desist orders. 15 U.S.C. § 53(b) (1988); see Federal Trade Comm'n v. Food Town Stores, Inc., 539 F.2d 1339 (4th Cir. 1976).
advertiser has unparalleled access to information about the product being advertised, information that other potential speakers do not possess and can obtain only at considerable expense. When the expense is coupled with the downside risk to competitors of “casting the first stone” in a counter advertising campaign, there is often insufficient incentive to present an alternative view.61

When speech favoring the violent overthrow of government crosses the line between advocacy and incitement, when it is on the verge of instigating a riot, and when no opportunity for reflection or further exchange of views is possible before action is taken, the Court has long held that the “clear and present danger” justifies government action in halting the speech.62 Advertising likewise may incite consumers to take action resulting in injury before an exchange of views can occur. Concededly, there is a distinction to be drawn between rioters and shoppers (except, perhaps, on the day after Thanksgiving). The public threat posed by a charismatic with a bullhorn working a crowd into a froth is different in degree and kind than that posed by a television spot presenting a one-sided view of why consumers should buy shorts at Sears. In the latter case, potential injury is obviously less imminent and less extreme; nevertheless, the same concern over the inadequate opportunity for an exchange of views that justifies government intervention in cases of clear and present danger should justify intervention in advertising, albeit to a lesser extent.

b. Objectively Verifiable Reasons for Government Intervention

Speech incident to the sale or promotion of goods and services is often persuasive speech calculated to convince listeners that they should

61. In an excellent article published in 1978, Professor Robert Pitofsky discussed the disincentives for advertisers to challenge each other’s advertising campaigns in court. Pitofsky, Beyond Nader: Consumer Protection and the Regulation of Advertising, 90 Harv. L. Rev. 661 (1978). Since that time, advertisers have begun to sue each other in exponentially increasing numbers, notwithstanding the disincentives that Professor Pitofsky identifies. Nevertheless, there are additional disincentives to challenging a competitor’s advertising in the mass media that do not apply to doing so in court, among them being the risk of appearing unduly negative to consumers, and reinforcing name recognition of the competitor’s brand by using it in counteradvertising.

62. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., joined by Holmes, J., concurring) (“[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.”). The clear and present danger rationale may be seen as a categorical or definitional balancing of interests in which quelling speech is the least restrictive means to accomplish the government’s compelling interest in avoiding a riot.
buy a particular good or service. A consumer may take any of a variety of factors into account in deciding what products or services to buy, including, but not limited to, price, quality, convenience, personal preference, and "value added" considerations. The common bond among these factors is that they relate to the intrinsic or comparative benefits attributable to a product or service. Speech seeking to persuade listeners to buy given products or services can thus be expected to focus upon product or service characteristics: "Buy brand X cereal, because it is priced at $2.95 a box; because it is high in fiber and eating it as part of a high fiber diet may help reduce your risk of cancer; because it comes in handy individual serving size packets; and because it tastes good."

As the foregoing example illustrates, statements concerning product or service characteristics are more often than not objectively verifiable: either the cereal is priced at $2.95 and is sold in individual serving packets, or it is not. The indisputable truth can be readily ascertained. Consequently, the Court has identified the objectively verifiable character of commercial speech as one of the "common-sense differences" separating it from noncommercial speech.

Commentators critical of the Court's "common-sense" distinction argue that commercial speech is not always objectively verifiable. In the cereal ad hypothetical, for example, whether dietary fiber assists in cancer prevention remains open to scientific debate and is not currently subject to "verification." Moreover, whether a cereal tastes "good" is a matter of subjective preference immune to objective measurement. But that misses the point. We are dealing in "common-sense" general impressions here, not mathematical axioms, and the fact that less than all speech in the commercial arena may be subject to objective verification does not refute the accuracy of the generalization, or eviscerate the utility of the distinction to the extent it applies.

The government has an important interest in preventing and reducing the risk of physical and economic injury to the public. False,
deceptive, misleading and manipulative statements about products or services may precipitate physical and economic injury to consumers; as suggested in the preceding section, the marketplace cannot always be counted upon to counter such statements and provide consumers with the timely information they need to avoid injury. A lingering concern, however, is that the government may be attacking particular statements for the purpose of imposing its own perverse views of truth on the public, rather than preventing physical or economic injury.

That concern is partially dispelled to the extent that the statements the government challenges are objectively verifiable. If, for example, the government challenges a statement as untrue and likely to cause injury because it is untrue, it is easier to take the government at its word when the falsity of the statement under attack can be independently ascertained. Speech incident to the sale of goods or services tends by its nature to focus upon product or service characteristics. Statements about product or service characteristics tend to be objectively verifiable in nature. When the government seeks to silence statements that are not objective ("Cereal X tastes good" may be an example), suspicion concerning the government's motives is not allayed.

66. See supra notes 55-62 and accompanying text.

67. Traditionally, representations actionable as unfair, deceptive or defamatory have been limited to representations of fact. Statements of opinion have been exempted from exposure to liability for common law misrepresentation, deception under the Federal Trade Commission Act, or false representations under the Lanham Trademark Act. Presidio Enters., Inc. v. Warner Bros. Distrib. Corp., 784 F.2d 674, 678-83 (5th Cir. 1986) (puffery is not actionable under common law or state Deceptive Trade Practices Act); Carlay Co. v. Federal Trade Comm'n, 153 F.2d 493 (7th Cir. 1946) (puffery is not actionable under the Federal Trade Commission Act); 15 U.S.C. § 57(a)(1) (1988) (limiting actionable representations in advertising or promotion under the Lanham Act to misrepresentations of fact); Data Cash Sys., Inc. v. JS & A Group, Inc., 223 U.S.P.Q. 865 (N.D. Ill. 1984) (defendant's advertisement of computer chess program as "new" and "like playing Karpov" is puffing and not actionable under the Lanham Act).

The two-fold explanation for exempting statements of opinion or puffing from regulatory action has been that such claims are "not capable of objective measurement," and that no reasonable consumer would believe them. Pitofsky, Federal Consumer Legislation, 28 Bus. Law. 289, 294 (1973). To these may be added a third, offered by Judge Goldberg in the above cited Presidio Enterprises case:

Opinions and beliefs reside in an inner sphere of human personality and subjectivity that lies beyond the reach of the law and is not subject to its sanctions. . . . [A]ctions for fraud or misrepresentation must be based on objective statements of fact, not expressions of personal opinion. The law wisely declines to tread in the latter area because, in some deep sense, "everyone is entitled to his own opinion."

784 F.2d at 679.

The point worth emphasizing is simply that the government has tended not to take action against the expression of opinion in the commercial arena, for reasons independent of, though not entirely unrelated to, concerns underlying the first amendment. One notable exception, where
the other hand, when the government challenges the veracity of an objective statement concerning a product or service characteristic, and when that characteristic is rendered difficult to prove true or false because available evidence is incomplete or contradictory ("Cereal X is high in fiber and may reduce your risk of cancer"), the nature of the claim may still partially alleviate concerns over government motives. If there is an objectively verifiable basis for the government’s position that the claim is false, and if it is clear that the public, due to an insufficient opportunity for corrective counter-speech, may suffer physical or economic injury if the government’s position is correct, then there is less cause for concern that the government objective is to suppress truth rather than to prevent otherwise unavoidable public injury.

opinion is actionable, has been in cases where the speaker may be imputed to have special knowledge by virtue of education, training or position. Where, for example, a physician renders a medical opinion, the physician’s training and experience are such that it is reasonable for a patient to rely on the physician’s judgment; moreover, there is an objective basis upon which to evaluate the reasonableness of the physician’s opinion, thus infusing the opinion with the objectively verifiable quality lacking in most puffery. Presidio Enterprises, 784 F.2d at 679-80. See also Hedin v. Minneapolis Medical & Surgical Inst., 62 Minn. 146, 64 N.W. 158, 159 (1895) (medical opinion is actionable in deceit).

68. Thus, for example, the Food and Drug Administration ("FDA") has proposed to limit the scope of permissible health claims that may be made for food products. The line FDA has drawn falls far short of permitting any claim that is not demonstrably false. Rather, FDA’s current proposal is to create a safe harbor for an extremely limited group of well substantiated claims, and to put manufacturers on notice that claims outside the safe harbor "will be at significant risk of regulatory action by FDA." Draft Public Health Message Final Rule at 14 (August 31, 1988) (This draft has been informally circulated but has not been formally published in the Federal Register. The FDA’s notice of proposed rulemaking was published in 52 Fed. Reg. 28843 (1985) (to be codified at 21 C.F.R. pt. 101) (proposed August 4, 1987). A copy of the draft final rule is on file with the University of Pittsburgh Law Review).

FDA’s draft final rule may survive first amendment scrutiny under either of two approaches. First, consumers may assume that manufacturers would not tout the health benefits of their products on food labels unless their claims were substantiated by a quantum of evidence comparable to that required by FDA. To the extent that manufacturers make claims based on less substantiation than consumers have reason to expect, the claim is misleading, notwithstanding that the claim may ultimately prove to be true. See Federal Trade Commission, Policy Statement Regarding Advertising Substantiation, 49 Fed. Reg. 31000 (August 2, 1984) (advertiser’s failure to possess prior substantiation constituting a reasonable basis for objective product claims is an unfair and deceptive trade practice; advertising stating or implying that the advertiser possesses a particular level of substantiation for a product claim, must be supported by the stated or implied level of substantiation).

Second, one may view the draft final rule as a restriction on potentially deceptive speech, which unlike deceptive speech is deserving of constitutional protection. Friedman v. Rogers, 440 U.S. 1, 13 (1979); Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447 (1978). FDA’s insistence upon an elevated level of substantiation has an objectively verifiable basis—namely, the scientific uncertainty surrounding the validity of most health claims. Accordingly, even though the truth or falsity of given health claims may be open to question, FDA’s objective in restricting health claims is
c. Commercial Motivation of the Speaker

The importance of the speaker's commercial motivation as a factor justifying greater government regulation of commercial speech is easy to overstate. It is, nevertheless, a relevant consideration contributing to the ultimate conclusion that commercial speech may properly be regulated more closely than noncommercial speech.

It has been correctly observed that all kinds of speech can be commercially motivated. But for the fact that it helped pay the rent, the world might never have been blessed with Shakespeare's *Hamlet*, John Rawls' *A Theory of Justice* or Spinal Tap's *Lick My Love Pump* (as with most blessings, this one too is mixed). In these cases, however, the speaker's commercial motivation does not threaten to skew the speech in such a way as to cause the kind of injury that the legislature may have a legitimate interest in preventing. Shakespeare, Rawls, and Spinal Tap may have had a financial incentive to present their speech in such a way as to maximize their profits, but it is impossible to say how that motivation may have affected the content of their speech and what, if any, public injury could have resulted.

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70. It would be facile to say that the influence of the profit motive on speech as product is altogether unpredictable. A socialist newspaper sold primarily to a socialist audience has a financial incentive to advocate socialist ideas. The relevant point, however, is that it is neither possible nor appropriate to assess the extent to which the ideas espoused by the newspaper are born of political ideology or economic necessity.

In this regard, it is useful to compare Perma-maid Co. v. Federal Trade Comm'n, 121 F.2d 282 (6th Cir. 1941), and Scientific Mfg. Co. v. Federal Trade Comm'n, 124 F.2d 640 (3rd Cir. 1941). In the former case, a manufacturer of stainless steel cookware was ordered to cease and desist from disseminating pamphlets that made false representations as to the supposed harms associated with aluminum cookware, and the court of appeals affirmed. In *Scientific Manufacturing*, on the other hand, the author of the pamphlets disseminated by Perma-maid was likewise ordered to cease and desist, but the court of appeals set the order aside. The author had a commercial interest in selling the pamphlet to the public (including Perma-maid), but no commercial interest in selling cookware. The court was of the view that the Federal Trade Commission Act authorized the FTC to order false or deceptive speech to cease and desist only to the extent that such speech was made by one in the affected trade, and that a contrary interpretation would run afoul of the first amendment.

By virtue of being in the relevant trade, Perma-maid had an economic incentive to exaggerate the virtues of its products and the pitfalls of its competitors' products; and utilizing Scientific Manufacturing Company's pamphlets was one means to do so. Scientific Manufacturing, in con-
With speech incident to the sale or promotion of goods and services, however, we are not concerned with speech as the product or service being sold, but with speech as a vehicle for encouraging or implementing the sale of some other product or service (recognizing that the product or service being sold may include speech, as in the case of a legal opinion letter). Here, the commercial motivation will incline the speaker to skew the content of speech in a particular direction—toward putting the product or service in its best light. The problem, of course, is that if the product's best light is not bright enough to sell the product, the speaker has an incentive to resort to false, misleading or manipulative speech, which can result in economic or physical injury that the legislature has every right to prevent.

Financial gain is only one of several motivations that may cause a speaker to distort the truth—jealousy, spite, and political ambition are others. Unlike other motivations, however, financial gain is fairly predictable in certain contexts. It is safe to presume that a speaker who profits from the sale of a product she exhorts the public to buy is motivated at least in part by financial gain; in contrast, while one may always harbor suspicions, it is difficult to make comparable presumptions when speech is motivated by jealousy, spite or political ambition.

