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The First Amendment and "Scalping" by a Financial Columnist: May a Newspaper Article Be Commercial Speech?

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The First Amendment and "Scalping"
by a Financial Columnist:
May a Newspaper Article Be Commercial Speech?

In Zweig v. Hearst Corp., a financial columnist for a daily newspaper bought stock in a company, then wrote a column recommending the stock without disclosing his ownership of shares and profited on the rise in the market resulting from the favorable article. The Court of Appeals for the Ninth Circuit held that such conduct, which is known as "scalping," violates section 10(b) of the Securities Exchange Act of 1934 and rule 10b-5 promulgated under this section. This note examines whether a column written by a journalist for the purpose of scalping is commercial speech and therefore less protected by the first amendment than non-commercial speech.

594 F.2d 1261 (9th Cir. 1979).

Id. at 1264-65. For details of the transaction, see notes 92-98 & accompanying text infra.


15 U.S.C. § 78j(b) (1976). This section provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentalities of interstate commerce or of the mails, or of any facility of any national securities exchange—

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.


17 C.F.R. § 240.10b-5 (1981). This rule provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentalities of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Zweig v. Hearst Corp., 594 F.2d at 1266-67; accord, Peskind, supra note 3, at 82.

For the test protecting commercial speech, see text accompanying note 189 infra.
The task of defining commercial speech has created difficulty. In Central Hudson Gas & Electric Corp. v. Public Service Commission, the Supreme Court of the United States described such speech as "expression related solely to the economic interests of the speaker and its audience." The Court also recited the earlier definition "speech proposing a commercial transaction." The Court recently repeated the first definition in In re R. M. J., but omitted the second definition. This note concludes that the first definition fails to withstand analysis and that the second comports with an analysis of commercial speech as "a means of forming commitments which are potentially part of the contract of sale" and reflects the Court's actual treatment of commercial speech cases.

The majority in Central Hudson set out the test applied to governmental regulation of commercial speech. The first amendment protects such speech from regulation only if the speech concerns lawful activity and is not misleading. A governmental unit may regulate even such protected expression if the regulation "directly advances" a "substantial" governmental interest and "is not more extensive than is necessary to serve that interest." In In re R. M. J., the Court stressed Central Hudson's observation that the regulation "must be in proportion to" the governmental interest.

This note argues that a columnist's scalping article fits the second definition of commercial speech—speech proposing a commercial transaction—but that treating the column as such speech is undesirable for two reasons. First, the extent to which the editorial content of a newspaper might

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10 Id. at 561.
11 Id. at 562 (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)).
14 447 U.S. at 566.
15 Id.
16 Id.
17 Id.; see id. at 573 (Blackmun, J., concurring in the judgment); Cox, The Supreme Court, 1979 Term—Foreword: Freedom of Expression in the Burger Court, 94 Harv. L. Rev. 1, 35-36 (1980); The Supreme Court, 1979 Term, 94 Harv. L. Rev. 75, 164 (1980) [hereinafter cited as 1979 Term].
19 In commercial speech cases, the Supreme Court has indicated that speech by broadcasters poses special problems which could require separate analysis. See Bates v. State
be deemed commercial speech if scalping articles were treated as such is unclear and therefore such treatment may have a chilling effect on non-commercial speech. Second, the Central Hudson test affords insufficient protection to the article because the test appears not to balance the government's interest in regulation of this instance of commercial speech against countervailing interests in the speech. Instead, an analogy to the Investment Advisers Act of 1940 suggests that the Court's commercial speech analysis may permit regulations that would be unacceptable intrusions on freedom of the press. The note observes that a solution is to recognize that speech may be commercial in varying degrees and to modify the Central Hudson test in two ways: first, to protect even misleading commercial speech from prior restraint when a less intrusive regulation will suffice, and second, to weigh the governmental interest in regulation against the first amendment interests restricted by the regulation. The emphasis in In re R. M. J. on proportionality may signal that the Court intends such balancing.

THE DEFINITION OF COMMERCIAL SPEECH

The Supreme Court originally appeared to deny protection to commercial speech. Forty years ago in Valentine v. Chrestensen, the Court said that although states and municipalities "may not unduly burden or proscribe" dissemination of information or opinion in public streets, "the Constitution imposes no such restraint on government as respects purely commercial advertising." Valentine was often interpreted to mean that the first amendment does not protect commercial speech. Thirty-three years after Valentine the Court suggested in Bigelow v. Virginia that Bar of Ariz., 433 U.S. 350, 384 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 773 (1976); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 387 (1973). For this reason, this note does not deal with the speech of broadcasters. The special problems presumably include the theory that scarcity of broadcast frequencies justifies greater regulation of broadcasts than of other media, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 387-90, 396-401 (1969).


Id.

316 U.S. 52 (1942).

Id. at 54.

Id.

Id.

Id.

Id.

Id.


commercial speech is entitled to some first amendment protection.\textsuperscript{29} Bigelow recognized such protection for an abortion referral service advertisement which reported the legality of abortion in another state, however, and therefore involved speech on a matter of "‘public interest."\textsuperscript{30} Not until \textit{Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.},\textsuperscript{31} in which the Court struck down a ban on pharmacists' advertising of prescription drug prices, did the Court hold that purely commercial speech enjoys some degree of first amendment protection.\textsuperscript{32}

In \textit{Central Hudson Gas & Electric Corp. v. Public Service Commission},\textsuperscript{33} one of a series of cases\textsuperscript{44} following \textit{Virginia State Board}, the Court analyzed a state public service commission's regulation banning advertising by electric utilities to promote use of electricity.\textsuperscript{35} Although the Court found such advertising to be a form of commercial speech,\textsuperscript{36} it held that the first amendment prohibits a ban on such advertising.\textsuperscript{37} In analyzing the issue, the Court considered commercial speech to be speech related to economic interests\textsuperscript{38} and speech proposing commercial transactions.\textsuperscript{39}

\textit{Commercial Speech as an Expression Related to Economic Interests}

The Court's definition of commercial speech as "expression related solely to the economic interests of the speaker and its audience"\textsuperscript{40} appears to be a new formulation. The Court did not explain the definition, but rather appended it to the observation that the regulation involved in the case "restricts only commercial speech."\textsuperscript{41} Justice Stevens, concurring in the judgment in \textit{Central Hudson}, persuasively criticized the definition, first by noting that it is unclear whether the definition refers to "the subject


\textsuperscript{30} 421 U.S. at 822.

\textsuperscript{31} 425 U.S. 748 (1976).

\textsuperscript{32} Id. at 770.

\textsuperscript{33} 447 U.S. 557 (1980).


\textsuperscript{35} 447 U.S. at 558.

\textsuperscript{36} See id. at 561, 566-71.

\textsuperscript{37} Id. at 571-72.

\textsuperscript{38} Id. at 561.

\textsuperscript{39} Id. at 562.

\textsuperscript{40} Id. at 561.

\textsuperscript{41} Id. The Court followed the definition with citations to \textit{Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.}, 425 U.S. at 762; \textit{Bates v. State Bar of Ariz.}, 433 U.S. 350, 363-64 (1977); and \textit{Friedman v. Rogers}, 440 U.S. 1, 11 (1979), but the definition was not used in any of these cases.
matter of the speech or the motivation of the speaker,” and second, by arguing that in each case, the definition is too broad:

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 interests of the audience. Nor should the economic motivation of a speaker qualify his constitutional protection; even Shakespeare may have been motivated by the prospect of pecuniary reward.\(^4\)

Nevertheless, in In re R. M. J. a unanimous Court recited the definition and applied it to the facts of that case,\(^4\) in which the Court held that certain restrictions in Missouri on attorneys’ advertising were unconstitutional as applied to the appellant lawyer.\(^4\) The Court wrote: “By describing his services and qualifications, appellant’s sole purpose was to encourage members of the public to engage him for personal profit.”\(^4\) This focus on “sole purpose” indicates that the definition refers to motivation, but that this is indeed the meaning is not clear because a description of services and qualifications is subject matter. Moreover, the Court did not make clear whether the “personal profit” was the profit of the attorney, the public, or both, though the definitional phrase “the speaker and its audience” suggests that the reference was to both.

If the phrase “economic interests” refers to economic motivation, the definition contrasts with the Court’s previous attitude that looking to the primary motivation of the writer or publisher could endanger commen-

\(^{4}\) 447 U.S. at 579 (Stevens, J., concurring in the judgment).

\(^{4}\) Id. at 579-80; accord, Schaefer, supra note 8, at 38-39. Justice Stevens also quoted Farber, supra note 13, at 382-83 (footnotes omitted): “Economic motivation could not be made a disqualifying factor [from maximum protection] without enormous damage to the first amendment. Little purpose would be served by a first amendment which failed to protect newspapers, paid public speakers, political candidates with partially economic motives and professional authors.” 447 U.S. at 580 n.2.

