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ARTICLES

WHO'S AFRAID OF COMMERCIAL SPEECH?

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IN 1942, the Supreme Court plucked the commercial speech doctrine out of thin air. The case was *Valentine v. Chrestensen*:[1] Mr. Chrestensen was a man with a nose for business and a submarine, which he moored in New York's East River and opened to the public for an admission charge. Anticipating substantial wartime interest in viewing the inside of a submarine, he began distributing handbills, but the law caught up with him; a police officer alerted Chrestensen to the fact he was violating section 318 of the Sanitary Code, which prohibited the distribution of commercial handbills in public places.

Chrestensen was not easily deterred. Mustering the full measure of ingenuity of an entrepreneur who had navigated his submarine all the way from Florida to make a quick buck, he printed two-sided handbills. On one side was an advertisement for his submarine; on the other, a protest against the City Dock Department's refusal to permit him to moor the submarine at the pier he preferred. This way, Chrestensen reasoned, the handbill was no longer purely commercial and was thus no longer proscribed by the Sanitary Code. Police Commissioner Valentine was not amused and prevented Chrestensen from

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[1] 316 U.S. 52 (1942).

distributing the two-sided handbills, setting the stage for the Supreme Court's first commercial speech case.

The most remarkable aspect of Justice Roberts' opinion, delivered for a unanimous Court, is that it cites no authority. None. Instead, the opinion disposes of the issue in one sentence: "We are . . . clear that the Constitution imposes no . . . restraint on government as respects purely commercial advertising."[2] And so was born the commercial speech doctrine. Without citing any cases, without discussing the purposes or values underlying the first amendment, and without even mentioning the first amendment except in stating Chrestensen's contentions, the Court found it clear as day that commercial speech was not protected by the first amendment.

We all know that things are a bit different now; since the mid-1970's, the Court has granted commercial speech some protection, although considerably less than other sorts of speech. But the concept of a commercial/noncommercial distinction has remained in the law. By now it has become such a well-established part of our jurisprudence that it is accepted almost without question. While the early commercial speech cases at least groped around for reasons justifying the distinction, the more recent cases, armed with precedent, have been able to revert to the *Chrestensen* technique of stating the distinction as an axiom. Even the academic literature embraces the distinction wholeheartedly; professors take it as a given and then devote their energies and research grants to discerning a principle to justify it, rather than proceeding the other way around.[3]

It is the thesis of this Article that the commercial/noncommercial distinction makes no sense. Before we get to the bottom line, however, we will very quickly run through the evolution of the commercial speech doctrine since *Chrestensen* to see if we can understand how we've arrived where we are today. We'll take a look at the Constitution and its documentary entourage to see if we can find the origin of the commercial/noncommercial distinction. We'll examine the nature of commercial speech and attempt to figure out what makes it

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[2] Id. at 54.

[3] See, e.g., Baker, Commercial Speech: A Problem in the Theory of Freedom, 62 Iowa L. Rev. 1 (1976); Farber, Commercial Speech and First Amendment Theory, 74 Nw. U.L. Rev. 372 (1979). A notable exception, written before the commercial speech doctrine took its current form, is Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20, 33-35 (1975).

less of a candidate for first amendment protection. We'll take a close look at the distinction itself and see whether or not it holds up in the hard cases. We'll consider some recent commercial speech cases in which the distinction has led to troubling results. And finally, we'll contemplate a world without the distinction and examine the distinction's final line of defense: the parade of horribles that will supposedly ensue when we offer commercial speech the same level of protection we afford noncommercial speech.

I. THE DOCTRINE SINCE *CHRESTENSEN*

The complete exclusion of commercial speech from first amendment protection was short lived. The early signs of the doctrine's weakening popped up in secondary opinions. Only seventeen years after *Chrestensen*, in a concurring opinion, Justice Douglas called the ruling "casual, almost offhand."[4] He observed that "it has not survived reflection."[5] Justices Blackmun and Stewart, dissenting in *Pittsburgh Press* in 1973, agreed with Justice Douglas.[6] The following year, Justices Brennan, Marshall, and Powell followed suit in Justice Brennan's dissent in *Lehman v. City of Shaker Heights*.[7] A year later, when *Bigelow v. Virginia*[8] determined that abortion advertising was constitutionally protected against state interference, it became apparent that *Chrestensen* could not hold out much longer.