The relevance of the speaker's economic motivation should not be overstated. It may be that economic self-interest can safely be presumed to encourage exaggerated and therefore misleading representations in the context of speech incident to proposing commercial transactions, while comparable presumptions concerning the impact of other motivations on other kinds of speech cannot ordinarily be made. But that is not always the case. One could surely argue, for example, that a candidate's political self-interest just as predictably encourages exaggerated and misleading political speech. Even so, however, that would not justify as much government interference with political speech as with commercial speech. As discussed elsewhere in this section, there

trust, was not in the business of selling cookware. To be sure, it had a financial interest in selling pamphlets, and to the extent one of its major clients—Perma-maid—would only buy those pamphlets if they contained inflammatory remarks about aluminum cookware, Scientific Manufacturing had a financial incentive to make such remarks. Nevertheless, the point remains that the motivations underlying the sale of speech as product are more complicated and unpredictable than the motivations underlying the sale of products generally. It is safe to assume that the speech of a pot and pan seller, such as Perma-maid, on the subject of the pots and pans it is offering for sale, will be influenced by its interest in selling pans. It is impossible to assess the extent to which Scientific Manufacturing was operating out of an interest in alerting an unsuspecting world to the dangers of aluminum, and to what extent it was simply pandering to its buyers.
are a variety of reasons for regulating commercial speech more closely than noncommercial speech that have nothing to do with the speakers' underlying motivations.

In short, the speaker's economic self-interest is simply one of several factors that, taken collectively, justify increased government regulation of speech incident to the sale of goods and services. Greater regulation is properly tolerated when the speaker has a commercial incentive to present an exaggerated or one-sided view of product or service characteristics; when listener acceptance of that view may result in economic or physical injury; when there is insufficient opportunity for listeners to be provided with the information needed to avoid physical or economic injury; and when the government regulates such speech for the purpose of protecting listeners from physical or economic injury. Government intervention is not justified, however, for purposes of restricting public access to information so the government may impose its own biased views of what is true or best for the public.

d. Opportunity for Manipulation of the Audience

Speech incident to the sale or promotion of goods and services is ordinarily calculated to elicit the patronage of listeners, at least to the extent that the speech is uttered in connection with proposing, rather than implementing, commercial transactions. In such cases, the listener is being encouraged, directly or indirectly, to part with her property—usually money—in exchange for a product or service. The product or service at issue represents an immediate and tangible benefit of the exchange. In contrast, the benefits associated with "buying" what noncommercial speech is "selling"—e.g., a political viewpoint—tends to be more remote and intangible. The immediate and tangible benefits of acting upon an invitation to engage in a commercial transaction ordinarily relate to the satisfaction of physical, financial or psychological needs of the purchaser. Such appeals to nonrational human needs

71. It is useful to distinguish the nonrational needs satisfied by commercial transactions from the speech encouraging purchase of goods or services that satisfy those needs, which may make a perfectly rational appeal: e.g., "I will sell you your life saving medication at the lowest price in town." It may also be noted that the generalization pertaining to the nonrational character of the needs satisfied by the sale or promotion of goods or services must admit to exceptions. The most obvious is where the product or service for sale is itself protectible speech, such as a book or a motion picture. In such cases, where the benefit of the proposed transaction relates to the buyer's interest in ideas, the risk of interference with the buyer's rational decision making process may be less. It may be noted in passing that the Court has recognized the special problems associated with restricting speech incident to the sale of other speech. See supra note 69.
have historically created unique opportunities for manipulation of the consumer's decision making process. It is precisely because of this problem that the Federal Trade Commission ("FTC") has historically protected gullible as well as "reasonable" consumers from deception. In addition, the FTC has the authority to restrain trade practices deemed "unfair," notwithstanding that they may not be false or deceptive.\(^7\)

2. The Consequences of Government Regulation of Speech Incident to the Sale or Promotion of Goods and Services are Less Troublesome

a. The Consequences of Regulation Generally—the Hardiness of Speech Incident to the Sale or Promotion of Goods and Services

The relative hardiness of commercial speech is among the "commonsense differences" between commercial and noncommercial speech identified by the Supreme Court in \textit{Virginia State Board of Pharmacy}.\(^7\) As the Court explained, the speaker's financial incentive to exploit the commercial speech right to its fullest, reduces the risk that fear of regulation will discourage or chill the exercise of constitutionally protected speech.\(^7\)

Commentators have criticized the Court on this point, correctly noting that while fear of regulation may not cause a commercially motivated speaker to be silent, it may nonetheless influence the content of what is said.\(^7\) Thus, for example, a risk averse advertiser may choose to make unassailable claims that are devoid of content, rather than factual claims that, while legitimate, could provoke a government inquiry resulting in adverse publicity and an expensive lawsuit.

The Court's point that government intervention poses less of a threat to the viability of commercial speech nevertheless remains a sound generalization. Government regulation of products and services, and speech incident to the sale of goods and services, are long accepted facts of business life, thus rendering the brooding omnipresence of potential government intervention less threatening and more routine to speakers in the commercial arena than elsewhere.\(^7\) Moreover, a com-


\(^{74}\) Id.

\(^{75}\) Redish, supra note 22, at 633; Shiffrin, supra note 3, at 1218.

\(^{76}\) In Handler, The Self-Regulatory System—An Advertiser's Viewpoint, 37 Food Drug
mercial speaker has a financial incentive to resist unjustified government interference with the dissemination of messages that the speaker has determined are likeliest to persuade its listeners. Before a commercial speaker can be expected to abandon an optimally persuasive (and therefore optimally lucrative) communications campaign, the costs of doing so must outweigh the benefits; the added benefit of financial gain associated with the speech ensures that the costs must be correspondingly higher before the speech will be abandoned.

In short, commercial speakers are less likely to be fazed by government peering over their shoulders than are noncommercial speakers. This is not to dispute that the threat of government intervention will discourage some commercial speakers from engaging in constitutionally protected speech. The essential point remains, however, that as compared to the normal run of noncommercial speakers, commercial speakers have an extra incentive to stick to their guns. For that reason, the chilling effect of government regulation upon constitutionally protected commercial speech is likely to be less extreme.

b. The Consequences of Regulations Compelling Additional Speech—Affirmative Disclosure Orders

Compelling a speaker to say what she does not want to say infringes upon the satisfaction the speaker derives from self-expression to no less an extent than compelling her not to say what she wants to say.\footnote{Cosm. L.J. 257 (1982), for example, an in-house counsel for Lever Brothers, Inc. discusses the broad range of advertising regulations that her company accepts and encourages.} The satisfaction the speaker derives from speaking her mind on matters of politics, the arts, science, or the economy, is as circumscribed by required insertions to, as deletions from, her speech.

When it comes to speech incident to the sale or promotion of goods and services, however, the speaker's first amendment interests are attenuated. As to corporate speech, it is illogical and ill-advised to conclude that artificial entities are capable of self-fulfillment or self-expression deserving of first amendment protection. This is not to say that corporate speech is undeserving of constitutional protection. Rather, it is simply to say that self-expression, self-realization or self-fulfillment are attributes of speech that only natural persons are capable of en-

\footnote{Virginia v. Barnette, 319 U.S. 624 (1943) (government may not compel a show of respect for the flag); Wooley v. Maynard, 430 U.S. 705 (1977) (government may not compel drivers to display state motto "Live free or die" on their license plates).}
joying, and that the constitutional value of corporate speech cannot be derived from its value to the speaker.\textsuperscript{78}

Natural persons, on the other hand, are a different matter. Human psychology is tricky business, and while it may be safe to assert that the profit motive can be expected to influence speech in particular ways,\textsuperscript{79} it is another thing altogether to assert, as Baker does, that such speech is financially dictated, cannot be freely chosen, and is thus incapable of being a means of self-expression.

The better point may be Shiffrin's—that regardless of whether speech incident to the sale of goods and services is capable of furthering the speaker's self-expression, it is not ordinarily so utilized.\textsuperscript{80} Rather, it is primarily a vehicle for proposing and implementing commercial transactions. To the extent that speech in the commercial arena is a vehicle for self-expression, the government interests previously identified (the limited opportunity for additional views, the objectively verifiable reasons for government intervention), coupled with the countervailing interest of marketplace theory in maximizing the dissemination of truthful information, justify compelling commercial speakers to say more than they otherwise would.

In \textit{Virginia State Board of Pharmacy}, the Supreme Court has concurred in the view that the audience is the focus of concern in the commercial and corporate speech context.\textsuperscript{81} As the Court has noted,

\begin{itemize}
\item \textsuperscript{78} Corporate employees may well derive vicarious self-fulfillment from the speech they draft for the corporation, as may shareholders who invest in such corporations. The corporation as a concept, however, is premised upon the fiction that it is a separate, artificial "person" independent of the people who own and operate it. As an independent, artificial person, the corporation is separately taxed and separately liable for its debts, which is precisely why the corporate form is attractive to officers, directors and shareholders. Given that the natural persons who own and operate the corporation voluntarily separate themselves from the artificial person they create in order to reap financial rewards, there is no sound reason to disregard that separation for purposes of first amendment analysis, by saying that the self-fulfillment that corporate employees or shareholders derive from corporate speech should be attributed to the corporation.
\item \textsuperscript{79} See \textit{supra} notes 69-70 and accompanying text.
\item Speakers who are natural persons present a tougher question. Although it may not be impossible for natural persons to derive self-fulfillment from uttering speech incident to transacting business, the satisfaction thereby derived is inextricably intertwined with the satisfaction associated with transacting the business itself, which has nothing to do with speech. Given Professor Shiffrin's intuitively sound observation that speech in the commercial and corporate context is not ordinarily employed as a means of self-expression, the generalization that speakers do not further self-fulfillment through commercial and corporate speech is a reasonable one.
\item \textsuperscript{80} See \textit{supra} note 46 and accompanying text.
\item In \textit{Virginia State Board of Pharmacy}, the Court defended the decision to extend constitutional protection to commercial speech, at least in part upon the premise that commercial advertising is important to the viability of the business. \textbf{Virginia State Bd. of Pharmacy v. Virginia}
\end{itemize}
"the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides." Similarly, the Court has justified the extension of full first amendment protection to corporate noncommercial speech with the explanation that "the inherent worth of the speech *in terms of its capacity for informing the public* does not depend upon the identity of its source."

Accordingly, in evaluating the constitutionality of regulating speech incident to the sale or promotion of goods and services, the focus shifts to the impact of the regulation upon the listener. Compelling a speaker to provide more information in the form of affirmative disclosures will not ordinarily affect the listener's interest in the speech adversely, and may, for that matter, facilitate it. For that reason, compelling additional speech does not pose the same constitutional problems as restricting speech in the commercial arena.

C. Reduced Protection for Commercial Speech Cannot be Justified on the Basis of a Weaker Speech Interest

For a variety of reasons, government interference with speech incident to the sale or promotion of goods and services is easier to square with the first amendment than is a comparable level of interference with other kinds of speech. Those reasons have to do with the greater government interest in regulation, and the less troublesome conse-

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84. One exception may be where affirmative disclosure orders are so onerous as to discourage the speaker from speaking at all, if speaking means that the speaker must make an affirmative disclosure order it cannot abide. In such a case, the first amendment implications of the order should logically be examined more closely. See, e.g., National Comm'n on Egg Nutrition v. Federal Trade Comm'n, 570 F.2d 157 (7th Cir. 1977), cert. denied, 439 U.S. 821 (1978) (revising FTC affirmative disclosure order in trade association advertising discussing the relationship between cholesterol in eggs, and heart disease, so that the order did not "interfere unnecessarily with the pro-egg position").
quences of such regulation. They have nothing to do with a weaker first amendment interest.

In *Virginia State Board of Pharmacy*, the Court suggested that commercial speech has as much first amendment significance as other kinds of speech. As the Court put it, for the listener, the interest in information conveyed in prescription drug advertising "may be as keen, if not keener by far, than his interest in the day's most urgent political debate."\(^8^5\) Two commercial speech decisions later, however, the Court backpedalled. Commercial speech was subject to greater regulation than other kinds of speech, not only because of "commonsense differences" rendering government regulation of commercial speech less troublesome, but also because commercial speech was less important.\(^8^6\)

The Court has not attempted to explain why it deems commercial speech to be of subordinate constitutional value relative to other kinds of speech. One possible explanation is that it regards commercial speech as implicating values less central to the purposes served by the first amendment. While commercial speech may generate information of general interest that contributes to self-realization and the collective pursuit of truth, it has comparatively little to do with the "core" values of facilitating self-government and political decision making. The obvious problem with this explanation is twofold: first, the Court has not limited constitutional protection for artistic, scientific and other speech that implicates self-government values indirectly, if at all;\(^8^7\) second, as previously discussed, there is no adequate basis upon which to conclude that self-government is the primary purpose served by the first amendment.\(^8^8\)

Alternatively, the Court may view commercial speech as implicating values central to the first amendment, but to a lesser extent than other kinds of speech. Such a view has at least superficial appeal: while Plato's *Republic* and an advertisement for Farberware pots both make


\(^8^7\) Red Lion Broadcasting Co. v. Federal Communications Comm'n, 395 U.S. 367 (1969) (first amendment applies to expression of social, political, esthetic, moral and other ideas); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) ("The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as inform.").