\(^{4}\) 50 U.S.L.W. at 4189 n.17. In Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882 (1981), the plurality applied the Central Hudson analysis to an ordinance that in part prohibited outdoor billboards containing commercial speech. The plurality said the ordinance’s partial ban on commercial speech was constitutional, id. at 2898, but found the ordinance unconstitutional because it prohibited noncommercial speech on billboards even more than it prohibited commercial speech, id. at 2899. The opinion did not recite a definition of commercial speech.

\(^{4}\) Id. at 4189-90. The Court reversed the Supreme Court of Missouri, id. at 4190, which had upheld the constitutionality of the restrictions and issued a private reprimand to the lawyer, id. at 4187; In re R.M.J., 609 S.W.2d 411, 412 (Mo. 1981) (“We are urged now by respondent to follow the Central Hudson model. We respectfully decline to enter the thicket of attempting to anticipate and to satisfy the subjective ad hoc judgments of a majority of the justices of the United States Supreme Court.” (emphasis in original)). The alleged violations against which the United States Supreme Court found the attorney to be constitutionally protected were describing his practice in unauthorized language, listing jurisdictions where he was admitted to practice, and mailing unauthorized announcement cards.

\(^{4}\) 50 U.S.L.W. at 4189.

\(^{4}\) 50 U.S.L.W. at 4189 n.17.
tary that should be protected. For example, that a publisher sells newspapers or receives payment to publish an advertisement expressing opinions and seeking financial support for the civil rights movement does not bar the publisher from the full protection of the first amendment.

If the economic motivation at stake is that of the audience rather than that of the speaker, the definition remains unsatisfactory. A profit-seeking businessman's access to a dissertation on the money supply still seems entitled to the full protection of the first amendment.

Even before Central Hudson, subject matter was soundly criticized as a basis for distinguishing commercial speech from noncommercial speech because the same products or services that are the subject of commercial advertising also are the subject of speech by consumer advocates, who deserve the full protection of the first amendment. Furthermore, "information about the quality and price of some products may relate to important political issues."

Although the Court in Central Hudson apparently attempted to limit the boundaries of commercial speech by defining it as "expression related solely to . . . economic interests," the word "solely" does not accomplish this purpose. If "solely" means that the speaker must have only an economic motivation, then a labor leader who for economic reasons exhorts employees to strike and an author who writes a pulp book only because of the potential for profit seem to engage in commercial speech, but an advertisement whose writer to any extent seeks esthetically pleas-

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50 Farber, supra note 13, at 381-82. In Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., the Court said that content must be what characterizes commercial speech. 425 U.S. at 761. However, the Court then observed that "speech whose content deprives it of protection cannot simply be speech on a commercial subject." Id.

52 In Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., the Court said it saw no "satisfactory distinction" between speech by contestants in a labor dispute and commercial speech. 425 U.S. at 762-63; see Bates v. State Bar of Ariz., 433 U.S. 350, 383 (1977). However, the Court then cited four cases which did not analyze labor contestants' speech as commercial speech, but rather seemed to treat the speech in a more general first amendment analysis. 425 U.S. at 762 (citing NLRB v. Gissel Packing Co., 395 U.S. 575, 617-18 (1969); NLRB v. Virginia Elec. & Power Co., 314 U.S. 469, 477 (1941); AFL v. Swing, 312 U.S. 321, 325-26 (1941); Thornhill v. Alabama, 310 U.S. 88, 102 (1940)). Thornhill v. Alabama even suggested that at least some speech by a labor contestant is political expression:
ing wording seems to be outside the definition. Moreover, determining whether a person had only one motivation would be difficult. Indeed, a speaker’s choice of words is probably seldom motivated only by an economic interest. If commercial speech must contain “solely” subject matter related to economic interests, the labor leader’s exhortation, the economist’s dissertation, and product information still seem to fit the definition as well as do product advertisements. Such a result is undesirable because of society’s interest in protecting labor’s decision-making process, scholarly economic analysis, and information about products whose safety, quality, and price are matters of public concern.

Furthermore, if commercial speech is defined “solely” by economic motivation, the definition is inconsistent with the facts of In re R____M. J____ and with some prior cases. In In re R____M. J____, the areas of practice which the attorney advertised included “Criminal,” “Divorce, Separation,” and “Custody, Adoption.” That the typical client seeks counsel in these areas solely for the purpose of profit seems unlikely. In Linmark Associates, Inc. v. Township of Willingboro, the Court found “For Sale” signs on real estate to be commercial speech even though one motivation for their use apparently was not the mere expectation of a decline in property values as neighborhoods changed from white to black, but rather the racial fears of white homeowners. In Bates v. State Bar of Arizona, the Court decided that two attorneys engaged in commercial speech by advertising the routine services of their legal clinic even though the attorneys were motivated in part by a desire to furnish legal services to persons of moderate income and thus not merely by the desire to make a profit. Moreover, the Bates advertisement also con-

In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. . . . Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.

310 U.S. at 102-03. The Court in Virginia State Bd. also said that “[w]e . . . advert to cases in the labor field only to note that in some circumstances speech of an entirely private and economic character enjoys the protection of the First Amendment.” 425 U.S. at 763 n.17; see Bates v. State Bar of Ariz., 433 U.S. 350, 364 (1977).

50 U.S.L.W. at 4190 app. A.


See id. at 91-92.

See id. at 88, 90-91. The Court found that an ordinance banning such signs, id. at 86, violated the first amendment, id. at 97.


See id. at 363-82.

Id. at 354.

Id. The lawyers placed their advertisement in order to generate enough business to enable the clinic to survive. Id. The Court decided that application to the attorneys of a disciplinary rule prohibiting lawyers’ advertising, id. at 355, violated the first amendment, id. at 384.
cerned representation in uncontested divorces and adoptions.\textsuperscript{1} Hence, in \textit{Linmark} and \textit{Bates}, the speakers' interests were not solely profit, and in \textit{In re R. M. J.} and \textit{Bates}, the audience's interests were not solely profit.

Similarly, if the definition refers "solely" to economic subject matter, the definition is inconsistent with the facts of \textit{In re R. M. J.} and with prior cases. The representation in divorces and adoptions advertised in \textit{In re R. M. J.} and \textit{Bates} is not solely, nor even primarily, economic in the view of the audience to which the advertisements were directed. In \textit{Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.},\textsuperscript{2} the Court recognized that "an individual advertisement, though entirely 'commercial,' may be of general public interest."\textsuperscript{3} Among the Court's examples were advertisements for abortion referral services and the promotion of the use of artificial furs as an alternative to causing the extinction of some mammals.\textsuperscript{4}

\textbf{Commercial Speech as the Proposal of a Commercial Transaction}

The Court did not expound upon the second definition of commercial speech contained in \textit{Central Hudson} either. The Court formulated this definition, that commercial speech is "'speech proposing a commercial transaction,'"\textsuperscript{5} in the earlier case of \textit{Ohralik v. Ohio State Bar Association}\textsuperscript{6} and suggested that the distinction between commercial and noncommercial speech is merely "'commonsense.'"\textsuperscript{7}

Justice Stevens, concurring in the judgment in \textit{Central Hudson}, argued that this definition "may be somewhat too narrow."\textsuperscript{8} He explained that

\footnotesize
\begin{itemize}
\item\textsuperscript{1} Id. at 354, 385.
\item\textsuperscript{2} 425 U.S. 748 (1976).
\item\textsuperscript{3} Id. at 764.
\item\textsuperscript{4} Id.
\item\textsuperscript{5} Id.
\item\textsuperscript{7} 436 U.S. 447, 456 (1978). The Court previously defined commercial speech as speech "which does no more than propose a commercial transaction." \textit{Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations}, 413 U.S. 376, 385 (1973), \textit{quoted in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.}, 425 U.S. at 762. For a discussion of this definition, see note 90 \textit{infra}.
\item\textsuperscript{8} 447 U.S. at 562 (quoting 436 U.S. at 455-56). The full quotation noted "the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." The word "commonsense" seems to add virtually nothing to the definition. On the one hand, it seems to be commonsense that the editorial content of a newspaper should not be considered commercial speech. On the other hand, it seems to be commonsense that a seller who recommends purchase of his product should be deemed to engage in commercial speech. Both descriptions fit the case of the scalping columnist. For analysis suggesting that the latter view reflects the current definition of commercial speech, see notes 99-115 & accompanying text \textit{infra}.
\end{itemize}

\textsuperscript{9} 447 U.S. at 579 (Stevens, J., concurring in the judgment).
it includes "[a] salesman's solicitation, a broker's offer, and a manufacturer's publication of a price list or the terms of his standard warranty," and might extend as far as "other communications that do little more than make the name of a product or a service more familiar to the general public." He concluded that "[w]hatever the precise contours of the concept, . . . it should not include the entire range of communication that is embraced within the term 'promotional advertising.'"