And it didn't. In *Virginia State Board of Pharmacy*,[9] a 1976 case striking down a Virginia statute making it illegal to advertise the price of prescription drugs, the Court held that commercial speech does, after all, fall within the scope of the first amendment. But tucked away in a footnote, the Court announced that the "commonsense differences" between commercial speech and noncommercial speech "suggest that a different degree of protection is necessary."[10] It would

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[4] Cammarano v. United States, 358 U.S. 498, 514 (1959) (Douglas J., concurring).

[5] Id.

[6] Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 401 & n.6 (1973) (Stewart, J., dissenting); id. at 404 (Blackmun, J., dissenting).

[7] 418 U.S. 298, 314-15 & n.6 (1974) (Brennan, J., dissenting, joined by Stewart, Marshall & Powell, JJ.).

[8] 421 U.S. 809 (1975).

[9] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

[10] Id. at 771-72 n.24.

take a few years before the Court would tell us what that different degree would be.

In the meantime, the doctrinal trunk sprouted an entirely new branch. Lawyer advertising, initially an area covered by mainstream commercial speech jurisprudence, became the subject of so many cases that it developed into its own distinct area of common law. The first few cases, such as *Bates*[11] in 1977 and *Primus*[12] and *Ohralik*[13] the following year, drew on the more general commercial speech doctrine to formulate rules regarding client solicitation.[14] But, by the time we got to *R.M.J.*[15] in 1982, *Zauderer*[16] in 1985, and *Shapero*[17] in 1988, that practice stopped. In its place the Court relied on the precedent of the previous decade.[18] At present, the law of attorney advertising has grown to such an extent that it has been able to seal itself off from its roots in first amendment theory; in a field of common law that is only thirteen years old, judges often decide these cases with reference only to prior case law.

But back to the main thrust of the story, which reached its climax in 1980, when *Central Hudson*[19] announced the derivation of a four-part test to determine when commercial speech is protected by the first amendment. A skeptic might say that the test was derived in much the same manner as *Chrestensen* derived the nonprotection of commercial speech, but *Central Hudson* at least took the trouble to cite some cases. To warrant protection, commercial speech must first concern lawful activity and not be misleading. If it meets these criteria, government may regulate it only if: (1) the asserted government interest is substantial; (2) the regulation directly advances the asserted government interest; and (3) the regulation is no more extensive than necessary.[20]

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[11] Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

[12] In re Primus, 436 U.S. 412 (1978).

[13] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).

[14] See id. at 454-68; *Primus*, 436 U.S. at 422-39; *Bates*, 433 U.S. at 363-84.

[15] In re R.M.J., 455 U.S. 191 (1982).

[16] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985).

[17] Shapero v. Kentucky Bar Ass'n, 108 S. Ct. 1916 (1988).

[18] See id. at 1921-24; *Zauderer*, 471 U.S. at 637-47; *R.M.J.*, 455 U.S. at 199-204.

[19] Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

[20] Id. at 563-66. This last requirement has since been substantially weakened. See Board of Trustees of the State Univ. of N.Y. v. Fox, 109 S. Ct. 3028, 3032-35 (1989).

Ever since, judges and Justices have filled quite a bit of space in the case reporters trying to figure out precisely what forms of regulation the four-part test permits. We know that it permits more regulation than the analogous standard for noncommercial speech. Beyond that, however, the cases have been able to shed little light on *Central Hudson*, aside from standing as ad hoc subject-specific examples of what is permissible and what is not. Thus, government cannot prohibit certain sorts of commercial billboards,[21] but can prohibit the unauthorized use of certain words altogether.[22] Government cannot prohibit the mailing of unsolicited contraceptive advertisements,[23] but can prohibit advertisements for casino gambling.[24] Government cannot require professional fundraisers to obtain licenses,[25] but can prohibit college students from holding Tupperware parties in their dormitories.[26]

This is where we stand now. Unless a case has facts very much like those of a prior case, it is nearly impossible to predict the winner. But why are we in such a state? Why do we make the distinction between commercial and noncommercial speech? The first amendment may be a good starting point for this inquiry.