\(^8^8\) *See supra* note 39 and accompanying text.
some contribution to the pursuit of truth and self-realization, intuitively, the contribution of the Farberware ad would seem to be more modest.\textsuperscript{89}

Translating this intuition into a rule of constitutional law that deems commercial speech to be less important and therefore less protected than other speech, however, is highly problematic. If intuition justifies ranking commercial speech behind other forms of protected speech, there is no reason to stop there; indeed, a host of rankings are possible. The \textit{New York Times} is more important than \textit{People} magazine; the film \textit{Citizen Kane} is of greater constitutional value than \textit{Mars Needs Women}; speeches of political candidates on the campaign trail are more important than the exhortations of bag ladies from public park podia, and so on. To the extent one embraces the devaluation of commercial speech on the basis of a collective hunch, there can be no objection to a program of prioritizing all kinds of speech on similar grounds.

If one accedes to the judgment that commercial speech is intuitively less valuable and thus less protected than noncommercial speech, it follows that it should be possible to make other intuitional value comparisons not only between different types of noncommercial speech, as suggested above, but also between different types of commercial speech; indeed, this is what the Supreme Court appears to have done. Abortion advertising is deemed more important than other advertising as it concerns information on the availability of a service with constitutional dimensions.\textsuperscript{90} Gambling advertising (where gambling is legal) is less valuable than other advertising, because gambling is customarily illegal.\textsuperscript{91} Trade names are less valuable than other commercial speech

\textsuperscript{89} Shiffrin, \textit{supra} note 3, at 1257-58 ("[M]any commentators have a rather strong intuition that the pharmacist drug advertising is far afield from genuine first amendment values . . . The combination of a particular profit motive and of subject matter triggers the intuition.").

\textsuperscript{90} In \textit{Posada; de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico}, 478 U.S. 328, 345 (1986), the Court distinguished a ban on gambling advertising, there at issue, from a ban on abortion advertising held unconstitutional in \textit{Bigelow v. Virginia}, 421 U.S. 809 (1975), on the grounds that the subject matter of the latter ban was constitutionally protected.

\textsuperscript{91} In \textit{Posadas}, the fact that casino gambling was prohibited in most states appears to have prompted the Court to stop short of conceding, as it had with respect to lawyer advertising, prescription drug advertising, and public utility advertising in earlier cases, that the underlying activity being advertised was clearly lawful, and not misleading or fraudulent, therefore entitling the advertising to some constitutional protection. Rather, the Court went only so far as to say that casino gambling cleared the first step of the \textit{Central Hudson} test "in the abstract." 478 U.S. 328, 340-41 (1986).
because of the nature of information communicated by a trade name.\textsuperscript{92}

In balancing the government’s interest in regulation against the audience’s first amendment interest in access to information, \textit{Central Hudson Gas & Electric Corp. v. Public Service Commission} provides a means for ascertaining the relative strength of the government’s interest in the commercial speech context.\textsuperscript{93} It does not provide a means for ascertaining the relative strength of the first amendment interest, which is fine, provided that the first amendment interest remains constant. If, however, the first amendment interest is variable, the \textit{Central Hudson} analytical framework is frustrated because the question of whether the Government’s objective is sufficiently substantial and the means to achieve that objective are sufficiently direct and narrow will depend entirely upon the relative value of the speech against which the government’s interest is balanced. To the extent intuition, rather than an articulable standard, controls the assessment of the relative first amendment value of commercial speech in any given case, the \textit{Central Hudson} analysis becomes highly manipulable. As a result, “important” commercial speech is scrutinized more closely and receives greater protection than commercial speech deemed trivial, irrespective of the outcome suggested by a straightforward application of \textit{Central Hudson}.

\textit{Posadas de Puerto Rico Association v. Tourism Company of Puerto Rico}\textsuperscript{94} illustrates the problems associated with affording commercial speech diminished protection on the basis of its lesser constitutional value. \textit{Posadas} concerned a legislative and administrative prohibition on advertising directed toward Puerto Ricans for legal casino gambling in Puerto Rico. The justification offered for the prohibition was to reduce the demand for casino gambling, thereby reducing both the inci-

\textsuperscript{92} Friedman v. Rogers, 440 U.S. 1, 12, 15-16 (1979) (“A trade name is, however, a significantly different form of commercial speech . . . [because it] has no intrinsic meaning . . . [and] conveys no information about the price and nature of the services offered. . . . [Restricting the use of tradenames thus] has only the most incidental effect on the content of commercial speech.”).

\textsuperscript{93} Recall that steps two through four of the \textit{Central Hudson} analysis—which are the steps applicable to commercial speech deserving of constitutional protection—relate exclusively to the nature and extent of the government’s interest in regulation and not to the nature or strength of the speaker or listener’s interest in the speech: step two—is the government’s interest in the speech substantial; step three—does the regulation directly advance the governmental interest asserted; step four—is the government regulation more extensive than necessary to accomplish its purpose. 


\textsuperscript{94} 478 U.S. 328 (1986).
The incidence of casino gambling and, ultimately, the harm it causes among Puerto Ricans.\textsuperscript{98} 

The dissenters and a number of commentators have argued that a straightforward application of the \textit{Central Hudson} analysis should have rendered the \textit{Posadas} advertising ban invalid.\textsuperscript{99} First, did the ban apply to truthful advertising about a lawful activity? Yes.\textsuperscript{97} Second, did the government have a substantial interest in the ban? No. If the government had a bona fide interest in protecting the public from harms associated with gambling, it would have banned all gambling advertising, not just casino gambling advertising. The ban's failure to encompass advertising for state sponsored gambling gives rise to the suspicion that the government's interest had more to do with protecting state sponsored gambling from competition than with protecting the public from the harms associated with gambling.\textsuperscript{88} Third, did the ban directly further the government's interest? No. Restricting the advertising of only one of several forms of gambling, so as to reduce the demand for gambling, as a means to reduce the incidence of gambling, ultimately in order to reduce the harms associated with gambling, is indirect at best.\textsuperscript{89} Fourth, was the ban no broader than necessary to accomplish the government's objectives? No. Less drastic alternatives would have included state sponsored counter speech, or vigorous enforcement of laws prohibiting many of the harmful activities associated with gambling, such as extortion, racketeering, prostitution, etc.\textsuperscript{100} 

The fact that the \textit{Posadas} majority found these arguments unpersuasive is less important than why it found them so. Regardless of whether the outcome in \textit{Posadas} can be justified on the basis of a forthright application of \textit{Central Hudson}, the significance of \textit{Posadas} is that its application of the four part \textit{Central Hudson} analysis was less than forthright. As discussed earlier, \textit{Central Hudson} provides a means to evaluate whether the government's objective in regulating commercial speech is substantial enough, and whether the means it has chosen to accomplish that objective are direct and narrow enough to justify the burden the regulation imposes on first amendment values. It does not

\textsuperscript{95} Id. at 341.  
\textsuperscript{96} Id. at 348 (Brennan, J., dissenting); L. Tribe, supra note 13, at 901-904; Kurland, Posadas de Puerto Rico v. Tourism Company: "'twas strange, 'twas passing strange, 'twas pitiful, 'twas wondrous pitiful", 1986 SUP. CT. REV. 1.  
\textsuperscript{97} 478 U.S. at 352 (Brennan, J., dissenting).  
\textsuperscript{98} Id. at 352-55.  
\textsuperscript{99} Id. at 355-56.  
\textsuperscript{100} Id. at 356-58.
provide a means to assess the first amendment value of commercial speech on a case-by-case basis. Therefore, a meaningful application of *Central Hudson* depends upon the presumption that the constitutional value of commercial speech remains constant. Implicitly, however, the *Posadas* Court gutted commercial speech of all, or nearly all, value, so that any rational government regulation would employ a means sufficiently direct and narrow to accomplish an objective sufficiently substantial to withstand first amendment (or more accurately, minimal due process) scrutiny.

The Court began by reiterating the observation first made several commercial speech opinions earlier, that commercial speech "receives a limited form of constitutional protection."\textsuperscript{101} Moreover, the Court appeared to suggest that the protection afforded speech for gambling services may be even more limited. As previous opinions had made clear, step one of the *Central Hudson* test required that commercial speech relate to a lawful activity to be deserving of any constitutional protection.\textsuperscript{102} While casino gambling was perfectly legal in Puerto Rico, it was traditionally illegal in most places, prompting the Court to conclude that casino gambling pertained to a lawful activity, and was therefore entitled to constitutional protection only "in the abstract."\textsuperscript{103}

With regard to whether the government had a substantial interest in the ban under step two, the Court determined, solely on the basis of the assertions in the brief submitted on behalf of Puerto Rico, that the legislature's objective was to reduce the harmful effects of casino gambling on Puerto Ricans.\textsuperscript{104} Examining whether the advertising ban directly advanced the legislature's objective under step three, the Court concluded that the legislature "obviously believed" that casino gambling advertising would increase the demand for casino gambling, that such a belief was a "reasonable one," and that the third prong of the *Central Hudson* test was satisfied when the legislative judgment was not "manifestly unreasonable."\textsuperscript{105}

\textsuperscript{101} 478 U.S. at 340.
\textsuperscript{102} Id.
\textsuperscript{103} Id. at 340-41.
\textsuperscript{104} Id. at 341. In addition to representations in the brief, the Court referred to a letter from Posadas to the Tourism Company, acknowledging that the legislature wanted "tourists to flock to the casinos to gamble, but not our own people." Id. That letter, however, did not address the issue that troubled the dissenters. That is, why the legislature wanted to discourage casino gambling among Puerto Rico residents, leaving unaddressed the question of whether Puerto Rico was simply trying to protect state sponsored gambling from competition.
\textsuperscript{105} Id. at 341-42. The Court opined that although the ban was underinclusive as to gam-
Finally, the Court concluded that it was "clear beyond peradven-
ture"106 that the advertising ban was no broader than necessary to ac-
complish the legislature’s objective under step four.107 The ban did not apply to all casino gambling advertising, but was tailored to prohibit only advertising directed toward residents of Puerto Rico. In response to the contention that the ban was broader than necessary, given the less restrictive alternative of disseminating counterspeech warning the public as to the harms of casino gambling, the Court declared that "it is up to the legislature to decide whether or not such a ‘counterspeech’ policy would be as effective" as a ban.108 "The legislature could con-
clude, as it apparently did here," said the Court, that such a policy would not be effective.109

In short, the Court’s review of Puerto Rico’s advertising restric-
tions bears all the earmarks of minimal due process scrutiny. Puerto Rico’s legislative objective was substantial, accepting at face value counsel for Puerto Rico’s characterization of that legislative objective. The ban directly advanced the legislative objective, as it was not a “manifestly unreasonable” means to the desired end. Finally, the ban was no broader than necessary because the legislature “could con-
clude” that alternatives would be ineffective.

The heightened scrutiny customarily afforded first amendment re-
strictions was entirely lacking; at bottom, the Court ascribed no true first amendment significance to the speech at issue. The Court reasoned that because the legislature possessed the "greater" power to ban gam-
bling, it necessarily possessed the "lesser" power to ban gambling ad-
vertising.110 The “greater” power to ban gambling, however, is nothing more or less than the legislative power to pass socioeconomic legisla-
tion, which ordinarily possesses no first amendment implications and will be upheld if rationally related to a legitimate legislative objective. If product or service advertising may be restricted whenever the prod-

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106. For the benefit of readers unacquainted with the subtle nuances of the law, this phrase should usually be accompanied by an asterisk and the helpful explanation that the author is only kidding, particularly when the phrase is called into service in a five to four decision.

107. 478 U.S. at 343.

108. Id. at 344.

109. Id.

110. Id. at 345-46.
uct or service may be restricted, it effectively reduces the level of scrutiny afforded commercial speech to that afforded socioeconomic legislation.