Justice Stevens thus recognized the difficulty of determining where the line between commercial and noncommercial speech is drawn using this definition. The definition focuses, however, on certain of the attributes of commercial speech, including one that a commentator has used in distinguishing commercial from noncommercial speech: "In addition to being a means of conveying information, commercial speech is also a means of forming commitments which are potentially part of the contract of sale. This trait serves to identify commercial speech." Under both this contractual analysis and the Court's analysis commercial speech consists of representations or misrepresentations which are made by or on behalf of one potential party to a commercial transaction and which may bind that party.

The second definition in Central Hudson apparently is broad enough to include a seller's mere repetition of a brand name to make it more familiar. In Friedman v. Rogers the Court upheld a state law against optometry practice under a trade name. The Court explained that a trade name "has no intrinsic meaning," but may acquire meaning over time as the public associates the name with a standard of price or quality. After sufficient use, a trade name may "identify an optometrical practice and . . . convey information about the type, price, and quality of services. . . . In each role, the trade name is used as part of a proposal of a commercial transaction." The Court observed that the public could be
deceived if the trade name remained unchanged after departure of the optometrists whose skill had attracted public patronage. Because a mere part of a proposal may be commercial speech, Friedman establishes that in the definition "speech proposing a commercial transaction," the word "proposing" must be read rather broadly. The trade name problem fits the contractual analysis because "[d]eception about the identity of a party to the transaction relates directly to the contractual nature of the transaction and is a classical ground for avoiding a contract." A similar rationale applies to brand names.

The contractual analysis and the Court's second definition are consistent with the results in cases in which commercial speech has been treated since the Court returned to the subject in 1973. The Court has deemed commercial speech to include such proposals as classified advertisements of employment opportunities, advertisements by pharmacists of prices of prescription drugs, "For Sale" signs on lawns of houses, advertising of fees for routine legal services, in-person soliciting of a client by an attorney, advertising by electric utilities promoting use of electricity, and, apparently, advertising of contraceptives, as well as optometry practice under a trade name. Accordingly, this note will apply the Court's second definition in an analysis of whether a newspaper ar-

"statement [which] is not an offer but... contemplates an offer," id. The Court apparently intends the second meaning and applies it broadly.

78 Farber, supra note 13, at 396 (footnote omitted).
79 The Court probably would find that the state in at least most instances may fulfill its interest in regulation of a brand name by means other than suppression of use of the brand name. For the test applied to governmental regulation of commercial speech, including consideration of whether the regulation is more extensive than necessary to serve the governmental interest asserted, see text accompanying note infra.
80 See Schaefer, supra note 8, at 38.
81 Farber, supra note 13, at 377.
82 Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973). In a subsequent case, the Court said that an advertisement for an abortion referral service "did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.'" Bigelow v. Virginia, 421 U.S. at 822. For discussion of speech which seems both commercial and noncommercial, see note 90 infra.
84 Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. at 91-92.
86 Ohralik v. Ohio State Bar Ass'n, 436 U.S. at 455-57.
89 Friedman v. Rogers, 440 U.S. at 8-16.
90 In Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, the Court indicated that commercial speech includes "statements [on public issues] made only in the context of commercial transactions." 447 U.S. at 562 n.5. Further, in a passage which seems to suggest that commercial speech includes only "advertising," the Court said, "The First Amendment's concern for commercial speech is based on the informational function of advertising." Id. at 563. However, the Court did not suggest that all advertising is commercial
article written by a scalping financial columnist may be commercial speech. 94

speech. See id. at 562 n. 5 ("utilities enjoy the full panoply of First Amendment protections for their direct comments on public issues"); cf. New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (full first amendment protection for "editorial advertisements").

The reference to statements made only in the context of commercial transactions apparently means that the mixing of noncommercial and commercial aspects in some speech will not exclude the mixture from the definition of commercial speech. See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. at 562 n. 5. This result is appealing because it seems that a speaker should not be able to avoid having speech treated as commercial simply by adding a noncommercial element. Bigelow v. Virginia, 421 U.S. at 831-32 (Rehnquist, J., dissenting); Comment, supra note 47, at 227; see Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. at 562 n. 5; Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 764-65; Farber, supra note 13, at 387-88; 8 IND. L. REV. 890, 896-97 (1975). Nevertheless, the result raises problems discussed below.

The Court's suggestion that commercial speech might be limited to advertising seems to be too narrow and also to add nothing useful to the definition. That limitation to advertising is too narrow is shown by the example of a broker's offer as commercial speech. The offer could be private. A private offer is not generally considered "advertising" because "advertising" means "making public intimation or announcement of anything, whether by publication in newspapers, or by handbills, or by oral proclamation." 2 A.C.J.S. Advertising (1972) (emphasis added) (footnote omitted) (citing People v. Montague, 280 Mich. 610, 619, 274 N.W. 347, 351 (1937) (quoting same language from earlier printing of CORPUS JURIS SEGUNDUM); McDonough v. Board of Educ., 20 Misc. 2d 98, 99, 189 N.Y.S.2d 401, 404 (Sup. Ct. 1959) (quoting same language from CORPUS JURIS)). If on the other hand "advertising" were so broadly defined as to include a private offer, it would seem to refer to the same concept as "statements made in the context of commercial transactions" and to add virtually nothing to the definition of commercial speech.

The Court previously suggested that commercial speech is speech "which does no more than propose a commercial transaction." Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 436 U.S. 736, 865 (1973), quoted in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 782; see Friedman v. Rogers, 440 U.S. at 11 n. 10; Bigelow v. Virginia, 421 U.S. at 822; Comment, Regulating Commercial Speech: A Conceptual Framework for Analysis, 32 BAYLOR L. REV. 235, 235 n. 1 (1980). As noted above, it is appealing to take the position that addition of a noncommercial element should not protect otherwise commercial speech. The contractual analysis deals with this problem by treating regulations dealing with the contractual function of speech differently from those dealing with the informative function. Farber, supra note 13, at 387-88. This does not seem to resolve the problem of an effect on the informative function of speech by a regulation of the contractual function. Like the Court in Central Hudson, Professor Farber appears to accept the commercial speech level of scrutiny for regulation of informative speech if such speech also is contractual: "A justification for regulating the seller's speech relates to the contractual function of the speech if, and only if, the state interest disappears when the same statements are made by a third person with no relation to the transaction." Farber, supra note 13, at 388-89. This note suggests that a scalping columnist's article is an instance in which the speech is contractual, see notes 105-15 & accompanying text infra, but the commercial speech level of scrutiny is inadequate, see notes 127-92 & accompanying text infra.

94 One commentator has suggested that under the first definition, an editorial may be commercial speech. Schaefer, supra note 8, at 39. He noted that a main line of business for Time, Inc., is forest products, id. n. 182 (citing N.Y. Times, June 23, 1978, § D, at 12), and queried, "Might not an editorial supporting or opposing forest conservation efforts, for example, be viewed as a form of 'commercial speech' where a significant percentage of the corporation's business interests involve forest products manufacturing?" Schaefer, supra note 8, at 39 (footnote omitted). This note argues that even under the second definition, the editorial content of a newspaper may be commercial speech.
THE CASE OF THE SCALPING COLUMNIST

In Zweig v. Hearst Corp., defendant Campbell, a columnist for a daily newspaper, bought 5,000 shares of stock in American Systems, Inc. (ASI), for $10,000 two days before his column about ASI appeared. The plaintiffs made an offer of proof which included an expert's opinion that the column caused an increase in the bid price of the thinly traded stock. The day after publication of the article, the columnist sold 2,000 shares for $10,000 and thus recovered his entire investment. Reasonable inferences were drawn that the defendant knew the column would increase the stock price and that he intended to profit. The column did not disclose the defendant's ownership of stock and intent to profit, his practice of scalping stocks of companies about which he wrote, or the reprinting of his columns as advertisements for the subject companies in a financial journal in which he owned an interest. The Court determined that the defendant should have disclosed these facts.

The Scalper's Column as Commercial Speech

Determination of whether the scalping columnist's article is commer-
COMMERCIAL SPEECH

1982]...

commercial speech requires determination of whether the column proposes a commercial transaction. By definition, a scalping column recommends a commercial transaction—the purchase of a specifically named security—and the columnist who makes the recommendation is one of the sellers in the market in which persons who follow the recommendation will make their purchases. The columnist’s recommendation is a proposal of a commercial transaction. The Court has used the word “propose” to include part of a proposal, and a recommendation by a seller to buy his product is at least part of a proposal of a transaction.

