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THE FIRST AMENDMENT AND ECONOMIC REGULATION: AWAY FROM A GENERAL THEORY OF THE FIRST AMENDMENT

Steven Shiffrin*

Genuine progress in free speech theory might well be achieved if commentators talked less about FREEDOM OF SPEECH and more about speech. It is not just that preoccupation with the phrase "freedom of speech" has produced excessively romantic generalizations. Nor is it merely that this emphasis helps not at all when the task is to "weigh" encomiums about freedom of speech against similar praise for privacy, the dignity of reputation, the rights of defendants, or what-have-you. Much more important, the commentators' focus upon the abstraction "freedom of speech" has been accompanied and reinforced by a myopic emphasis on Supreme Court law in place of constitutional law.

Nowhere has this myopia been more apparent than in the area called "commercial speech." Reacting to the spectacular adventures of the Supreme Court in the now legendary line of cases from Valentine v. Chrestensen to Central Hudson Gas & Electric Corp. v. Public Services Commission, commentators have gleefully filled the law reviews with articles in which they pore over the decisions and write with grandeur about free speech and its connection to commercial advertising. The commentators' myopia is not simply that they by and large waited for

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Once again I have benefited greatly from the painstakingly detailed and richly constructive suggestions of two outstanding critics: Kenneth Karst and Aviam Soifer. I have also solicited and received valued advice on various aspects of the article from a number of friends and colleagues including Ronald Cass, Robert Jordan, William Klein, Neesa Levine, Gary Schwartz, Seana Shiffrin, and Stanley Siegel. I would particularly like to thank Alison Anderson who was generous with her time in helping me think about a number of securities law questions and to Jonathan Varat who was similarly patient in helping me to work through many of the first amendment rough spots. Finally, I am grateful for the contributions of the many students at U.C.L.A. and Boston University who discussed and debated these issues with me in a series of seminars. None of the above are responsible for any of the errors in the article—indeed, many of them have yet to see the full version.

1 316 U.S. 52 (1942).
2 447 U.S. 557 (1980).
the Court to announce the topic; it is that the commentators have permitted the Court's opinions to define the topic in a narrow and misleading way.

Each commercial speech case the Court has considered has involved advertising or the proposal of a commercial transaction, and almost all of the commentators have looked at the "commercial speech" problem through the lens of commercial advertising. The collective myopia has distorted something quite important: the commercial speech that has been beneath the protection of the first amendment for all these years has not been confined to commercial advertising.

To take an example I will return to, consider the defamation cases in which plaintiffs sue commercial credit corporations for false statements made to potential creditors or employers. During the period between Valentine to Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., the lower courts called such statements commercial speech beneath the protection of the first amendment. After

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6 See, e.g., Note, *Constitutional Protection of Commercial Speech*, 82 COLUM. L. REV. 720, 720 n.2 (1982); Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205 (1976) (extensive and influential analysis of the problems involved in defining commercial speech that assumes a focus on commercial advertising). Daniel Farber, who has written one of the leading articles in the commercial speech area, is careful to note that a variety of speech takes place in other commercial contexts, but limits his discussion of commercial speech to advertising. See Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372, 372 n.1 (1979). A conspicuous exception to the scholarly trend is that of C. Edwin Baker whose theoretical perspective causes him to look at the problem more broadly. See Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976). Even Baker's analysis, however, has been hindered by a focus that is narrower than the diverse range of expressions involved in commercial speech. See infra text accompanying notes 240-50. One of the few writings that takes a comprehensive approach to the question is an excellent student note. See Note, supra note 4.


Virginia Pharmacy, what were the courts to call them? They do not propose a commercial transaction and they are not commercial advertising. Instead, the statements involve speech that is made both pursuant to a commercial transaction and in pursuit of profit. So do statements by political consultants, lawyers, psychiatrists, newspapers, and broadcasters, as we shall later discuss.

By looking at speech made pursuant to commercial transactions, however, we examine only the tip of the iceberg. Commercial actors such as corporations do not speak only to propose commercial transactions, to advertise, or even to influence the outcome of initiatives. Corporations speak to the press, for example, about their corporate future, regulated by the securities laws,9 to their shareholders about their future, regulated by still other aspects of the securities laws,10 to their employees, subject to the labor laws,11 to their competitors, subject to the antitrust laws,12 to government officials, with an eye on the lobbying laws,13 and to their lawyers, their accountants, their bankers, and their suppliers, subject to a host of government regulations.14 Some of

(1981). During the final stages of the editorial process for this Article, the Court agreed to hear a case involving this fact pattern. Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc., 52 U.S.L.W. 3359 (U.S. Nov. 7, 1983) (No. 83-18). The lower court held that no special speech or press protection was appropriate because the defendant was a non-media defendant. Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc., 9 MED. L. REP. (BNA) 1902 (D. Vt. 1983). My view is that the lower court focused on the wrong question. The character of the speech should be the relevant consideration, not the status of the defendant. In my opinion, non-media defendants deserve the same protection afforded to media defendants, see Shiffrin, infra note 37, but some commercial transactions involve no substantial first amendment values. See infra notes 327 & 328 and accompanying text.


these same corporations are banks, airlines, or public utilities subject to other layers of regulation.\textsuperscript{15} Most such regulation has been thought to be economic regulation of speech that is beneath the protection of the first amendment.\textsuperscript{16} Most of the speech I have described above does not propose a commercial transaction. Yet some of it could be characterized as relating solely to the economic interests of speaker and audience—to borrow a phrase casually introduced by the Court in \textit{Central Hudson}.\textsuperscript{17} What is its status? Is it beneath the protection of the first amendment under \textit{Valentine}? That is, is \textit{Valentine} alive and well except for a small part of what the Court previously deemed unprotected? Or is some (much?) of this speech entitled now to full first amendment protection because it does not meet the definition of commercial speech? How should we think about it?

There are many options. Some people believe that the Court should not have disturbed \textit{Valentine}'s cavalier, off-hand, but (they would argue) wise dictum. Better not to impose first amendment values where they do not belong, laureled in a forest of diverse economic regulations; better not to send the courts on search and destroy missions throughout the commercial world; and better to make large rules so that we will not have to worry about small ones.

Seventeen years ago Kenneth Karst wrote a tribute to Harry Kalven that would steer us in another direction. Karst celebrated "the advantages of thinking small."\textsuperscript{18} He praised Kalven for recognizing that if we do not think small we run the risk of deciding cases on the basis of empty abstractions. "To make a balancing approach meaningful, we must think in narrower terms, recognizing that the strengths of the competing interests may vary in new contexts. That is precisely the sort of thing that Professor Kalven does so well."\textsuperscript{19} Even following Karst and Kalven, we might want to create rules that exclude much

\begin{itemize}
\item \textsuperscript{15} See, e.g., sources cited supra note 14.
\item \textsuperscript{16} See, e.g., sources cited supra note 8 (commercial credit reporting companies); SEC v. Wall Street Transcript Corp., 422 F.2d 1371 (2d Cir.), cert. denied, 398 U.S. 958 (1970) (commercial speech subject to SEC regulation of investment advisors); Halsted v. SEC, 182 F.2d 660 (D.C. Cir. 1950) (solicitation of funds for business reorganization by stockholder committee is commercial speech subject to regulation under Public Utility Holding Company Act of 1935); Holiday Magic v. Warren, 357 F. Supp. 20 (E.D. Wis. 1973) (pyramid scheme is commercial speech); Harris v. Beneficial Fin. Co., 338 So. 2d 196 (Fla. 1976) (debt collection communications are commercial speech). For the view that most commercial speech remains outside the first amendment, see Bangor & Aroostook R.R. v. ICC, 574 F.2d 1096 (1st Cir. 1978).
\item \textsuperscript{17} Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. at 561. Even with the new definition, one that would include much speech that is not commercial advertising, the Court still seemed to assume that commercial speech and commercial advertising were one and the same. \textit{See id.} at 563 ("The First Amendment's concern for commercial speech is based on the informational function of advertising.").
\item \textsuperscript{18} Karst, \textit{The First Amendment and Harry Kalven: An Appreciative Comment on the Advantages of Thinking Small}, 13 UCLA L. REV. 1 (1965).
\item \textsuperscript{19} \textit{Id.} at 18.
\end{itemize}
commercial speech from the protection of the first amendment. Before
deciding upon rules, however, we would need to take account of the
range of speech involved.

I begin by supporting the contention that the Court's doctrinal
treatment of commercial speech has been inadequate, and I will be
brief because others have covered the ground so many times before. I
then turn to a more detailed assessment of the commentary that would
exclude commercial speech from first amendment protection entirely. I
consider two main lines of argument. The first contends that the first
amendment is concerned exclusively or predominantly with political
speech, and that commercial speech is not political. The second
maintains that the first amendment is concerned with self-expression,
and that commercial speech does not involve self-expression. Although,
for purposes of exposition, the organization of my response to
these arguments is somewhat different, the substance of my response is
ultimately the same: (1) even if the premises of these arguments were
accepted, some commercial speech nevertheless would merit protec-
tion; and (2) the premises should not be accepted.

Moving from criticism to construction, I describe a more eclectic,
albeit incomplete, framework for thinking about first amendment is-
sues and try to show some of its advantages in the course of exploring
several different types of commercial speech issues. Using my frame-
work, I examine attempts to prohibit the dissemination of true state-
ments, regulations designed to prohibit the dissemination of false or
misleading statements, and time, place, or manner regulations that
discriminate against commercial speech.

I offer neither a bold new methodology, nor any creative "solu-
tion" to the commercial speech problem here. It is precisely because
the problem is so difficult that both courts and commentators have
been groping to find their way. If I have a contribution to make, it is to
show why this difficulty exists, why the commercial speech problem is
in fact many problems, and why the small questions will not go away.

20 See infra text accompanying notes 27-73.
21 See supra note 3. The next round of commentary will presumably consider the R.M.J. and
Bolger cases, see supra note 5. R.M.J. will serve those who want an example of excessively fine-
tuned distinctions masquerading as constitutional law or as an example of the kind of case the
Court might well have left to the lower courts. Bolger has many interesting ramifications outside
the commercial speech area, but its relevance for our purposes is its contribution to the defini-
tional problem. See infra notes 70 & 105.
22 See infra text accompanying notes 84-176.
23 See infra text accompanying notes 177-250.
24 See infra text accompanying notes 271-92.
25 See infra text accompanying notes 293-349.
26 See infra text accompanying notes 350-86.
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The Supreme Court, Commercial Speech, and Free Speech Theory

Virginia Pharmacy and the Equal Value of Commercial Speech

The path that the Court has taken from Valentine to Central Hudson has been described many times. For our purposes, we need focus on only part of the story. In Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,27 the Court told us that the question "squarely before" it was "whether there is a First Amendment exception for 'commercial speech.'"28 Later, the Court stated that "[O]ur question is whether speech which does 'no more than propose a commercial transaction' . . . is so removed from any 'exposition of ideas' . . . and from 'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government' . . . that it lacks all protection."29

Having posed two quite different questions, the Court answered only the second—in the negative.30 Along the way, the Court took a series of positions about the place of commercial speech in first amendment doctrine that it would ultimately repudiate. With an air of insouciant moxie, the Court suggested that commercial speech may be more important than political speech. "[T]he particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate."31 Without breaking stride, the Court opined that commercial speech is political speech, for while it furthers "the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered."32 Yet, in the midst of this, the Court threw up its collective hands to say that it could not tell the difference between commercial and political speech:

Obviously, not all commercial messages contain the same or even a very great public interest element. There are few to which such an element, however, could not be added. Our pharmacist, for example, could cast himself as a commentator on store-to-store disparities in drug prices, giving his own and those of a competitor as proof. We see little point in requiring him to do so, and little difference if he does not. . . . [N]o line between publicly "interesting" or "important" commercial advertising

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28 Id. at 760-61.
29 Id. at 762.
30 Id.
31 Id. at 763. For an interesting application of this, see Ernest W. Hahn, Inc. v. Codding, 501 F. Supp. 155 (N.D. Cal. 1980) (abuse of process may be more keenly felt in the commercial setting than in a public interest setting).
and the opposite kind could ever be drawn.\textsuperscript{33}

The Court discarded this last point before it even completed the opinion. In footnote 24, the Court admitted that it could tell the difference between commercial and political speech, referring to the now famous "commonsense differences"\textsuperscript{34} between commercial speech (which the Court equated with proposing a commercial transaction)\textsuperscript{35} and other forms of speech. But through it all the Court never admitted that commercial speech was less valuable than political speech. The "commonsense differences" had nothing to do with value. Commercial speech was thought to be more verifiable and hardy than political speech.\textsuperscript{36} As the commentators quickly pointed out, the verification distinction has weak empirical foundations\textsuperscript{37} and the hardness analysis is just a logical mistake.\textsuperscript{38}

However much the distinctions were lacking in sagacity, the doctrinal approach was relatively clear. True commercial speech was as good as true political speech and deserved protection. False commercial and political speech were beneath first amendment protection.\textsuperscript{39} Commercial speech, however, because it was thought to be harder and easier to verify than political speech, did not need the doctrines of prior restraint or overbreadth to maintain its vigor.\textsuperscript{40}

This nomenclature obscured the important fact that the line between true and false speech is not bright. I do not refer here to the difficulty of distinguishing true commercial speech from false commer-

\textsuperscript{33} \textit{Id.} at 764-65.

\textsuperscript{34} \textit{Id.} at 771 n.24.

\textsuperscript{35} \textit{Id.}

\textsuperscript{36} \textit{Id.} at 772 n.24.

\textsuperscript{37} As Daniel Farber puts it:

Commercial speech is not necessarily more verifiable than other speech. There may well be uncertainty about some quality of a product, such as the health effect of eggs . . . . On the other hand, political speech is often quite verifiable by the speakers. A political candidate knows the truth about his own past and his present intentions, yet misrepresentations on these subjects are immune from state regulation.


\textsuperscript{38} As Martin Redish puts it:

[It is also incorrect to distinguish commercial from political expression on the ground that the former is somehow harder because of the inherent profit motive. It could just as easily be said that we need not fear that commercial magazines and newspapers will cease publication for fear of governmental regulation, because they are in business for profit. Of course, the proper response to this contention is that our concern is not whether they will publish, but what they will publish: fear of regulation might deter them from dealing with controversial subjects.

Redish, supra note 37, at 633. Accord Shiffrin, supra note 37, at 957 n.252. For related discussion see Farber, supra note 6, at 386.

\textsuperscript{39} Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) ("There is no constitutional value in false statements of fact.") For criticism of this view, see Shiffrin, supra note 37, at 953-54.

cial speech, but rather to the presence of a category in between the two extremes. The Court in *Virginia Pharmacy*, without using the word "misleading," considered the argument that the publication of the truth in drug advertising would be misleading in the context. Misleading speech is a half-breed, true in form and even in effect for many, but false in the impressions it creates for others. All language misleads some people to some extent. How many are too many and how much is too much are questions of policy and degree. The distinction between the true and the misleading is normative. In *Virginia Pharmacy*, the state apparently feared that if price advertising entered the market, consumers would be misled: they would place undue emphasis on cost over quality, and would be led away from the professional quality pharmacist whose services go beyond that of a mere retailer.

In response to this argument, the Court observed that it saw no obstacle to state regulation of misleading commercial speech even if such speech were not probably or even wholly false. Yet the Court rightly interpreted the state's apparent concern as having nothing to do with misleading speech. The speech was not likely to create a false impression about the product for sale. Instead, the state was concerned with the uses to which the consumers would put the true information. This concern set the stage for the Court to inveigh against a paternalistic approach that sought to advance state ends by keeping citizens in ignorance, and to recommend that the better approach would be to open the channels of communication. "[N]othing prevents the 'professional' pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer." Indeed, the choice between open and closed channels of communication was not "[the Court's] to make." The choice between the dangers of suppressing information and the dangers of its misuse if freely available is one "that the First Amendment makes for us.

In bold strokes, the Court thereby endorsed different treatment of commercial and political speech while it simultaneously supposed that the value of each type of speech in the first amendment hierarchy was constitutionally equal. By so doing, the Court fashioned an elaborate doctrinal mosaic with three dominant themes: (1) a longstanding opposition to the creation of hierarchies of protected speech within the first amendment.
amendment; (2) an absolute commitment to the principle that paternalistic closing of the channels of communication is forbidden by the first amendment; and (3) an assumption that "commercial speech" and "proposing a commercial transaction" were one and the same.

The Demise of Equality Among Types of Protected Speech

Soon after *Virginia Pharmacy*, the New York Court of Appeals evaluated the constitutionality of a slightly revised version of the same ordinance that had been considered in *Valentine v. Chrestensen*. It read *Virginia Pharmacy* to say that commercial speech was as good as political speech and, therefore, concluded that a New York ordinance that outlawed commercial but not political leafletting was unconstitutional. In short, it held that the doctrine of *Valentine* had "passed from the scene."

This was the most reasonable reading of *Virginia Pharmacy*, yet *Valentine*’s holding and much of its doctrine have not passed from the scene. In fact, *Valentine* now stands at center stage. Within two years of *Virginia Pharmacy*, the Court completely changed rationales. In *Ohralik v. Ohio State Bar Association*, the Court held that commercial speech occupied a lower place in the first amendment hierarchy than other noncommercial expression. In *Metromedia, Inc. v. San Diego*, a majority of the Court decided that commercial billboards could be outlawed even if political billboards were not banned. Although it would not take a magician to distinguish leaflets from billboards, it is unlikely that the Court will be much interested in doing so.

The holding of *Valentine*, in all likelihood, survives. Commercial speech is within the protection of the first amendment, but it receives less than full protection. Contrary to *Virginia Pharmacy*, commercial speech is not equivalent to political or even artistic speech; it is less important. Although Justice Blackmun labored to defend the asserted equal relationship between commercial speech and political speech for the *Virginia Pharmacy* majority, Justice Powell in *Ohralik* was content

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51 See id. at 529, 355 N.E.2d at 377, 387 N.Y.S.2d at 416.
52 Id. at 530, 355 N.E.2d at 377, 387 N.Y.S.2d at 417.
55 Id. at 456.
57 Seven members of the Court supported that conclusion, but not in a majority opinion. See id. at 513 (White, Stewart, Marshall, and Powell, JJ.); id. at 541 (Stevens, J., dissenting in part); id. at 563-69 (Burger, C.J., dissenting); id. at 569-70 (Rehnquist, J., dissenting).
58 The groundwork for such a distinction is set out in Redish, supra note 4, at 448 n.89.
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to lead the Court to an opposite position without explanation. In so doing, Justice Powell steered the Court to accept a hierarchy of protected speech for the first time, despite his own stated opposition to creating any such hierarchy.

From Absolute Anti-Paternalism to Balancing With No Holds Barred

In *Central Hudson Gas & Electric Corp. v. Public Services Commission,* Justice Powell altered the second part of *Virginia Pharmacy*’s doctrinal mosaic. In *Virginia Pharmacy,* by way of *ipse dixit,* the Court said that the choice between the dangers of suppressing information and the dangers of its misuse had already been made by the first amendment. Paternalistic suppression of information was not permitted—period. In *Central Hudson,* Justice Powell observed with more panache than accuracy that the commercial speech cases had developed a multipart test, an approach that ultimately allows paternalistic suppression of true commercial information so long as the government has a substantial government interest, that the regulation in question directly advances the government interest, and the regulation is not more extensive than necessary to serve that interest. Thus, it seems that a slightly different choice was “made for us.” Perhaps one *ipse dixit* deserves another.

Under the new regime, true commercial speech may be outlawed if, but only if, the prohibition directly serves a substantial state interest by means no more extensive than necessary. Prohibitions of false or misleading speech are always permitted, although the standards for evaluating government claims that particular commercial speech is misleading remain open-ended. The standards are searching and skeptical when pharmacist and lawyer advertising are at issue; they are lax and trusting when optometrist trade names are in question. The Court has suggested strongly that advertising about the quality of attorneys' services might be misleading and thus not permitted, despite *Virginia Pharmacy*’s assertion that quality advertising by pharmacists is permitted. Under the first amendment, it seems, there is no such

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59 He did observe that if commercial and noncommercial speech were placed on a par, the latter would be subject to dilution, see *Ohrnalik v. Ohio State Bar Ass’n,* 436 U.S. at 456, but this concern presupposes an unexplained difference between the two.

60 *Young v. American Mini Theatres,* 427 U.S. 50, 73 n.1 (Powell, J., concurring) (inclination is to avoid distinctions between types of protected speech).


62 See id. at 566.


66 *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. at 770 (“[N]othing prevents the ‘professional’ pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer.”).
thing as a false idea, unless it is a commercial opinion or at least a private attorney's opinion, about his or her own worth.