The Court’s analysis makes sense only if speech about the product or service has no first amendment value independent of the product or service itself. For example, the “greater” power to prohibit a Communist uprising does not subsume the “lesser” power to ban the *Communist Manifesto*, because the *Communist Manifesto* has independent first amendment value entitled to independent constitutional protection in the form of heightened judicial scrutiny. In a Supreme Court case decided in the wake of *Posadas*, the state of Colorado was prompted to argue that the greater power to prohibit the state initiative process altogether included the lesser power to restrict expression relating to the initiative process. A unanimous Supreme Court rejected the argument with the explanation that the *Posadas* rationale applies only to restrictions upon commercial speech.\(^{111}\)

Confining the Court’s analysis to commercial speech, however, does not help matters. To the extent commercial speech has any independent first amendment value, legislative restrictions upon it should be scrutinized more closely than legislative restrictions upon the goods or services to which the commercial speech relates. Indeed, prior to *Posadas*, the best, if not the only articulation of the argument that the greater power to ban goods and services should include the lesser power to ban advertising for those goods and services, was in a law review article by Professors Jackson and Jeffries. There, the authors proffered this argument as the basis for concluding that commercial speech has no first amendment significance and is therefore not entitled to constitutional protection.\(^{112}\)

*Posadas* is undeniably responsible for causing a respectable chunk of the commercial speech firmament to break loose and land with a loud, dull thud. It would nonetheless be premature to suppose that the entire sky is falling. In *Board of Trustees v. Fox*,\(^{119}\) the Court sought to clarify the quantum of protection commercial speech should be afforded. In that case, a State University of New York (“SUNY”) resolution barring commercial enterprises from operating on SUNY facili-

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112. Jackson & Jeffries, supra note 21, at 34. It may be added that the Jackson & Jeffries article was cited in the majority opinion in *Posadas*, albeit on a separate point. 478 U.S. at 340 n.7.
ties was applied by campus police to prohibit a company from demonstrating and selling its wares at a party hosted in a student dormitory.\textsuperscript{114}

The district court upheld the resolution against a constitutional challenge initiated by students and the company.\textsuperscript{116} The United States Court of Appeals for the Second Circuit reversed and remanded, on the grounds that it was unclear whether the third and fourth prongs of the \textit{Central Hudson} test had been satisfied.\textsuperscript{116} The court of appeals instructed the district court to make additional findings, and to conclude that the fourth prong was satisfied only if the resolution constituted the "least restrictive measure" to accomplish the state's objective.\textsuperscript{117}

The Supreme Court agreed that the case should be remanded for further findings by the district court, but disagreed with the circuit court's characterization of \textit{Central Hudson} as disallowing commercial speech restrictions that fall short of being the least restrictive means to further the government's ends.\textsuperscript{118} As the Court correctly noted, subjecting commercial speech regulations to a least restrictive means analysis—a standard traditionally reserved for fully protected speech—would be inconsistent with the Court's well established view that commercial speech is not fully protected.\textsuperscript{119}

At the same time, however, the Court reaffirmed that commercial speech was deserving of some constitutional protection, and likened the quantum of protection due commercial speech to that afforded expressive conduct, or time, place and manner restrictions imposed upon fully protected speech.\textsuperscript{120} What that means, opined the Court, is that a regulation will survive constitutional scrutiny even if it is not the least restrictive means to accomplish the government's ends: "We have not insisted that there be no conceivable alternative but only that the regulation not 'burden substantially more speech than is necessary to further the government's legitimate interest'. . . . And we have been

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\textsuperscript{114} Id. at 3030-31.
\textsuperscript{115} Fox v. Board of Trustees, 649 F. Supp. 1393 (N.D.N.Y. 1986).
\textsuperscript{116} Fox v. Board of Trustees, 841 F.2d 1207 (2d Cir. 1988).
\textsuperscript{117} Id.
\textsuperscript{118} 109 S. Ct. at 3032-35.
\textsuperscript{119} Id. at 3033 ("Our jurisprudence has emphasized that commercial speech . . . is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression' . . . . The ample scope of regulatory authority suggested by such statements would be illusory if it were subject to a least-restrictive-means requirement, which imposes a heavy burden on the state.").
\textsuperscript{120} Id.
loath to second guess the government's judgment to that effect." 121
What is required, continued the Court, is a “fit” between government ends and means “that is not necessarily perfect, but reasonable; that represents not the single best disposition but one whose scope is ‘in proportion to the interest served.’” 122

The Court rejected the suggestion that its approach was “overly permissive,” adding that it was “far different” from a rational basis standard of review. The Court further stated that with commercial speech “we require the government goal to be substantial, and the cost to be carefully calculated.” 123 “By declining to impose, in addition, a least-restrictive means requirement,” concluded the Court, “we take account of the difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires, and provide the legislative and executive branches needed leeway in a field (commercial speech) ‘traditionally subject to government regulation.’” 124

At first blush, Board of Trustees offers some useful elaboration upon the magic words in the Central Hudson test. In the end, however, the opinion may simply have added a few new magic words to the lexicon. In deciding whether a regulation is “more restrictive than necessary” within the meaning of Central Hudson’s fourth prong, one must decide whether the regulation “burden(s) substantially more speech than is necessary to further the government’s legitimate interest,” or alternatively, whether its “scope is in proportion to the interests served.”

Whether these new formulations of the fourth prong are satisfied in any given case will continue to depend upon how seriously the Court takes the speech being regulated. When, as in Virginia State Board of Pharmacy and several of the lawyer advertising cases, a majority of the Court takes the speech under regulation seriously, a determination whether the scope of the regulation is in proportion to the interests served will follow a careful review of the justifications offered for the regulation, and a close look at alternative forms of regulation.125 On

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121. Id. at 3034 (quoting Ward v. Rock Against Racism, 109 S. Ct. 2746, 2758 (1989)).
122. Id. at 3035.
123. Id.
124. Id.
125. While the protection afforded commercial speech has been more or less consistently qualified and diminished by the string of cases decided after Virginia State Board of Pharmacy, the lawyer advertising decisions represent something of an exception. The Court has struck down all or part of lawyer advertising restrictions in five of the six cases decided since Virginia State
the other hand, where, as in Posadas or Friedman v. Rogers, a majority of the Court regards the speech at issue as essentially trivial, the same determinations will follow an all but complete capitulation to the legislature’s judgment. 126 Given the Court’s admonition in Board of Trustees that it is “loath to second guess the government’s judgment,” 127 its assurances that, despite so deferential a standard of review, the government’s objective must still be supported by more than a rational basis to survive constitutional scrutiny 128 gives rise to the question: how much more? If Posadas is any indication, the answer is: not much.

In sum, the recent refinements to Central Hudson offered by the Board of Trustees Court do nothing to limit the extent to which the standards for review of commercial speech can be and are manipulated. I do not suggest that it is only in the context of commercial speech that a court’s application of a given standard of review can be influenced or manipulated by the value the judge ascribes to the speech under regulation. To be sure, a court’s subjective perceptions as to the relative worth of “fully protected” speech may silently or subconsciously influence the level of scrutiny to which regulation of that speech is subjected, notwithstanding that such differentiation is technically inappropriate. But because the value of fully protected speech officially remains constant 129 (with the nature and extent of the government in-

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126. See supra notes 90-91.
128. See id. at 3034-35.
129. Police Dep’t v. Mosley, 408 U.S. 92, 96 (1972) (“There is ‘an equality of status in the field of ideas,’ ”) (quoting A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWER
terest being the only variable), review of regulations with an eye toward the relative value of the affected speech may occur only in sub rosa fashion and is thus effectively discouraged.

Commercial speech analysis, on the other hand, explicitly justifies the regulation of commercial speech with reference to both the diminished value of the speech, and the nature and extent of the government interest in the regulation. In the continuing absence of any guidance as to how much less valuable commercial speech is, that value becomes a variable. The *Central Hudson* analysis, which is designed to assess whether the government’s interest is strong, direct and narrowly tailored enough to outweigh the value of the speech, will thus change depending upon the weight assigned to the second variable—the value of the speech. Revision of the test for evaluating the government’s interest, as was done in *Board of Trustees*, thus does nothing to circumscribe the malleability of that test.

II. THE CONSEQUENCES OF DIMINISHED COMMERCIAL SPEECH PROTECTION

As the first amendment protection afforded commercial speech shrinks, the line separating fully protected noncommercial speech from increasingly less protected commercial speech, becomes ever more important. Regulations standing no chance of survival, if strictly scrutinized as restrictions upon “pure” or noncommercial speech, may easily withstand the passing glance the *Posadas* Court gave to commercial speech. Thus, the category to which the speech is assigned—commercial or noncommercial—may often prove dispositive.

The Court’s initial efforts to distinguish commercial from noncommercial speech came in the wake of dicta in *Valentine v. Chrestensen*. The Court held that handbills “communicating information and disseminating opinion” were entitled to first amendment protection, while those constituting “purely commercial advertising” were not. In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, a newspaper want ad that was “no more than a proposal of possible employment” was regarded as a “classic example[] of commercial speech.” In *Bigelow v. Virginia*, on the other hand, a Virginia news-

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130. *See supra* notes 85-86.
paper advertisement promoting the sale of abortion services in New York was distinguished from the advertising at issue in Valentine and Pittsburgh Press, on the grounds that it "did more than simply propose a commercial transaction," because it "contained factual material of clear 'public interest.'"\textsuperscript{133}

The second wave of cases distinguishing commercial from noncommercial speech began with the Court's concurrent rejection of Valentine and recognition of first amendment protection for purely commercial speech in Virginia State Board of Pharmacy. The Court, in Virginia State Board of Pharmacy, addressed the propriety of a state ban on prescription drug advertising. Through such advertising, the Court observed, the advertiser "does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The 'idea' he wishes to communicate is simply this: 'I will sell you the X prescription drug for the Y price.'"\textsuperscript{134} Quoting from Pittsburgh Press, the Court concluded that prescription drug advertising is "speech which does no more than propose a commercial transaction" and is therefore purely commercial speech.\textsuperscript{135}

So far, so good. Bigelow, read in tandem with Virginia State Board of Pharmacy, suggests that speech which simply proposes a commercial transaction is commercial speech, while speech that "does . . . more" than propose a commercial transaction, i.e., that "presents factual material of clear public interest" or "generalized observations" about "commercial matters," is not. The fly in the ointment is that commercial advertising—let alone other closely related forms of commercially motivated speech—infoms, entertains or educates, and is rarely limited solely to proposing commercial transactions.

The Court was therefore left with a couple of options. The first was to live with the narrow definition it had created, and to accept that commercial speech was so restricted in scope that it encompassed only a limited number of situations, such as the classified advertisement in Pittsburgh Press. Not surprisingly, the Court found this option unpalatable. If a speaker could transform what would otherwise be commercial speech through the simple expedient of adding a "public interest" component to her sales pitch, and if such an adjustment would

\textsuperscript{133} Bigelow v. Virginia, 421 U.S. 809, 822 (1975).


\textsuperscript{135} Id. at 762 (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)).
provide the speaker with greater first amendment protection against regulation, speakers would be foolish not to do so. As the Court subsequently noted, so narrow a definition of commercial speech “would grant broad constitutional protection to any advertisement that links a product to a current public debate.”136 Given that “many, if not most, products may be tied to public concerns with the environment, energy, economic policy, or individual health and safety,” the resulting failure to distinguish between commercial and noncommercial speech “‘could invite dilution simply through a leveling process of the force of the [first] amendment’s guarantee with respect to the latter kind of speech.’”137

The alternative was to take another whack at the definition of commercial speech, which was done in Central Hudson. There, public utility advertising touching upon issues concerning the nation’s energy supply obviously did more than simply propose a commercial transaction. Nevertheless, such advertising was ruled to constitute commercial speech because it was “expression related solely to the economic interests of speaker and audience.”138 This definition appears calculated to address the problem confronting its predecessor: speech relating solely to the economic interest of speaker and audience would seem to encompass a far greater range of expression than speech that does no more than propose a commercial transaction.

Unfortunately, defining commercial speech with reference to the economic motivations of speaker and audience creates more problems than it solves. On the one hand, it still does not go far enough. Conventional commercial advertising is only occasionally calculated to appeal solely to the economic interest of the audience. Rather, it can and does appeal to the complete range of human motivations, of which economic self-interest is only one. Indeed, the advertising at issue in Central Hudson would appear to be calculated to address the consumer’s concern not only for her pocketbook, but for the nation’s energy supply as well. This new definition does not even reach the bulk of commercial advertising, to say nothing of related forms of speech.

On the other hand, defining commercial speech with reference to the economic motivations of speaker and audience goes too far. Political speech in its purest form may nonetheless relate to the economic

137. Id. (quoting Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447, 456 (1978)).
138. Id. at 561.
interests of speaker and audience. A speech by a political candidate on
the state of the economy bears directly on self-governance, self-fulfill-
ment, and pursuit of truth; at the same time, its appeal to speaker and
audience may be purely economic.¹³⁹

Back to the drawing board. In the face of two failed attempts to
encapsulate the substance of commercial speech in a definition, the
next best option was to define it with reference to its form or context.
In Bolger v. Youngs Drug Products Corp., the Court considered
whether a condom manufacturer's brochure about venereal disease that
discussed condoms without reference to brand name (except that the
manufacturer was identified as the author of the brochure) constituted
commercial speech.¹⁴⁰

The Court conceded that the pamphlets “cannot be characterized
merely as proposals to engage in commercial transactions.”¹⁴¹ And
while the Central Hudson definition was not specifically addressed, the
Court's acknowledgment of the speaker's desire “to convey truthful in-
formation relevant to important social issues such as family planning
and the prevention of venereal disease,”¹⁴² leaves little room for doubt
that the speech at issue related to more than the economic interest of
the audience, if not the speaker.