Indeed, to say that a seller who recommends the product sold rather than directly proposing a sale of the product is engaged in noncommercial speech would be to place form over substance. That the columnist has not made the proposal to a specific buyer does not matter; advertising is directed to a general audience and nevertheless may be commercial speech. That the buyer of the columnist’s security may not have read or even heard of the columnist’s recommendation does not matter; advertising is no less commercial speech when the advertisement does not cause sales. Finally, that the columnist does not reveal his identity as a seller does not render the speech noncommercial. On the contrary, that a person might engage in commercial speech without disclosing his identity is a concern of the Court.

In addition to satisfying the Court’s definition, identification of the scalping columnist’s article as commercial speech fits the analysis of commercial speech as a potential part of a contract of sale. The columnist, a potential party to a sale, makes representations about the security, but does not disclose his ownership of the security or, as in Zweig v. Hearst Corp., his intent to profit from sale of the security. Under contract law,
"[a] person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist [if]: (a) he knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material." 

A fact is material if the person who does not disclose it "knows or has reason to know [that the fact] will influence the other [person] in determining his course of action." 

In the case of scalping, the columnist seems to have reason to know that his ownership of the security and his intent to sell the security are facts which would influence a potential buyer's action. Therefore, these facts are material. 

An assertion is fraudulent "[i]f a fact is intentionally withheld for the purpose of inducing action." 

The scalping columnist withholds facts at least partly for the purpose of enabling himself to trade on the rise he expects in the market when buyers act in accordance with the recommendation. Hence, the nondisclosure is also fraudulent. 

For these two reasons, the columnist's nondisclosure is equivalent to an assertion that the facts of his ownership and intent to trade do not exist. "A misrepresentation is an assertion that is not in accord with the facts." 

The columnist's nondisclosure, treated as equivalent to an assertion, fits this definition. 

The misrepresentation is a commitment which may make a contract voidable. 

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108 Id. Comment b ( citing id. § 162(2)). One view is that in securities law, a fact is material if there is a "substantial likelihood" that a reasonable person would consider the fact important in deciding on a course of conduct. See TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976); Zweig v. Hearst Corp., 594 F.2d at 1266; R. JENNINGS & H. MARSH, SECURITIES REGULATION 931 (4th ed. 1977). But see SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969).

109 Courts have found the facts that a scalper owns a security and plans to sell the security after publication of the recommendation to buy to be material, though the courts were not applying the precise definition in the text. See, e.g., SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 201 (1963); Zweig v. Hearst Corp., 594 F.2d at 1265-66.

110 RESTATEMENT (SECOND) OF CONTRACTS § 161, Comment b (1979); see id. § 162(1).

111 In order to have an action, such as for voiding a contract, against the maker of the misrepresentation, a person may have to prove justifiable reliance. See id. § 164. Other than in the cases of assertions of opinion, id. §§ 168-169, assertions as to matters of law, id. § 170, assertions of intention, id. § 171, and fault, id. § 172, "the requirement of justification is usually met unless, for example, the fact to which the misrepresentation relates is of only peripheral importance to the transaction or is one as to which the maker's assertion would not be expected to be taken seriously." Id. § 164, Comment d. Under the contractual analysis, the commitment need only be potentially part of a contract of sale for the speech to be distinguished as commercial. See note 72 & accompanying text supra. The misrepresentation in the scalper's column bears the potential that a reader will rely on the column's recommendation and contract to purchase the scalper's securities. This potential reliance is thus sufficient for the reliance element in the contractual analysis of commercial speech.


113 "[A] half-truth may be as misleading as an assertion that is wholly false." Id. Comment b.

114 Id. § 164.
tractual analysis, this commitment serves to identify the column containing the recommendation as commercial speech.\(^{115}\)

**Independence of Liability from Commercial Speech Analysis**

The federal government has sought to regulate speech incidental to securities transactions through section 10(b) of the Securities Exchange Act of 1934\(^{116}\) and rule 10b-5\(^{117}\) promulgated thereunder. These provisions are aimed at discouraging securities transactions based on misinformation.\(^{118}\)

One requirement violated by a scalping columnist is rule 10b-5(b),\(^{119}\) which prohibits a misleading omission of a material fact from a statement made in connection with the purchase or sale of a security. The columnist has made statements about the security, including a recommendation to buy, in a misleading manner by omitting the material facts that he

\(^{115}\) Although the scalper's fraudulent misrepresentation fits the contractual analysis, whether speech is commercial depends on whether it proposes a commercial transaction, see notes 65-91 & accompanying text supra, rather than on whether it contains a misrepresentation. Hence, a recommendation by a columnist who discloses stock ownership also would be commercial speech.

\(^{116}\) 15 U.S.C. § 78j(b) (1976). For the text of this section, see note 4 supra.

\(^{117}\) 17 C.F.R. § 240.10b-5 (1981). For the text of this rule, see note 5 supra.


\(^{119}\) 17 C.F.R. § 240.10b-5(b) (1981). For the text of this clause, see note 5 supra.
owns the security and intends to trade on the rise in the market following the recommendation.\footnote{Zweig v. Hearst Corp., 594 F.2d at 1265-66.} This renders the columnist liable for damages to a person who buys from the columnist, at least in cases in which the buyer relies on the recommendation.\footnote{Id. at 1265.}

A scalping columnist's liability to a purchaser after publication of the article, however, does not depend on finding the column to be commercial speech. At common law, as under the securities statute, the columnist has a duty to disclose as a result of being a party to a business transaction and having knowledge of matters "that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading."\footnote{Chiarella v. United States, 445 U.S. 222, 225 n.5 (1980); 17 C.F.R. § 240.10b-5 (1981).} However, liability need not be stated so as to depend on the existence of a commercial transaction. One who makes a representation which the maker knows is materially misleading because it is incomplete\footnote{RESTATEMENT (SECOND) OF TORTS § 551(2)(a) (1976).} may be liable to a person or class of persons whom the maker

\footnotesize{
\begin{enumerate}
\item Zweig v. Hearst Corp., 594 F.2d at 1265-66.
\item The columnist also may be liable to others. For instance, the plaintiffs in Zweig were not parties to a business transaction with the columnist in that case. See \textit{id.} at 1263, 1265.
\end{enumerate}
}

One commentator has suggested that another theory of liability when a scalping columnist purchases a security before publication of the column recommending the security is that the columnist is liable for nondisclosure of the material fact that the article is impending. Peskind, supra note 3, at 88, 92-96. Because in such a situation the columnist has not yet made a statement, potential liability under rule 10b-5 on the basis of this nondisclosure would seem to depend on rule 10b-5(a) & (c). See Chiarella v. United States, 445 U.S. 222, 225 n.5 (1980); rule 10b-5, 17 C.F.R. § 240.10b-5 (1981). Liability on this theory seems dubious because of the holding in \textit{Chiarella} that liability under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1976), for silence "is premised upon a duty to disclose arising from a relationship of trust and confidence between parties to a transaction." 445 U.S. at 230. This "relationship of trust and confidence" apparently is at least similar to the "fiduciary or other similar relation of trust and confidence," \textit{RESTATEMENT (SECOND) OF TORTS} § 551(2)(a) (1976), quoted in \textit{Chiarella} v. United States, 445 U.S. at 228, from which a duty to disclose arises under a tort theory at common law, \textit{RESTATEMENT (SECOND) OF TORTS} § 551(2) (1976). At least at common law, a newspaper columnist does not seem to owe a fiduciary duty to his readers. Zweig v. Hearst Corp., 594 F.2d at 1269; Peskind, supra note 3, at 85, 90. To hold all newspaper writers to the high standards of a fiduciary almost surely would have a chilling effect and seems contrary to the policies behind freedom of speech and of the press, see, e.g., \textit{New York Times} Co. v. Sullivan, 376 U.S. 254, 269-70 (1964). For a suggestion that a financial columnist to some extent has a fiduciary bond with the columnist's readers, however, see Brudney, supra note 3, at 369. The Supreme Court has said in another context: "The extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly—a duty widely acknowledged but not always observed by editors and publishers." \textit{Nebraska Press Ass'n} v. Stuart, 427 U.S. 539, 560 (1976). Because of the potential chilling effect, this "something in the nature of a fiduciary duty" would seem not to rise to the level of the "relationship of trust and confidence" required by \textit{Chiarella}. Indeed, the context of the comment in \textit{Nebraska Press Ass'n} suggests a lesser duty than that required by \textit{Chiarella}. The sentence following the sentence quoted above is: "It is not asking too much to suggest that those who exercise First Amendment rights in newspapers or broadcasting enterprises direct some effort to protect the rights of an accused to a fair trial by unbiased jurors." 427 U.S. at 560.