**The Move from "Proposing a Commercial Transaction" to the "Economic Interests of Speech and Audience"**

The Court also discarded the last part of *Virginia Pharmacy*'s doctrinal mosaic in *Central Hudson*. In *Hudson*, the Court described commercial speech as that relating solely to the economic interests of speaker and audience. The phrase is repeated in a recent attorney advertising case. Presumably, this phrase is a term of art, an empty vessel into which content is poured, for the Court has applied the phrase in a way that has nothing to do with the English language. A person listening to commercial advertising is not hermetically sealed off from his or her place in the world—as homo economicus. Those who paid attention to *Central Hudson*'s promotion of electricity did not process its message by shunting the message into an exclusive economic compartment entirely removed from all thinking about energy problems. A person contemplating divorce who listens to an attorney's message about divorce services may be a consumer, yet it is curious to describe the message as relating solely to his or her economic interests. Obviously, also, many persons not contemplating divorce hear attorney advertising and attend to it nonetheless. It is unclear whether the Court's locution focuses on the message, the motivations of speaker and audience, or on some other aspect or combination.

Once this problem is sorted out, an obvious move would be to substitute the phrase "predominantly in the economic interests of speaker and audience" for "solely in the economic interests of speaker and audience." Such a substitution would make it less difficult to swallow

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70 Matter of R.M.J., 455 U.S. 191 (1982). On the other hand, the Court in *Bolger v. Youngs Drug Prods. Corp.*, 103 S. Ct. 2875 (1983), returns to the "proposing a commercial transaction" notion. *Id.* at 2879. It again seems to equate commercial speech and commercial advertising. *Id.* at 2879 n.6. The Court seemed to equate the two even in *Central Hudson*. See supra note 17.
71 For perceptive elaboration of the points made in this paragraph, see Note, The First Amendment and "Scalping" by a Financial Columnist: May a Newspaper Article be Commercial Speech?, 57 IND. L.J. 131, 134-36 (1982). Justice Stevens also observed that the definition the Court offered was ambiguous. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. at 579 (Stevens, J., concurring).
72 It may be, however, that the Court has written itself into a corner. In *Virginia Pharmacy*, the Court wrote that "the interests of the contestants in a labor dispute are primarily economic, but it has long been settled that both the employee and the employer are protected by the First Amendment when they express themselves on the merits of the dispute in order to influence its outcome." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 762. Perhaps the word "solely" in the Court's new definition of commercial speech is used to
the fiction employed. Even then, a casual glance at the diversity of fact situations involving speech by commercial actors suggests that whatever phrase the Court uses, it will have to absorb a multiplicity of relevant factors. What nags here is not that the Court has abandoned an excessively narrow phrase, "proposing a commercial transaction" for a better but still unsuitable one; the suspicion is that the Court does not yet appreciate the nature of the commercial speech problem. What we are witnessing could be described by any number of epithets; a generous characterization is that we are watching doctrine evolve case-by-case via the common law method, with all its potential for false starts, ambiguities, and uncertainties.\footnote{73} The Court has not explained why commercial speech deserves a subordinate place in a hierarchy of protected speech, and it has shifted its stand on paternalism without extended consideration of the implications of either position. Finally, the Court has yet to fully focus on the question of what-speech outside advertising is to count as commercial speech. In short, there is much room for discussion about the relationship between the first amendment and economic regulation, and about the role that courts should play in examining that relationship.

THE COMMENTATORS, COMMERCIAL SPEECH, AND FREE SPEECH THEORY

Divorcing Commercial Speech from the First Amendment

Many first amendment commentators would counsel the courts to stay out of the commercial speech area. They include people who are profoundly committed to freedom of speech, like C. Edwin Baker,\footnote{74} Archibald Cox,\footnote{75} Thomas Emerson,\footnote{76} Alexander Meiklejohn,\footnote{77} and

\begin{itemize}
\item Emphasize that \textit{labor} speech is not \textit{commercial} speech. Even with this understanding, the complexity of the Court's categorization scheme has not been exhausted, for the strength of protection afforded to an employer's speech is a function of context, a context that the Court has recognized as quite different from that of an ordinary political speech. See \textit{NLRB v. Gissel Packing Co.}, 395 U.S. 575, 617-18 (1969).
\item In any event, it is clear that the Court has not allowed doctrine to interfere with its intuitions. This is not necessarily bad. The wisdom of the common law might inhere in its willingness to reformulate principles when new fact situations suggest that its prior formulations have been misguided. Such flexibility might be particularly important in constitutional law when the consequences of decisions are nationwide with small possibilities for change. As Thomas Nagel has observed:

\begin{quote}
[Judgment—essentially the faculty Aristotle described as practical wisdom—reveals itself over time in individual decisions rather than in the enunciation of general principles . . . . We should [not] abandon the search for more and better reasons and more critical insight in the domain of practical decisions. It is just that our capacity to resolve conflicts in particular cases may extend beyond our capacity to enunciate general principles that explain those resolutions. Perhaps we are working with general principles unconsciously, and can discover them by codifying our decisions and particular intuitions.]
\end{quote}

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\item \textit{See Cox, Foreword: Freedom of Expression in the Burger Court}, 94 \textit{Harv. L. Rev.} 1, 28, 33
\end{itemize}
Frederick Schauer. Each of these commentators counsels that commercial speech has little to do with our commitment to free speech. Two main lines of argument are advanced in support of this view. The first is a politically based interpretation of the first amendment. The most detailed exposition of this position is in Thomas Jackson and John Jeffries’ article entitled *Commercial Speech: Economic Due Process and the First Amendment.* The authors propound a point of view more or less in the Meiklejohn tradition and owe much (duly credited) to the writings of Lilian BeVier, Judge Robert Bork, and Alexander Bickel. The second line of argument has been expounded by C. Edwin Baker. Under his interpretation of the first amendment, the self-expression of the speaker is the amendment’s nearly exclusive focus. Although Baker writes with one foot in the radical tradition and another in the liberal tradition, he owes nothing to anyone. His theory is a genuine original and it has been developed in a number of difficult but provocative articles.

I propose to show that the politically based approach and the self-expression approach are both misguided. On their own premises, neither approach supports the view that commercial speech should be outside the scope of the first amendment, for the commentators have not taken full account of the range of activity that has traditionally been thought of as commercial speech. Moreover, their premises are indefensible.

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77 Indeed Meiklejohn’s animosity toward the profit motive carried him beyond the exclusion of commercial speech from the first amendment. See A. Meiklejohn, Political Freedom 87 (1965); “The radio as it now operates among us is not free. Nor is it entitled to the protection of the First Amendment. It is not engaged in the task of enlarging and enriching human communication. It is engaged in making money.”
76 F. Schauer, Free Speech: A Philosophical Enquiry 103 (1982).
81 Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1 (1971).
The Politically Based Approach.—Jackson and Jeffries begin with the assumption that the commercial speech that has long been considered to be beneath the protection of the first amendment is “business advertising that does no more than solicit a commercial transaction or state information relevant thereto.”84 With this understanding, they proceed to argue that free speech has nothing to do with commercial speech. In their view, the first amendment protects “only certain identifiable values.”85 The principal value is effective self-government.86 It is possible, they observe, that the amendment protects the opportunity for individual self-fulfillment through free expression,87 though they are not comfortable with that idea and assume it only for purposes of argument.88 The two principles of self-government and individual self-fulfillment, they say, “capture in reliable summary the dominant89 conceptions of the meaning of freedom of speech.”90 In their view, “neither value is implicated by government regulation of commercial speech.”91 And Jackson and Jeffries “are unable to discover—in the opinion of the Court, in the secondary literature, or in our own reflections—any other principle that would bring the protection of commercial speech within the scope of the first amendment.”92

To the contrary, John Stuart Mill’s emphasis on the role of free speech in the discovery of truth and on the fallibility of the government in regulating speech is a prominent theme in the secondary literature,93 not to mention its frequent appearances in the opinions of the Court.94

84 Jackson & Jeffries, supra note 79, at 1.
85 Id. at 5.
86 Id.
87 Id.
88 Id. at 13. They do not follow through on their assumption, however. They adhere to it to the extent they consider whether the interest in self-fulfillment supports protection for the advertiser. Id. at 14. When they finally address values that could easily be grouped under the self-fulfillment of the listener, they deny their relevance to first amendment analysis. See id. at 17 n.57.
89 The word “dominant” is doing a lot of work here. It is designed to exclude traditional first amendment values such as advancing truth. This value is discarded in a footnote as not being a principal first amendment value by reference to a quotation from Alexander Bickel. See id. at 11-12 n.40. Bickel is quoted for the argument that truth cannot be the sole or chief first amendment value “unless we take the view that truth is entirely a product of the marketplace and is definable as the perceptions of the majority of men, and not otherwise.” Id. (quoting A. BICKEL, THE MORALITY OF CONSENT 62-63 (1975)). For the argument that the so-called marketplace argument depends upon no such assumption, see infra text accompanying notes 293-300. Even if the goal of advancing truth were not a dominant value, however, Jackson and Jeffries do not explain why a value need be dominant in order to count in a first amendment balance.
90 Jackson & Jeffries, supra note 79, at 12 n.40.
91 Id. at 5-6.
92 Id. at 13.
93 See infra text accompanying notes 293-300.
94 For a brief survey, see Baker, Freedom of Speech, supra note 83. Jackson and Jeffries are not unaware of this, of course. Their treatment of the issue, however, is both cryptic and unsatisfying. See supra note 89 and accompanying text.
That fact should at least give one pause before conceding the reliability of the Jackson-Jeffries glossary of first amendment values. Additional doubt arises when one remembers that Kenneth Karst\textsuperscript{95} and Ronald Dworkin\textsuperscript{96} emphasize equality, dignity, and respect as principal values of the first amendment. One can question whether Karst's and Dworkin's concepts are captured in a summary that itself does not distinguish between individual self-fulfillment and autonomy.\textsuperscript{97} These considerations can be saved for discussion of Professor Baker's work, however, since he gives them more detailed treatment.

In analyzing Jackson and Jeffries, it is profitable to explore whether an exclusive emphasis on political speech would remove commercial speech from first amendment protection. I also want to explore the assumptions about law one would have to make even to doubt that self-fulfillment should play a strong role in first amendment analysis or to believe that a reliable summary of first amendment law could be confined to political speech and self-fulfillment.

Jackson and Jeffries are on their strongest ground when they argue that a politically based approach to the first amendment would dictate a different result in \textit{Virginia Pharmacy}. Politically based approaches to the first amendment, of course, have long been criticized for their inability to define the scope of "political."\textsuperscript{98} Commentators either define political speech too narrowly, excluding literature, art, and science from the first amendment, or define political speech broadly enough to include these areas, an approach that exaggerates the role of literature, art, and science in politics and offers no principled way to justify other exclusions.\textsuperscript{99} Jackson and Jeffries believe that they need not tackle the problem of defining political speech in order to handle the problem of commercial speech. Whatever the scope of a politically based approach, it surely does not "include 'speech' irrelevant to the processes of political decisionmaking, or so tenuously connected as to be no more useful in the formation and reformation of political opinions than the experience of life itself."\textsuperscript{100}

What of \textit{Virginia Pharmacy}'s claim that drug price advertising is relevant to the political process? Jackson and Jeffries have a relatively


\textsuperscript{96} See, e.g., R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

\textsuperscript{97} See Jackson & Jeffries, \textit{supra} note 79, at 13-14. For extended discussion of the two as separate values that are somewhat peculiarly housed under the umbrella value of individual self-realization, see Redish, \textit{supra} note 37. A distinction between the two is of importance to Ronald Dworkin's work. See Dworkin, \textit{Is There a Right To Pornography?}, 1 OXFORD J. LEGAL STUD. 177 (1981).

\textsuperscript{98} See, e.g., Chafee, Book Review, 62 HARV. L. REV. 891 (1949); Redish, \textit{supra} note 4, at 436-38.

\textsuperscript{99} See, e.g., Shiffrin, \textit{supra} note 37, at 935-38.

\textsuperscript{100} Jackson & Jeffries, \textit{supra} note 79, at 11.
easy path to pursue here. Price advertising is simply not political speech. In terms of relevance to political decisionmaking, "advertising is neither more nor less significant than a host of other market activities that legislatures concededly may regulate." The same can be said about the role of commercial information in fostering the efficient allocation of resources. Their argument here seems right on target. It was strange indeed for the Court to suggest that the first amendment has been Chicago-school economics travelling incognito for all these years. This suggestion looks a little less strange, of course, if the pursuit of truth is counted as one of the purposes of the first amendment. It is easy enough to say, however, that price advertising is removed from political debate.

Jackson and Jeffries have a more difficult time with the Court's contention that an individual advertisement may be of general public interest. The Court points to such examples as an artificial fur manufacturer promoting its product as an alternative to the extinction of fur-bearing mammals by its competitors, or a domestic producer advertising its product as an alternative to imports. There is a straightforward way to handle these examples. One could candidly admit that the content of commercial advertising sometimes has political significance, and proceed to argue that sorting out such advertisements on a case-by-case basis presents risks of arbitrary decisionmaking and uncertainty—speech might be commercial one day and political the next, creating the concomitant difficulty of determining how long an issue is political—and that commercial advertising is so rarely political that a general refusal to make these inquiries would not seriously interfere with political debate.

Has the nation's political debate turned much at all on the content of product advertisements? Advocates could find occasional examples, but putting aside institutional advertising, commercial advertisements rarely contribute to political dialogue. Recognizing that some commercial speech is relevant to political dialogue seems more palatable, however, than pretending (as the Court does in Central Hudson) that speech advocating the consumption of electricity in the midst of a national debate about energy is "related solely to the economic interests of the speaker and its audience." Admitting that commer-

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101 Id. at 18.
102 Id. at 25-33.
104 For the surprising claim that content regarding public affairs in an advertisement should in some circumstances be a factor cutting in favor of regulation, see Standard Oil Co. v. FTC, 577 F.2d 653, 659 (9th Cir. 1978) (public affairs content may take on increased importance in public mind and court apparently thinks it is related to reliance).
105 Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. at 561. The Court, however, did candidly observe in a footnote that the material in the advertisements was of political interest. Id. at 563 n.5. The problem is matching that observation with its definition of
cial speech is occasionally relevant to political issues also seems more palatable than the way in which Jackson and Jeffries handle the Court's artificial fur and domestic manufacturer examples.

In a move that preserves their textual claim that commercial speech has nothing to do with political speech, Jackson and Jeffries consign the Court's examples to a footnote in which they argue that government can regulate such speech because the government could outlaw the underlying activity.106 "The problem with the examples used in Virginia Board of Pharmacy, therefore, is that it is difficult to justify protection of a means to an end primarily on the ground of its ability to achieve that end, when the end itself may be freely dispensed with."107 Indeed it is.108 But the examples mentioned in Virginia Pharmacy were not offered to show that advertising achieves a particular end. They were designed to support the separate argument that commercial advertising may be of general or public interest.109 The best Jackson and Jeffries can do here is try to argue that the speech can be regulated nonetheless, but they cannot maintain a squeaky-clean separation between commercial advertising and political speech.

Beyond Commercial Advertising.—If it is difficult to fashion a neat dichotomy between commercial advertising and political speech, it is impossible to maintain a commercial/political distinction when one moves beyond advertising to other categories of "commercial" speech. Let us first focus upon what most would regard as a sacred cow. Surely the first amendment has nothing to do with the securities laws, or at least so we have long assumed. In Ohralik v. Ohio State Bar Association, the Court went out of its way to explain that "numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities . . . [or] corporate proxy statements . . . ."110 That is the Court's present bottom line, but it glosses over a significant doctri-

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106 Jackson & Jeffries, supra note 79, at 21 n.70.
107 Id. (quoting Supreme Court, 1975 Term, 90 HARV. L. REV. 56, 145 n.23 (1976)).
108 On the other hand, Jackson and Jeffries are on more tenuous ground when they invoke the "familiar notion that the greater power normally includes the lesser" as a major premise to oppose the commercial speech case law. Jackson & Jeffries, supra note 79, at 34. Their "familiar notion" seems to be a variation of a well known fallacy, namely the fallacy of division. See M. BLACK, CRITICAL THINKING 212 (1946) (the assumption that what is true of the whole is true of the part). Among other things, the "familiar notion" is difficult to reconcile with the equal protection clause and is of no assistance without criteria for distinguishing greater powers from lesser ones.
nal problem which makes the distinction between commercial and political speech impossible to maintain.

Suppose the chief executive of General Motors wants to give a speech at a press conference. He or she wants to talk about the future of the company, future production plans and expected sales, expected areas of difficult competition, and the potential for successes and failures in meeting that competition. Would such a speech be political or commercial? There are certainly commercial aspects to the speech. People will likely buy and sell General Motors stock in response to it. But the executive is not proposing a commercial transaction or advertising cars. Rather, the speech is about the economic future of General Motors.

Analyzing the political aspects of the encounter is somewhat more complicated than it would be if the speech were to be given by a car manufacturer in Eastern Europe. The political character of the speech would then be obvious since the speaker would be an appointed government official announcing the government’s hopes and expectations. Some might be tempted to say that what is political there is non-political here, but that retort is glib.

Look first at the executive’s speech through the lens of American libel law. In casting the decisive vote to extend the protection of New York Times Co. v. Sullivan\(^{111}\) to public figures, Chief Justice Warren recognized that “increasingly in this country, the distinctions between governmental and private sectors are blurred . . . . It is plain that although they are not subject to the restraints of the political process, ‘public figures,’ like ‘public officials’ often play an influential role in ordering society.”\(^{112}\) Even if the libel perspective were not available, it would be quite difficult to maintain that the remarks of a major auto executive are irrelevant to the political process. The fate of elected public officials often turns on the degree of inflation or unemployment, or more generally on economic conditions. The decisions of major corporate executives obviously affect economic conditions. Public officials have never been blind to this. They have tried to threaten, to subsidize, to regulate, and to persuade businesses to serve the public interest.\(^{113}\) They have talked of a partnership between business and government because there is one. If we shift our example from the auto industry to the defense industry, the point is even more obvious. The Lockheed executive’s expectations for the future depend in large measure on his or her expectations about what government officials are likely to do in the future, and insights on that point are of political moment. The same is true of auto executives and many others. In short, if Jackson

\(^{111}\) 376 U.S. 254 (1964).


\(^{113}\) For a perceptive general discussion, see C. LINDBLOM, POLITICS AND MARKETS 161-233 (1977).
and Jeffries were to maintain that a first amendment that covered only political speech would be irrelevant to the speech of corporate executives about the future of their companies, they would be forced to fall back on a simplistic model of politics.\textsuperscript{114}

Moreover, if the position would be a hard one for Jackson and Jeffries to take, it would be even harder for the Court to do so. Having opined that a pharmacist's public statements of drug prices are political because they serve to allocate resources in the economy, what room for maneuver could the Court find if it were confronted with the fact that bankers routinely examine the statements of corporate executives in deciding how productive resources shall be invested?\textsuperscript{115}

All this comes home to roost in the securities laws. For years the SEC has taken various positions as to what corporate executives could talk about without exposing their companies to crushing liability under the securities laws.\textsuperscript{116} Today the Commission purportedly encourages executives to make statements about the Company's future,\textsuperscript{117} but the form of the Commission's "encouragement" is such that a lawyer is likely to advise a corporate executive that serious risks attach to making future projections.\textsuperscript{118} Moreover, for many years the SEC discouraged executives from making projections.\textsuperscript{119} If the analysis so far is correct, for many years the SEC has been regulating speech\textsuperscript{120} that is important to the political process—\textit{without any first amendment scrutiny.}

\textsuperscript{114} I do not think Jackson and Jeffries would do this. They recognize, for example, that information about the degree of concentration in an industry would be relevant for informed decision-making on antitrust policy, even if it did not involve a debate over governmental action. Jackson & Jeffries, supra note 79, at 10. If they were to exclude such speech from first amendment protection, they would follow an argument much like that of Judge Bork. See infra text accompanying notes 118-64. They apparently leave open questions about the scope of "political speech." See Jackson & Jeffries, supra note 79, at 11.

\textsuperscript{115} See Schneider, supra note 9, at 266-68; Kripke, The SEC, the Accountants, Some Myths and Some Realities, 45 N.Y.U. L. Rev. 1151, 1199 (1970).

\textsuperscript{116} For a brief survey, see materials in R. Jennings & H. Marsh, SECURITIES REGULATION 144-67 (5th ed. 1982).

\textsuperscript{117} See id. at 157. When companies have securities in registration, however, the Commission warns them not to initiate publicity, but allows them to respond to "legitimate inquiries for factual information . . . ." Nonetheless, the issuers are told to avoid "[i]ssuance of forecasts, projections, or predictions relating but not limited to revenues, income, or earnings per share. . . ." and to avoid publishing "opinions concerning values." Guidelines for the Release of Information by Issuers Whose Securities are in Registration, Release #33-5180, 1 FED. SEC. L. REP. (CCH) ¶3056, at 3065 (1973).

\textsuperscript{118} For a glimpse of the risks, see H. Bloomenthal, 1982 SECURITIES LAW HANDBOOK § 11.08, at 185-88, § 12.05, at 214-15.