The Court was nonetheless satisfied that the pamphlets were com-
mercial speech. The fact that the pamphlet was concededly an adver-
tisement, said the Court, did not alone make it commercial speech; that
the pamphlet identified its author as the seller of a product discussed in
the brochure was likewise deemed insufficient by itself to render the
pamphlet commercial speech; and the manufacturer's commercial mo-
tivation, without more, again would not make the speech commercial in
character. “The combination of all these characteristics, however,”
opined the Court, “provides strong support” for the conclusion that the
speech was commercial.¹⁴³

Note that none of the considerations contributing to the Court's
conclusion pay any heed to the substance of the speaker's message. It is
the form or context of the message that is all important: if the speech is
in the form of an ad, if a product is mentioned by name, and if the

¹³⁹. Id. at 579-80 (Stevens, J., concurring) (“Neither a labor leader's exhortation to strike,
nor an economist's dissertation on the money supply, should receive any lesser protection because
the subject matter concerns only the economic interest of the audience.”).
¹⁴¹. Id. at 66.
¹⁴². Id. at 69.
¹⁴³. Id. at 67 (emphasis in original).
speaker has a financial incentive to speak, the speech is commercial, regardless of what is said. The net effect is that the degree of substantive constitutional protection afforded speech is wholly contingent upon considerations of form.

The Court has seen this as no reason to worry. At the same time that the constitutional protection for commercial speech was being weakened by Central Hudson and Posadas, corporate, noncommercial speech was being strengthened by First National Bank v. Bellotti, Consolidated Edison Co. v. Public Service Commission, and Pacific Gas & Electric Co. v. Public Utilities Commission. In the latter group of decisions, the Court came to afford full first amendment protection to corporate noncommercial speech, on the grounds that the first amendment protects the speech itself without regard to the identity of the speaker. Reducing the constitutional protection afforded speech by calling it commercial, solely on the basis of its form or context, thus presents no particular problem, because the speaker is always free to repackage the same message in a different form that the Court will fully protect as noncommercial speech. As the Court has put it, "[a] company has the full panoply of protections available to its direct comments on public issues, so there is no reason for providing similar protection when such statements are made in the context of commercial transactions."

147. Bellotti, 435 U.S. at 777 (the "inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association or individual"); Consolidated Edison Co., 447 U.S. at 533 (quoting Bellotti, 435 U.S. at 777).
148. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. at 562 n.5. This view was reconfirmed in the recent case Board of Trustees v. Fox, 109 S. Ct. 3028 (1989). The Board of Trustees Court began by asserting that "the test for identifying commercial speech" established in Virginia State Board of Pharmacy, is whether the speech "propose[s] a commercial transaction." Id. at 3031. Such a test, however, represents a significant departure from Virginia State Board of Pharmacy, which as previously noted, characterized commercial speech as "speech which does no more than propose a commercial transaction." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (emphasis added). Whereas the implication of the Virginia State Board of Pharmacy test was that speech that did more than propose a commercial transaction was more than commercial speech, the implication of the Board of Trustees test is that anything said in the context of proposing a commercial transaction is commercial speech. In response to the contention that the solicitation at issue in Board of Trustees—a Tupperware party—was noncommercial speech because it involved an inextricably intertwined combination of selling housewares and home economics counselling, the Court observed that "[N]o law of man or nature makes it impossible to sell housewares without teaching home economics, or to
This, of course, is simply an invitation for corporate speakers to play the very sort of games the Court had suggested it would not tolerate. Although a corporation may not transmute commercial speech into noncommercial speech through the simple expedient of adding a “public interest” component to the company’s message, it may do so by recasting its message as direct comments on public issues. Accordingly, a corporation that disseminates false, deceptive, misleading, manipulative or otherwise unfair messages in furtherance of its economic interests, but carefully avoids doing so in the context of proposing commercial transactions, is at least arguably entitled to full first amendment protection for its efforts.

More fundamentally, defining commercial speech with reference to the form or context in which the speech occurs is completely at odds with the Court’s justification for affording commercial speech reduced constitutional protection. Commercial speech is deserving of less protection, the Court has said, because it is of less constitutional moment than are other kinds of speech. Put another way, the content of the message communicated by commercial speech is of less importance to the first amendment than noncommercial speech. If, however, commercial speech is distinguished from noncommercial on the basis of its context, rather than the content of the message communicated, then there is no rational basis for saying that the substance of what is communicated by commercial speech is less important, because the substance of what is communicated is largely irrelevant to whether the speech will be deemed commercial in character.

One of the primary problems in assessing the Court’s several random stabs at a definition of commercial speech is that it is not entirely clear what the definition is intended to encompass. At a minimum, it would seem that the Court is interested in capturing the average run of
commercial advertising within the scope of commercial speech. As noted above, to the extent that this is the case, defining commercial speech in terms of expression that "does no more than propose a commercial transaction" or that "relates solely to the economic interests of speaker and audience" is underinclusive.\textsuperscript{149}

The three factor "definition" in Bolger appears to have succeeded where its predecessor definitions have failed, at least insofar as it includes speech taking the form of commercial advertising as part of the definition; yet it gives rise to new problems and leaves others unresolved. The problem created by hinging the quantum of constitutional protection afforded speech upon the form of the speech, rather than on its content, was examined above. Still unresolved is the issue of what, if any, speech other than purely commercial advertising or solicitation will fall within the definition of commercial speech. What about negotiations over employment contracts, consumer product labelling, corporate or trade association speech enhancing the image of the corporation or industry, dissemination of commercial credit information, or day-to-day correspondence between commercial entities in the normal course of business? Under the Virginia State Board of Pharmacy rationale, the speech in each of these cases can do more than propose a commercial transaction and may not propose a transaction at all. Under the Central Hudson analysis, the speech in most, though not all, of these contexts may appeal primarily, although not necessarily exclusively, to the economic interest of speaker and audience. And under the three-part test in Bolger, the speaker in each case has an economic incentive to utter the speech in question, yet the speech need never take the form of advertising per se, and at least in some cases, need not identify a specific brand of product or service.

In short, in any number of cases, speech incident to the sale or promotion of goods and services may fit one characterization of commercial speech, not fit another, and fit part, but not all, of a third. Given the options of wading back into the definitional mire in yet another effort to fashion coherence from muck, or of bypassing the swamp altogether, the courts have consistently chosen the latter alternative. Rather than expanding the definition of commercial speech to encompass some or all of the above mentioned variations, the courts have sought to accomplish the same objective by proliferating the categories of speech entitled to some, but not full, protection.

\textsuperscript{149} See \textit{supra} notes 132-39 and accompanying text.
Thus, for example, one circuit court has ruled that corporation sponsored speech extolling the virtues of the corporation and encouraging the purchase of its stock was not commercial speech. While the speech may have related solely to the economic interest of both speaker and audience, and have thus satisfied the Central Hudson definition, the court was reluctant to expand the scope of commercial speech beyond the context of commercial advertising, for fear that doing so might inadvertently result in recategorization of speech traditionally regarded as fully protected. Because the speech was not concededly commercial advertising, reasoned the court, it did not satisfy the first component of the Bolger definition and was thus not commercial speech. That did not mean, however, that the speech was fully protected. Rather, concluded the court, because the speech concerned securities, which have traditionally been subject to extensive regulation, such speech was entitled to no greater protection than commercial speech.

Similarly, in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., the Supreme Court majority rejected the dissent's implication that commercial credit information disseminated by one company to another was commercial speech. Such speech was entitled to less protection than the normal run of speech discussing public figures or issues of public interest, not because it was commercial in character, but because it addressed matters of purely private concern.

As a final example, the Supreme Court and the lower courts continue to tiptoe around the question of whether and under what circumstances labor relations activities may constitute commercial speech. In Virginia State Board of Pharmacy, the Court defended its decision to grant constitutional protection to commercial speech by noting that the speech of labor disputants has been afforded constitutional protection, notwithstanding that it, like commercial advertising, may be "of an entirely private and economic character." Seeing "no satisfactory distinction" between commercial advertising and the speech of parties to
labor disputes, the Court concluded that commercial advertising was entitled to first amendment protection.157

Notwithstanding the dicta in Virginia State Board of Pharmacy, lower courts have questioned whether various forms of speech arising in connection with labor activity can accurately be characterized either as speech relating solely to the economic interests of speaker and audience, or speech proposing a commercial transaction.158 The Supreme Court has likewise expressed reservations as to whether union handbills urging shoppers not to patronize a shopping mall because the owner paid substandard wages constituted commercial speech.159 The speech of labor disputants is nonetheless regulated more closely than other forms of speech, but as a category separate unto itself.160

The potential for continued proliferation of the categories of substandard speech is considerable. Product labeling may be "commercial speech." On the other hand, it does not necessarily propose a commercial transaction, does not relate exclusively to the economic interests of the audience, and is not advertising per se. Consequently, it may be assigned its own special niche, and like securities, may be afforded diminished protection on the grounds that it has traditionally been subject to extensive regulation. The whole range of communications between businesses, within businesses, and between businesses and the public, is arguably subject to some but not full first amendment protection because it is commercial speech, because it is private speech, because it is traditionally subject to regulation, or just because.

In all of these cases, the speech at issue is a means to the end of doing business—it is incident to the sale or promotion of goods and services. As discussed in the first section of this Article, there are good

157. Id. at 763.

158. Hospital & Serv. Employees Union v. NLRB, 743 F.2d 1417, 1428 n.8 (9th Cir. 1984); Florida Gulf Coast Bldg. and Constr. Trades v. NLRB, 796 F.2d 1328, 1335 n.7 (11th Cir. 1984).

159. The Court has stated:

We do not suggest that communications by labor unions are never of the commercial speech variety and thereby entitled to a lesser degree of constitutional protection. The handbills involved here, however, do not appear to be typical commercial speech such as advertising the price of a product or arguing its merits, for they pressed the benefits of unionism to the community and the dangers of inadequate wages to the economy.


reasons for permitting speech of this kind to be regulated more closely. There has, however, been no recognition by the courts, and little recognition by commentators, that these cases present similar problems that should be addressed in similar ways. Rather, the problem of regulating speech in the labor context has been analyzed independently of the problems of regulating commercial speech, speech relating to the sale of securities, and so on.

The obvious solution might be to expand the definition of commercial speech to encompass these related forms of expression. The problem with such an approach, however, is twofold. First, attempting to capture speech in a preestablished category is inherently problematic. The litter of tried and abandoned characterizations of commercial speech, strewn across a line of Supreme Court decisions, is evidence of how difficult it is to fashion a relatively simple, narrow definition of commercial speech, let alone a broad, all encompassing one. Second, the task is made even more difficult by the fact that the line separating commercial from noncommercial speech has acquired exaggerated significance. As the chasm separating the quantum of protection afforded commercial and noncommercial speech has become increasingly vast, the definition of commercial speech has become increasingly critical.

III. A Multifactor Approach

Any effort to categorize speech on the basis of its content must begin with the recognition that no bright lines exist. This is not to disparage all efforts to draw such lines. There is, for example, no getting around the need to delineate what is and is not deserving of first amendment protection, however problematic, specious or elusive that line may be. Accepting that a line must be drawn, it might just as well be drawn brightly, so to better serve the interests of clarity and predictability.

The difficult and sometimes impossible task of parsing what is from what is not entitled to constitutional protection is one exercise in line drawing that may be unavoidable. There is, however, no comparable need to subdivide protectable speech into a hierarchy of categories, with "commercial" speech, "securities" speech, "labor" speech, and others, assigned a lower intrinsic value than other categories of expression.

Instead, I begin with the premise that it is neither possible nor desirable to conclude that one category of protectable speech is more valuable than another. That does not mean that some kinds of speech
are not subject to greater regulation than others. There are a variety of attributes to speech incident to the sale of goods and services that render regulation of that speech less troublesome. Those attributes are not limited to commercial speech as the Court has tried to define it, but apply in varying degrees to securities, labor and corporate speech. The common link is that such speech occupies the gray area between the marketplace of goods and services and the marketplace of ideas.

In assessing how closely one should scrutinize a regulation of speech, focus should be shifted away from pigeonholing speech into a category on the basis of ultimately arbitrary factors, but rather toward an assessment of whether the speech possesses attributes that would render government intrusion less troublesome. One can better understand how this approach would play out in practice by exploring its application in three different contexts: the regulation of false speech; the regulation of deceptive or misleading speech; and the regulation of truthful, non-misleading speech.

A. The Regulation of False Speech

False speech has long been regarded as categorically devoid of first amendment value. It is fair to say that false speech bears, at best, a marginal relationship to the exposition of ideas, hinders rather than facilitates political decisionmaking, and makes no meaningful contribution to the self-realization of the listener. There is an argument to be made that the contribution of speech to the speaker's self-realization does not depend upon whether the speech is truthful. As an initial matter, one may wonder whether self-realization as a first amendment

161. See supra notes 51-84 and accompany text.
163. It has been argued that false speech can be expected to elicit truthful counterspeech, and therefore makes a contribution to pursuit of the truth. M. Nimmer, supra note 24, § 3.03[B], at 3-16. Accepting for the moment that this assumption is correct, the question remains whether false speech makes a net contribution to pursuit of the truth when the harm to truth seeking created by the falsehood is taken into account. After all, a crime wave may result in a more responsive and efficient police force, just as a stronger and more effective Federal Trade Commission may emerge from a protracted bout with a spate of particularly fraudulent advertising. In neither case, however, is one inclined to congratulate the criminals or advertisers involved for a job well done, because they have done more harm than good.