\footnote{Id. § 529.}
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has reason to expect to act in justifiable reliance on the incomplete statement.\textsuperscript{124} Hence, what matters is not that a scalping columnist is engaging in a commercial transaction, but rather that the columnist is making a fraudulent misrepresentation.\textsuperscript{125} Nevertheless, the scalping columnist's article fits the definition of commercial speech.\textsuperscript{126}

\textit{Implications of Treating a Newspaper Column as Commercial Speech}

\textbf{The Uncertain Borders of Commercial Speech}

Treatment of the editorial contents of a newspaper as commercial speech could have a chilling effect on journalists beyond the effect of knowledge that journalists are liable for fraudulent misrepresentation.\textsuperscript{127} The extent of such treatment is uncertain because the borders of the definition of commercial speech are undetermined. This uncertainty and the ability of government to regulate commercial speech could chill some journalists' speech.

Four problems demonstrate the haziness of the definition of commercial speech. The first is that it is unclear whether the speaker must propose the commercial transaction only on his own behalf or on the behalf

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\textsuperscript{124} Id. § 531; see James & Gray, \textit{Misrepresentation—Part II}, 37 Md. L. Rev. 488, 524 (1978).

\textsuperscript{125} One might argue that liability is in tort rather than in contract, and that the case of a scalping columnist therefore does not fit the contractual analysis of commercial speech despite the analysis in the text accompanying notes 105-15 supra. It is true that the Supreme Court has analyzed liability under rule 10b-5, 17 C.F.R. § 240.10b-5 (1981), by analogy to tort law. See \textit{Chiarella v. United States}, 445 U.S. 222, 227-29 (1980). However, the contractual analysis of commercial speech does not turn on whether the speech is potentially a basis for liability in tort as well as potentially part of a contract of sale. See note 72 & accompanying text supra. The case simply is that a misrepresentation may be the basis for a tort claim as well as for a contract claim:

A misrepresentation may also be the basis for an affirmative claim for liability for misrepresentation under the law of torts. Such liability for misrepresentation is dealt with in the Restatement, Second, Torts. See Restatement, Second, Torts chs. 22, 23. The rules stated there conform generally to those stated here. However, because tort law imposes liability in damages for misrepresentation, while contract law does not, the requirements imposed by contract law are in some instances less stringent. Notably, under tort law a misrepresentation does not give rise to liability for fraudulent misrepresentation unless it is both fraudulent and material, while under contract law a misrepresentation may make a contract voidable if it is either fraudulent or material.

\textit{Restatement (Second) of Contracts}, Ch. 7, Topic 1, Introductory Note (1979). Moreover, much of the tort law of misrepresentation involves commercial transactions. See, e.g., \textit{Restatement (Second) of Torts} § 529, Comment c, Illustrations 1, 2 (1976). Two commentators have suggested the contract theory of an implied warranty of disinterestedness as a basis for liability of a scalping columnist. Brudney, \textit{supra} note 3, at 369; Peskind, \textit{supra} note 3, at 88-92.

\textsuperscript{127} See text accompanying notes 99-115 supra.

Like the chilling effect of liability for libel, the chilling effect for liability for fraudulent misrepresentation seems desirable. See Comment, \textit{Testing the Vicarious Liability of a Newspaper Publisher Under 10b-5—Zweig v. Hearst Corp.}, 1975 \textit{Utah L. Rev.} 740, 749.
\end{flushleft}
of someone by whom he has been hired, or whether he might also engage in commercial speech by proposing a commercial transaction on behalf of another person, such as a near relative with whom the speaker has a close relationship. If the proposal may only be for the benefit of the speaker, near relatives might circumvent regulations on commercial speech by proposing commercial transactions on each others' behalves. If the proposal may be for the benefit of another, whether a particular relationship would be close enough to make the speech commercial would likely be uncertain.

A related problem involves whether an article in a newspaper might be viewed as speech on behalf of another corporation. This could occur in two ways. First, several officers and directors of newspaper corporations are also officers and directors of other corporations. If a newspaper's officer or director is found to be acting on behalf of the second corporation as well as of the newspaper when he participates in a decision to publish a favorable story in the newspaper about the second corporation, that story could then be considered commercial speech. Second, the newspaper may be a parent or subsidiary of a corporation which engages in other lines of business, or both the newspaper and the second corporation may be subsidiaries of the same parent. In any of these cases, an article related to the second corporation's line of business could be considered speech on behalf of the second corporation.

The third problem is that it is unclear what constitutes a proposal of a commercial transaction. It seems that a seller's recommendation of a purchase of the seller's product should be considered a proposal to engage in a commercial transaction. A requirement that a proposal or a recommendation be direct, however, would be unduly formalistic. As one com-

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123 Examples of commercial speech on behalf of another are an advertisement placed for a client by an advertising agency and an advertisement published by a newspaper as in Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973).


126 Another potential consequence of the interlocking directorate is that if the newspaper's officer or director, when he serves as a director of the second corporation, is acting on behalf of the newspaper to the extent that he has been "deputized" under § 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b) (1976), and if the newspaper corporation trades in the second corporation's stock, the newspaper corporation may be treated as a director of the second corporation and therefore liable to the second corporation for "short-swing" profits which fall within the provisions of § 16(b). See Feder v. Martin Marietta Corp., 406 F.2d 260 (2d Cir. 1969), cert. denied, 396 U.S. 1036 (1970).

127 For discussion of a favorable feature story, see text accompanying notes 136 & 137 infra.

128 See Schaefer, supra note 6, at 13 & n.61, 39 n.192.

129 See id. at 39.

130 See text accompanying notes 100-02 supra.
mentator said of an indirect recommendation to buy securities, in the form of a feature story: "Wooden adherence to the form of the distribution of corporate information will not advance the integrity of the principles of securities legislation." Similarly, wooden adherence to the phrasing of speech rather than to its message will not advance the integrity of the principles of the first amendment. To cause the determination of whether certain speech is commercial to turn on whether the word "recommend" is used, for instance, would be to invite circumvention of the definition of commercial speech. The difficulty of determining when the message is sufficient to constitute a proposal, however, creates uncertainty. Such uncertainty would arise, for example, in determining whether a feature story is favorable in a manner which amounts to a recommendation.¹³⁷

The fourth problem is the potential difficulty in determining whether a person proposing a commercial transaction is speaking as a seller. The proposal of a commercial transaction requires speech by or on behalf of a seller.¹³⁸ A merchant who proposes purchase of the type of goods in which he regularly trades,¹³⁹ or a professional who proposes use of a service which he provides,¹⁴⁰ appears to be a seller. Similarly, a newspaper financial columnist who has engaged in a pattern of selling stock¹⁴¹ might be considered a seller of stock. However, a person who sells on only one occasion also might be a seller. An ordinance regulating "For Sale" signs on lawns, for instance, might reach persons selling their own houses.¹⁴² Whether a person who is not an issuer, broker, or dealer, but who owns securities and recommends purchase of them, is proposing purchase of his securities would seem to depend on whether that person intends to sell at the time of the making of the recommendation.¹⁴³ A sale immediately following the recommendation would be evidence, although not conclusive,

¹³⁶ Peskind, supra note 3, at 85.
¹³⁷ Similar uncertainty would arise from an unfavorable story written about a company by a columnist who plans to purchase the company's stock after the story causes a decline in the price of the stock.
¹³⁸ "How ... does commercial speech differ from noncommercial speech? One obvious distinction is that the commercial speaker not only talks about a product, but also sells it." Farber, supra note 13, at 386; see Rotunda, supra note 48, at 1090. For a discussion of buyers as commercial speakers, see note 72 supra.
¹⁴¹ The columnist in Zweig engaged in scalping more than 20 times. 594 F.2d at 1264 n.4.
¹⁴² See Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. at 86.
¹⁴³ Cf. Zweig v. Hearst Corp., 594 F.2d at 1271 (scalping columnist omits material facts by failing to disclose ownership of security and intent to profit from recommendation of the security).
of intent to sell. The length of time an owner of securities who recommends their purchase must wait before selling in order to attenuate the probative value of the sale as evidence of intent would be an additional source of uncertainty. Intent also might be more easily inferred if the seller had purchased the securities, rather than receiving them as a gift or inheritance, especially if the purchase was made shortly before the recommendation to buy.

The Potential for Regulation

Commercial speech may be regulated to prevent it from being deceptive or misleading. The potential effects of governmental regulation may be seen from the Investment Advisers Act of 1940, an example of regulation designed to prevent deception and the dissemination of misleading commercial information. This example is especially apt because an investment adviser might engage in scalping.