\textsuperscript{119} R. Jennings & H. Marsh, supra note 116, at 153. The SEC took the position for years that projections were \textit{per se} misleading. See 17 C.F.R. § 240.14a-9 (1976)(note to proxy rules stating that projections are misleading).

\textsuperscript{120} The nature of the regulation has been somewhat complex. The SEC took the position that projections were misleading. Nevertheless, executives took the SEC more seriously with respect to documents filed with the Commission; except when they had materials in registration (see supra note 117), they frequently ignored the SEC's position with respect to their other public communi-

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On Jackson and Jeffries' own premises, even if they are right about *Virginia Pharmacy*, there are strong grounds for questioning the sagacity of the "commercial speech" doctrine.

The same set of questions arises when government regulates union or corporate elections. Here the regulations vary. The NLRB, for example, has vacillated for many years about the scope of its power to act when it finds that a representation election has been influenced significantly by the misleading statements of an employer. By contrast, the SEC regulates the content of proxy materials in corporate elections to screen out misleading statements. Similarly, the SEC regulates the content of proxy materials in corporate elections to screen out misleading statements. By contrast, a federal administrative agency surely could not screen out "misleading" statements made by a candidate for political office, or dictate other sanctions, even if it found the statements to be deceptive or misleading.

Even if one were prepared to cling to the idea that elections of those who command substantial productive resources are non-political, however, a separation between the political and the commercial could not be easily made here, either. For example, suppose a shareholder submits a proposal for the proxy materials suggesting that the corporation should not invest in South Africa, Israel, or the Middle East. Better yet, suppose the shareholder submits a proposal that would bar the corporation from using treasury funds to give contributions to any Republican or to solicit funds for any fund that gives money to Republicans. Suppose the shareholder opposes a proposed slate of directors because they are Republicans and argues that Republicans have always done a poor job of managing the productive resources of the economy. Even if one assumes that corporate elections are generally non-political, the spectacle of the SEC editing proxy materials on the basis of what is true or false on matters of domestic and foreign policy should at least cause first amendment eyebrows to lift.

The union context is equally interesting. The debate over whether

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1. See infra note 331.
2. The Commission requires that proxy statements first be filed with it to permit adequate review. See Material Required to be Filed, Regulation § 240.14a-b, 3 FED. SEC. L. REP. (CCH) ¶ 24,010, at 17,557 (1982). The filings are not public, but the material may be disclosed to other agencies and "the Commission may make such inquiries . . . as may be necessary for an adequate review . . ." Id. Nonetheless, that materials have been examined by the Commission "shall not be deemed a finding" that the material is accurate or not misleading. Id. ¶ 24,013, at 17,565. For brief discussion of the enforcement mechanisms, see L. Loss, FUNDAMENTALS OF SECURITIES REGULATION 562-67 (1983).
3. See, e.g., Redish, supra note 37, at 634.
4. In 1980, the Division of Corporate Finance of the SEC stated that shareholder proposals concerning matters of public policy accounted for some 20% of resolutions subject to shareholder vote. STAFF OF SENATE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, 96TH CONG., 2D SESS., REPORT ON CORPORATE ACCOUNTABILITY 139 (Comm. Print 1980) [hereinafter cited its STAFF REPORT].
to unionize is a debate about the sources of power that should govern an important part of an employee's life. The debate often may turn on matters of general political interest. Moreover the union often works as lobbyist in the legislative process and as participant in the electoral process. At the same time, unions are bargaining to sell the services of their members at the highest price. In that sense they are "commercial" entities. Similarly, the content of the employers' speech often may involve statements that relate to matters of general political interest. When discussion focuses on how power ought to be distributed in the workplace, we might regard the discussion as inherently political. In any event, many union campaigns involve the most volatile of political issues. If those committed to a politically based conception of the first amendment were to consign labor law to a status beneath first amendment protection, they could not plausibly defend the consignment on the ground that such speech was irrelevant to the processes of political decisionmaking.

The approach that Jackson and Jeffries champion, then, is not well suited to support the conclusion that all economic regulation should be beneath first amendment protection. Even if one accepts their assumption that the first amendment is exclusively concerned with political speech, there is good reason to think that much so-called economic regulation touches speech of political importance. The case they marshal, however strong in the commercial advertising area, seems to cut the other way when one steps back to examine more of the territory than they and other commentators have typically examined.

Confronting The Underlying Premises.—I have accepted the underlying wisdom of a politically based approach to the first amendment, to this point, arguing only that its scope reaches somewhat further than Jackson and Jeffries might want to allow. In retort, those authors could retreat to a narrow conception of politics, a strategy followed by Judge Bork, but one that they have left open. In any event, Jackson and Jeffries are building from Bork's general interpretation of the first amendment. It is that interpretation I now want to criticize. My aim is to establish that the premises of the politically based approach are unacceptable.

In understanding the politically based approach that Jackson and Jeffries, BeVier, and Bork follow, it is important to recognize that their approach derives from a particular theory of the judicial role as much as from a theory of freedom of speech. It owes as much to Herbert Wechsler as it does to Alexander Meiklejohn. As Bork develops

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125 It is not at all clear that Jackson and Jeffries would go that far. See supra note 114.
127 A. Meiklejohn, supra note 77 (arguing for a limited conception of freedom of speech).
the argument, the starting point is that the Court must not be a “‘naked power organ’”128 and must formulate principled positions because if “the judiciary really is supreme, able to rule when and as it sees fit, the society is not democratic.”129 His idea is that the judiciary can properly function as a counter-majoritarian force that confronts majority tyranny only by resort to “certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution.”130 If the judiciary functions in this way, Bork is prepared to say that society has consented to be ruled undemocratically to that extent.131 If, on the other hand, the judiciary imposes its own value choices, the Court “necessarily abets the tyranny either of the majority or of the minority.”132 The Court must govern according to principle, then, because the constitutional and popular assumptions that give the Court power demand that it so function.133

“[L]ed by the logic of the requirement that judges be principled,”134 Bork concludes that constitutional protection should be afforded only to political speech.135 What about literature or speech that is otherwise conducive to the development of the faculties of an individual, to happiness, or to the spread of truth? First amendment analysis cannot countenance any of these goals because “[t]hese functions or benefits of speech are . . . to the principled judge, indistinguishable from the functions or benefits of all other human activity. He cannot, on neutral grounds, choose to protect speech that has only these functions more than he protects any other claimed freedom.”136 Such values and others like them raise questions about expediency, prudence, and how to rank the means of human gratification. Therefore, according to Bork, these questions are best suited for resolution by legislatures, not judges.137

Freedom of political speech, on the other hand, Bork asserts is implicit in the representative democracy formed by the Constitution: “The first amendment indicates that there is something special about speech. We would know that much even without a first amendment,

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128 Bork, supra note 81, at 2 (quoting Wechsler, supra note 126).
129 Bork, supra note 81, at 2. In attempting to show that Judge Bork does not adequately support his conception of the judicial role, I touch lightly on a number of grand issues. I do not purport, however, to address the interpretivist-non-interpretivist debate, let alone to support adequately any affirmative position of my own concerning the relationships among democracy, principles, and the judicial role. My objective here is confined to refutation.
130 Id. at 3.
131 Id. at 2-3.
132 Id. at 3.
133 Id. at 4.
134 Id. at 20.
135 Id.
136 Id. at 25.
137 Id. at 25-26.
for the entire structure of the Constitution creates a representative democracy, a form of government that would be meaningless without freedom to discuss government and its policies."\(^{138}\)

Nonetheless, Bork contends that only explicitly political speech deserves protection.\(^{139}\) Any other view, he argues, would lead to unprincipled decisions; and that is that. All other speech is open for regulation by city councils, legislatures, town mayors, and the like. "Freedom of non-political speech rests, as does freedom for other valuable forms of behavior, upon the enlightenment of society and its elected representatives. That is hardly a terrible fate. At least a society like ours ought not to think so."\(^{140}\)

Bork's position breathes new vitality into the old cliche about the tail wagging the dog. Instead of first exploring the concept of freedom of speech in light of our history and traditions, and then paying attention to judicial responsibilities in light of that exploration, he interprets freedom of speech in a way that services a pre-conceived judicial role. As Bork puts it: "[W]e are looking for a theory fit for enforcement by judges."\(^{141}\)

If the tail is to wag the dog, if we are to define freedom of speech by the judges' role, rather than the other way around, one at least expects a powerful showing about the theory of the judicial role. I shall argue that Bork's showing is deficient, but first, some of the underbrush needs to be cleared away. By invoking the term "principle" to cloak his theory, Bork's position enjoys a rhetorical advantage it does not deserve. To be opposed to a principle or a principled interpretation suggests that one is unprincipled, lacking integrity. One can be stock full of integrity, however, and favor entirely different ways of looking at the judicial role. Indeed, it is not clear that any Justice of the Supreme Court has ever adopted Bork's view of the judicial role; certainly no Justice of the Supreme Court has ever adopted anything close to Bork's theory of freedom of speech. Bork would not contend they all lacked integrity. He would contend, however, that their exercise of power has been illegitimate.\(^{142}\)

Before addressing the heart of the legitimacy claim, it is helpful to note what Bork rejects. Some might think that the history leading up to the adoption of the first or fourteenth amendments is a legitimate interpretative source, and Bork would endorse that position—to a point.\(^{143}\) The history is somewhat inconclusive, but it is at least clear that prior restraints were regarded as an interference with freedom of the press.

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\(^{138}\) Id. at 23.

\(^{139}\) Id. at 20.

\(^{140}\) Id. at 28.

\(^{141}\) Id. at 4, 20.

\(^{142}\) See id. at 21, 35.

\(^{143}\) Id. at 20-23.
whether or not the restrained publication was political in character.\textsuperscript{144} Bork chooses to ignore this history, citing Leonard Levy only for the conclusion that “[t]he framers seem to have had no coherent theory of free speech and appear not to have been overly concerned with the subject.”\textsuperscript{145} What is remarkable here is the idea that, because the framers had no coherent theory, we should ignore the particular evils with which they were concerned. Certainly, one might have thought that the particular evils of concern should be taken into account in the building of theory. But no, “[w]e are . . . forced to construct our own theory of the constitutional protection of speech.”\textsuperscript{146}

Not only does Bork give no weight to the particular evils that concerned the framers, he also disregards a massive body of judicial precedent. Bork puts the point gently: “I am, of course, aware that this theory departs drastically from existing Court-made law. . . .”\textsuperscript{147} He does not explore the jurisprudential implications of that departure. In BeVier’s development of a politically based first amendment theory, heavily influenced by Bork, she spells out the implications of this disregard for precedent. “[T]he only legitimate sources of constitutional principle are the words of the Constitution itself, and the inferences that reasonably can be drawn from its text, from its history and from the structure of government it prescribes.”\textsuperscript{148} In BeVier’s theory, precedent is not a legitimate source of principle. Therefore, precedent is not a legitimate source of constitutional interpretation.

Assuming we can read BeVier and Bork together, their position is not merely a claim that a particular set of precedents is wrong. That would be unremarkable. Their position assaults the idea of precedent itself. That is remarkable, and neither author elaborates on that position.\textsuperscript{149} To be sure, if principle, as they define it, is to reign supreme in constitutional law, precedent will always give way when it is not tidy. Indeed it apparently will be entitled to no weight. Their position on precedent flows with precision from their respect for what they call principle, but, so understood, the position should at least be recognized as extremist.

Extremist positions are sometimes right, of course, and in any event they deserve to be treated on the merits. The heart of Bork’s position is a theory about legitimacy and democracy. “[A] Court that


\textsuperscript{145} Bork, \textit{supra} note 81, at 22 (citing L. Levy, \textit{Legacy of Suppression} (1960)). For the same strategy, see BeVier, \textit{supra} note 80, at 307 (citing Bork, \textit{supra} note 81; L. Levy, \textit{supra}).

\textsuperscript{146} Bork, \textit{supra} note 81, at 22.

\textsuperscript{147} Id. at 20.

\textsuperscript{148} BeVier, \textit{supra} note 80, at 304. It seems clear from BeVier’s discussion that precedent is not included in the term “history” as she employs it.

\textsuperscript{149} There is nothing in Judge Bork’s position, however, that would deny the force of stare decisis as applied to lower court judges.
makes rather than implements value choices cannot be squared with the presuppositions of a democratic society." A person who endorses a court that does so "if he is candid . . . must admit that he is prepared to sacrifice democratic process to his own moral views." Bork confuses support of institutions with support of the views they endorse, drains substance from the idea of democracy, underestimates the role of making value choices in his own theory, and does not answer the problem of legitimacy that he purports to solve. First, one who supports the proposition that a court should make value choices is not necessarily advancing his or her own moral views, let alone sacrificing the democratic process to those views. My own moral views, for example, would have been advanced if the Court had not used the first amendment as a weapon to interfere with legislative efforts to combat inequality in cases like Miami Herald Publishing Co. v. Tornillo, Buckley v. Valeo, and First National Bank of Boston v. Bellotti. Yet I can support the legitimacy of the Court's act of making value choices even if I condemn the particular choices that it makes.

Second, Bork's conception of democracy is shallow. He adopts a neo-Madisonian model, assuming that "in wide areas of [American] life majorities are entitled to rule for no better reason [than] they are majorities," but also recognizing that "[t]here are some things a majority should not do to us no matter how democratically it decides to do them." Bork appears to recognize the dilemma that "neither the majority nor the minority can be trusted to define the freedom of the other." The dilemma is purportedly resolved by resort to the fiction of consent. According to Bork, we have consented to majority rule subject to Supreme Court restrictions pursuant to a theory of interpretation that would be more accurate to say that we have consented to some electoral accountability in parts of the system, less in others, and almost none in others. We would have consented to majority rule subject to Supreme Court restrictions pursuant to a theory of interpretation that

150 Bork, supra note 81, at 6.
151 Id.
152 418 U.S. 241 (1974) (state statute granting political candidate access to newspaper held unconstitutional).
153 424 U.S. 1 (1976) (statutory limitations on expenditures in political campaigns held unconstitutional).
155 Bork, supra note 81, at 2.
156 Id.
157 Id. at 3.
158 Id.
159 Id.
160 The electoral accountability of many administrative agencies exists on paper only and involves principles of tracing every bit as realistic as those associated with the constructive trust and
gives weight to considerations of language, history, intent, structure, precedent, power, and policy. In fact, we may or may not have consented to any of this. Consent here is a theological device.

What is missing from Bork's analysis is a satisfactory explanation of why majority "tyranny" is any more legitimate than majority rule tempered by minority "tyranny." Lurking behind Bork's devotion to principle, one suspects, is a commitment to relativism and to utilitarian preference-maximizing. Those who resist relativism and utilitarian preference-maximizing in favor of a different moral view, for example, a natural rights view or one of its variations, can characterize the institution of majority rule as a "naked" and illegitimate "power organ." They can also regard majority rule as undemocratic or illegitimate when it fails to respect basic human rights. In short, Bork's claim of legitimacy ultimately rests on question-begging. Indeed, Bork disregards the very concept of rights he purports to interpret. So understood, Bork's case for a politically based interpretation of the first amendment, and for abandoning first amendment protection for art, literature, philosophy, and science has not been made. If a case for excluding commercial speech from first amendment protection is to be made, it must come from an understanding of first amendment values, not from reflection about the judicial role.

Politically based theories contain one final argument relevant to the commercial speech question that merits consideration. It is an argument designed to refute the suggestion that self-expression, self-realization, or the like are legitimate first amendment values. The argument against values like self-expression is of general academic interest because it has been attractive in one form or another to scholars such as Scanlon, Schauer, and Wellington, along with the politically based theorists Bork, BeVier, and Jackson and Jeffries. Refuting the politically based theorists' argument, of course, will make a nice bridge to Professor Baker's position because he is at the opposite pole, believing that self-expression is the only value protected by free-

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161 For related discussion, see Shiffrin, Liberalism, Radicalism, and Legal Scholarship, 30 UCLA L. REV. 1103 (1983).
162 See Bork, supra note 81, at 10.
163 There are contexts in which a distinction between self-expression and self-realization might be important, but I see no need to make a sharp distinction in this Article.
165 F. SCHAUER, supra note 78, at 3-14.
167 Bork, supra note 81, at 25.
168 BeVier, supra note 80, at 321.
169 Jackson & Jeffries, supra note 79, at 13 n.46.
The argument begins with the premise that freedom of speech is in the Constitution as a special right. Therefore, speech must have some unique property that distinguishes it from conduct. The search for first amendment theory (alternatively, a principled approach to the first amendment) is the search for that unique property. Bork's search, of course, ends with the discovery of the political functions of speech. He rules out individual development as a first amendment value because it does "not distinguish speech from any other human activity." Self-development can take place through work, jogging, "or in any of thousands of endeavors."

The premise of this argument is strange, and an example quickly shows the problem. Suppose we took the same premise and applied it to other amendments in the Bill of Rights. The fourth amendment protects against unreasonable searches and seizures; therefore, there must be something special about that provision, and we would have to look for the unique property that would separate it from the other parts of the Constitution. Privacy could not be a value underlying the fourth amendment because other amendments advance privacy; the same for property, equality, dignity, and the like.

The premise is wrong in at least two respects. First, there is no reason to assume at the outset that speech is dramatically unique. It might be a part of a larger view of how human beings flourish or a subcategory of a larger value or set of values. Such a reading of the amendment, for example, might emerge from an elaboration of the structure of the Constitution. Second, and more important, for our purposes, there is no reason to suppose that the uniqueness of freedom of speech flows from a single value or perspective. It could well be that

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170 Baker sometimes emphasizes participation in change as a first amendment value, but as I interpret his work, participation in change is derivative from the self-realization or self-expression value. See, e.g., Baker, Commercial Speech, supra note 83, at 7; Baker, Process of Change, supra note 83, at 293 n.1. In any event, the point is not important to the criticisms I make of his general position.

171 See supra notes 165-71.

172 Bork, supra note 81, at 25. As Redish argues, however, it is also the case that many actions are political in character and many others bring knowledge helpful to politics. Speech, therefore, is not unique on Bork's own terms. See Redish, supra note 37, at 599-600.

173 Bork, supra note 81, at 25. On its own terms, the argument seems exaggerated. Certainly, it is easy to understand why the framers might regard speech as a more significant contributor to self-realization or fulfillment than playing tennis, jogging, working as a bar maid, or the like. Speech is universally necessary for the formation and maintenance of relationships. It is a major part of what it is to be a human being. Few other activities are as important for so many. To be sure, eating, sleeping, and sexual activity would also be counted as basic, but the founders may well have felt that government regulation of speech was a more likely threat than regulation, for example, of eating.

speech is different from conduct in that speech more or less combines many values in a particular way we do not generally find in conduct. As Kent Greenawalt has explained, the fallacy of Bork's line of argument is its failure to acknowledge that speech may well be thought to promote development or happiness in different ways (or more consistently) than nonspeech activities, that speech may be thought generally not to possess the offsetting disadvantages of many other activities, and that legislatures may be thought particularly likely to forbid speech with insufficient reason. In other words, substantial justifications could exist for affording explicit constitutional protection to expression even if the basic justifications for liberty of expression coincided with the basic justifications for permitting a broader range of liberty generally.\footnote{Greenawalt, \textit{Speech and Crime}, 1980 A.M. B. FOUND. RESEARCH J. 645, 734 n.344. \textit{See also} Redish, \textit{supra} note 37, at 601.}

A summary of the objections to a politically based approach to the first amendment in general and to the commercial speech problem in particular can now be set forth. Even if the Court adopted a politically based approach to the first amendment, the Court could not exclude all commercial speech from first amendment protection unless it gave the term "political" an exceedingly narrow definition. More important, a politically based approach to the first amendment abandons history, precedent, and important values in pursuit of a legitimacy that is founded on controversial question-begging. Finally, the exclusion of self-expression from the values underlying the first amendment is based on similar question-begging. The politically based approach to first amendment analysis is not irrational. It does ask us to "think large" by adopting an extremist position in regard to the judicial role and freedom of speech. The politically based theorists offer the security of a monistic position, but root this position too far from our traditions and institutions to be taken seriously.\footnote{For a general attack on monistic positions in legal scholarship, see Shiffrin, \textit{supra} note 161.} An exploration of the implications of a politically based theory, however, suggests that even through its limited perspective, some commercial speech might deserve a measure of first amendment protection. Even if we were to adopt that way of looking at free speech problems, the category of commercial speech would be too abstract to be serviceable. Some commercial speech would deserve protection; some would not.