Moreover, in the commercial arena, it is not as safe to assume that false speech will elicit truthful counterspeech. As previously indicated, there are financial and temporal disincentives to counterspeech in the commercial context. See supra notes 55-62 and accompanying text.
164. M. Nimmer, supra note 24, § 3.07[B], at 3-16.
value characterized in terms of fulfilling the "need of many men to express their opinions on matters vital to them if life is to be worth living" should logically reach the speech of the thankfully few for whom a day without fraud, perjury or slander is a day without meaning. Setting that to one side, however, self-expression is but one of several justifications for the freedom of speech that the Court has acknowledged in adopting an eclectic approach to the first amendment. To the extent that speech contributes to self-realization, while exerting a detrimental impact on other first amendment values, an eclectic approach to the first amendment properly takes those other values into account in concluding that false speech does not make a net contribution to first amendment values. Accordingly, to the extent that government action prohibits or otherwise regulates false speech without affecting truthful speech, there is no legitimate speech interest to balance against the government interest in regulation. Therefore, the regulation should stand if it can survive minimal due process scrutiny.

The real problem is in deciding when and to what extent government action directed against false speech exerts an impact upon truthful speech. Resolving that problem necessitates two inquiries: first, is the government's characterization of speech as "false" trustworthy and second, will regulation of false speech discourage speakers from uttering truthful speech, out of fear of government regulation?

When the government restricts speech on the ground that it is false, concern that the government may not be trusted to claim a monopoly on the truth is lessened to the extent that the falsity of the speech can be objectively verified. If, for example, the assertion that person A made statement B is demonstrably false, it may form the basis for a Federal Trade Commission cease and desist order, a perjury charge, a slander judgment, or any of a variety of other government actions, depending upon the context in which the statement was made. Regardless of whether the speech is political, scientific, artistic or commercial in character, there is no argument that the government is attempting to redefine the truth.

Even when the falsity of particular speech is not free from doubt, the risk that the government's determination will be improperly biased is still lessened to the extent such determinations are confined to ex-

165. Z. CHAFFEY, FREE SPEECH IN THE UNITED STATES 33 (1941).
166. M. NIMMER, supra note 24, § 1.03, at 1-52 ("In balancing speech and anti-speech interests, the speech interest may often be found subordinate to the anti-speech interest where only the self-fulfillment, and not the enlightenment function, is served by the speech.").
press or implied representations of fact made in the context of speech incident to the sale or promotion of goods and services. With respect to representations of fact, it is possible to assess objectively the government's claim that the representation is false, which would not be the case as to representations of opinion. Moreover, there is an inherent economic incentive for speakers to exaggerate the representations they make to facilitate the sale of their goods and services, thereby justifying greater government vigilance in evaluating those representations. Finally, the consequence of a false representation is that the listener is often given a reason that does not exist to buy a product or service. The logical consequence of having the listener act upon that falsehood is frustration of the listener's expectations and economic or physical injury, both of which the government has an indisputable interest in preventing. In other words, the government's interest in preventing economic or physical injury justifies its efforts to act against close cases of false speech, whereas in other contexts the government's motivations for doing so might be suspect.

Even accepting that the government's motives are pure and that its assessments of falsity are unbiased (so that truthful speech is not at risk of being wrongfully labeled false), prohibition of false speech poses a second potential threat to truthful speech: fear of government sanction for uttering false speech could discourage the dissemination of truthful speech. As previously discussed, however, the profit motive underlying speech incident to the sale or promotion of goods and services makes speakers less timid about approaching the line separating truth from falsehood. Commercially motivated speech incident to the sale or promotion of goods and services can be presumed to influence the content of speech in a predictable direction—toward encouraging purchase of the product. The commercial motivation renders speech "hardier" because there is a financial incentive for the speaker not to alter the content of the communication unless required to do so, or unless alterations in content can be made without diminishing prospective profits. In such cases, the risk of adversely affecting truthful speech by banning false speech is reduced.

167. See supra notes 63-68 and accompanying text.
168. Gertz v. Robert Welch Inc., 418 U.S. 323, 340-41 (1974) ("Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate . . . . And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press.").
169. See supra notes 73-76 and accompanying text.
The foregoing analysis counsels no significant changes in the regulation of false commercial speech, which the Court has properly concluded is deserving of no first amendment protection. It does, however, clarify, if not change, the approach that should be taken to false speech falling outside the comparatively narrow scope of commercial speech, but within the larger purview of speech incident to the sale or promotion of goods and services, particularly corporate speech.

The Court has observed on a number of occasions that the speech itself, and not the identity of the speaker, is relevant to deciding whether and how much first amendment protection to give the speech. Accordingly, the Court has stated that the corporate identity of the speaker is irrelevant to its first amendment analysis and that corporate noncommercial speech is entitled to full first amendment protection.

While the Court has not had an opportunity to confront the issue directly, one implication of extending full protection to corporate speech is that the government may be constrained to tolerate false corporate speech to a greater extent than false commercial speech.

This should not be the case. As an initial matter, I take issue with the conclusion that the identity of the speaker is irrelevant to the quantum of protection that should be afforded the speech. The statement: "Buy a heat pump; it will cut your heating bills in half" is fully protected noncommercial speech if spoken by Ralph Nader, and partially protected commercial speech if spoken by Al the heat pump salesman. If, as the Court has repeatedly emphasized, the speaker's motivations are relevant to the identification of common sense differences justifying

172. New York Pub. Interest Research Group, Inc. v. Insurance Information Inst., 554 N.Y.S.2d 590 (N.Y. App. Div. 1990) (first amendment prohibits application of state deceptive business practices and false advertising statutes to noncommercial speech of insurance trade association). This issue was also confronted recently by the Federal Trade Commission, in an action against an advertisement run by R.J. Reynolds. R.J. Reynolds Tobacco Co., 5 Trade Reg. Rep. (CCH) ¶ 22,522 (April 11, 1988). The advertisement did not identify a brand of cigarettes and did not propose or expressly encourage the consumption of cigarettes. Rather, it merely critiqued scientific evidence linking smoking and disease. The Federal Trade Commission brought a complaint against R.J. Reynolds on the grounds that the company's characterization of the scientific evidence was false and misleading. The administrative law judge dismissed the complaint on the grounds that the advertisement was noncommercial speech, and was therefore beyond the reach of Federal Trade Commission action. The full Commission reversed the administrative law judge, concluding that the speech was commercial in character, and remanded the case for a hearing on the merits. The case ultimately settled.
toleration of greater government interference with some kinds of speech over others, then the identity of the speaker is obviously relevant.

Speech by for-profit corporations, be it technically "commercial" or not, is commercially motivated. Accordingly, the same "hardiness" that inheres in commercial speech is present in equal measure in corporate noncommercial speech. Assuming that the government is not seeking to interpose itself as an ex officio truth fairy where the "truth" cannot properly be ascertained, false corporate speech can be properly restricted.\(^{173}\)

B. The Regulation of Deceptive or Misleading Speech

A false statement is one that is literally untrue or incorrect. An example would be the representation that "Cereal X contains twice as much vitamin A per serving as Cereal Y," when it does not. This literally false statement is obviously capable of deceiving the listener, in the sense of communicating an incorrect impression.\(^{174}\) At the same time, a literally true statement is equally capable of deceiving the listener. Referring back to the cereal example, suppose that cereal X contains twice as much vitamin A per serving as cereal Y, but that the serving size for cereal X is twice as large as for cereal Y. To the extent the representation conveys the impression that a person who eats a serving of cereal X will walk away with more Vitamin A than if she eats a

\(^{173}\) Insofar as newspaper, magazine and television publishing operations are corporations, one may wonder what the implications of proposing to regulate false and deceptive corporate speech would be for the press. The answer is none. Long before the Supreme Court first acknowledged in \textit{Bellotti} that corporate speech generally was deserving of first amendment protection, the Court had separately upheld the first amendment rights of press organizations—incorporated and unincorporated alike. The press is singled out for separate mention in the first amendment, which some commentators have argued should constitute a basis for protecting the press that is independent of the freedom of speech. Baker, \textit{Press Rights and Government Power to Structure the Press}, 34 U. MIAMI L. REV. 819 (1980); Stewart, \textit{Or of the Press}, 26 HASTINGS L.J. 631 (1975). Irrespective of whether the press clause creates a constitutional basis for singling the press out for separate protection, the fact remains that historically the press has occupied a unique niche in American society and has received a unique degree of protection in American law. \textit{See generally L. LEVY, LEGACY OF SUPPRESSION} (1960). Nothing I propose in this Article would change that.

Insulating the speech of the incorporated press from regulations applicable to the speech of other corporate entities, may well give rise to the prickly question of where corporate speech ends and the 'corporate press begins—as, for example, in the case of a magazine sponsored by a single corporation. Regardless of how the press is ultimately defined, however, it does not follow that constitutional authority to regulate false corporate speech generally includes authority to regulate the incorporated press.

\(^{174}\) Craswell, \textit{Interpreting Deceptive Advertising}, 65 B.U.L. REV. 658, 660-61 (1985) ("a consumer is 'deceived' if and only if the consumer forms a belief about some proposition of fact and that belief is false").
comparable amount of cereal Y, the representation is deceptive or misleading. The discussion of deceptive or misleading representations in this section is limited to representations that may deceive without being literally false.

The Supreme Court has summarily concluded that deceptive speech is on a par with false speech, and is thus deserving of no constitutional protection. This is true with respect to perfectly deceptive speech—speech that conveys an accurate impression to no one. On the other hand, what of speech that misleads some, but conveys accurate and valuable information to others?

Preventing deception in advertising, labelling and other business communications would be essentially pointless if the definition of deception was limited to acts or practices that would mislead everybody. In such a case, a business could escape a charge of deception by locating a lone, infinitely cautious, skeptical and neurotic consumer who could testify that he was not misled. Not surprisingly, then, regulatory definitions of deception have fallen short of insisting upon perfectly deceptive representations. The Federal Trade Commission, for example, has characterized a deceptive practice as one with a tendency or capacity to mislead ordinary consumers, or more recently as one that is likely to mislead reasonable consumers.

The net effect is that speech is routinely banned as deceptive, not-

175. Professor Craswell makes a similar point with the following example: Consider an ad that reads: "Enjoy the feel of real mink. Buy a Von Pelt coat today." This ad does not literally claim that Von Pelt coats are real mink. It merely urges the reader to do two things (enjoy real mink, and buy a Von Pelt) without explicitly asserting any relation between the two. However, consumers who saw such an ad would almost surely expect to get real mink if they bought a Von Pelt coat. In legal terms, this would be an "implied claim" that the coat was real mink, and the lack of explicit or literal falsity would not be a defense.


176. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumers Council, 425 U.S. 748, 771 (1976) (in rejecting a state ban on prescription drug advertising, the Court observed that the state did not "claim that prescription drug advertisements are forbidden because they are false or misleading in any way. Untruthful speech, commercial or otherwise, has never been protected for its own sake.").

177. In re Cliffdale Associates, Inc., 103 F.T.C. 110 (1984) (the three member majority opinion applied the new standard of deception that the two member dissent rejected in favor of the established standard).
withstanding that it may be truthful and non-deceptive for a significant segment of the audience. Existing definitions of deception ensure that whatever first amendment value there may be in speech that deceives some but not others, it is inevitably offset by the government interest in regulation. Put another way, step one of the Central Hudson test, which places deceptive speech outside the scope of first amendment protection, represents a categorical application of the succeeding three steps: that the government has a substantial interest in preventing deception and consumer injury resulting from deception; that the interest is directly furthered by a ban on deceptive speech, including speech that may deceive some but not others; and that such a ban is no broader than necessary, given that a ban limited to perfectly deceptive speech would not be effective in preventing most deception.

Conceptually, it may be preferable to view restrictions upon less than perfectly deceptive speech as categorically permissible regulation of otherwise protectable commercial speech, rather than as unprotected noise falling wholly outside the first amendment. Unlike false speech, which is inevitably valueless, deceptive speech is without first amendment value only to the extent it misleads.

Advertising or labelling of certain foods as low in cholesterol provides a useful illustration. Recent studies have associated a low cholesterol diet with a reduced risk of heart disease, prompting a number of advertisers to advise consumers that their products are cholesterol free.\textsuperscript{178} The problem is that many of these same products are high in saturated fat, which has been demonstrated to increase blood cholesterol levels, e.g., snack foods deep fried in palm or cottonseed oil.

Advertising a food as low in cholesterol when it is high in saturated fat may well mislead the consumer who does not focus on the presence of saturated fat in the product, or who is unaware of the relationship between saturated fat and blood cholesterol levels. Such a consumer is likely to see the statement “no cholesterol” and assume, at a

\textsuperscript{178} The Surgeon General has issued a report on diet and health that endorses the conclusions of studies finding a relationship between a low-cholesterol, low-fat diet, and a reduced risk of heart disease. Surgeon General’s Report on Nutrition and Health (United States Department of Health and Human Services 1988). Other studies referenced in the Surgeon General’s report found relationships between sodium consumption and hypertension, between calcium consumption and osteoporosis, and between dietary fiber and colorectal cancer. Food manufacturers have capitalized upon these studies by touting those attributes of their products that are consistent with diets that may reduce the risk of disease. The proliferation of such advertising is reflected in the abundance of regulatory action directed against it. See, e.g., the cases cited in Harris, Legal Restrictions on Food, Drug, and Cosmetic Advertising, 43 Food Drug Cosm. L.J. 249 (1988).
minimum, that eating the product will not adversely affect her blood cholesterol level, which may not be the case.