The application of provisions similar to those contained in the Investment Advisers Act to a newspaper columnist could result in various forms

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144 If the speaker has not previously sold securities, he might be considered to have intended to sell only if a sale follows his recommendation to buy. Requiring at least one sale in order to infer an intent to sell, however, would seem to strain the present definition of commercial speech in order to avoid imposing prior regulations on a person who turns out not to sell. Government then would be able to regulate commercial speech in order to prevent it from being fraudulent and misleading only in the sense that government could attempt to deter fraudulent or misleading speech by imposing civil liability or a criminal penalty after the speech, or imposing those limitations on time, place, and manner of speech which would be permissible on noncommercial speech. In indicating that commercial speech may be regulated to prevent it from being deceptive or misleading, the Supreme Court seemed to suggest the permissibility of other regulations too. See Friedman v. Rogers, 440 U.S. at 9-10; Bates v. State Bar of Ariz., 433 U.S. at 383-84; Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 770-72.

145 Cf. Zweig v. Hearst Corp., 594 F.2d at 1264 (scalping columnist purchased stock he was scalping two days before publication of his recommendation).


147 15 U.S.C. § 80b (1976). The act defines “investment adviser” so as to exclude, among others, a publisher of a bona fide newspaper:

“Investment adviser” means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities; but does not include . . . (D) the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation . . . .

Id. § 80b-2(a)(11). The Securities and Exchange Commission staff has suggested that the exemption does not cover an independent contractor who writes a financial column, see note 200 infra, but whether the exemption covers a columnist who is a regular full-time employee of a newspaper is unclear.


149 See id. at 181-82.
of regulation of a columnist's speech. The regulation could lead to registration, disclosure of notes and sources of information to a government agency, the possibility of prior restraint, and the possibility of an injunction requiring publication of statements of disclosure.

Registration under the Investment Advisers Act requires disclosure of considerable business information, including the manner of rendering advice and analysis and the business affiliations for the past ten years of not only the investment adviser, but also of persons who control or are controlled by the investment adviser. Such persons might well be found to include the columnist's editors and publisher. Application for registration requires a $150 nonrefundable fee.

The Investment Advisers Act could require disclosure of sources of information in three ways. At registration, the applicant must describe sources of information. An apparently more exacting requirement is the keeping of records subject at any time to reasonable examinations by the Securities and Exchange Commission. Records include "accounts, correspondence, memorandums, tapes, discs, papers, books, and other documents or transcribed information of any type, whether expressed in ordinary or machine language." This definition would seem to include a journalist's notes. Moreover, in deciding whether to seek to restrain an investment adviser when it appears that the Investment Advisers Act has been or is about to be violated, the commission may require the person violating or about to violate the act to file a written statement "as to all the facts and circumstances relevant to such violation, and may otherwise investigate all such facts and circumstances."

The commission may impose prior restraint in two ways. First, the

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152 Id. § 80b-3(c)(1)(C).
153 Id. § 80b-3(c)(1)(B).
157 Id. § 78s(a)(37). This definition is incorporated into the Investment Advisers Act of 1940 for purposes of the section requiring records. Id. § 80b-4.
158 It appears that the Securities and Exchange Commission does not by rule require an investment adviser to retain all notes. See 17 C.F.R. § 275.204-2 (1981).
160 The court in SEC v. Wall St. Transcript Corp., 422 F.2d 1371 (2d Cir.), cert. denied, 398 U.S. 958 (1970), said that the Investment Advisers Act "grants no authority for review or censorship by the Commission of investment advisory material prior to its publication." 422 F.2d at 1380 n.13. For the reasons in the text accompanying notes 161 & 162 infra, the commission nevertheless appears able to engage in prior restraint.
commission may prevent certain persons from lawfully giving investment advice by denying or suspending registration for cause after a hearing. Second, the commission may obtain an injunction against a practice which violates the Investment Advisers Act.

The commission also might require publication of statements of disclosure under two provisions. First, the provision on keeping records permits the commission to require dissemination of information. Second, the commission may obtain an injunction which requires disclosure of information, such as a practice of scalping.

The requirements of registration, including the work necessary to assure accuracy of the disclosures in the application as well as payment of the fee, might deter a newspaper from reporting on and analyzing securities and their issuers despite the significant role which corporations play in modern society. Although the Supreme Court has determined that the first amendment does not protect a newspaper from the burdens of compliance with regulatory statutes such as federal labor laws and antitrust laws, the Court has not yet dealt with the application of a statute which goes so far as to require registration of a journalist for reasons related to the editorial content of his articles. To the extent that accurate speech about corporations and their securities is chilled, investors and the marketplace, as well as voters reviewing economic decisions by governmental officials, will suffer.

A greater deterrent to a journalist’s speech probably would result from requirement that the journalist’s notes and other information about his sources be available to a government agency because they are records.

16 Id. § 80b-9(e).
145 Id. § 80b-4.
146 Id. § 80b-9(e).
147 SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 196-97 (1963) (injunction may require investment adviser to disclose practice of trading on effect of the adviser's recommendation); cf. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 771 n.24 (it may be appropriate to require a commercial message to include "such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive").
170 The Court has indicated that a newspaper corporation is subject to federal securities law, including the registration requirements of the Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1976). See Curtis Publishing Co. v. Butts, 388 U.S. 130, 150 (1967). Curtis Publishing, however, did not address the issue of regulation of the editorial content of a newspaper.
The Court has permitted access to a journalist's information after a particularized showing of a need for such access.\footnote{Herbert v. Lando, 441 U.S. 153 (1979) ("public figure" plaintiff in libel action, who had to prove knowing or reckless falsehood in order to recover, may inquire into state of mind of journalist alleged to have libeled plaintiff; Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (law enforcement personnel may search newsroom for evidence after obtaining search warrant based on finding of probable cause that newspaper possessed evidence of a crime in which the newspaper was not involved).} It has also held that a journalist, as any other citizen, must testify before a grand jury investigating whether a crime has been committed, even if this compromises a confidential source of the journalist.\footnote{Branzburg v. Hayes, 408 U.S. 665 (1972).} In addition, a subpoena by an administrative agency seeking to obtain papers showing the source and receipt of news from outside a state has been upheld.\footnote{Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946). The subpoena is in 327 U.S. at 210 n.46.} This subpoena was for purposes of enforcing a wage and hour law, however, rather than for purposes of regulating the editorial content of the newspaper;\footnote{SEC v. Wall St. Transcript Corp., 422 F.2d 1371 (2d Cir.), cert. denied, 398 U.S. 958 (1970), the Court cited Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946), in upholding a subpoena by the Securities and Exchange Commission for records in order to determine whether a financial publication was subject to regulation under the Investment Advisers Act or was a "bona fide newspaper" within the exclusion of 15 U.S.C. § 80b-2(a)(11)(D) (1976). 422 F.2d at 1380-81. The subpoena requested the production of "[a]ll documents, agreements, memoranda, correspondence and any other writings relating or containing reference to the obtaining of reports, comments, management speeches and any other written materials for publication in the Wall Street Transcript." Id. at 1374 n.4. The court characterized the subpoenaed papers as "certain correspondence and advertising materials which appear to be directly related to an investigation of the type of practices which might cause a newspaper to fall outside the Act's exclusion." Id. at 1381. The court thought the subpoena would not unduly restrict the publication's expression. Id. This is different from a requirement of registration and continuing regulation.} The Court did not discuss the impact of the subpoena on the editorial content.\footnote{In SEC v. Wall St. Transcript Corp., 422 F.2d 1371 (2d Cir.), cert. denied, 398 U.S. 958 (1970), the Court cited Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946), in upholding a subpoena by the Securities and Exchange Commission for records in order to determine whether a financial publication was subject to regulation under the Investment Advisers Act or was a "bona fide newspaper" within the exclusion of 15 U.S.C. § 80b-2(a)(11)(D) (1976). 422 F.2d at 1380-81. The subpoena requested the production of "[a]ll documents, agreements, memoranda, correspondence and any other writings relating or containing reference to the obtaining of reports, comments, management speeches and any other written materials for publication in the Wall Street Transcript." Id. at 1374 n.4. The court characted the subpoenaed papers as "certain correspondence and advertising materials which appear to be directly related to an investigation of the type of practices which might cause a newspaper to fall outside the Act's exclusion." Id. at 1381. The court thought the subpoena would not unduly restrict the publication's expression. Id. This is different from a requirement of registration and continuing regulation.} The Court has not gone so far as to require the keeping of

\footnote{Ohralik v. Ohio State Bar Ass'n, 436 U.S at 456.}
records which describe the source of the editorial content of a newspaper and which are to be available for inspection by a governmental agency.