\textbf{The Self-Expression Approach.}

Explaining Baker's Approach.—While some commentators doubt that self-expression should play any part in first amendment analysis, C. Edwin Baker gives it a central role. Although his argument is complex, much of Baker's first amendment theory can be summarized in a sentence: "As long as speech represents the freely-chosen expression of..."
the speaker while depending for its power on the free acceptance of the
listener, freedom of speech represents a charter of liberty for noncoer-
cutive action."\textsuperscript{177} Quite consistently, he argues from this perspective that
corporate speech, not merely corporate commercial advertising, should
ordinarily be excluded from constitutional protection because it is dic-
tated by the search for profits and is not the freely-chosen expression of
the speaker.\textsuperscript{178} The domination of profit, which Baker believes is in-
herent in the market structure of contemporary American capitalism,
severs any "connection between speech and any vision, or attitude, or
value of the individual or group engaged in advocacy. Thus the con-
tent and form of commercial speech cannot be attributed to individual
value allegiances."\textsuperscript{179} To take one of Baker's examples, a whisky com-
pany would promote the consumption of whisky regardless of the per-
sonal views of its managers, employees, or shareholders. "The
proposition that commercial speech cannot be attributed to individual
free choice is explained not by the fact that psychological factors deter-
mine or influence the individual's beliefs [of those in the whisky com-
pany]. . . but by the fact that the individual's beliefs, however formed,
do not determine the speech."\textsuperscript{180}

Before reaching the next step in Baker's argument, it is helpful to
understand the more general vision that animates his writing. Baker
wants a society in which free individuals choose their own ways of life,
in which novel life styles might be encouraged, serving as examples for
new and vibrant forms of interaction.\textsuperscript{181} He apparently believes that
mass American society is stultified by a preoccupation with consumer-
ism,\textsuperscript{182} that American workers are deprived of creative opportunities in
work,\textsuperscript{183} and that private control of the means of production has been
counter-productive to the free development of people's humanity.\textsuperscript{184}
At the same time, Baker is aware that socialist regimes in other coun-
tries have trampled upon important liberties;\textsuperscript{185} he fears discretionary
government. Like C. B. Macpherson,\textsuperscript{186} Baker would blend the western capitalist model's appreciation for civil liberties with the traditional
socialist concerns for the economic welfare of all. In transforming soci-

\textsuperscript{177} Baker, \textit{Commercial Speech}, supra note 83, at 7 (emphasis deleted).

\textsuperscript{178} His argument is most fully developed in Baker, \textit{Commercial Speech}, supra note 83.

\textsuperscript{179} \textit{Id.} at 17 (emphasis deleted).

\textsuperscript{180} \textit{Id.} at 18.

\textsuperscript{181} \textit{See, e.g., Baker, Freedom of Speech, supra note 83, at 990-1035.}

\textsuperscript{182} \textit{See, e.g., Baker, Process of Change, supra note 83, at 313; Baker, Commercial Speech, supra
note 83, at 14-16.}


\textsuperscript{184} \textit{Id.} at 308, 314-16. At the same time, Baker maintains that state control of the means of
production will not necessarily bring about fundamental change. \textit{Id.} at 299. Instead, his concern
is with "mass participation in democratizing and transforming existing institutions . . . ." \textit{Id.} at
321.

\textsuperscript{185} \textit{Id.} at 322-26.

\textsuperscript{186} \textit{See, e.g., C. MACPHERSON, DEMOCRATIC THEORY: ESSAYS IN RETRIEVAL} (1973). Baker

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ety, however, Baker would not resort to violence in the political realm, but would hope that progressive institutions would develop after genuine liberty is guaranteed.187

It is important, then, for Baker to lock in absolute guarantees of liberty. In keeping with that idea, he has spoken out many times against judicial balancing and in favor of "principle."188 In his commercial speech article, he complained that balancing can lead to varying results in the absence of distinctions that have principled content189 and observed that balancing offers scant protection for fundamental rights.190 He has also suggested that value-laden decisions are legislative in character and should not be made by the judiciary.191

An understanding of Baker's broad vision should help clarify his views about freedom of speech in general and commercial speech in particular. Free speech, broadly defined,192 is to be guaranteed for all persons. Private ownership of the means of production, however, promotes a hedonistic people prone to engage in unhealthy competition. We should encourage more democratic participatory support structures. To the extent that government is willing to regulate managers of productive enterprises in the interest of humane values, the Constitution should not be a barrier. Thus, Baker is comfortable in giving legislatures the power to regulate private profit-seeking centers of power, and the emphasis of his argument is upon confining the first amendment to protecting speakers who freely choose their expression without coercing others.

Happily, from Baker's perspective, unions are protected since the market does not determine their speech;193 corporations ordinarily are not protected since the market is thought to determine their speech.194 At this point, however, the argument must become more complicated because, without introducing some qualifications, Baker would have to deny first amendment protection to corporations such as the New York Times Company and the National Broadcasting Company. No one, including Baker, has any interest in proposing a theory marching to the

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188 Baker, Commercial Speech, supra note 83, at 44-47; Baker, Press Rights, supra note 83, at 850 (criticizing balancing but recognizing its necessity when an instrumental claim is involved if, but only if, the balancing takes place at a high level of generality).
189 Baker, Commercial Speech, supra note 83, at 46.
190 Id. at 46.
191 Id. at 47.
193 Baker, Realizing Self-Realization, supra note 83, at 656 n.35; Baker, Commercial Speech, supra note 83, at 37.
194 Baker, Commercial Speech, supra note 83.
conclusion that major press institutions enjoy no protection under the first amendment.

Baker’s task, then, is to distinguish the press corporation (which concededly tries to maximize profits) from the business corporation. The press gets no protection from the speech clause and enjoys whatever protection it has from the press clause. What distinguishes the press from other businesses, says Baker, is that its product is unique. Unlike other businesses, the press or communications industry “produces, distributes, and sells products such as speech, print, or pictures.”

If Baker’s distrust of judicial government underlies his general opposition to balancing, that same distrust plays an important role in his interpretation of the press clause. The press, he argues, receives special constitutional protection so that it can act as a counterforce to government. Baker does not confine this government criticism/fourth estate conception to the media’s criticism of government; the fourth estate is also valuable in exposing abuses by those in private power and in providing people with “a diverse nongovernmentally controlled source of information, entertainment, and perspectives.” The informing and entertaining function of the press is related to the government criticism function, but the latter function should predominate, Baker thinks, in the Court’s interpretation of the press clause.

What then of the business corporation that produces commercial advertising that might be critical of government? What of corporate institutional advertising or explicitly political speech? Does the business corporation get any press protection? Apparently, Baker’s answer is that business corporations are not traditionally thought of as the press, and that the Court need not expand the definition of the press “in order to assure production of nongovernmentally produced opinion, or to provide a counterbalance for governmental dogma.” Perhaps most important, Baker contends that we would increase human freedom if we subjected commercial speech to collective control. That normative consideration leads him to the conclusion that it would be counterproductive to expand the definition of the press.

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195 See, e.g., Baker, Press Rights, supra note 83, at 824-25. On the other hand, Baker contends that the impact of profits on content is less dominant in the press context. Id. Nevertheless, the connection between press content and individual liberty is too attenuated to satisfy Baker that the speech clause should afford press protection. See id. at 825.
196 Id. at 825.
198 Id.
199 Id. at 32.
201 Id.
202 Baker, Commercial Speech, supra note 83, at 32.
203 Id.
emerges is a tidy realm with persons, associations, unions, and the press free to communicate, but corporations subject to collective control.

Baker contends that his liberty interpretation of the speech clause and his structural interpretation of the press clause are superior to the traditional approach to first amendment interpretation. The Supreme Court, Baker recognizes, has employed a balancing methodology\(^{204}\) and has concentrated upon the value of speech in promoting truth.\(^{205}\) Thus, the Court has justified many of the categorical exceptions to first amendment protection by the claim that the contribution to truth of the regulated speech was slight and that the interests in order and morality therefore should prevail.\(^{206}\) The Court in many ways has expressed its belief in the wisdom of Justice Holmes's oft-quoted claim about the marketplace being the best test of truth.\(^{207}\) In so doing, the Court seems to value speech for the audience, so it can find truth, rather than for the speaker. Baker's exclusion of non-media corporate speech from first amendment protection, on the other hand, may depend upon a rejection of the marketplace of ideas theory. The claim he must oppose, of course, is that the audience for corporate speech is entitled to hear such speech in the pursuit of truth whether or not the speech is the product of self-expression.

Indeed, Baker's theory is designed as an alternative to marketplace theory. His interpretation of the speech clause focuses on source, rather than content or audience; even his interpretation of the press clause, he thinks, avoids marketplace theory. His theory of the press clause focuses on the source of the speech,\(^{208}\) and is said to be "based more on a distrust of power than on a faith in truth or rationality."\(^{209}\)

Baker's criticism of marketplace theory proceeds similarly from a lack of faith in truth or rationality. The starting premise for Baker is that truth itself "is not objective."\(^{210}\) Baker might mean a number of things by that assertion, and he does little to elaborate. Looking at his argument in the best light, Baker is associating himself with a currently fashionable\(^{211}\) movement in philosophy that regards perception of what

\(^{204}\) Baker, Freedom of Speech, supra note 83, at 973; Baker, Commercial Speech, supra note 83, at 44-45.

\(^{205}\) Baker, Freedom of Speech, supra note 83, at 968.


\(^{207}\) Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes & Brandeis, JJ., dissenting) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market"); Baker, Freedom of Speech, supra note 83, at 968-74.

\(^{208}\) Baker, Commercial Speech, supra note 83, at 32.

\(^{209}\) Id.

\(^{210}\) Id.

\(^{211}\) Actually, Baker took the position before it became fashionable. Perhaps the most powerful exponent of the view has been Richard Rorty. See, e.g., R. RORTY, CONSEQUENCES OF PRAGMATISM (1982); R. RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979). Baker cites and was apparently influenced by Thomas Kuhn. See T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLU-
truth is as dominated or controlled by the contemporary needs of human beings. According to this view, "reality" can be interpreted in many ways and the process of interpretation is creative rather than externally dictated by the world. In that sense, truth is subjective.

Armed with that assumption, Baker offers a number of criticisms of the view that societal truth will emerge from competition in the marketplace of ideas. Persons, Baker observes, do not weigh arguments like rational decisionmakers. They are passionate beings influenced by their experience and their environment. They will believe what they want to believe. Drawing from the sociology of knowledge, Baker claims that “[p]eople’s perspectives and understandings are greatly influenced, if not determined, by their experiences and their interests, both of which reflect their location in a specific, historical socio-economic structure.” Moreover, the marketplace is stacked. It disproportionately represents dominant economic groups who tend to favor the status quo on fundamental issues. Even if it were somehow possible to correct the marketplace to address these failures, there would, according to Baker, be no reason to assume that truth for everyone should be the same. If truth is created, people’s expressive experience itself may be as important as speech in arriving at their own private truth. Moreover, serious problems plague efforts to correct marketplace failures. To interfere with liberty, in order to arrive at the right balance of views, is to interfere with the respect owed human beings and presuppose a view of what the right balance should be. It is a dangerous approach, for it allows government to define truth.

Because of the difficulties with marketplace theory and the problems involved in reforming the marketplace, Baker would dispense with it as a source of first amendment values. Instead, he would confine the free speech clause to his liberty theory and the press clause to his structural interpretation. Baker claims that by doing so he preserves the possibilities of progressive change. By allowing minorities to live in ways the majority finds offensive, “society protects an important process for peaceful change of tastes and values while decreasing the conditions of domination.” By protecting liberty of speech and conduct, “everyone, by their choice of activities, participate[s] in the debate...
and in building the culture.”

Indeed, Baker thinks the liberty model provides the most realistic possibilities for change because it avoids “the false hope that dissenting positions, even without a real basis in experience, can be shown to be best; . . . it provides for a more realistic method of change from ‘the bottom up.’”

Criticizing Baker’s Approach.—In evaluating Professor Baker’s work, I pursue a bifurcated approach. I first advance three criticisms. The first relates to Baker’s claim that we should interpret the first amendment to countenance general regulation of corporate speech by the state. I argue that the case can be better made without claiming that the market dictates corporate speech. The second criticism attacks Baker’s underlying methodological premises. Here I argue, as I did with the politically based theorists, that his conception of the judicial role is too narrow and I inquire about the relationship of his methodology to his substantive premises. Third, I argue, as I did with Jackson and Jeffries, that his theory has focused on only a part of the commercial speech territory. I use a defamation example involving a corporation that provides commercial credit information to probe weaknesses in his commercial speech theory and to expose what I argue are serious aberrations in his overall approach to free speech theory.

Having completed these criticisms, I reach an organizational impasse. Contrary to Professor Baker, I contend that marketplace theory has an important role to play in first amendment analysis. Instead of making that claim only in the context of criticizing Professor Baker’s work, however, I will present it in the context of developing my own affirmative views. In the course of presenting those views, I will at appropriate points compare and contrast our differing approaches.

My first criticism of Baker’s approach is that, in attacking corporate speech, Baker begins in the wrong place, making arguments he does not need to make. Baker focuses on the claim that the market dictates corporate speech. This makes his theory unpersuasive to those who think the market is not quite so powerful. Baker concedes at one point that his argument is “least valid” when applied to “monopolies or quasi-monopolies which, because competition does not force strict pursuit of profits, can modify economic decisions in accord with the personal desires of relevant groups within the enterprise.” This concession is no small matter, applying as it does to some of the most powerful corporations in America.

The preoccupation with the structure of the market also leaves Baker open to attacks drawn from the very sociology of knowledge he

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221 Id. at 1027.
222 Id. at 1028.
223 Baker, Commercial Speech, supra note 83, at 19 n.66.
224 For general discussion, see J. Galbraith, The New Industrial State (2d ed. 1971).
uses to attack the marketplace theory. If he is correct that people's perspectives "are greatly influenced, if not determined" by their location in a specific socio-economic structure, then it becomes difficult to understand why individual speech reflects free choice any more than does corporate speech. Baker's approach is also vulnerable to the question of why it should matter that the structure determines the speech in those circumstances in which the parties who make up the corporation would themselves choose that speech anyway and would regard it as their self-expression. For example, in discussing his whiskey company example, Baker concedes that we might expect a high correlation between the views promoted by the company and the views of the company's owners. He also suggests that we should accord business enterprises run by families freedom of speech when their speech is the product of self-expression even if their decisions are the same as those that would have been "dictated" by the market. In short, by emphasizing the dictates of the market, Baker's approach relies upon questionable empirical assumptions, forces him to make distinctions the sociology of knowledge does not support, and is vulnerable to the ultimate inquiry about why these distinctions should make a difference.

Baker's theory would stand on sturdier ground if he emphasized the structure of the corporation rather than the market structure in which the corporation participates. There is little reason to think that the expression of a corporation with publicly traded stock is necessarily in harmony with the views of its shareholders and by suggesting that a high correlation might exist between the attitudes expressed and those of the shareholders, Baker concedes too much to those who would protect corporate speech. Of course, if an investor freely chooses to invest in a whisky company, he or she is likely to support (or at least not oppose) whiskey commercials. It may even be that such a

226 See Farber, supra note 6, at 382-83 n.47; Redish, supra note 37, at 621-22. For a recent, insightful, and broad-ranging critique of Professor Baker's work, see Schlag, An Attack on Categorical Approaches to Freedom of Speech, 30 UCLA L. Rev. 671, 710-21 (1983).
227 Baker, Commercial Speech, supra note 83, at 17.
228 See Baker, Commercial Speech, supra note 83, at 13, 19 n.66; Baker, Realizing Self-Realization, supra note 83, at 653-54.
229 Brudney, Business Corporations and Stockholders' Rights Under the First Amendment, 91 YALE L.J. 235, 237-38, 257-58. Indeed, many shareholders are locked into their investments because of pension funds or the like, see id. at 270 n.126, or even because of legal restrictions on alienation. For general materials on the restrictions under the Securities Act of 1933, see W. CARY & M. EISENBERG, CORPORATIONS (5th ed. 1980). For the view that ordinary shareholders have never participated in the control of public corporations and that the thoughts of commentators and courts to the contrary reflect a misunderstanding of history and business reality, see Werner, Corporation Law in Search of its Future, 81 COLUM. L. Rev. 1611 (1981).
230 See supra note 227 and accompanying text. In his more recent writing, Baker has begun to emphasize the corporate structure as an independent rationale for limiting much commercial speech. For general discussion, see Baker, Realizing Self-Realization, supra note 83, at 755.
shareholder supports the political expression of such a corporation, that
is, its lobbying, political contributions and the like, though this is less
clear. A shareholder may expect whiskey advertisements without even
knowing that his or her funds are used in various political ways.

The difficulty is that with publicly traded shares, many of the
shareholders may not even know their money is being invested in a
whiskey company. Tens of millions of corporate shares are controlled
by institutional investors. The beneficiaries of these trustee invest-
ments have, in the main, no knowledge of how the institutional inves-
tors are using their money from day to day. At the same time, many
investors are required (either by the practical impact of federal securi-
ties laws or by the structure of the securities markets) to hold on to
their shares for long periods even if they are totally opposed to what
the corporation is doing. There is no reason to believe that the benefi-
ciaries of institutional investments or those required to hold on to
shares adhere to the views of the companies their investments support.
To be sure, they want a profit. But if the speech opportunities of corpo-
rations in which they had invested were regulated, it would be fatuous
to say that their self-expression had been stifled. In the absence of regu-
lation, their investments serve political purposes to which they may be
hostile.

Nothing in the preceding paragraph is new to Baker. My con-
tention is that the case against corporations claims to free speech pro-
tection is on firmer ground when the argument proceeds from the
structure of the corporation rather than the structure of the market. In
order to fend off criticism, Baker ultimately makes similar arguments
about the structure of the corporation. If those arguments are true,
there is little need to dance off into musings about the power of the
market in determining speech.

My particular criticism should be put in perspective. Even if cor-
porate speech were not fully representative of the views of corporate
shareholders, it might be open to argue that some corporate speech was
protected nonetheless. I refer here to arguments based on a market-
place model or some variation of it. The limited point for the moment

231 Institutional investors controlled 36.3% of the market value of all stock outstanding by the
end of 1978. STAFF REPORT, supra note 124, at 381.

232 See Brudney, supra note 229, at 237-38.

794 n.34 (1978) (shareholder free to withdraw investment “at any time”).

234 His references to this line of argument, however, are more general. See, e.g., Baker, Realiz-
ing Self-Realization, supra note 83, at 648-49 n.11; Baker, Commercial Speech, supra note 83, at 37.

235 Baker, Commercial Speech, supra note 83, at 37.

236 Baker's market argument does allow him to reach some non-corporate commercial speak-
ers, i.e., those who are motivated by profit. But cf. supra note 228 and accompanying text (non-
corporate commercial speakers protected if their speech is the product of self-expression).
is about where to start in building a case against corporate speech. I think Baker starts in the wrong place.

My second point about Baker's approach may be more a question than a criticism. I wonder what Baker is seeking to accomplish with his scholarship. The inquiry might seem impertinent, but I will try to show it is not. One answer to such an inquiry might be that Baker is not trying to accomplish anything; he is just a scholar seeking the truth. This response, which would be perfectly appropriate for almost anyone else, at least would provoke other questions if it came from Baker. First, Baker writes in a radical tradition that ordinarily holds that the point is to change the world, not to create unrealizable utopias, nor to spin out theories unlikely to be adopted in the historical context. Baker is free to disagree with that perspective, but this is the same Baker who professes not to believe in objective truth, who apparently believes that truth is what you create to meet the needs of progressive people. Baker may have some large ideas about the relationship of scholarship to change, about the need for utopian thinking and the like. It would be interesting to know what those thoughts are. My suspicion is that Baker believes in objective truth—and its pursuit for its own sake—more than he lets on.

Alternatively, (and here we turn from observation to criticism) Baker may believe that his scholarship is a piece of advocacy designed to promote change. If so, I think his strategy is seriously flawed. Baker’s theory is mainly about how judges should interpret the Constitution, and his first canon is that balancing is to be either entirely avoided or pursued only at the highest levels of abstraction. Meanwhile, judges have been balancing for years in every significant area of human rights. To ask them now to change all that in favor of a general theory of the Constitution is to abandon practice for theory. If, on the other hand, one wants to move the society toward a set of substantive values, it is always easy to argue case-by-case for humane accommodations within a balancing framework. The other side, of course, is that it is just as easy to argue for an inhumane balance (though such advocacy would hardly be so labeled—it is not always so easy to tell the good guys from the bad guys). Baker foregoes, however, the luxury of being able to advocate on a case by case basis because his strategy asks judges to accept grand theory.

It also seems too late in the century for Baker to argue that balancing calls for value judgments and, therefore, belongs to the legislature. Baker’s theory, of course, is loaded with value judgments; any judge who accepted it would be accepting the underlying value system. Baker himself has attacked Posner, Nozick, Ely, and others who hide


238 On the other hand, any balancer can appropriate Baker's insights; indeed many do and to that extent Baker's scholarship participates in the process of change.
behind false pretensions of neutrality. He advances his theory not at all by supposing that judicial judgments should be value free. In the final analysis, balancing is nothing more than a metaphor for the accommodation of values. Everyone balances—even Baker. The real debate is about how we should accommodate values in specific contexts. By failing to appreciate that, Baker's scholarship becomes more isolated than it ought to be.