At the same time, the no cholesterol representation may provide valuable information to the highly sophisticated consumer. Such a consumer may know that the absence of cholesterol alone is insufficient to assure that the food will make a positive contribution to a diet designed to reduce blood cholesterol levels, and that in light of the saturated fats listed in the ingredients and the grams of fat per serving listed in the nutrition information, the product would likely do the consumer's blood cholesterol level more harm than good. Nevertheless, if such a consumer is on a mission to buy junk food, the information that a particular brand of chip is cholesterol free may be of value in choosing between it and a competing brand equally high in saturated fat but fried in lard, thus containing cholesterol as well.

For the sophisticated consumer, the representation at issue is not misleading; if the audience were confined to such consumers, there would be no argument that the advertisement was deceptive. In addition, there would be no basis upon which to claim that the ad was undeserving of first amendment protection. If the audience is expanded to include less sophisticated consumers who may be misled, the first amendment value of the information to those who are not misled is in no way diminished. The most that can be said is that the government interest in preventing deception of the less sophisticated consumers offsets the first amendment value of the speech to the more sophisticated consumer.

The implication of acknowledging a first amendment interest in less than perfectly deceptive speech is that there exists some constitutional dimension to regulatory definitions of deception. Suppose, for example, that deception is defined to include any representation that misleads a member of the audience. In such a case, the Federal Trade Commission could presumably amass an elite cadre of village idiots, one or more of whom is inevitably confused by everything, and systematically find all commercial speech deceptive. In such a case, the government interest in preventing deception of the very few may well be outweighed by the first amendment value of the speech for the many. In the parlance of Central Hudson, so expansive a definition would not directly advance the government's interest in preventing deception, given how few additional consumers are protected, and would be unreasonably broad in scope.
C. The Regulation of Truthful, Non-Misleading Speech

Now for the hard part. The government is on its weakest ground when it seeks to regulate the content of truthful, non-misleading speech, be it commercial or noncommercial in character. Professor Laurence Tribe characterizes regulations aimed at the communicative impact of speech as subject to "Track 1" analysis, in which the first amendment interest is all but absolute, except to the extent that the expression at issue falls into a category outside the scope of the "freedom of speech," such as obscenity or fighting words. "Track 2" analysis, in contrast, is reserved for cases in which the regulation is directed toward the noncommunicative impact of expression. In such cases, as, for example, with time, place and manner restrictions or with the regulation of conduct that may have an expressive component, the incidental impact of the regulations upon speech must be balanced against the government interest in regulation. To the extent commercial speech is regulated on the basis of content, the regulation should theoretically qualify for rigorous Track 1 treatment. In practice, however, the Court has subjected commercial speech restrictions to less searching scrutiny more closely akin to that given speech in Track 2. In the recent Board of Trustees v. Fox case, for example, the Court likened the level of scrutiny given commercial speech restrictions to that given time, place and manner regulations, or restrictions on expressive conduct.

1. Content Neutral Regulations

Time, place and manner restrictions and regulations of expressive conduct are given diminished scrutiny because the purpose served by such restrictions and regulations is unrelated to the suppression of the communicative impact of speech and, therefore, is less threatening to first amendment values. Put another way, the rationale for Track 2 scrutiny is that when government regulation exerts only an incidental, content neutral impact on speech, the government's methods and motives are less suspect, and the degree of judicial skepticism reflected in the standard of review is properly reduced.

180. Id.
181. Id. at 792.
183. See supra notes 181-82 and accompanying text.
In some instances, commercial speech may likewise be regulated in furtherance of objectives unrelated to the goal of suppressing dissemination of the speaker's message. Therefore, commercial speech is justifiably subject to less rigorous scrutiny on that ground. In *Valentine v. Chrestensen*, for example, the legislature's objective in limiting the manner in which commercial speech could be disseminated by prohibiting commercial handbills was to prevent litter. The city's concern had nothing to do with either the message the handbills communicated or the public's response to such communications.  

Similarly, in *Board of Trustees v. Fox*, the state university resolution at issue banned commercial enterprises from operating on campus. The ban encompassed speech, but the effect on speech was arguably incidental to the focus of the resolution, which was aimed at commercial practices or conduct. Again, in *Metromedia, Inc. v. City of San Diego*, a plurality of the Court concluded that a ban on commercial billboards, which had been enacted not because of objections to the substance of the commercial messages communicated, but because of aesthetic concerns over the physical presence of billboards, was constitutional as a restriction on commercial speech.

In none of these instances were the restrictions at issue "neutral" in the traditional sense, because the government had sought to limit the impact of such restrictions to commercial expression while leaving non-commercial expression untouched. This subject matter distinction would likely be intolerable if made between different categories of speech in the noncommercial sphere. The government has, however, traditionally played a role in the regulation of commerce. Consequently, a subject matter distinction that singles out speech in commerce for special regulation may give rise to none of the suspicions that would occur if speech on, say, nuclear energy, were similarly targeted. When, as in *Valentine, Board of Trustees* and *Metromedia*, the government objective is unrelated to the suppression of the message com-

184. 316 U.S. 52 (1942).
187. Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980) ("The first amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion on an entire topic."); Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) (the first amendment prohibits restrictions upon speech "because of its message, its ideas, its subject matter, or its content"). See also Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978).
municated, the regulation may reasonably be regarded as content neutral for purposes of constitutional analysis, notwithstanding that speech in the commercial arena alone is subject to the regulation. Such subject matter distinctions are premised upon the government’s proper and non-suspect involvement in the regulation of commercial practices, and do not warrant special judicial skepticism. Put another way, otherwise neutral regulations of time, place and manner or of expressive conduct should not be considered less than neutral simply because their incidental impact on expression may be limited by subject matter to speech incident to the sale or promotion of goods and services.

2. Content-Based Regulations

Diminished scrutiny of restrictions upon speech incident to the sale or promotion of goods and services cannot always be justified on the ground that the restrictions do not directly regulate speech content, because such restrictions often do. In such cases, the Track 2 rationale for a more relaxed standard of review is inapplicable. In its stead, the Court has offered a hodgepodge of explanations for why content-based regulations of commercial speech are deserving of only intermediate scrutiny, as compared to that given content neutral restrictions on non-commercial speech under Track 2: commercial speech is hardier than other speech; it is more objectively verifiable; it concerns matters within the special competence of the speaker; and it is of less constitutional portent.188

These miscellaneous explanations fall into one of two categories: those suggesting that the government’s interest in regulation is stronger, and those suggesting that the speech interest is weaker. As previously discussed, it is my view that only the former category is valid.189 Even within that former category, however, the most that can be said is that the various features of speech incident to the sale or promotion of goods and services can combine to justify content-based regulation where such regulation would otherwise be forbidden. From this result, it does not logically follow that all content-based regulation of such speech is invariably deserving of diminished scrutiny. Rather, content based regulation of speech incident to the sale or promotion of


189. See supra notes 51-130 and accompanying text.
goods and services is deserving of less stringent scrutiny only to the extent that the factors making it so are present in any given case.

The government may attempt to regulate speech incident to the sale or promotion of goods and services for reasons that are no less troublesome than for other kinds of speech. That will be the case whenever the government regulates speech for fear the speech will function normally by persuading, informing or educating the audience. Speech can persuade, inform or educate the audience in commercial and non-commercial contexts. To the extent the only "danger" the regulation seeks to avert by banning speech is the risk that the public will find the speech persuasive and put it to poor use, there is no more reason to tolerate suppression in the commercial arena than there is anywhere else. As the Virginia State Board of Pharmacy Court put it, "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." When, as in Posadas, the government objective offered for regulating speech is to deprive listeners of access to information for fear that the public will find the information persuasive, there is no justification for reviewing the regulation with less exacting scrutiny than would be applicable to content-based regulations outside the commercial sphere. Absent some special problem unique to speech in the commercial sphere that creates an exception to the principle that the dangers of suppressing speech outweigh the dangers of dissemination, content-based regulation should not be tolerated to any greater extent.

Under what circumstances, then, is diminished scrutiny justified for content-based regulation of speech incident to the sale or promotion of goods and services? It is justified when such speech falls within an exception to the proposition articulated by the Court in Virginia State Board of Pharmacy—that the harm associated with suppressing speech outweighs the harm of the public misusing speech when it is freely available.

The Court's proposition, however, assumes that the public is ordinarily capable of rationally interpreting and acting upon the information it receives. If not, the value of the speech to the truth-seeking process is nullified, and the risk of harm associated with misuse increases geometrically.

That assumption, however, does not always hold true. As empha-
sized in Section I of this Article, speech incidental to the sale or promotion of goods and services possesses a variety of features that can short-circuit the listener's rational decision making process: the commercial motivation of the speaker creates an incentive to exaggerate product and service benefits; the appeal of product and service benefits to nonrational needs of listeners creates unique opportunities for listener manipulation; and the risk that consumers will be constrained to act upon incomplete information due to impediments to the timely airing of alternative viewpoints. At the same time, the relative hardiness of speech incidental to the sale or promotion of goods and services, coupled with the limited range of first amendment interests relevant to the speaker (as compared to the listener), makes it possible to regulate such speech more intensively and to impose affirmative disclosure requirements on speakers without chilling speech unduly or otherwise undercutting first amendment values. When, as in *Friedman v. Rogers* or *Ohralik v. Ohio State Bar Association*, the government's objective in regulating speech occurring in the context of proposing commercial transactions relates to preventing the harms associated with listener manipulation, the less rigorous scrutiny of the *Central Hudson* test is appropriate.

Thus, for example, while diminished scrutiny was not justified by the explanation offered for the advertising ban in *Posadas*, diminished scrutiny might be justified by alternative explanations. Gambling may possess certain qualities that make it an addiction or a compulsion for a significant number of consumers. The addictive feature of the activity may effectively short-circuit the consumer's ability to interpret the promotion of that activity rationally, in much the same way as overreach ing and undue influence may short-circuit the consumer's ability to respond rationally to in-person solicitation from lawyers.  

191. For similar reasons, dicta in *Central Hudson* suggests that a regulation banning speech that encourages energy consumption *solely* because the public may find the speech persuasive, should be regarded as presumptively invalid and subjected to strict scrutiny. Again, this is not to say that a regulation of the sort contemplated in *Central Hudson* should invariably receive strict scrutiny. A ban on electricity advertising that encourages increased energy consumption may be motivated by the concern that consumers are not in a position to make rational, informed decisions on the basis of the advertising alone. Consumers are being encouraged to satisfy their short term energy wants, but may not be aware that they will be doing so at the expense of the nation's long-term energy needs. Given that speech proposing commercial transactions is a call to action that will often be heeded before alternative viewpoints can be heard, greater government regulation is justifiable. Whether the appropriate remedy is a ban on such advertising or merely an affirmative disclosure requirement, is a matter properly resolved in the context of the *Central Hudson* analysis.
The absence of a law forbidding the sale of a product or service may reflect a passive legislative judgment that the harms associated with permitting sales to continue (presumably including the harm caused by the product or service being addictive) are outweighed by the benefits. Accepting as much, there is persuasive force to the view that banning speech about a legal product or service is an inappropriate means to discourage consumption of that product or service. For the reasons just discussed, such speech should not be banned merely because it functions in a commercial context in the same way as it functions elsewhere, by persuading listeners. On the other hand, it is an altogether different situation if the objective is not to discourage consumption of the product or service, but to prevent consumer manipulation. In such a case, the passive legislative determination that a product or service should continue to be sold is irrelevant to the decision whether speech promoting the sale of that product or service is properly regulated on the ground that the consumer's ability to interpret the information received has been impaired.

It was argued earlier that false, deceptive or misleading speech can properly be regulated whenever it is incident to the sale or promotion of goods or services, without regard to whether the speech includes a commercial proposition. Underlying this argument is the premise that false speech, and deceptive speech, at least to the extent it deceives, have no first amendment value. The concerns that have prompted courts to extend a privilege of sorts to utter false speech in other contexts do not ordinarily apply to commercially motivated, objectively verifiable representations incident to the sale of goods or services.