II. THE CONSTITUTION

At the risk of sounding unsophisticated, we point out that nothing in the text of the first amendment creates a distinction between commercial and noncommercial speech. The first amendment does not say that Congress shall make no law abridging the freedom of speech other than commercial speech; it refers only to speech. Of course that isn't the end of the story—the Constitution doesn't mention child pornography either, and we know that it receives no protection at all[27]—but it shows that proponents of a commercial speech distinction must base their argument on some other source.

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21 See Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

22 See San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987).

23 See Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983).

24 See Posadas de P.R. Assocs. v. Tourism Co., 478 U.S. 328 (1986).

25 See Riley v. National Fed'n of the Blind, 108 S. Ct. 2667 (1988).

26 See Board of Trustees of the State Univ. of N.Y. v. Fox, 109 S. Ct. 3028 (1989).

27 See New York v. Ferber, 458 U.S. 747 (1982).

The Framers' commentary on freedom of speech focuses entirely on the importance of free speech to self-government. Thomas Jefferson wrote:

> The people are the only censors of their governors: and even their errors will tend to keep these to the true principles of their institution . . . . The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.[28]

James Madison, addressing the House of Representatives regarding the adoption of the Bill of Rights, valued the freedom of speech solely as necessary to protect the right of citizens to criticize government officials.[29]

The debate a decade later surrounding the Alien and Sedition Acts only reinforced the focus on political speech. In arguing against the constitutionality of the Acts, for example, Madison stressed the importance of the freedoms of speech and the press in assuring that the electorate receives a continuous flow of accurate information about political candidates.[30] One searches in vain for an indication from any of the people involved with the drafting or ratifying of the first amendment that they were concerned with anything besides politically oriented speech.

Proponents of a commercial speech distinction could point to the Framers' occupation with political speech as providing support for their position. Advertising, while not the high-tech operation it is today, was a common feature of the newspapers of the late eighteenth century. The Framers and their contemporaries would have encountered commercial speech in a number of other contexts as well: They would have seen signs outside shops announcing the prices of goods and services; they would have heard the cries of itinerant salesmen hawking products in the street; and they would have experienced the clamor of public marketplaces. The argument would go like this: The

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[28] Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), *reprinted in* 5 The Founders' Constitution 122 (P. Kurland & R. Lerner eds. 1987).

[29] 1 Annals of Cong. 434-36, 440-43 (J. Gales ed. 1789), *reprinted in* 5 The Founders' Constitution, supra note 28, at 128-29.

[30] Report on the Virginia Resolutions, Jan. 1800, *reprinted in* 5 The Founders' Constitution, supra note 28, at 141, 145.

Framers evidenced absolutely no interest in protecting commercial speech, so it would be a gross misinterpretation of the first amendment to construe it to afford commercial speech the same level of protection as political speech.

But this argument proves too much. The Framers never expressed an interest in protecting literature either, but the idea that the first amendment protects artistic expression is not one that attracts much opposition.[31] The Framers were unconcerned with door-to-door proselytizing, but it seems that most people are happy to let the first amendment protect that.[32] The Framers evidenced no apprehension that, without the first amendment, government would tyrannically suppress the practice of nude dancing, but nude dancing falls within the scope of the first amendment as well.[33] A myopic originalist view of freedom of speech does not get us very far.

This seems to be a conclusion reached fairly unanimously. Judge Bork, in the now-infamous *Indiana Law Journal* article, noted that: "The framers seem to have had no coherent theory of free speech and appear not to have been overly concerned with the subject."[34] He concludes that the debates over the adoption of the Bill of Rights and the controversy surrounding the Alien and Sedition Acts "do not tell us what the men who adopted the first amendment intended, and their discussions tell us very little either. . . . The first amendment, like the rest of the Bill of Rights, appears to have been a hastily drafted document upon which little thought was expended."[35] Most other scholars who have looked closely at the first amendment's history agree.[36]

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[31] See, e.g., Roth v. United States, 354 U.S. 476 (1957).

[32] See, e.g., Martin v. City of Struthers, 319 U.S. 141 (1943).

[33] See, e.g., Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981).

[34] Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 22 (1971).

[35] Id.