Now down to cases. Suppose the following: A supplier of commercial credit information named \( S \) gives false information about \( V \) (victim) to \( B \), a banker, and several other commercial lenders. \( S \) had informed \( B \) and the others that \( V \) had gone bankrupt three years ago, when \( V \) had not. As a result, \( B \) and the others refused to lend money to \( V \), and \( V \) suffered damage. Perhaps one of the commercial creditors is also \( V \)'s employer, and has fired \( V \). Finally, assume that \( V \) sues \( S \) for defamation and that state law allows recovery on these facts. How should we think about this example under Baker's theory?

In the first place, we would need to know more about \( S \). If \( S \) is a natural person whose speech is not dictated by profit, Baker's theory calls for a rather surprising result. No matter what showing \( V \) makes, \( V \) cannot recover on a defamation theory. Baker's liberty theory allows people to speak freely unless they coerce another, and defamation is not coercion under Baker's theory—apparently not even if the speaker deliberately lies. This is a maddening aspect of Baker's the-

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240 As Larry Alexander has pointed out to me, however, the balancing metaphor implies that all values can ultimately be reduced to one measuring standard. In that respect, I think the metaphor fails. See generally Shiffrin, supra note 161 (endorsing the view that values are intractable).

241 For consideration of the argument that speech to an employer might not be commercial speech because it is not solely in the economic interests of the audience, see Comment, supra note 8, at 140. Under this interpretation, the same speech would be commercial when addressed to one audience and non-commercial when addressed to another. Id.

242 Presumably, speech not dictated by profit might be based on a fact-finding process that is either less careful or more careful than that which profit would dictate, depending upon the substantive values of the individual.


244 See supra note 243. This is less clear. Although Baker speaks at points of abolishing the tort of defamation, he would exclude from first amendment protection the knowing presentation of false representations in order to obtain money. Baker, Freedom of Speech, supra note 83, at 1002 n.112. For Baker, this speech is apparently not protected because it is "designed to disrespect and distort the integrity of another's mental processes." Id. at 1002. Yet, that is what most most knowing lies, including defamatory lies, are designed to do. In fraud, the listener is the victim; in defamation, both the listener and the defamed are victims. Baker also would exclude perjury from first amendment protection. Id. His discussion is cryptic and his views are still developing, but at least two puzzles are already manifest: (1) why he distinguishes perjury and fraud from those defamatory statements made as knowing falsehoods; (2) whether he can reconcile his views
The conclusion follows from his rule about coercion, but we do not know the source of Baker’s rule. Before sweeping away centuries of tort law, we are entitled to more argumentation. Baker’s conclusion about defamation illustrates the danger of reasoning from abstract principles, and underscores the need to shun absolutes. The example I am working with here is only illustrative. Baker also apparently would afford constitutional protection to public sexual acts of any type so long as they are designed to communicate to others. They are not coercive; thus, public acts of sexual intercourse, masturbation, and bestiality are in some contexts protected under Baker’s first amendment. Again, I suggest that the coercion principle is inadequately designed to reflect the needs of this society.

Let us return to our commercial credit information supplier. What if S is a profit-seeking corporation? Would that change the outcome for Baker? Here the focus on profit-seeking is especially unhelpful. The corporation was not proposing a commercial transaction; it was implementing a commercial transaction. If it had been advertising its services, Baker might well apply his whiskey example. But profit here presumably dictates that commercial suppliers of credit information be accurate. There is nothing at all socially counterproductive about profit’s role in this example. In our example, we have not assumed negligence on S’s part. It is hard to understand why S should not be liable if he or she were a natural person whose speech were not dictated by profit, but should be liable if S were a corporation engaged in profit-seeking. Baker’s analysis was designed for a different category of transactions.

Indeed, under Baker’s analysis, there is a case for claiming that the commercial credit supplier is protected under the press clause! It is after all in the business of supplying speech for profit. So too are in-

about perjury and fraud (which depend upon conceptions of truth and falsity) with his skepticism about objective truth.

245 Baker, Freedom of Speech, supra note 83, at 1019 n.153. Baker’s discussion is confined to the issue of public nudity. Under his theory, however, I see no way to distinguish public sexual acts, and I do not believe Baker would want to make any distinction.

246 See id.

247 On the other hand, profit would dictate that information suppliers should invest in resources leading to accurate fact-finding only to the point needed to assure maximum profits. Beyond that point, investment in accuracy would be wasteful. Allowing a defamation action in some markets might lead some suppliers to invest more in assuring accurate information and, in any event, would spread the risk of inaccuracy, and compensate for damages resulting from loss of reputation.

248 But cf. supra note 247. Note that this example does not postulate an underinvestment in resources to assure accuracy. Moreover, profit’s role here does not cause the corporation to say things its managers or shareholders do not believe. Profit, in fact, dictates no specific message, as it does in Baker’s whiskey example.

249 Note that the non-profit seeking person may, for that reason be less careful than the profit-seeking person.
vestment advisors, real estate agents, lawyers, union solicitors, and fortune-tellers. They are all non-governmental sources of information and opinion. Baker has yet to come up with a definition of the press, and with all the work he has done in developing his theory, there is still fundamental work left for him to do.

FREE SPEECH METHODOLOGY AND COMMERCIAL SPEECH

In this section, I propose to pursue three objectives. First, I want to describe a first amendment methodology, make some observations about how I might defend it, and discuss some of its general strengths and weaknesses. Second, I want to defend the claim that marketplace theory should play an important but limited role in commercial speech analysis. Third, I aim to advance a number of normative claims about the relationship of freedom of speech and commercial speech, specifically with respect to the regulation of true speech, of false speech, and of time, place, and manner regulations that discriminate against commercial speech. I reach the second objective in order to pursue the third. That is, I hope to explore the important but limited place of marketplace theory while discussing several different commercial speech problems. In pursuing the third objective, I seek to make my proposed first amendment methodology more attractive, but I also argue that the methodology is appealing even if the conclusions I recommend in the commercial speech area are unpersuasive.

First Amendment Methodology

An Eclectic Approach.—For many years, the Court has pursued what I call a general balancing methodology or an eclectic approach, and I believe it has been right in doing so. It has balanced

\[250\] Baker might want to respond to the credit example by saying that such entities are not ordinarily considered the press and that tradition is important in drawing the press/non-press line. See supra text accompanying note 202. His recent writing suggests, however, that he is unwilling to hew a definition that relies so heavily on tradition. His recent tentative view is that:

The focus in special protection for the press centers on people’s continuing role in uncovering and communicating information to a public usually as large as is willing to receive (pay for) the communication. This role suggests that the lecturer as well as the print publisher should receive protection if 1) a consistently large proportion of her time is devoted to this role and 2) she makes her communications available to the general public. Protection would not, then, extend to the private detective. Nevertheless, rather than fully develop and defend this approach, I will take the usual “out” of a person who does not want to think through the issue, by suggesting that a definition of “press” be developed through case-by-case adjudication.

Baker, Press Rights, supra note 83, at 841 n.83. In considering the commercial credit supplier example, notice that a supplier will normally provide information to whoever is willing to pay. For criticism of Baker’s use of the press clause, see Farber, supra note 6, at 383 n.48. For further discussion of the media/non-media distinction as applied to credit reporting entities, see infra note 328.

\[251\] See Shiffrin, supra note 37, at 942-63.

\[252\] Shiffrin, Government Speech, 27 UCLA L. Rev. 565, 609-12 (1980). For the defense of an eclectic approach in political theory generally, see Shiffrin, supra note 161. For a provocative
the impact of challenged regulations on first amendment values against
the seriousness of the evil that the state seeks to mitigate or prevent, the
extent to which the regulation advances the state's interest, and the ex-
tent to which the interest might have been furthered by less intrusive
means. The Court's approach has been eclectic in several respects.
First, in striking a general balance, the Court has been unwilling to
confine the first amendment to a single value or even to a few values.
In recent years, the first amendment literature has exploded with com-
mentary finding first amendment values involving liberty, self-realiza-
tion, autonomy, the marketplace of ideas, equality, self-government,
checking government, and more. Much of that commentary argues
that some or many Court decisions implicate the particular value dis-
cussed. In short, the Court has been generous about the range of values
relevant in first amendment theory, and unreceptive to those who ask it
to confine first amendment values to a particular favorite. For exam-
ple, the Court has failed to heed those who seek to confine the first
amendment to political speech\textsuperscript{254} or to self-expression.\textsuperscript{255}

Second, the Court has been eclectic about the tests it employs in
differing contexts. Sometimes speech presenting a clear and present
danger of a substantive evil is protected (consider negligent libel of a
public official);\textsuperscript{256} sometimes it is not (consider advocacy of illegal ac-
tion);\textsuperscript{257} sometimes speech is not protected even though it presents no
clear and present danger of any evil that is ordinarily cognizable (con-
sider obscenity). In short, the structure of first amendment doctrine
varies from context to context. The assumption of general balancing is
that the values of speech interact with other values in such complicated
ways that the Court may need discrete doctrinal tools to resolve partic-
ular problems. At their best, the rules the Court has formulated are
fashioned to reflect the complex accommodations needed in each con-
text. The nature of social reality is too complex to expect that any sin-
gle vision, value, or technique could meet the needs of society.

Finally, the Court has been willing to formulate rules in most con-

\textsuperscript{253} The general discussion of first amendment methodology develops and elaborates on mate-
rial contained in notes 251 & 252. Citing them over and over again in this section seems
unproductive.

\textsuperscript{254} It is no doubt true that a central purpose of the First Amendment "was to protect the free
discussion of governmental affairs." . . . But our cases have never suggested that expression
about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonex-
haustive list of labels—is not entitled to full First Amendment protection.


texts, but has employed ad hoc techniques in others. It has rejected any requirement that it always engage in definitional balancing. The term "definitional balancing" ultimately houses the simple but extreme proposition that the Court should always settle on rules in the first amendment area. The absence of rules, of course, leads to uncertainty and invites subjective ad hoc judgments that threaten important first amendment equality values. There is no doubt that the absence of rules is costly and that the costs are of first amendment importance. A general balancing methodology assumes that sometimes those costs are worth absorbing.

Take, for example, the issue of reporters' privilege. If the exclusive concern were avoiding uncertainty and ad hoc decisionmaking, there are two rules that might be adopted—either that reporters never have to testify or that they always have to testify. A middle road invites uncertainty, particularly because it seems to require the weighing of factors to be applied in particular contexts. Yet for all its difficulties, the middle road seems superior to the alternatives. Perhaps the same is true with respect to injunctions against the dissemination of national security information. The current "rule" places a heavy burden on the government, as it should. That "rule" merely formalizes a commitment to engage in ad hoc balancing, albeit with differing views as to the weights that courts should apply in the balance. Presumably, we could improve on the current standard; we might be more articulate about the kind of danger that would be required before such an injunction could issue. Whatever we might formulate, it seems obvious that the distinction between a regime of rules and ad hoc balancing is one of degree. Rules too leave plenty of opportunity for subjective manipulation and for arbitrary decisionmaking. In any event, the Court is yet to be persuaded that ad hoc balancing is wrong in every context. By adopting a general balancing methodology, it can implement a firm preference for rules, but employ ad hoc balancing in specific contexts when no other alternative seems palatable.

Methodology, Theory, and Justification.—It is fashionable to have a theory these days, and discussion of the general balancing methodology invites inquiry as to its relationship to theory. First, anyone committed to this methodology is necessarily committed to the rejection of many

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259 See cases cited supra note 258.

first amendment theories. No one who accepts an eclectic general balancing approach can fully accept the theories offered, for example, by Baker, Bork, Dworkin, Emerson, or Meiklejohn. By positing that we should weigh all the values of speech in the constitutional balance, an eclectic approach rejects (a) any theory that would exclude one or more of the values of speech; (b) any theory that would value speech over all other values; (c) any theory that would always require the accommodation of speech and other values to take place at high levels of abstraction.

Second, adherence to a general balancing methodology implies a normative conception of human nature, of speech, and of social reality. Balancing implies that speech is important but not all-important. It assumes that human nature and social reality are complicated, so complicated that abstractions about freedom of speech are likely to be unproductive. The premises of an eclectic approach closely match those that John Rawls labels intuitionist: "The intuitionist believes . . . that the complexity of the moral facts defies our efforts to give a full account of our judgments and necessitates a plurality of competing principles. He contends that attempts to go beyond these principles either reduce to triviality . . . or else lead to falsehood and over-simplification." An eclectic approach is intuitionist because it posits that there are limits to the level of generality we can achieve in free speech theory without falling into triviality or falsehood. This does not mean that no progress is possible in free speech theory; we can do much more to sharpen, to clarify, and to criticize our underlying intuitions. It does mean that the ideal of system building aspires beyond the possibilities offered by the raw material. If theory requires high level abstractions that dictate results in all or most concrete cases, an eclectic approach is anti-theoretical. If theory builds to the highest level of generality that the raw

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261 See supra note 83 (confining the first amendment to self-expression values and rejecting marketplace values).
262 Bork, supra note 81 (confining first amendment to political speech and rejecting self-expression values).
263 R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977) (rejecting ad hoc balancing except when rights come into conflict with other rights); Dworkin, Is the Press Losing the First Amendment?, N.Y. REV. BOOKS, Dec. 4, 1980, at 53 (rejecting marketplace arguments or other arguments based on efficiency).
264 T. Emerson, supra note 76, at 718 (rejecting any ad hoc balancing).
265 A. MEIKLEJOHN, supra note 77 (confining first amendment to political speech).
266 Cf. Redish, supra note 37, at 595 (making a stylistically similar set of comparisons with his own quite different theory, one that reduces all first amendment values to "one true value," individual self-realization). Redish abandons an eclectic approach at several points, most notably when he denies that democracy and, derivatively, freedom of speech contribute to better social decisionmaking. Id. at 602.
267 For fuller discussion of how these assumptions relate to a broad range of issues in legal and political theory, see Shiffrin, supra note 161.
Economic Regulation

materials afford, the work of theory would amount to fleshing out the appropriate accommodation of speech with other values in concrete contexts and building principles from the ground up. In the latter sense, an eclectic approach is an important part of free speech theory.

There is an important sense, however, in which an eclectic approach is either not a theory or only part of a theory. One can flesh out the accommodation of values in concrete contexts in many different ways, ways that could range from the radical to the reactionary. Even though an eclectic approach rules out some substantive approaches, even though it is rooted in a normative conception of social reality, it is indeterminate and incomplete. We do not operate in a complete vacuum, however. While using an eclectic approach the Court has produced a vast body of substantive accommodations between speech and other values. I disagree with many of these accommodations; so does everyone writing in this Symposium; perhaps most revealing, so does every member of the Court.269 To the extent that we would all argue for change (and the changes "we" would argue for would be conflicting) or pursue truth wherever it leads, I think we are better off arguing within the eclectic confines of a general balancing methodology.

This leads to the problem of justification. How does one justify an eclectic approach? Alternatively, how does one refute it? Here too, Rawls is instructive. "A refutation of intuitionism consists in presenting the sort of constructive criteria that are said not to exist."270 The problems in justifying intuitionism (in Rawls's sense) or an eclectic approach are inherent. The difficulty is that an eclectic approach affirms a negative, that is, it denies the possibility of any general theory that would dictate solutions in most concrete cases. Proving a negative in this context requires refutation of the alternatives and there is no way to assure that all alternatives have been canvassed. Some of the alternatives are not yet in mind, let alone in print. The best that one can do is to pursue two lines of justification. First, one can show the weaknesses of existing alternatives. The first part of this article does part of that work; moreover, I and many others have attacked other proposed theories elsewhere. Second, in addition to attacking existing theories, one can concentrate on the nature of speech and the systems regulating it, noting its variety and the complex interaction of important values. By examining different problems of commercial speech, for example, one might be able to show that free speech problems are best treated in concrete contexts and are unsuited to resolution by resort to general abstractions.

269 Each member of the Court has dissented in freedom of speech cases and there is no reason to believe that will change. Even Justice O'Connor, the newest member of the Court, has already exhibited disagreement with important holdings. Anderson v. Celebrezze, 103 S. Ct. 1564 (1983); Board of Educ., Island Trees Free Union School Dist. v. Pico, 457 U.S. 853 (1982).

270 J. RAWLS, supra note 268, at 39.
Commercial Speech: Applying an Eclectic Approach

True Commercial Speech.—In analyzing the difficulties associated with state regulations of true commercial speech, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council is an excellent place to start. In that case, consumers maintained that their audience rights had been violated by a regulation that prohibited pharmacists from informing the general public of their drug prices. The regulation did not prohibit false speech, nor was there any good argument that the speech would mislead the audience. The state was trying to prevent the dissemination of admittedly true information.

From one perspective, Virginia Pharmacy is an uncommonly easy case. The first amendment is at least in part designed to further the process of arriving at the truth. When the state tries to prevent the dissemination of truth, it is time to demand justification. Looking at Baker’s marketplace arguments in this context highlights their excessively abstract character. What, for example, would it mean to say in this context that objective truth does not exist? Are we to doubt that pharmacists exist? Drugs? Prices? The debate about truth may provide interesting coffee house conversations, but here the government obviously seeks to prevent speakers from telling the truth to consumers. Philosophical debates about the nature of truth are out of place in this context and provide a fragile foundation for denying audience rights.

More interesting attempts to avoid the truth argument in Virginia Pharmacy would argue that the truth at issue in that case is not the kind of truth with which the first amendment is concerned. One tactic might be to argue that the marketplace was designed to protect ideas, not factual information. This, however, is a dangerous line. Even Jackson and Jeffries could not take the fact/idea dichotomy seriously. Even under their restricted approach, government ordinarily could not prevent speakers from communicating non-defamatory facts about political actors. Nor is this an argument Baker would make because it forces case-by-case content analysis of messages to determine which speech content falls in the idea category and which speech does not.

My reaction to this particular argument is to admit that drug prices are not ideas and to admit that they are irrelevant to the political process, but to insist that audience rights do not depend upon some connection to general marketplace theory, or to the political process or, as Baker would have it, to the presence of a speaker making speech choices free of profit domination. The Court should invoke first amendment scru-

271 Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 750-51. Of course, individual members of the public could be told the prices; how else could drugs be sold? Essentially, the prohibition was against advertising.
272 T. Emerson, supra note 76, at 6-7.
tiny whenever the government seeks to prevent the truth from being disseminated.

Nonetheless, many commentators have a rather strong intuition that pharmacist drug advertising is far afield from genuine first amendment values. Many insist that information on drug prices simply is not the kind of "truth" we are worried about protecting. What is the source of that intuition? The answer to this question is somewhat complicated. First, I suggest that the intuition is not based just on subject matter. If the government tried to stop Consumer Reports or an academician from publicizing comparative drug prices, I suspect the intuition that first amendment values were not present would quickly vanish. For discussion of similar examples, see Alexander, Speech in the Local Marketplace: Implications of Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. for Local Regulatory Power, 14 San Diego L. Rev. 357, 374-75 (1977) (contending that profit motive ordinarily is not relevant to constitutional protection); Farber, supra note 6, at 381-82. A magazine may have a profit motive in taking a particular position on a particular subject, but the courts will ordinarily not count that motivation as significant. In thinking about profit motive and the dissemination of truth consider these examples: (1) Without his consent, Mercedes Benz truthfully advertises that Frank Sinatra drives a Mercedes. Sinatra sues for misappropriation. Does it make a difference if Mercedes in its ad says, "We didn't ask Sinatra's permission to tell you this" or "Sinatra doesn't want us to tell you this but . . ."? (2) Suppose Time magazine writes a story on Mercedes Benz and puts Sinatra on the cover with a picture of his Mercedes. Suppose they put Sinatra on the cover purely for reasons of profit. (3) Suppose Time, Inc. advertises: "Get the recent issue of Time with Frank Sinatra on the cover with his Mercedes." (4) Suppose Time truthfully advertises: "Sinatra doesn't want us to tell you this, but he is one of our regular readers."

In misappropriation suits, Sinatra has no chance of recovering in example two. See Time, Inc. v. Hill, 385 U.S. 374, 397 (1967), quoting Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952) ("That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment."). Nor should Sinatra fare any better in example three. As Judge Weinfeld explained in Friedan v. Friedan, 414 F. Supp. 77, 79 (S.D.N.Y. 1976), "[A]n advertisement, the purpose of which is to advertise the article, 'shares the privilege enjoyed by the article' if the 'article itself was unobjectionable.'" Accord Guglielmi v. Spelling-Goldberg Productions, 25 Cal. 3d 454, 462, 160 Cal. Rptr. 352, 360 (1979) (en banc); Namath v. Sports Illustrated, 48 A.D.2d 487, 371 N.Y.S.2d 10 (1975); Booth v. Curtis Co., 15 A.D. 343, 348-49, 223 N.Y.S.2d 737, 743 (1963).