Truthful, non-misleading speech, in contrast, is not valueless, and presents a separate problem. I have argued that greater regulation of truthful speech in the commercial sphere can be justified only where the speech, though truthful, is manipulative or unfair, i.e., where the rational decision making ability of the audience is impaired, and where the assumption that the listener is capable of rationally interpreting the speaker's message does not apply. A risk of manipulation sufficient to justify regulation is ordinarily present only in cases where a commercial transaction is proposed. It is in the context of proposing commercial transactions that listeners are routinely encouraged, explicitly or implicitly, to act before there may be opportunity to receive opposing

192. See supra notes 171-73 and accompanying text.
viewpoints. It is in that context that consumers are confronted with speech offering listeners immediate satisfaction of nonrational needs, which may cloud the listeners' capacity to interpret speech rationally. Speech that does not include a commercial proposition—such as corporate "noncommercial" speech—does not present the same threat to the listener's decision making process. Corporations, like political leaders, may succeed in manipulating their audience, but it is only in the context of speech proposing commercial transactions that the risk of manipulation should be deemed sufficiently real as a general proposition to justify reduced judicial scrutiny.\(^{193}\)

193. This line is concededly somewhat arbitrary. Few would dispute, for example, that the public can be irrationally influenced by the volume or quantity of speech, including but not limited to speech proposing commercial transactions. It is too late in the day to deny the effectiveness of commercial and noncommercial saturation advertising, independent of the merits of the message communicated. Nevertheless, permitting the government to regulate the quantity of truthful information disseminated would represent a rejection of a fundamental principle underlying the first amendment—that the government cannot be trusted and should not be permitted to regulate the freedom of speech.

Some can therefore be anticipated to react with alarm to the Supreme Court's recent decision in Austin v. Michigan State Chamber of Commerce, 110 S. Ct. 1391 (1990), where a Michigan statute prohibiting corporations from using general corporate funds to advertise in support of a political candidate, survived first amendment challenge. Prohibiting the use of general corporate funds to finance political advertising was deemed "precisely targeted", id. at 1398, to serve a compelling state interest in preventing "corporate domination of the political process" by reducing the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." Id. at 1397.

Viewed uncharitably, the Court's decision in Austin "endorses the principle that too much speech is an evil that the democratic majority can proscribe." Id. at 1408 (Scalia, J., dissenting). More charitably viewed, however, Austin simply authorized the state to regulate a species of deceptive, noncommercial corporate advertising. Corporate political advertising is a form of testimonial advertising: the advertising expressly conveys the message that the corporation endorses the candidate; impliedly, the advertising conveys the impression that the owners of the corporation, i.e. the shareholders, likewise endorse the candidate, while the quantity of advertising disseminated reflects the depth of their commitment to the candidate. If such advertising can be purchased with funds that the stockholders have contributed only for general use and not expressly for use in supporting political candidates, the advertising reflects neither the views of the stockholders nor the strength of those views. In effect, words are put in shareholders' mouths, and audiences hearing those words are misled. That this was in fact the concern animating the majority's opinion is reflected in the pains it took to emphasize that under the Michigan law, corporations remained free to purchase political advertising with funds specially segregated for that purpose. In that way, concluded the Court, "the speech generated accurately reflects contributors' support for the corporation's political views." Id. at 1398.

Justice Stevens wrote separately to express his view that there is a "vast difference" between "debating public issues on the one hand, and political campaigns for election to public office on the other", id. at 1407 (Stevens, J., concurring), and that Austin should not be read to authorize segregated fund requirements for corporate noncommercial speech generally. The Court may well find it convenient to so confine Austin, but the difference between a political campaign and a
In light of the foregoing analysis, a threshold inquiry should precede application of a diminished standard of review to content-based regulations of truthful commercial speech under *Central Hudson*: Can the means selected to achieve the government’s objectives be reconciled with the first amendment principle articulated in *Virginia State Board of Pharmacy* that the danger of suppressing speech outweighs the danger of the public misusing speech? The answer is yes whenever the assumptions underlying that principle do not hold, as will be the case when the audience’s capacity to interpret speech rationally is at risk of being impaired, and when the dangers of misuse are correspondingly higher. The circumstances are limited in which the risk of audience manipulation should be deemed sufficient to justify greater government regulation of speech content. When those circumstances are present, however, diminished scrutiny is justified and the remainder of the *Central Hudson* analysis should proceed. In applying the *Central Hudson* analysis, the goal should be to confirm that the government’s objective is to prevent harms resulting from audience manipulation or related problems, and that the means chosen by the government to achieve that objective are logical and do not burden access to truthful information more than is necessary to prevent such manipulation.

Thus far in this Article, I have advocated an approach to the regulation of truthful speech incident to the sale or promotion of goods and services based upon a distinction between manipulative speech, which the government can be trusted to regulate, and merely persuasive speech, which the government has no more business regulating in the commercial sphere than anywhere else. In so doing, I have offered no clue as to how that distinction is to be drawn, except to contrast in general terms speech that influences the listener in a manner comparable to that in the noncommercial sphere, with speech that influences the listener through an impairment or short-circuiting of the listener’s rational thought processes.

The debate over where commercial persuasion ends and commercial manipulation begins is longstanding, and has attracted a venerable line of commentators; I am in firm control of my urge to join the fray—public debate—if a legitimate distinction can be drawn at all—will often be less than vast. If advertising that enables “corporate domination of the political process” is the problem, it is a problem that is not confined to ads endorsing a particular candidate. Other examples include corporate advertising that speaks critically of elected officials, advocates positions on initiatives, referenda or recalls, or urges citizens to write their elected representatives or otherwise communicate their views to any decision making body.
in the twilight of this Article. It is enough to say that one readily available approach would be to turn to the the Federal Trade Commission’s jurisdiction over “unfair” (as distinguished from “deceptive”) acts or practices for guidance. Consistent with current FTC policy, an act or practice is deemed “unfair,” and subject to a cease and desist order on that ground, if the act or practice is likely to result in unjustified consumer injury—a criterion comprised of three sub-parts. First, the act or practice must create a risk of substantial consumer injury, defined to include physical or economic harm, and to exclude emotional or psychological harm. Second, the harm caused by the act or practice must exceed any benefits derived from permitting the act or practice to continue. Third, the consumer must not reasonably be able to avoid the injury. 194

The FTC’s unfairness standard applies to acts or practices; it is not limited to speech. As the standard has been applied to speech, however, the range of representations that the FTC construes to be unfair may reasonably be characterized as falling within the scope of, if not defining, consumer manipulation as the phrase has been used in this Article. By excluding emotional or psychological injury from the scope of unfairness, speech in the commercial sphere that may cause “injury” in the same way as speech arising in the noncommercial context (offensive speech is one example) does not fall within the ambit of unfairness. By confining the definition of unfairness to acts or practices, precipitating injury that cannot reasonably be avoided by the audience, unfair speech is effectively limited to cases in which the audience cannot fairly be expected to interpret the speech meaningfully or rationally (the assumption being that a rational audience will avoid injury if it can). Examples of acts or practices the FTC deems unfair thus include withholding critical information, coercion and undue influence. 195

The approach advocated in this Article is undoubtedly susceptible to a number of valid criticisms. One, however, is worth particular mention. The barrier separating commercial from noncommercial speech may be arbitrarily set, but it is concrete. By removing that barrier in favor of a multifactor analysis, as I have proposed, there is a risk that the principles justifying increased regulation of speech in the commercial sphere will spill over and serve as precedent supporting increased regulation in the noncommercial sphere. Along related lines, a mul-

195. Id. at 539-45.
tifactor analysis lacks the clarity and predictability that the commercial/noncommercial distinction provides. The Supreme Court has expressed a similar concern: "the failure to distinguish between commercial and noncommercial speech 'could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech.'" In other words, by eliminating the lines separating commercial from noncommercial speech, I have created a slippery slope that slides inexorably toward a diminution of first amendment protection.

This is a criticism to be taken seriously. If the multifactor analysis that I have proposed is applied with care, however, it is a criticism that is unwarranted.

First, assume for the sake of argument that the slope created by rejecting the commercial/noncommercial distinction is not without its slippery spots. Even so, it is an improvement over the prevailing approach, which employs a sort of slippery staircase that, in its own way, is more treacherous than a slope in that it deceptively seems to offer firm footing. Where does commercial speech end and noncommercial speech begin? As discussed in Section II, despite the Court's best efforts to create bright line distinctions, none have emerged. Board of Trustees tells us that the inclusion of a commercial proposition is sufficient but, adds Bolger, unnecessary to render speech commercial in character. In the absence of language explicitly proposing a commercial transaction, it is unclear what will be minimally sufficient to qualify speech as commercial. Somewhere between the condom company that says prophylactics are good for America, which the Court tells us is commercial speech, and the power company that says nuclear power is good for America, which the Court tells us is not commercial speech, a nonexistent distinction remains waiting to be drawn. It may have a long wait. In the interim, an amorphous category of substandard speech has been created that can, and in the view of some Court members, already has inadvertently brought speech undeserving of diminished protection within its scope.

As a consequence of the Court's vain efforts to define commercial speech with the precision needed to set it apart as a discrete category, closely related forms of expression have been excluded from the definition that may, in some cases, properly tolerate regulation to no less an

extent. Instead, the courts have proliferated the categories of substandard speech, with each category or step as difficult to define as commercial speech. The rigid and arbitrary classification of speech is responsible for increasing the risk that speech will be inadvertently classified as substandard when it is not.

Second, my slope is not all that slippery, and does not pose a realistic threat to speech properly deserving of full first amendment protection. The approach I have suggested would increase protection for truthful speech in the commercial sphere by limiting the situations in which diminished scrutiny is justified. In those circumstances in which regulations of speech incident to the sale or promotion of goods and services are entitled to less exacting scrutiny than that applicable to regulations of speech in other contexts, the factors justifying diminished scrutiny are sufficiently clear to avoid misapplication of a lesser standard of review to speech meriting full protection. Where the speaker’s financial motivation to disseminate the speech at issue renders it less susceptible to chill, and where the objectively verifiable character of the falsehood or deception ensures that truthful speech is not restricted, false and deceptive speech can be regulated without special concern for either the government’s motives or the chilling effect of the government’s action. Truthful speech can be regulated subject to a less stringent standard of review, provided that the speech is regulated to prevent audience manipulation brought about by a confluence of factors that occurs only in situations where commercial transactions are proposed: an economic incentive for the speaker to exaggerate product or service attributes; inadequate opportunity for audience reflection or access to counterspeech; or an appeal to the audience’s nonrational human needs.

IV. Summary and Conclusions

Speech incident to the sale or promotion of goods and services implicates a range of values underlying the first amendment. Once it is acknowledged that such speech is deserving of first amendment protection, it is inappropriate to assess the quantum of protection it should receive with reference to the relative value of the speech. Within the range of ideas protected by the first amendment, courts have traditionally been reluctant to characterize some ideas as more important than others, notwithstanding the intuitional appeal of doing so. Unfortunately, the Court has not been similarly restrained when it comes to
commercial speech, which the Court has characterized as categorically less important than noncommercial speech.

This is not to say that speech incident to the sale or promotion of goods and services cannot be more closely regulated than other forms of speech. Increased government intervention is justified, given a range of factors rendering regulation of such speech more trustworthy and less troublesome. Regulations addressing problems unrelated to the content of commercial messages, which nonetheless exert an incidental burden upon the dissemination of such messages, are properly subject to the diminished standard of review currently applied to time, place and manner restrictions, and to regulation of conduct that has expressive characteristics. Regulations falling into these categories are intrinsically less suspect because they serve objectives having nothing to do with circumscribing the message the speaker wishes to communicate. Regulations with otherwise content neutral objectives, which exert only an incidental burden on commercial expression, are not rendered more suspect simply because the incidental burden is borne by commercial expression alone. Given the government's longstanding, legitimate, and non-suspect involvement in the regulation of commerce, subject matter distinctions of this limited nature are better understood as a consequence of the government's traditional role in regulating the marketplace, rather than as an invidious effort to deprive audiences of particular categories of information.

With respect to content-specific regulation, there should be no impediment to regulating false or deceptive speech falling within the relatively broad "category" of speech incident to the sale or promotion of goods and services—a category "defined" with reference to those characteristics that render regulation of falsity or deception less troublesome. Those characteristics—the commercial incentive to exaggerate product or service benefits and the traditional role of government in regulating the marketplace to prevent consumer injury, the relative hardiness of commercial expression, and the objectively verifiable nature of the representations challenged as false or deceptive—ensure that the regulation of false or deceptive speech is undertaken for the right reasons, and that it will not exert an unreasonably adverse impact on the dissemination of truthful speech.

In contrast, the circumstances in which the content of truthful speech incident to the sale or promotion of goods or services may be regulated are considerably more limited. It is only when certain assumptions underlying the freedom of speech do not apply that content-
specific regulation of truthful expression in the commercial context should be regarded with less suspicion than content-specific regulation of expression in any other context. Those assumptions relate to the ability of the audience to interpret speech freely and rationally. Only so far as a regulation is directed toward speech that is manipulative, i.e. that threatens to suspend or impair the rational decision making capability of the audience, is diminished scrutiny justified.

I have suggested that the regulation of manipulative speech is properly subject to a more relaxed standard of review only when it arises in the context of speech incident to the sale or promotion of goods or services—a category that again must be defined with reference to those characteristics rendering government regulation of manipulative speech less problematic. Those characteristics are different for regulation of manipulative speech than for false and deceptive speech because it is audience vulnerability that makes manipulative speech a special problem. It is thus only in the context of speech proposing commercial transactions, and related situations posing a comparable threat of audience susceptibility to manipulation, that a problem sufficiently imminent to justify greater judicial toleration of government regulation is presented. In such cases, the more relaxed standard of review developed in *Central Hudson* and clarified in *Board of Trustees* is appropriate.