The opportunity for prior restraint is contrary to a strong first amendment policy against such restraint. "Any system of prior restraints of expression comes to [the Supreme] Court bearing a heavy presumption against its constitutional validity." The party seeking the restraint "thus carries a heavy burden of showing justification for the imposition of such a restraint." The Court has suggested that commercial speech may be subject to prior restraint under less stringent standards than these. One such standard appears to be that the restraint be a restriction which "is not more extensive than is necessary to serve" the governmental interest asserted. This standard seems to afford more ready approval of a prior restraint than the usual standard, whose heavy burden of showing justification for such a restraint appears to require a showing not only that the restraint is no more extensive than necessary for a governmental interest, but also that the governmental interest is sufficient to overcome the first amendment interest at stake. The Court has not indicated that the lesser standard applies to the editorial content of a newspaper.

A policy which runs counter not only to requiring statements of disclosure, but also to prior restraint, is the policy that journalists, not the government, should determine a newspaper's editorial content. Although

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180 Id.

181 See Organization for a Better Austin v. Keefe, 402 U.S. 415, 418 (1971) (in case challenging restraint of pamphleteering entitled to full first amendment protection, "the courts do not concern themselves with the truth or validity of the publication"); Carroll v. President of Princess Anne, 393 U.S. 175, 183 (1968) (indicating that the governmental interest for "[p]olicy ordered in the area of First Amendment rights must be . . . the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order"). But see Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. at 599-600 (Rehnquist, J., dissenting) (one can virtually always find a less restrictive regulation).

182 Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 391 (1973); Columbia Broad-
this policy may be phrased in terms of protecting political speech, the role played by large corporations in modern society renders difficult any distinction between comment on political and related societal effects of corporate behavior and comment merely on the value of an investment. The policy is not strong enough to prevent the government from requiring a newspaper to publish a statement of ownership in order to receive the privilege of using the mails at a reduced rate. The justification for this requirement, however, is that such a privilege is at public expense and is "not any . . . general regulation of what should be published in newspapers." Moreover, because determination of what facts are material and therefore must be disclosed requires judgment about whether a person has reason to know that a fact would influence another person's decision, the government might have considerable leeway in determining the contents of a disclosure statement under a statute like the Investment Advisers Act. This leeway could chill speech more than the postal regulation. The diminished protection afforded commercial speech would permit such regulation of an article written by a journalist about a company in whose shares he trades or intends to trade with benefit from the article.

IMPLICATIONS OF THIS ANALYSIS FOR DEFINITION AND TREATMENT OF "COMMERCIAL" SPEECH

Because of the uncertain limits of commercial speech and the regulation permitted when speech is treated as commercial, treatment of any editorial content of a newspaper as commercial speech is likely to have a chilling effect. Even without regulation, journalists even somewhat removed from a financial interest in a subject may be reluctant to discuss it due to uncertainty whether they might be inviting regulation. The
number of journalists who have a no more than somewhat removed interest, like the number of officers of newspaper corporations who serve as directors of other corporations, may be quite high. To guard the independence of the press, the editorial content of a newspaper should receive the protection afforded noncommercial speech. A commercial speech analysis will not suffice unless it protects such content. The second definition in Central Hudson & Electric Corp. v. Public Service Commission—speech proposing a commercial transaction—places part of the editorial content of a newspaper in a category receiving diminished protection. The extent of that protection is controlled by a four-part analysis:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.189

This analysis fails to balance the interest in any particular instance of commercial speech against the government's interest in regulating that instance of speech. Instead, the Court's analysis assumes that the interest in all commercial speech is less than any substantial governmental interest in regulation and requires only that regulation directly advance the governmental interest and not be more extensive than necessary.190

The analogy to the Investment Advisers Act illustrates the deficiency of the Central Hudson analysis. The governmental interest in protecting securities markets is substantial. Registration of investment advisers enables the government to identify persons on whom investors rely and who therefore can influence investors. Disclosure of sources of information enables the government to police investment advisers, such as by identifying conflicts of interest. Prior restraints prevent violations. Statements of disclosure avoid uninformed reliance on investment advice. Hence, these regulations directly advance the governmental interest. Moreover, these regulations are necessary for the fullest possible realization of the government's purpose.191

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188 447 U.S. at 562.
189 Id. at 566. The test at least arguably is inconsistent with prior cases. Id. at 576-78 (Blackmun, J., concurring in the judgment). Justice Blackmun argued that the majority's test is appropriate for regulations aimed at misleading or coercive speech, and for time, place, or manner restrictions, but not for regulations intended "to manipulate a private economic decision that the State cannot or has not regulated or outlawed directly." Id. at 573.
190 The Central Hudson test may be read as a balancing test. See notes 201-05 & accompanying text infra.
tools, the securities markets would be less protected against fraudulent investment advice. The deficiency is that the Central Hudson analysis does not allow for the possibility that somewhat less protection of the securities markets is a price worth paying in order to protect a first amendment interest such as financial columnists' discussions of corporate behavior. Even a financial columnist who discloses his intent to trade a security after recommending it proposes a commercial transaction and thereby engages in commercial speech. As a result, the columnist could be made subject to such regulations.

The case of the financial columnist thus supports the proposition that commercial speech has not been sufficiently distinguished from noncommercial speech and provides some support for the position that commercial speech should receive the same first amendment protection as noncommercial speech. As the column written by a scalping journalist illustrates, commercial speech may comprise statements which would be

(Rehnquist, J., dissenting) ("The test adopted by the Court . . . elevates the protection accorded commercial speech that falls within the scope of the First Amendment to a level that is virtually indistinguishable from that of noncommercial speech.").

Because prior restraints prevent speech and therefore are more extensive regulations than, for example, registration, the Court may find that imposition of prior restraints is unconstitutional until less extensive regulations have failed. The commission's means of imposing prior restraints nevertheless may be constitutional because such restraints depend on a showing of cause at a hearing, see text accompanying note 161 supra, or a showing of a violation of the Investment Advisers Act, see text accompanying note 162 supra.

Rotunda, supra note 48, at 1091, cited in 1979 Term, supra note 17, at 166 n.46; 1979 Term, supra note 17, at 166; see 11 ENVTL. L. 767, 768 n.5 (1981) ("Commercial speech has yet to be defined with any precision by the Court, but in general the term refers to business advertising which solicits a commercial transaction or offers relevant information.").

Rotunda, supra note 48, at 1091, cited in 1979 Term, supra note 17, at 166 n.46; 1979 Term, supra note 17, at 166; see 11 ENVTL. L. 767, 768 n.5 (1981) ("Commercial speech has yet to be defined with any precision by the Court, but in general the term refers to business advertising which solicits a commercial transaction or offers relevant information.").

E.g., 1979 Term, supra note 17, at 164-68; Note, Yes, FTC, There Is a Virginia: The Impact of Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., on the Federal Trade Commission's Regulation of Misleading Advertising, 57 B.U.L. REV. 833, 862 (1977); 61 CORNELL L. REV. 640, 660 (1976); see Meiklejohn, Commercial Speech and the First Amendment, 13 CAL. W.L. REV. 430, 443-50 (1977). Contra, Baker, Commercial Speech: A Problem in the Theory of Freedom, 62 IOWA L. REV. 1, 3 (1976) ("given the existing form of social and economic relationships in the United States, a complete denial of first amendment protection for commercial speech is not only consistent with, but is required by, first amendment theory" (footnote omitted)); Roberts, supra note 27, at 115 (the Court's "intermediate course," granting commercial speech "some 'lesser degree' of first amendment protection, offers the proper approach"); Schaefer, supra note 8, at 38 ("few would quarrel with the need for the distinction").

For an argument that securities prospectuses should receive the same protection from prior restraint as the traditional press, in part because the rationale that commercial speech is more durable than political speech does not apply to securities information, see Lively & Leahy, Prior Restraints, Prisoners, Pornography and Prospectuses: A Generic Concept of the Press as a Missing Link in First Amendment Analysis, 15 U.S.F.L. REV. 179, 196-202 (1980-1981). For an argument that "that prior restraint is an inappropriate remedy for the regulation of commercial speech," see Note, Commercial Speech and the FTC: A Point of Departure From Traditional First Amendment Analysis Regarding Prior Restraint, 16 NEW ENG. L. REV. 793, 828 (1981).
protected as social or political speech if they were not made by a person proposing a commercial transaction.