As to examples one and four, I can make two relatively non-controversial observations: (1) they are much harder examples than two or three, a point that illustrates the complex relationship of profit motivation to first amendment law; (2) whatever way examples one and four should be decided, they should be decided the same way. This latter point clarifies the limited character of any special press privilege that a court might use to deny the hypothetical Sinatra claim in example three.

My own views on examples one and four are not uncontroversial, and I will offer a point of view rather than a full analysis. Assuming enough disclosure to avoid deception, I think Mercedes Benz and Time, Inc. should have the right to tell the public which public figures buy their products and that the public has a right to be told that information without the permission of the public figure. Few would seriously regard these as intimate details of a public figure's private life. The issue is whether public figures should be able to license (or worse, not license) use of this true
ject matter triggers the intuition.\textsuperscript{276} I am not sure it is possible to give a full account of the intuition, but something like this may be involved: the first amendment is heavily concerned with protecting matters of general concern or public interest.\textsuperscript{277} When the government interferes with the dissemination of truth by a commercial advertiser, rather than by the media or by an individual speaking to the public who has no profit motive in the product advertised, there is no particular\textsuperscript{278} reason to think that the speech is of general or public interest. Moreover, we have no general\textsuperscript{279} basis to believe that the government is operating from an unhealthy bias, as we might if it interfered with the press or an individual generally unencumbered with a profit motive in the particular product. Notice that this argument need not assume that the first amendment is \textit{exclusively} concerned with matters of general concern or of public interest. It can concede that the first amendment is concerned with individual self-expression and with vital human relationships whether or not of general or public interest, but posit that neither value is implicated in \textit{Virginia Pharmacy}.

Whether or not one has sympathy for the principle that the first amendment has special concern for matters of general or public interest, however, that principle does not really fit here, despite contrary intuitions. There is a significant difference between holding that some categories of commercial speech are not of general or public interest and allowing the state selectively to bar particular factual statements information by commercial entities. In the absence of deception, what is being weighed is the freedom to communicate the truth against the creation of a property interest allowing the public figure to control the dissemination of truth for his or her own profit. For those concerned about the “unjust” enrichment of the vendors, I counter that it is “unjust” only if one views the name-selling business as more important than freedom of speech. There are good reasons, I think, to create private property rights in items from clothing to cars; and there are good issues to be debated about the creation of the private property in the means of production. But the creation of a commercial appropriation or right of publicity tort in examples one and four seems to be a clear case of limiting freedom of speech in pursuit of excessive capitalism.

For an excellent discussion (although it does not fully consider the problem in example one when no deception is involved) of the issues and case law surrounding examples like these (including the interesting question of whether an advertiser like Mercedes could republish the \textit{Time} article with \textit{Time}’s permission, but not Sinatra’s), see Treece, \textit{Commercial Exploitation of Names, Likenesses, and Personal Histories}, 51 \textsc{Tex. L. Rev.} 637 (1973).

\textsuperscript{276} See Note, supra note 6, at 720 n.2 (combination of content and motivation needed as a minimum for presence of commercial speech). Cf. Bolger v. Youngs Drug Prods. Corp., 103 S. Ct. 2875, 2880 (1983) (combination of reference to a product in advertisement with economic motivation supports conclusion that informational pamphlets are commercial speech).

\textsuperscript{277} New York Times v. Sullivan, 376 U.S. 254, 270 (1964) (referring to our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”).

\textsuperscript{278} Cf. \textit{infra} note 364 and accompanying text.

\textsuperscript{279} Of course, in particular cases a malignant bias might be present; the point is that in the general run of cases there is no reason to think that any partisan or other worrisome motives are substantially implicated. Cf. Note, supra note 4, at 1194 (that government wants to regulate suggests that the interest of individuals in receiving the information may be substantial).
such as those in *Virginia Pharmacy*. Whether or not some categories of commercial speech are generally bereft of general or public interest, there is no good reason to believe that true commercial statements that the state would like to suppress are similarly innocuous. I would let arguments about the nature of the truth involved go to the weight of the free speech interest, not to its existence.

Strongly connected to the truth argument is another matter to be weighed on the first amendment side of the balance in *Virginia Pharmacy*, and we can borrow from Professor Baker in making the argument despite the fact that he contends the decision is wrong, while I contend it is right. According to Baker, human beings have the right to speak because they are entitled to be treated by government as equal and autonomous agents. Similarly, human beings are entitled to the same treatment when they are members of audiences. In *Virginia Pharmacy*, the purpose of the state’s restriction was to keep drug price information from human beings for fear that they would make bad decisions on the basis of the information. From this perspective, the problem with the *Virginia Pharmacy* regulation is not that it offends the efficient functioning of the marketplace; rather, it offends the concept of human dignity. The problem is less that consumers would be deprived of valuable information; the problem is that when government prevents willing speakers from speaking the truth to audiences in order to manipulate their decisionmaking, it engages in an especially offensive form of paternalism. If the government tells me that I cannot read Mobil Oil’s literature, I should have a first amendment right to object whether or not I have any desire to read the literature (irrespective of the rights of Mobil Oil and wholly apart from whether truth will emerge in the marketplace of ideas). Any such regulation would offend the value of respect owed to persons.

I need to insert two immediate qualifications. First, the concepts of dignity and respect are often overused and will not assist us in resolving most of the most interesting first amendment conflicts. For example, the values of respect and dignity weigh on both sides of the defamation-free speech conflict, the privacy-free speech conflict, and even the personal security-free speech conflict. Staring at words like respect, dignity, and autonomy will not produce answers to such conflicts. Recognizing the limited problem-resolving power of these concepts, however, ought not to blind us to their enormous importance, particularly in cases like *Virginia Pharmacy*.

Second, respecting people is not the same as respecting the choices that people make. We may show our respect for a hopeless drug addict by administering involuntary medical care. Paternalism is not always

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wrong even when adults are the recipients. Paternalism, however, is risky business; it needs more justification than was provided in *Virginia Pharmacy*.

Under an eclectic approach, however, justification is always a possibility when first amendment values are impinged upon, and that principle operates even when the government seeks to suppress the truth. Any idea that the first amendment automatically protects the dissemination of truth is simply specious. The libel laws, for example, afford a defense of "truth," but republication of a defamatory utterance is not considered true unless the defamatory sting of the statement is true.\textsuperscript{281} To be sure, there are defenses, some constitutionally based, some based in common law privileges.\textsuperscript{282} There are many occasions under the libel laws, however, when the press is not free to publish the truth.\textsuperscript{283} Moreover, the public disclosure of embarrassing private facts is often tortious and without first amendment protection,\textsuperscript{284} although the Supreme Court has suggested that the question is still open.\textsuperscript{285} Similarly, labor unions are not free to publicize true facts about a secondary employer's connection to a labor dispute\textsuperscript{286} even though they may use pickets to communicate other facts about the same employer.\textsuperscript{287} The list of permissible abridgments is not infinite, but the point has been made: we prohibit the dissemination of a lot of truth for various reasons. Indeed, the test adopted by the Court in *Central Hudson Gas & Electric Corp. v. Public Services Commission* makes it clear that the Court will permit suppression of the truth if substantial state objectives are furthered in the least restrictive way.\textsuperscript{288} Meeting such a test might not always mean


\textsuperscript{282} For general discussion, see \textbf{Restatement (Second) of Torts} §§ 582-612 (1977).


\textsuperscript{284} \textbf{Restatement (Second) of Torts} § 652D (1977).

\textsuperscript{285} Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975).

\textsuperscript{286} \textit{See}, e.g., NLRB v. Retail Store Employees, Local 1001, 447 U.S. 607 (1980).


\textsuperscript{288} \textit{See supra} note 55 and accompanying text. The Court has gone even further. Some truth is unprotected \textit{per se}. Under the Court's test, commercial speech must concern lawful activity before it gets any first amendment protection. \textit{See} Central Hudson Gas & Elec. Corp. v. Public Serv.
that the disadvantages in suppressing truth have been outweighed, but the test is flexible enough to permit maneuver when necessary.

Although there is much room for criticism here, the courts have not always been wrong in permitting the state to outlaw the dissemination of truth. Speech is important, but so are the values of privacy, security, and reputation. Although we might question many of the specific accommodations in this area, the problems lie in particular contexts; the process of making accommodations is appropriate. It is tempting here to march through the commercial speech cases in an effort to show that speech interacts with other values in complicated ways and to suggest that many other factual combinations are possible. It is enough to note that the state interests introduced in the commercial speech context have included a desire to protect competition in the drug industry,\textsuperscript{289} the promotion of racial equality,\textsuperscript{290} and the preservation of energy.\textsuperscript{291} Daniel Farber, I would suggest, is right on the money when he observes:

[A] state could claim any number of possible justifications, each potentially requiring separate treatment. . . . [W]hen the regulation impinges upon the flow of truthful information, the situation should be analyzed under general first amendment theory, whatever that may turn out to be. The best approach to the topic is probably to discuss the problems on a case-by-case basis, just as the Court is forced to confront them.\textsuperscript{292}

\textit{False and Misleading Commercial Statements}.—The regulation of false and misleading commercial statements raises many of the most difficult questions in first amendment law. Confronting some of those questions requires a firm conception of the place of so-called marketplace values in first amendment theory. Marketplace values are related to a basic fear about government bias in regulating speech. Discussion of marketplace values will lead us to a discussion of the kind of bias with which we are concerned, and the questions of whether such a bias is either necessary or sufficient to trigger marketplace values. That discussion will suggest several other important variables. One such variable is the mode of dissemination. A consideration of that aspect will invite a reconsideration of the much-discussed question of whether the press is special.

Marketplace Theory: General Considerations.—In attempting to clarify the so-called marketplace argument it is helpful to turn back to John Stuart Mill. Mill has been charged with saying a lot of stupid

\textsuperscript{292} Farber, \textit{supra} note 6, at 399.
things he never said. In fact, his “marketplace” argument was quite limited. His basic claim was that it was not useful for government to prohibit speech merely because it was false.\(^{293}\) Mill thought it was useful to prohibit speech only when it was likely to cause harm\(^{294}\) or, more precisely, harm to the interests of others.\(^{295}\) For example, Mill had no objection to libel laws.\(^{296}\) If speech caused harm, Mill’s approach was to ask whether restricting it, on balance, was likely to promote utility.\(^{297}\) If it would promote utility, the restriction should be enacted. In modern terms, Mill was a balancer. He entertained no pie-eyed notions about the value of truth. If the dissemination of truth were likely to cause significant harm, nothing in Mill’s writings suggests that he would oppose sanctions. Similarly, Mill had no romantic conceptions about truth emerging in the marketplace of ideas.\(^{298}\) Instead, Mill propounded a thesis that Frederick Schauer has stressed in his recent writings: there is no good reason to think that government has a monopoly on truth.\(^{299}\) If government intervenes to prevent speech, simply on the basis that it is false, without more, there are reasons to fear that the government acts out of bias or in an effort to repress minorities. As Mill put it, there is no reason to suppose that government is infallible.\(^{300}\)

It is instructive to recognize that in many respects, C. Edwin Baker is a latter day Mill. His whole first amendment project is designed to implement Mill’s vision. The difference, however, is that Baker opposes ad hoc balancing. He wants clean lines. He would substitute “coercion” for Mill’s “harm.”\(^{301}\) Like Mill, Baker would permit unrestricted freedom for speakers so long as they do not cause harm to others. Unlike Mill, Baker would permit speakers to cause harm to others until the speech became coercive.\(^{302}\) Like Mill, Baker hopes that

\(^{293}\) J.S. MILL, ON LIBERTY (D. Spitz ed. 1975).
\(^{294}\) Id. at 12, 53.
\(^{295}\) For discussion of the term “interest” in Mill’s work, see J.C. Rees, A RE-READING OF MILL ON LIBERTY, 8 POL. STUD. 113 (1960). For criticism, see Wollheim, John Stuart Mill and the Limits of State Action, 40 SOC. RESEARCH 1 (1973).
\(^{297}\) See J.S. MILL, supra note 293, at 12. For extended discussion of Mill’s views concerning utility, see Mill, UTILITARIANISM, in THE UTILITARIANS 399-472 (Dolphin ed. 1961).
\(^{298}\) See, e.g., J.S. MILL, supra note 293, at 28 (“[T]he dictum that truth always triumphs over persecution is one of those pleasant falsehoods which men repeat after one another till they pass into commonplace, but which all experience refutes.”).
\(^{299}\) Id. at 18. Cf. F. SCHAUER, supra note 78, at 80-86 (distrust of governmental determinations of truth and falsity). For a helpful general discussion of marketplace theory, see Schauer, supra note 68, at 268-76.
\(^{300}\) J.S. MILL, supra note 293, at 18.
\(^{301}\) Baker is quite explicit on the point. See Baker, Freedom of Speech, supra note 83, at 998.
\(^{302}\) Mill would allow speakers to cause harm if it was not useful to intervene. See J.S. MILL, supra note 293, at 12; MILL, supra note 296.
if speakers are granted a zone of liberty, they will set examples that others might follow in building a better society. Baker's attack on the marketplace theory should not disguise his basic agreement with Mill on these common premises: a distrust of government's ability to define truth, a search for rules that will grant dissenters a generous measure of freedom, and a hope, but not a guarantee, that the lives of dissenters will serve as models for a progressive future.

The difficulty comes in applying these abstractions. Perhaps the principal area of government concern is the prevention of fraudulent speech. If I take your money by telling lies, in Mill's terms, I have harmed you. In Baker's terms, I have coerced you by not treating you with the respect I owe you as an equal. I can trick you in many ways: I can lie about the future of my corporation to drive up the price of its stock, about the product I sell, about various facts to get your proxy in a stock sale, about what my union will do for you in return for your dues, about why you should not join a union in order to keep my company's costs down, about what I will do as a politician to get contributions for my campaign, about my role as a religious leader to get contributions for my church, and about my soothsaying abilities to persuade you to pay for my predictions.

In many of these areas I may be negligent or careful, but wrong. Whatever my motivation, I harm you when, in reliance on my false statements, you act to your detriment. Similarly, in order to prevent harm, states have enacted a series of licensing statutes that prevent people from charging money for giving legal advice, investment advice, real estate counsel, and the like without state approval. Indeed, most states prohibit giving free legal advice without a license. When the state regulates in any of these areas, it asserts its ability to know the truth and its unwillingness to let truth emerge in an unregulated marketplace.

We are, of course, more comfortable about letting the states' notions of truth or "expertise" prevail in some of these areas than in others. The first point to notice is that economic harm is not in and of itself sufficient to justify the absence of first amendment scrutiny. If the state were to license politicians or ministers in order to prevent persons from being hoodwinked into contributing their money to those who make false statements, the first amendment surely would pose a bar.

303 "[S]ince most legislation does not exempt gratuitous activity, much advice commonly imparted by friends, employers, political organizers, and newspaper commentators, constitutes unauthorized practice." Rhode, Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions, 34 Stan. L. Rev. 1, 47 (1981). Enforcement, however, has typically been confined to remunerative activity. Id. at 65.

304 At least, the state decides who is most likely to know the truth. The act of licensing usually involves an assessment of the knowledge one needs to give opinions.
The Court itself made this clear in *Thomas v. Collins*,\(^{305}\) a case in which the state regulation was less offensive. The state of Texas merely sought to register a paid union organizer who was in the business of soliciting persons to purchase the services of a union, or to join a union, depending on your characterization.\(^{306}\) In fact, both characterizations are correct, and the Court so recognized. The Court firmly denied that "the First Amendment safeguards are wholly inapplicable to business or economic activity,"\(^{307}\) observed that "regulation . . . aimed at fraud . . . must not trespass upon the domains set apart for free speech and free assembly,"\(^{308}\) and insisted that no clear conclusion could automatically be drawn from the simple fact that the individual receives compensation for speaking.\(^{309}\) The Court affirmed that "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. . . ."\(^{310}\)

*Thomas* is a difficult case, but the Court is on firm ground when it posits that the exchange of money in a transaction is not a sufficient condition for the obliteration of first amendment protections. States consequently cannot tell religious or political peddlers that they can distribute their materials so long as they do not ask for money.\(^ {311}\)

*Thomas* thus highlights an uncomfortable truth, namely, that special subject matter categorizations are unavoidable. It is clearly unconstitutional to license political speakers and ministers, but most of us assume that licensing lawyers, psychiatrists, real estate agents, and investment advisors is not unconstitutional. Yet lawyers, psychiatrists, real estate agents, and investment advisors are speaking or writing for money; so are politicians, ministers, and union solicitors. It would, of course, be possible to argue that the first amendment prohibits government licensing of lawyers; it is easy to see how the argument would go.\(^ {312}\) My point is that those who want no content discrimination

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\(^{305}\) 323 U.S. 516 (1945).
\(^{306}\) Id. at 524-25.
\(^{307}\) Id. at 531.
\(^{308}\) Id. at 532.
\(^{309}\) Id. at 531.
\(^{310}\) Id. at 532.


\(^{312}\) One might easily take the classic arguments against occupational licensing and put them in the language of prior restraints. For a powerful attack on occupational licensing, see Gellhorn,
would have to go at least that far. For those unwilling to go that far, the problem is not only how to draw the lines, but how to justify the lines drawn.

As an eclectic approach suggests, a number of variables interact in complex ways. To show how complicated the issues are we ought to continue our consideration of one part of the balance to be struck, that is, the way marketplace values figure in several different contexts. The marketplace argument is obviously powerful in some of these cases. We have grave doubts about the government's ability to define truth, even about matters of fact, in the political arena and in religion. To repeat a prior point, suspicions are triggered not merely because of content. Although no one supposes the FTC is infallible, we have significantly less doubt about government's capacity to define truth when it moves against a deceptive advertiser who makes an allegedly false statement about its own or another's product, than we do when the government moves against a source that has no profit motive in the sale of a product.\textsuperscript{313} The first amendment will ordinarily bar the latter action even if the false statement were the same one that had been made by an advertiser. Consider, again, for example, an injunction action against a consumer magazine or an author of a book who has no financial interest in the product discussed. The first amendment would prevent such an injunction because we fear that the government has no other reason for restricting the publication except a desire to suppress a certain version of truth.

There are enormous complications here that we ought not to smooth over. There are problems of identifying the type of bias we are concerned with and there are problems of sorting out how important a role such bias should play in the marketplace part of the balance.

Truth and Bias in Marketplace Theory.—First, the presence of a matter of general or public interest or even a matter of political importance in a speaker's presentation need not suggest the presence of the kind of government bias we are worried about, although first amendment values might otherwise be involved. Return, for example, to the SEC's regulation of statements by corporate executives about a corporation's future. I argued earlier that those statements are of political importance. Nonetheless, it is unlikely that SEC regulation of such statements has been infected with the same kind of bias we ordinarily

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\textit{The Abuse of Occupational Licensing}, 44 U. Ch. L. Rev. 6 (1976). For a criticism of unauthorized practice statutes on many fronts, including constitutional attacks, see Rhode, \textit{supra} note 303.

\textsuperscript{313} See Note, \textit{supra} note 4, at 1195. The problem of bias may be present with respect to particular advertisements, however. See Scanlon, \textit{Freedom of Expression and Categories of Expression,} 40 U. Pitt. L. Rev. 519, 531, 541, 542 n.27 (1979). The Court, wisely I think, is unwilling, however, to engage in ad hoc judgments as to when the subject matter of an advertisement might give rise to suspicions of government bias. See Bolger v. Youngs Drug Prods. Corp., 102 S. Ct. at 2881.
worry about when the government regulates political speech. There do not seem to be grounds for believing that partisan interests have influenced the scope and kind of regulation in such a case, as there would be if a Political Exchange Commission regulated political campaign speeches. Even if worrisome bias is absent, government action may implicate first amendment values nonetheless. In its best light, the government, without partisan bias, is here suppressing speech of political, social, and economic importance. To make the case even more difficult, the speech at issue is not false; the government’s concern is that it will mislead. The speech would be valuable to many (for example, investment advisors) and harmful to others (many of the uneducated small investors). If the marketplace theory values truth for its own sake wholly apart from concern about bias, there is a case for heightened scrutiny of the regulation.

There is some reason to believe that the SEC regulation would not survive any such scrutiny. Consider the two most obvious responses the SEC could offer. The first is that the SEC has expertise to which the Court should defer; the second is that the SEC has a compelling governmental interest in its regulations.

Some might put the first argument entirely beyond the pale. It is reminiscent of Gil/ow v. New York and if anything is clear, some would say, it is that courts should not defer to legislative or executive determinations about how to weigh first amendment values. This general posture might be subject to some qualification when an administrative agency with demonstrable expertise is especially sensitive to first amendment concerns. The Court has on occasion apparently been impressed by this possibility when the FCC has taken positions on broadcast regulations. But the argument for deference would be less persuasive when the agency could not make such a case. I certainly do not pose as an expert on securities regulation, but there is some evidence to suggest that a case for the SEC would be difficult to make. Distinguished commentary suggests that the SEC in many areas has framed its regulations with an eye to protecting the small investor while subordinating concern for the allocative inefficiency of its regulations. Indeed, the commentary is often less generous than that. Observers of the SEC criticize the regulations for not directly advancing the goal of protecting the small investor and, sometimes, for being inco-

314 Anderson, supra note 9, at 337-38; Schneider, supra note 9, at 268.
315 268 U.S. 652 (1925) (judicial deference to legislature in advocacy of illegal action context).
No one, so far as I am aware, contends that the SEC is especially sensitive to first amendment values or even that the value of allocative efficiency is a compelling interest. Given that the Court has paid so little deference to the SEC's interpretation of the securities laws, there seems less reason to defer to the SEC's assessment about how SEC regulations implicate first amendment values.

What then of the SEC's substantial government interest, namely, that projections about the future of a company have the potential to mislead unsophisticated investors? The attempt to justify regulation by reference to this interest is precisely what the commentators' criticism is all about. Most small investors' information about a corporate executive's speech (and certainly about information contained in documents filed with the Commission) comes through their brokers, whose opinions are in large part influenced by the reactions of other investment advisors and of institutional investors. Much of that reaction is quickly reflected in the market price of the stock. If the corporate executive does not give the speech (or does not put the projection in a document filed with the SEC), the small investor and the economy do not get the benefit of the information and are misled to that extent. The market price will not reflect information that is not available. However one comes out on the issue, there are excellent grounds for wondering why SEC statements that speech is misleading should be given great deference when the State Bar of Arizona's similar assessments are not.

Let us suppose then that the SEC's past or present regulation of corporate projections might not satisfy heightened scrutiny analysis. Let us also assume that utterly toothless scrutiny is inappropriate. If the dissemination of truth has some first amendment value, we will af-

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318 See, e.g., Anderson, supra note 9, at 312. For powerful criticism, see Kripke, supra note 115, at 1197-1201.
319 See, e.g., Dirks v. SEC, 103 S. Ct. 3255 (1983) (rejecting SEC theory of tippee liability); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) (rejecting SEC position on nature of fault showing required under § 10(b) and Rule 10b-5).
320 H. KRIPE, supra note 9, at 15; Anderson, supra note 9, at 329-30.
321 Comment, supra note 9, at 1533.
322 Some think there is an important institutional problem lurking here. Extension of first amendment scrutiny to the SEC would make the courts potential independent reviewers of any challenged registration statement. As Schauer puts it, "This does not seem likely in our lifetime." Schauer, supra note 68, at 299. If, however, the challenge is after the publication of the statement, the courts are already independent reviewers under the securities laws. Prior to issuance, the issuers are typically in a hurry to get the statement out. Lengthy litigation at that point is not in the cards on any theory.
323 It bears emphasis that the analysis of projections here does not purport to be comprehensive, or even to have made a case against any of the various SEC policies. I only intend to suggest that there is first amendment ammunition that could be used against SEC positions on soft information. For a defense of restrictions on corporate projections, see Heller, Disclosure Requirements Under Federal Securities Regulation, 16 Bus. Law. 300 (1961).
ford this value no protection if government agencies can entirely avoid scrutiny by saying they are regulating "misleading" speech. To suppose, however, that the courts should invoke some very strict scrutiny is to suppose that, in all contexts, the general value of information or truth that the corporate executive seeks to disseminate presumptively outweighs the value of protecting small investors. I see no reason for creating such an abstract hierarchy or for making that choice. Anyone who is confident that one such value is significantly more important than the other ought to speak out. This is not a decision the first amendment has "made for us." It is one we must make for ourselves.

The Court made such a decision in the defamation area. The complex set of rules produced in *Gertz v. Robert Welch, Inc.*, right or wrong, resulted from an appreciation that the protection of truth was important but that the protection of reputation also was important. The Court wisely avoided discussion of levels of scrutiny because any resort to such abstractions would have constitutionalized reductionism. *Gertz* reflects the balancing methodology Mill called for in the middle of the nineteenth century. Indeed, the problem of defamation in the commercial arena further illustrates the theme of this section. Typically, state regulation of commercial defamation gives rise to no general concern of partisan bias. Consider, for example, the case of a commercial supplier of credit information that defames a person applying for credit. If the first amendment requirements outlined in *Gertz* apply, there is something clearly wrong with the first amendment or with *Gertz*. The interests in individual self-expression, autonomy, and the like are not present here or are present in only an attenuated way. The constitutional interest in affording strategic protection to these defamatory falsehoods in order to encourage investment in credit information suppliers is not impressive. Nor are there general grounds for concern about government bias. Affording constitutional prote-

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324 Cf. supra text accompanying notes 48 & 49.
325 418 U.S. 323 (1974) (varying the showing plaintiffs required to make by their status and perhaps by the status of the defendant).
326 Mill's conclusions were somewhat different. Contrary to his wild-eyed reputation, his conclusions were less speech protective than those of the Court. Compare Mill, supra note 296 with Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).
327 See Hood v. Dun & Bradstreet, Inc., 486 F.2d 25, 32 (5th Cir. 1973) (credit reporting agencies do thriving business in states that deny such agencies any common law privilege in defamation suits), cert. denied, 415 U.S. 985 (1974). My argument depends upon the supposition that not every sale of speech deserves the kind of special speech or press protection that could displace significant state interests. That supposition will be unattractive to those who do not wish to make content distinctions (to those who, for example, oppose the commercial/non-commercial distinction or any variations on that theme), and it will not be easy to draw lines in some cases. The line between credit or financial reports and general financial newsletters could be difficult to apply at the margin, and I think it clear that general financial newsletters deserve significant protection.
tion here would trivialize the first amendment.328

Nonetheless, it would be a mistake to conclude that commercial defamation law is always bereft of first amendment interest. Competitive commercial advertising is an important example in which first amendment values loom large despite the absence of any particular concern about government bias. Take the case of trade defamation. A competitor makes derogatory statements about another’s product. The marketplace seems greatly unbalanced here.329 Billions are spent making affirmative claims about products; much less is spent in opposing them. Here we need to afford some strategic protection for falsehoods in order to encourage the dissemination of truth. If Gertz is to apply generally to statements about persons on the assumption that the public has a “right to know,” there is a strong case for suggesting that similar protection should apply to statements about products.330

See infra note 345 and infra text accompanying notes 340-49. Moreover, there are admittedly types of speech between credit reports and general newsletters that present difficult questions. Nonetheless, drawing lines based on underlying first amendment values is a far cry from sending out the judiciary on a general ad hoc expedition to separate matters of general public interest from matters that are not. A commitment to segregate certain commercial speech from Gertz protection is not a commitment to general ad hoc determinations. Moreover, drawing the line in these cases involves no special worries about judicial bias. The costs of uncertainty in the line-drawing process are outweighed by respect for state interests and for avoiding unnecessary trivialization of first amendment concerns. 328 Thus, there is no need to reach the question in this context of whether first amendment defamation requirements should ordinarily extend to non-media defendants. Indeed the media/non-media distinction could become exceedingly complicated if anything were made of it here. Suppose, for example, that the credit reporting entity affords subscriber access to a computer program that can be received on a computer terminal in the subscriber’s office. Suppose, further, that banks and other lending agencies throughout a city can call up such information on their computer screens. Would this justify a media classification for the credit reporting entity? If not, what if the information supplier afforded access to a computer program containing the Associated Press wire service? Does the media classification turn on the content of the information supplied? Does it matter if the credit reports have opinion in them?

If the credit reporting entity is classified as part of the media when it affords computer access, does it become non-media when it sends out written communications to a small number of subscribers? Does it matter if they are sent out all at once? What if such communications are sent out regularly? Presumably, if the credit reporting agency provides its service by answering questions on the telephone, it should be classified as a non-media defendant. Nonetheless, it is hard to see why anything for first amendment-defamation law should turn on factual distinctions such as these. It is the character of the speech, not the status of the defendant, that should matter here. For a general discussion of the media/non-media distinction in the defamation context, see Shiffrin, supra note 37. For additional discussion of this credit reporting entity problem, see supra note 249 and accompanying text. For a discussion of the media/non-media distinction as applied to regulation of investment advisors, see infra notes 340-49 and accompanying text.

329 Note, supra note 4, at 1195. The problem is not that replies are not forthcoming when attacks on products are made, but that more criticism of products needs to appear in the communications marketplace.

330 Arguably, the most important factor in the product disparagement area is the need to encourage criticism of products. If this factor is regarded as significant, it would be appropriate to establish a high scienter threshold for any damage recovery. If a plaintiff met such a scienter
I mean to make only tentative claims in this section. The conclusions I reach in each of the specific areas discussed are of little concern. It is important, however, to separate the marketplace concern about bias from the concern for having as much truth or information as possible in the marketplace, because the latter concern could trigger first amendment scrutiny even when there is no reason to be concerned about government bias.

The Possibility of Benign Bias.—As shown above, there is room for inquiry as to whether the presence of a government bias is necessary to trigger marketplace values. In this section, I want to suggest that the presence of a partisan government bias might not be sufficient to trigger any strict form of scrutiny. Consider again the NLRB’s on-again-off-again policy of setting aside representation elections in circumstances in which the misleading or false statements of an employer have allegedly influenced the outcome. Presumably the Board is pro-union in some years, and is not in other years. Nonetheless, it is not obvious that first amendment values are necessarily compromised in this context by the presence of bias. If it were national policy to encourage the

requirement, however, requiring the plaintiff to show specific loss of customers or the like would seem excessively stringent. Strategic protection of falsehoods in order to avoid chilling effects need not require inordinately difficult proof of damages as a part of the strategy. Moreover, it would be consistent with such a strategy to allow injunctions to issue freely against false statements made by competitors. Competitors are likely to risk possible injunctions more readily than large damage awards, and, in any event, injunctions against false advertising are justified by the need for consumer and commercial protection. In other words, in this area the courts should turn the first amendment’s usual priorities for remedies upside down: injunctions should be easier to get than damages. Nonetheless, concerns about bias should lead courts to invoke the law of prior restraints against injunctions that control the speech of non-competitors. For an excellent discussion of product disparagement issues and the first amendment, see Note, Corporate Defamation and Product Disparagement: Narrowing the Analogy to Personal Defamation, 75 COLUM. L. REV. 963 (1975). The case law is divided on the related question of the standards that should apply in determining when a corporate plaintiff is a public figure. Compare, e.g., Vegod Corp. v. ABC, 25 Cal. 3d 763, 603 P.2d 14, 160 Cal. Rptr. 97 (1979) (corporate plaintiff who had engaged in advertising not a public figure), cert. denied, 449 U.S. 886 (1980) with Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264 (3d Cir. 1980) ($16,000 advertising campaign enough to make corporate plaintiff a public figure).

331 In Midland Nat'l Life Ins., 263 N.L.R.B. No. 24, 1982-83 NLRB Dec. (CCH) ¶ 15,072 (1982), the Board decided that it would no longer probe into the truth or falsity of campaign statements by employers (or any other party) in a representation election and would no longer set the elections aside on the basis of misleading statements. In doing so it overruled Hollywood Ceramics Co., 140 N.L.R.B. 221 (1962) and General Knit of Cal., 239 N.L.R.B. 619 (1978), and returned to the “sound principles” (263 N.L.R.B. at 15) of Shopping Kart Food Market, 278 N.L.R.B. 1311 (1977). The Board, however, will continue to set aside elections when forged documents are employed, Midland Nat'l Life Ins., 263 N.L.R.B. No. 24, at 17, or when threats, promises, or similar conduct interfere with “free choice.” Id. at 22. As the Midland opinion itself reports, “the policy views of the Board have changed.” Id. at 20. For a comparison of the SEC approach in the corporate proxy context, see L. Loss, supra note 122, at 562-67.

332 Note, supra note 4, at 1206.
formation of labor unions, for example, and a particular board consistently interpreted the facts surrounding representation elections in a pro-union fashion, the first amendment implications would not be clear. Even if we think of representation elections as political (or not commercial) and public (or not private), the presence of government bias, without more, might be irrelevant to any first amendment point. That, of course, would not be the case if a National Political Relations Board were to favor Democrats over Republicans in elections for the House of Representatives.

Suppose, on the other hand, the Board were to favor employers over prospective unions in representation election cases. It would then be necessary to consider the relationship between freedom of association and unions. It is at least arguable that employees have a first amendment right to form unions and to engage in collective bargaining. If government intervenes to prevent such associations out of

333 I am assuming that the remedy at issue is the setting aside of an election, not direct sanctions against an employer or the certification of a union that did not receive sufficient votes. If the remedy in question involved sanctions against the employer for his or her false or "coercive" speech, any bias against the employer's speech immediately would trigger first amendment concern. This does not mean that direct regulation of employer speech necessarily violates the first amendment. The Court has already observed that coercive employer speech is beyond first amendment protection. Query whether after Ohralk v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (prohibition of in-person lawyer solicitation valid as a prophylactic measure), the Board could enact more stringent regulations of employer speech during representation elections. For example, what if the Board took the position that determining the presence of coercive speech on an ad hoc basis was too difficult, led to uncertainty, and risked arbitrary decisionmaking?

Assuming, however, that direct regulation of employer speech raises serious first amendment issues, setting aside a representation election only indirectly involves first amendment interests. The employer has no serious first amendment interest in not having his or her employees form a union. Setting aside union elections implicates the first amendment because this action will arguably chill the employer's speech in the future. Bok, supra note 11, at 68. In some circumstances, the chill could be substantial. Suppose the Board set aside all elections that did not certify a union if an employer had said anything negative about the union. My point, therefore, is not that the setting aside of elections can never involve first amendment questions. The point is that a bias in favor of unions is not always a factor that raises scrutiny. The first amendment concern here is the liberty of the employer and the marketplace value of the employer's speech. We would be concerned about setting aside a political election, on the other hand, whether or not a chilling effect were produced, whenever we knew that setting aside the election had been influenced by partisan considerations including pro- or anti-labor biases.

Finally, setting aside a representation election is not the same as certifying a union that did not receive sufficient votes. The latter raises first amendment interests of yet another kind—The first amendment right of employees not to associate would then be jeopardized. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).


335 See supra note 333.

336 Although the Supreme Court has never so held, many lower courts have interpreted cases like Hague v. CIO, 307 U.S. 496 (1939) and Thomas v. Collins, 323 U.S. 516 (1945) to establish a
bias against them, first amendment values appear to be strongly impli-
cated. From this perspective, government intervention to encourage
associations like unions does not interfere with first amendment values,
but intervention to oppose such associations does interfere with those
values.

However one decides this issue, trying to determine whether
speech in the union context is political, commercial, or an example of
political economy is a witless exercise. The existence of regulation in a
political context need not betray an underlying government bias, nor is
the existence of governmental bias in a free speech context necessarily a
constitutional problem. We may sometimes consider bias to be consti-
tutionally benign.

The Difficulty of Recognizing Bias.—Sometimes even malignant
bias is so deeply entrenched in our society that it becomes respectable.
Most scholarly disciplines have decades to their discredit in which
quite reasonable approaches were “out of fashion” or “wrong” and not
pursued. Determining when marketplace values should cancel at-
tems by the state to regulate fraud is obviously a tricky business.
Whatever confidence we might muster about our decisions as to gov-
ernment regulation of political or religious fraud must diminish when
we leave such traditional territory; there are gray areas and hard cases.
In developing this point, I shall rely on an example that I suspect will
be controversial. In many states fortune-telling is outlawed.337 Some
fortune-tellers have raised first amendment arguments, only to meet the
brisk refrain that charlatans and quacks who engage in fraud are not
entitled to the protection of the Constitution.338

No doubt, the vast majority of people and certainly the vast major-
ity of academics think fortune-tellers are quacks, at best; frauds, at
worst. Indeed, academics typically have a strong emotional stake in
opposing psychic phenomena. They are genuinely threatened by the
thought that fortune-tellers might be right. There is a literature in the
scientific community, for example, arguing that any scientist who at-
ttempts to apply normal scientific methodological techniques to test the
alleged psychic abilities of individuals is not involved in scientific re-

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337 The case law is replete with epithets regardless of the constitutional claim advanced. See,
e.g., Bridewell v. City of Bessemer, 35 Ala. 337, 46 So. 2d 568 (1950) (hocus pocus); In re Bartha,
63 Cal. App. 3d 584, 511, 134 Cal. Rptr. 39, 43 (1976) (business of fortune-telling is inherently
deceptive); People v. Ashley, 184 A.D. 520, 172 N.Y.S. 282 (1918) (fortune-tellers always classed
with rogues and mountebanks); People ex rel. Mirsberger v. Miller, 46 N.Y.S.2d 206 (Mag. Ct.
1943) (fortune-telling is the crime of quacks, mountebanks, and charlatans, but finding religious
exemption in a fortune-telling statute). But see Marks v. City of Roseburg, 65 Or. App. 102, 670
Science, it seems, tests claims that comply with contemporary scientific paradigms. Galileo had similar opponents.

Yet Galileo was right, and fortune-tellers are quacks, many would say, and it is time to turn back to marketplace theory. Marketplace theory does not rest on confidence in the market; it rests on distrust of government. Government is not to define the truth for us. We are to define our view of truth, and should be able to present that truth to others free of government interference. Fortune-tellers make an ontological or epistemological claim that is contrary to what most people believe and to what most people want to believe. Whether or not we must define the religion clause broadly to include the activities of fortune-tellers (and that itself is an interesting question), fortune-tellers’ claims to free speech protection are hardly frivolous. To be sure, the state interest in protecting people from fraud is also not frivolous. But the consumers of fortune-tellers pay little money to receive many things—they get attention and a sympathetic ear; they are entertained; and they get stories to tell their friends. The state’s consumer protection efforts here are founded on an enormous lack of respect for consumers. I suspect the urge to censor plays a stronger role than the desire to protect the public. Marketplace values, individual self-expression, respect, dignity, and the like weigh heavily here, and the state’s interest, however well-pedigreed, seems relatively insubstantial in this context. This seems to be one of the few areas where caveat emptor is a useful phrase.

The fortune-telling example illustrates, I hope, an important point. Malignant bias in the fraud context is necessarily a function of historical and social context. It cannot be resolved by formula. Once Thomas made clear that the fraud label was not a talisman for the automatic eradication of first amendment values, the formidable task of drawing lines among subject matter categories could not be escaped. The fortune-telling example also nicely captures the general point that a range of first amendment values might interact in very different and complicated ways with interests the state seeks to advance. In that sense, the example presents a significant challenge to the building of first amendment theory.

The Special Place of the Press.—Another uncomfortable truth emerges from an analysis of the fraud issue—the press does have a special place in first amendment analysis. Many have argued (and I agree with them) that the press has made a tactical error in contending so frequently that it should be entitled to special privileges denied to others. It was a tactical error to rely so heavily on the argument that

339 B. Barnes, supra note 211, at 90-93 (discussing the literature).
the press was special in *Zurcher v. Stanford Daily*, for example. Moreover, there are strong arguments to support the view that the press should have no special privileges in the defamation context. In the view of many, the press clause simply means that the freedom of speech guaranteed in the Constitution does not diminish when someone uses a printing press in the act of speech.

Yet the regulation of fraud presents at least one area in which the press is special. Consider SEC regulation of investment advisors. In order to combat fraud in the securities market, the SEC has cumbersome registration provisions for investment advisors. Investment advisors, however, do not only give advice over the telephone. They sometimes communicate to their clients in writing. If they have enough clients, they send out newsletters. The extreme case, of course, is the person who writes a column in the *Wall Street Journal*. I suspect that most people would regard it as a clear first amendment violation if the SEC required financial columnists in major newspapers to comply with SEC registration requirements. At the same time, most would see

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341 436 U.S. 547 (1978) (search of newspaper office can be authorized under normal warrant procedures). Such argumentation distracted from the general question of the fourth amendment standards applicable to searches of innocent third parties. Justice Stevens addressed this point, and the advocates properly could have made it the centerpiece of their argument.

342 *See*, e.g., Shiffrin, *supra* note 37.

343 Lewis, *supra* note 340, at 597-600. For powerful historical arguments on the other side, see Anderson, *supra* note 144.

344 I would not distinguish between major and minor newspapers or between financial publications and general publications. Some would do so, however. *See infra* note 345.

345 Cf. *Thomas v. Collins*, 323 U.S. 516 (registration requirement for union organizers violates freedom of speech). *But see* SEC v. Lowe, 556 F. Supp. 1359 (E.D.N.Y. 1983). There Judge Weinstein concluded that a publisher of an impersonal investment newsletter could be required to register under the Investment Advisors Act of 1940, 15 U.S.C. § 80b-3 (1976). On the other hand, the court held that the SEC could not deny registration for publishing to those who had engaged in past deceptive behavior. At the same time, the court held that the SEC could bar the defendant from providing information over the telephone. Telephoning created "dangers of personal advice." SEC v. Lowe, 556 F. Supp. at 1371. It is not clear that the personal/impersonal distinction captures the court's point. Would a letters-to-the-editors section make the "impersonal" newsletter personal? What about speeches to large numbers of people? *See infra* note 346. The real distinction the court appears to be working with is a public/private distinction.