A less drastic solution would be a return to the position in *Bigelow v. Virginia* that speech may be “commercial in widely varying degrees.” Once speech has been identified as at least in part commercial, the test for regulations could then be the *Central Hudson* analysis with these modifications: first, even misleading speech should be subject to no more extensive regulation than necessary to serve the governmental interests in the regulation, and second, even a regulation which directly advances substantial governmental interests and which is no more extensive than necessary should be invalid if the first amendment interests in the speech outweigh the governmental interests.

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195 Commercial speech is identified by its content, L. Tribe, supra note 8, § 12-15, at 654; Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 Va. L. Rev. 1, 2 (1979); Meiklejohn, supra note 193, at 444; 1979 Term, supra note 17, at 167, and by the context of a prospective commercial transaction, Jackson & Jeffries, supra, at 1-2; Meiklejohn, supra note 193, at 444. The case of the scalping columnist shows that content which amounts to a proposal of a commercial transaction in the context of a prospective transaction may not be such a proposal if that same content occurred in a different context. Similarly, a claim that a drug cures cancer may be commercial speech if it occurs in an advertisement, but fully protected speech if it occurs in a book not written by a seller of the drug. Rotunda, * supra note 48, at 1090. Professor Farber has contended that regulation of deceptive advertising fits the description of content-based regulation in Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1491-92, 1498-99 (1975). Farber, supra note 13, at 388 n.73. Professor Farber has argued that regulation of commercial speech should not be treated as content-based because a state’s interest in regulating contracts is unrelated to free expression. *Id.* Regardless of the state’s interest, however, commercial speech always is identified at least in part by its content. L. Tribe, supra note 8, § 12-15, at 654; Jackson & Jeffries, supra, at 1-2; Meiklejohn, supra note 193, at 444; 1979 Term, supra note 17, at 167. Consequently, regulation of commercial speech necessarily is regulation of content. Cf. Ely, supra, at 1495 (conduct which also is speech is 100% action and 100% expression). Professors Jackson and Jeffries, in their article arguing against any first amendment protection for commercial speech, acknowledged that if *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, had “involved political commentary or the publication of newsworthy information [rather than price advertising], the result would have been commonplace, and there would have been no occasion for the groundbreaking assertion of first amendment protection for speech of purely commercial import.” Jackson & Jeffries, supra, at 16 (footnote omitted). The case of the scalping columnist supports the position that newsworthy information may be commercial speech. This contradicts the contention by Professors Jackson and Jeffries that commercial speech does not contribute to self-government, Jackson & Jeffries, supra, at 14.

For an analysis challenging the distinction of content-based regulations from content-neutral regulations, see Redish, *The Content Distinction in First Amendment Analysis*, 34 Stan. L. Rev. 113 (1981).

196 421 U.S. at 826.

197 See id. (test for regulation of speech requires “assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation”). One commentator has asserted that in recent Supreme Court cases, “different forms
In the case of a scalping columnist, this modified analysis still may permit an injunction forbidding the columnist to trade, but could prohibit an injunction forbidding publication of the column because the former injunction would satisfy the governmental interest and the latter injunction therefore would be more extensive than necessary. This remedy would prevent scalping without imposing a prior restraint on speech, and might prevent the government from dictating at least part of the content of a newspaper column contrary to the policy of leaving editorial judgments to journalists.

Under the modified test, purely commercial speech would receive at least the protection of the Central Hudson test, which presumably reflects the Court's weighing of the first amendment interest in speech which does no more than propose a commercial transaction. Intermediate speech such as the scalper's column, however, could receive more protection than under the commercial-noncommercial dichotomy. Because of the chilling effect that registration and disclosure of sources would have on journalists, and the undesirability of prior restraints and government orders about the publication of information, the balance should be struck against application of such regulations to the editorial content of a newspaper.

Such balancing may even be read as consistent with the Central Hudson test. The test requires that there be no less restrictive alternative which satisfies the governmental interest. Applied straightforwardly, such an analysis prohibits "only laws that engage in the gratuitous inhibition of expression," and therefore has been said to invalidate nothing.


See text accompanying notes 160-62 & 175-86 supra.

See text accompanying notes 163-65 & 182-86 supra. If the misleading column has appeared before issuance of an injunction, a court might wish to require another article disclosing ownership of the recommended security. In a case like Zweig v. Hearst Corp., in which the newspaper publisher was not at fault for the scalping, 521 F.2d 1129, cert. denied, 423 U.S. 1025 (1975), an order to publish a subsequent article seems inappropriate. If the publisher is liable, on the other hand, an order to publish a disclosure might satisfy even the modified test.

Before the recent commercial speech cases, and without using a commercial speech analysis, one commentator suggested that an order requiring disclosure would not violate the first amendment. Peskind, supra note 3, at 97-98.

Similar application of a balancing test could challenge the indication by the Securities and Exchange Commission staff that the Investment Advisers Act of 1940 applies to a column written by an investment adviser as an independent contractor for a popular magazine, Bernard Feuer, [1979] Fed. Sec. L. Rep. (CCH) ¶ 81,954.

Ely, supra note 195, at 1485.

See id. at 1490. But see Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. at 569-72 (invalidating a ban on promotional advertising by an electric utility on
However, such analysis also may be applied as a balancing test. A balancing test is "notoriously unreliable," but affords some protection and accommodates the varying first amendment interest as speech varies in the degree to which it is commercial.

In re R_____ M. J_____ may signal that the Court contemplates such balancing. The four-part Central Hudson analysis was relegated to a footnote in In re R_____ M. J_____; the standard repeated in the opinion is that "the interference with speech must be in proportion to the interest served." In order to compare the extent of the interference to the extent of the governmental interest, one must measure the interference. One way to measure the interference is by the degree to which it intrudes on the public interests served by the speech at stake. Another way is to gauge whether the interference is no more extensive than necessary to serve the governmental interest, regardless of whether the interference intrudes to a greater degree on some instances of commercial speech than on others. A requirement of disclosure of sources, for instance, may intrude to a lesser degree on investment advisers, who have an economic interest at stake, than on articles by newspaper financial columnists, who may have a political and an economic interest at stake, even though the requirement in both cases may be no more extensive than necessary to serve the governmental interest in regulation of securities markets. Because the second method of measurement is contained in the Central Hudson test, and because that test followed a discussion including the proportionality standard, the Court appears to

the ground that the state interest at stake was conservation of energy and the ban prohibited even advertising of energy-saving products).

Ely, supra note 195, at 1486-87; see John Donnelly & Sons v. Campbell, 639 F.2d 6, 24 (1st Cir. 1980) (Pettine, J., concurring in the judgment) ("I do not believe that Central Hudson was intended to preclude a balancing test when a statute imposes a near-total ban on one medium of communication."); aff'd, 101 S. Ct. 3151 (1981); 11 ENVT'L L. 767, 781, 783 (1981) (describing Central Hudson test as a "balancing test").

Before presenting the four-part test, the majority in Central Hudson acknowledged that "[the protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation," 447 U.S. at 563. However, this does not make clear whether the Court was recognizing different first amendment interests in varying degrees of commercial speech or was observing that the extent of the government's regulation will depend in part on the form of the expression, for example, the billboards in Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882 (1981). That the Central Hudson test divides speech into commercial and noncommercial, see text accompanying note 189 supra, suggests that the court intended the latter.

50 U.S.L.W. at 4189 n.15.

Id. at 4189 (citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. at 563-64).

See text accompanying note 189 supra.

See 447 U.S. at 566.

See id. at 564.
have intended the second method of measuring proportionality. In *In re R M. J*., however, the Court acknowledged that, at least as applied to advertising of professional services, commercial speech theory is a "developing area of the law." The shift from the focus in *Central Hudson* on the four-part analysis to the focus in *In re R M. J* on the proportionality standard could indicate recognition of varying interests in commercial speech and of a balancing element in the *Central Hudson* test.

CONCLUSION

A newspaper columnist who recommends purchase of a security which he intends to sell proposes a commercial transaction. Consequently, an article by a columnist who engages in scalping fits the definition of commercial speech. Subjecting the editorial content of a newspaper to current commercial speech analysis is undesirable because the limits on what editorial content of newspapers might be commercial speech are unclear, and because commercial speech is subject to regulation which includes the possibility of burdensome registration of journalists, government access to sources of information, prior restraints, and orders about the editorial content of a publication. For these reasons, the case of the scalping columnist provides some support for the position that commercial speech should not be distinguished from noncommercial speech. The distinction may be retained without permitting governmental regulation of the editorial content of a newspaper, however, by recognizing that speech may be commercial in varying degrees and by modifying current analysis to protect even misleading commercial speech against a regulation which is more extensive than necessary and to balance the governmental interest in regulation of speech which contains both commercial and noncommercial elements against the first amendment interest in such speech.

BRUCE A. KOHN

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211 50 U.S.L.W. at 4189 n.16.