Perhaps the more interesting question is posed by the registration requirement which, under the terms of the act, does not apply to publishers of "bona fide" newspapers, magazines or financial publications of "general and regular circulation." 15 U.S.C. § 80b-2(a)(11) (1976). "Congress concluded that publications providing general business and financial information pose less dangers to the public than specialized advisory publications designed particularly for potential investors." SEC v. Lowe, 556 F. Supp. at 1362. *But see* SEC v. Wall Street Transcript Corp., 422 F.2d 1371 (2d Cir. 1970) (somewhat broader conception of the scope of the exemptions from the Act). Surprisingly, the court in *Lowe* concluded that investment advice was not commercial speech, SEC v. Lowe, 556 F. Supp. at 1366-67, but nonetheless upheld the registration requirement. *Id.* at 1367-71. Moreover, the court apparently concluded that the government could condition the right of the publishers of such newsletters to publish on their willingness to "submit to
not have initially balked at requiring investment advisors who communicate in person, by telephone, or through informal notes to register. The problem is to determine when the "informal notes" become the press. Is it enough that the authors label their notes "newsletters"? Presumably not.

A body of law exists in which judges have attempted to draw lines. One major difficulty is that in order to make decisions about the character of the "publisher," judges have found it appropriate to conduct discovery on how the purported investment advisor makes decisions, what his or her financial holdings are, with whom he or she consults, what his or her sources of compensation are, and the like.

registration and provide all information that is now or may in the future be properly required by the SEC" under the Act’s provisions. Id. at 1369. For an even less sensitive approach, see Savage v. Commodity Futures Trading Comm’n, 548 F.2d 192 (7th Cir. 1977) (person who had a prior securities conviction could be denied registration under Commodity Future Trading Commission Act and prevented from publishing an investment newsletter).

There are important state interests at stake here. Some abuses by financial columnists properly call for regulation. See, e.g., Zweig v. Hearst Corp., 594 F.2d 1261 (9th Cir. 1979) (financial columnist purchased stock at a discount, wrote a favorable article without disclosing his ownership of shares, then profited from the rise in the market caused by his article). For discussion, see Note, supra note 71.

The questions are whether the form of regulation requires a system of prior restraints, and whether a distinction between types of newspapers and magazines should survive attacks based on equality values. The whole idea of registering publishers is sufficiently alien to a first amendment regime that a quite substantial justification seems in order. That some publishers need to register and others need not has perhaps helped to insulate these provisions from general media attack, but this discrimination also would seem to require weighty support. In that connection, note that the financial columnist in Zweig v. Hearst Corp. was writing in the Los Angeles Herald Examiner, a general circulation newspaper. Whatever way those questions might be resolved, it is difficult to imagine a persuasive rationale that would justify any use of injunctions to block a financial publication unless the publication itself was deceptive. Even if the failure to disclose information to a government agency could give rise to criminal or civil penalties, it is hard to imagine why the blocking of otherwise protected publications would be necessary or appropriate. Cf. Kunz v. New York, 340 U.S. 290 (1951) (past causing of public disorder through speech may give rise to punishment through public remedies but not suppression of future speech).

There is a danger of overstatement here. Presumably, it should be unconstitutional to bar people from giving speeches to audiences (whether or not for a fee) about investment or about law or psychiatry even though licensing restrictions might be upheld for more personal compensated advice. One could argue that speaking to an audience is the press function or that public speakers and the press are protected. In either case the press is getting special treatment not afforded to those who speak in private. For discussion of the press function, see Sack, Reflections on the Wrong Question: Special Constitutional Privilege for the Institutional Press, 7 HOFSTRA L. REV. 629 (1979). A similar implication arises from Branzburg v. Hayes, 408 U.S. 665 (1972), where the Court created a qualified privilege for reporters who refuse to disclose sources. This reading of the case leans heavily on Justice Powell’s concurrence, but lower courts have so read the opinion. See, e.g., Zerilli v. Smith, 656 F.2d 705 (D.C. Cir 1981); State v. St. Peter, 132 Vt. 266, 315 A.2d 254 (1974). The Court had previously created what is probably a special privilege for political associations, though it applied its test in a toothless fashion. See Barenblatt v. United States, 360 U.S. 109 (1959). Thus, the Court prefers some speech activities to others. For example, if you are called as a witness by a grand jury or a legislative committee, and you do not want to reveal what your next door neighbor said to you, you would have to argue for new law in order to get the
Again, my purpose is not to resolve this issue but to suggest that lines must be drawn. The same problems can arise in psychiatry, law, real estate, and elsewhere unless it is constitutional to prevent people from writing about law in a newspaper without bar certification, about psychiatry without a degree, and so on. Finally (I cannot resist), would those who uphold fortune-telling laws advocate outlawing the astrology column in the local newspaper?

The urge to make the press special comes in part because we think the danger of exploitation is greater when the speech is not exposed to public view. We may not entertain romantic expectations about truth emerging in the marketplace, but if we ensure that people give bad advice publicly, there is a greater opportunity for someone to respond.

Yet there may also be an element of special privilege for the press in current first amendment doctrine. The doctrine of prior restraint may have been designed to put the press on an equal footing. People could speak or write without a license and that ought not to change merely because they used a printing press. Yet we now license a good deal of speech (for example, of lawyers), and those licenses are clearly prior restraints. So we have turned the law upside down. To speak you sometimes need a license; to use the press you almost never do. A doctrine designed to create equality for the press has evolved into one that gives it a special place.

Discriminating Against Commercial Speech in the Time, Place, and Manner Context.—Even if commercial speech were equated with commercial advertising, it would still be the case that the commercial speech problem is an abstraction that includes several distinct problems. These include the problems of when government can prohibit the dissemination of truth, what the limits are upon government power to suppress the false and the misleading, and the extent to which government can limit dissemination of advertising in circumstances in which it has permitted non-commercial speech. The last of these problems is perhaps the most interesting because it challenges what many regard as fundamental in free speech theory. Martin Redish states the problem in strong terms: "[I]f the first amendment means anything it is that the level of constitutional protection cannot vary on the basis of differing viewpoints." Indeed, Redish finds it "doubtful protections of a Branzburg or Barenblatt balancing test. The Court has not yet shown concern about the potential chilling effect on private conversations per se in disclosure contexts.


The point can easily be exaggerated, however. My point is not that the doctrine opposing prior restraints is confined to the press. It obviously is not. See, e.g., Staub v. City of Baxley, 355 U.S. 313 (1958). The point is that any licensing of the press arouses outrage, whereas licensing of speech is frequent and is not ordinarily characterized as what it clearly is—a prior restraint.

Redish, supra note 37, at 613.
that an arm of the state should have the authority to decide for the individual that certain means of mental development are better than others." He argues, therefore, that we cannot justify any differences in our treatment of commercial speech and non-commercial speech on the premise that "some forms of speech are more valuable than others."352

One should not read too much into Redish's doubt that the "state should not have the authority to decide for the individual that certain means of mental development are better than others." He would freely concede that the state rightly makes such decisions daily. For example, the state compels education, and selects curriculum and textbooks. In so doing, the state decides for the individual that "certain means of mental development are better than others." Indeed, as I argue elsewhere in detail, the state necessarily makes such decisions in deciding what rights will exist, in accommodating clashes between rights, in designing systems of property rights, and so on.353 The state appropriately makes content decisions about what is best suited to belong in its libraries and its museums. The state then of necessity makes decisions about what is best suited for mental development and about what kind of people we ought to be.

The fighting issue is whether that form of decisionmaking should extend to prevent private actors from communicating. To a large extent, the equal value principle has already been breached. Obscenity regulation presents a clear example. The very test used to determine whether speech is obscene calls upon judges to determine what is or is not of literary, artistic, political, or scientific value.354 Similarly, the standard argument the Court makes to explain various categorical exclusions of speech from first amendment protection is that some categories of speech are "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."355

Nor is the breach in the equal value principle confined to speech that is deemed to be outside the protection of the first amendment. In determining whether there is a "public" controversy for purposes of establishing the status of a libel plaintiff, the Court clearly looks to the normative value of the subject matter. In Time, Inc. v. Firestone,356 the subject matter surrounding the plaintiff's divorce had attracted much

351 Id. at 627.
352 Id. at 635.
353 Shiffrin, supra note 161.
media attention; nonetheless, there was no "public" controversy. I suppose that translates to the proposition that Palm Beach gossip has enough first amendment value to warrant some protection for the media under Gertz, but not enough to warrant a malice test.

Does all this mean that there is no equal value principle? Not at all. Everyone presumably agrees that it is not desirable as a general matter to have judges making decisions that turn on the value of the speech. Some, like Redish, would never permit such decisions. Others would permit judges to make decisions that depend upon the value of speech some of the time, but not without regret. If and when the value principle is to be breached, the breach should be noted and accompanied by significant justification.

That justification has not been sufficiently articulated in the commercial speech area. In Ohralik, the Court crisply observed that commercial speech occupies a "subordinate position in the scale of First Amendment values." Commentators like Redish, of course, disapprove. Yet many individuals and communities have the intuition that commercial speech is not as important or valuable as non-commercial speech. In time, place, and manner contexts alone, communities have barred commercial leafletting, while permitting non-commercial leafletting, prohibited commercial door-to-door soliciting, while permitting similar non-commercial activity, and outlawed commercial off-site billboards, while permitting non-commercial off-site billboards. It is surely worth exploring the intuitions that might support a subordinate position for commercial speech and to inquire into how much damage, if any, the subordinate position doctrine has wrought.

Let us ask first why communities make such distinctions and later examine the first amendment implications of what they have done. If one focuses upon the personal interest people have in the communications, it seems hard to draw a distinction. Product advertisements may provide important information to individuals or call their attention to matters of importance to them. So may political or religious speech.

357 Id. at 484-85 (Marshall, J., dissenting).
358 Id. at 454.
359 Compare Karst, supra note 95.
360 Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). See also Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. at 563 n.5 ("Commercial expression... although meriting some protection, is of less constitutional moment than other forms of speech.")
364 For an article pressing this theme, see Redish, supra note 4. See also Note, supra note 4, at 1194.

Perhaps one part of the overall intuition is a sense that ideological speech is public in character. Such speech tends to seek a community response, asking people to share values. Commercial advertising (although it is addressed to the public and of interest to members of the public) seeks to influence private economic decisions. Of course, some religious speech seeks to bring about
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Academics and intellectuals may profess a greater interest in ideological matters, but academics and intellectuals are probably not the constituencies such laws were designed to serve.\footnote{365}

More interesting as a basis for the discrimination is the idea that commercial speakers are lining their pockets, seeking profit, and treating people as objects for exploitation while political and religious speakers are advancing a cause and seeking genuine personal contact. Obviously, this rationale is both overinclusive and underinclusive. Some who sell products regard their activities as socially productive, as a mission, or a cause. Some politicians and religious folk are exploiting and out to make money. Despite the overgenerality of the commercial/non-commercial stereotypes, they contain some appeal as a general matter. Those who sell pots and pans are not ordinarily engaged in an ideological pursuit; the Jehovah's Witnesses surely are.

An interesting test of the distinction based on profit-seeking is presented by the decision \textit{Breard v. Alexandria},\footnote{366} in which a door-to-door solicitor was selling many kinds of magazines.\footnote{367} The Court in \textit{Breard} put the solicitor on the commercial side of the line\footnote{368} because the solicitor had no cause and was representing many who had no cause. When the issue concerns misleading statements, the profit motive associated with the press does not place it in the commercial category.\footnote{369} In the door-to-door context, however, the profit motive seems to put the press seller on the commercial side.

It may be that the commercial/non-commercial distinction goes no deeper than this, but at least in some communities, there appears to be a more fundamental basis for the distinction, whatever its relation-

\footnote{365} This response may be too fast, however. Perhaps politicians pass laws in the form they do because they believe such laws that discriminate against commercial speech will be upheld and they recognize they may not outlaw all leafletting, \textit{Schneider v. State}, 308 U.S. 147 (1939), or all door-to-door soliciting, \textit{Martin v. City of Struthers}, 319 U.S. 141 (1943). On that premise, the politicians have implemented a community intuition to get rid of as much speech as possible (that is disseminated in ways or in places the community does not want), and the discrimination springs not from a community intuition, but from judge-made law. This would send us back to exploring judges' intuitions and would leave open the possibility that judges are imposing their own elitist intellectual hierarchy. Such a line of argument would open up questions about the distance between judges and their communities on issues of this type and questions about the intellectual character of the judiciary. I doubt that the \textit{Valentine} rule was simply the imposition of one class's preference for subject matter over another's, but that could be a factor.\footnote{366} \textit{341 U.S. 622} (1951).


ship to first amendment values might be. The concern, if articulated with some passion, might go like this:

We live in a society in which citizens are daily confronted with massive amounts of commercial advertising. Millions of children educated in schools purportedly promoting humane values return to their homes to watch state subsidized\(^{370}\) commercial television for four hours a day.\(^{371}\) Adults watch that same television often for longer periods.\(^{372}\) Persons of all ages leave their homes to encounter commercial billboards and to confront leaflets hawking wares of every description. By organizing a property structure making this possible, America undeniably promotes a system of values. Americans are taught to be materialistic, to be hedonists, to pursue profit. Instead of being taught to ask who they really are and how their identity is constituted by their relationships, their projects and commitments, they are taught to ask what they want to own. Their identity is defined by their consumption desires.\(^{373}\)

People with widely differing political perspectives criticize this commercial environment. Opposition to a society in which persons are viewed as appropriate objects for commercial manipulation is a prominent theme in the writings of both conservatives\(^{374}\) and Marxists.\(^{375}\) Indeed, the opposition to a society in which people are viewed as means and not as ends is also a central theme of liberals from Kant\(^{376}\) to John Stuart Mill.\(^{377}\) More important, I would suggest that the commercial/non-commercial distinction in time, place, and manner contexts is supported by communities whose environmentally oriented citizens have internalized these anti-commercial themes in a powerful way.

Enter the first amendment. The initial first amendment retort would be that citizens of these communities would like to suppress commercial speech precisely because they do not consider it as valuable as other speech, and that the first amendment stands for the proposition

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\(^{371}\) See G. COMSTOCK, S. CHAFFEE, N. KATZMAN, M. MCCOMBS & D. ROBERTS, TELEVISION AND HUMAN BEHAVIOR 92 (1978) [hereinafter cited as G. COMSTOCK]. The figures refer to 1976 viewing and are not necessarily confined to commercial television. As cable grows, the number of hours spent watching non-commercial channels will surely increase. In any event, before graduating from high school, the average student spent 15,000 hours watching television and only 11,000 hours in school. B. COLE & M. OETTINGER, RELUCTANT REGULATORS 252 (1978).

\(^{372}\) G. COMSTOCK, supra note 371, at 92.

\(^{373}\) For helpful commentary on this attitude, see M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982).

\(^{374}\) For discussion, see R. NISBET, SOCIOLOGY AS AN ART FORM 77-78 (1977).

\(^{375}\) For a particularly forceful presentation by a prominent member of the Frankfurt School, see M. HORKHEIMER, ECLIPSE OF REASON (1947). As Kolakowski notes, the Frankfurt School was strongly influenced by Lukács's and Korsch's interpretation of Marx, "especially the concept of 'reification' as an epitome of the problems of the modern world." 3 L. KOLAKOWSKI, MAIN CURRENTS OF MARXISM 341 (1981).


\(^{377}\) See Mill, supra note 297, at 418-19.
that the value of ideas is to be fought out in the marketplace.\textsuperscript{378} Ideas are not open to suppression in the marketplace merely because they are deemed offensive. Moreover, it could be argued that the anti-commercial argument is deeply paternalistic. If people want to internalize or promote materialistic values, they ought to be free to do so.

Perhaps they should, but this conventional first amendment response does not admit the difficulty of the issue and is unduly romantic. It calls up the picture of a rational individual making informed choices, and downplays the extent to which the inputs in a culture influence the beliefs of the persons within that culture. Looking at the matter in the aggregate, it is certain that the children born, for example, in San Francisco in the coming year will grow up with quite different views and perspectives than those born in Jackson, Mississippi.\textsuperscript{379} This is not to deny free will or free choice. It is not to invoke a conspiracy theory. It is only to affirm that the inputs into a culture have a major influence in value formation.\textsuperscript{380}

Certainly the inputs promoting materialism in American culture are quite strong. Living in a society in which children and adults are daily confronted with multiple communications that ask them to purchase products inevitably places emphasis on materialistic values. The authors of the individual messages may not intend that general emphasis, but the whole is greater than the sum of the parts. Even if it were not, the parts add up to a loud materialist chorus.

Moreover, the promoters of the materialist message benefit from an almost classic case of market failure. Advertisers spend some sixty billion dollars per year to disseminate their messages.\textsuperscript{381} Those who would oppose the materialist message must combat forces that have a massive economic advantage. Any confidence that we will know what is truth by seeing what emerges from such combat is ill placed. The inequality of inputs is structurally based.

Yet arguments about market failure have limited appeal to the current Court. The Court rejected such arguments when it was said that the media dominated the market,\textsuperscript{382} when the wealthy were thought to control candidates' political campaigns,\textsuperscript{383} and when corporations were said to dominate initiative campaigns.\textsuperscript{384} After all the fac-
tors are sifted and weighed, the reality becomes apparent: the lesser status for commercial speech flatly contradicts conventional first amendment principles. To the extent that we accept the subordinate position of commercial speech, we do not believe in the first amendment—at least not the conventional stereotype of the first amendment, or Redish's first amendment, or the ACLU's first amendment.

Instead, lurking throughout first amendment doctrine are renunciations of the equal value principle, and difficult compromises. What is important is that the courts should be forced to face up to the significance of the compromises that they make. At the same time, it is important to recognize that the compromises, while theoretically significant, have been small compromises. The subordinate position for commercial speech does not deny anyone the right to promote a materialist message. Indeed, in addition to overtly ideological speech, current commercial speech doctrine protects commercial advertising from any general state prohibition. As a practical matter, the subordinate position of commercial advertising simply permits greater community control of the time, place, and manner of its dissemination. Nor is any damage wrought by the subordination of commercial advertising likely to create any pressure to carve out pockets of non-protection for political speech. This latter point is related to the Court's perspective in Ohralk. The lesser position for commercial speech is designed to avoid "dilution . . . by a leveling process, of the force of the Amendment's guarantee" with respect to non-commercial speech. Arguably, the creation of a first amendment hierarchy makes the equal value principle more secure in the areas that count the most. In any event, however troublesome the compromise may be, it is something less—a great deal less—than a wholesale abandonment of constitutional ideals.

CONCLUSION

An exploration of the relationship of the first amendment to economic regulation yields a valuable perspective on first amendment law. That exploration highlights the diversity of the speech that is subject to regulation as commercial speech and the complexity of first amendment doctrine. Judges and commentators have been understandably reluctant to admit that complexity. We all have a strong emotional investment in the symbol "the FIRST AMENDMENT" and a corresponding reluctance to admit that the real first amendment contains its own inner tensions, compromises, even hypocracies. We want the first amendment to stand for more than tensions, compromises, or accom-

386 But see Note, supra note 4, at 1192 (recognizing the impossibility of formulating single rules in the economic area because of diversity).
modation. To a large extent, it still does. There are still grounds to make honest Fourth of July speeches. But there is little to support the optimism presupposed by most first amendment legal scholarship.

Witness Thomas Emerson's *Toward a General Theory of the First Amendment*, which discussed issues years ahead of the courts and the commentators. Its discussion of those issues has influenced legal writing and courts profoundly; it is surely the best book on the first amendment written in this century.

Emerson's attempt to formulate a general theory of the first amendment, however, has not been successful. Scholar after scholar has set out to produce a different but more successful general theory. All of these attempts, in my judgment, have been thwarted by the complexity of social reality. Speech interacts with the rest of our reality in too many complicated ways to allow the hope or the expectation that a single vision or a single theory could explain, or dictate helpful conclusions in, the vast terrain of speech regulation. In trying to move toward general theory, scholars have too often built abstractions without sufficient regard for the diverse contexts in which speech regulation exists. I do not mean to imply that our attempts in the past twenty years to move toward a general theory of the first amendment have been unproductive. I do suggest, however, that in the next twenty years we would be better off if we had more appreciation for the advantages of thinking small. It is time to move away from a general theory of the first amendment.

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387 *T. Emerson, Toward A General Theory of the First Amendment* (1963). The book originally appeared as an article in the *Yale Law Journal*. It was later expanded into a larger work. See *T. Emerson, supra* note 76.

388 See *supra* note 18.