[36] See, e.g., BeVier, The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle, 30 Stan. L. Rev. 299, 307 (1978); Emerson, Freedom of Speech, *in* 2 Encyclopedia of the American Constitution 790, 790 (L. Levy, K. Karst & D. Mahoney eds. 1986) ("The precise intentions of the framers of the First Amendment have never been entirely clear. The debates in Congress when the amendment was proposed do not throw much light upon the subject."). Historians' efforts to discern the Framers' conception of the freedom of speech have yielded results that have been, to put it charitably, mixed. See, e.g., Anderson, Levy vs. Levy (Book Review), 84 Mich. L. Rev. 777 (1986) (reviewing L. Levy, Emergence of a Free Press (1985)).

The first amendment's text and history don't provide us with any explanation of the distinction between commercial and noncommercial speech. Perhaps the explanation lies in the nature of commercial speech; maybe there is something about commercial speech that should lead us to want to protect it less, or not to protect it at all.

III. THE NATURE OF COMMERCIAL SPEECH

Many of the commercial speech cases refer to the "commonsense differences" between commercial and noncommercial speech, as if further explication of these differences would be beneath the dignity of the Court.[37] A close reading of the cases, however, catches the Court, often in footnotes, alluding to these differences. In the fourteen years since *Virginia State Board of Pharmacy*, the Court has managed to identify two. First, commercial speech is supposedly more objective than noncommercial speech because its truth is more easily verifiable. Second, because commercial speech is engaged in for profit, it is claimed to be more durable than noncommercial speech. As a result, it is less susceptible to being chilled by proper regulation.

These two differences pop up in most of the commercial speech cases in the few years after *Virginia State Board of Pharmacy*.[38] They drop out of the more recent cases, which no longer need to resort to theory because they can draw upon the case law instead. In fact, since *Central Hudson*, examination of the nature of commercial speech is undertaken only when a dissenting Justice wants to point out that the majority opinion makes no sense, as did Justice Brennan in *Posadas*.[39] But the two differences are never questioned; at no time has any member of the Court suggested that they do *not* justify a lower level of protection for commercial speech. That's too bad,

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[37] See, e.g., Posadas de P.R. Assocs. v. Tourism Co., 478 U.S. 328, 349 (1986) (Brennan, J., dissenting); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 (1985); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 506 (1981) (plurality opinion); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562 (1980); Bates v. State Bar of Ariz., 433 U.S. 350, 381 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976). In our experience, the more frequently common sense is invoked to support a proposition, the less likely it is to reflect common sense.

[38] See, e.g., *Central Hudson*, 447 U.S. at 564 n.6; Friedman v. Rogers, 440 U.S. 1, 10 (1979); *Bates*, 433 U.S. at 381; *Virginia State Bd. of Pharmacy*, 425 U.S. at 771-72 n. 24. The second pops up again in Board of Trustees of the State Univ. of N.Y. v. Fox, 109 S. Ct. 3028, 3035 (1989).

[39] 478 U.S. at 350-51 (Brennan, J., dissenting).

because when we examine the differences, we find that they can have any number of implications for first amendment jurisprudence other than the ones they have been given.

First, we question the notion that it is easier to ascertain the truth of commercial speech. Clearly, this is true in some paradigm cases: It is certainly easier to determine the truth of the claim "Cucumbers cost sixty-nine cents" than the claim "Republicans will govern more effectively." But not all commercial speech is so objective. What about the statement "America is turning 7-Up"? Is that true? How would you tell? What about the claim that Burger King's hamburgers taste better than McDonalds' because they are charbroiled? That begins to sound more like the claim of a political candidate; it's hard to say that its truth can be easily verified.

The objectivity of commercial speech fades even more when we get beyond old-fashioned "We make a good product" advertising and consider the way advertising is actually practiced today. What about a television commercial that shows a man using a particular brand of deodorant and, as an apparent result, leading a much more vigorous social life? How could we ascertain the truth of that commercial? Does it even have a truth? It is intended to plant the suggestion in the minds of consumers that this deodorant is a desirable product, but surely a purchaser cannot claim to have been defrauded when he fails to acquire a new group of friends. The notion that commercial speech is any more verifiable than noncommercial speech may once have been true, but it ceased to be so when advertising entered the twentieth century.

The other side of the comparison collapses as well, because there are many varieties of noncommercial speech that are just as objective as paradigmatic commercial speech and yet receive full first amendment protection. Scientific speech is the most obvious; much scientific expression can easily be labeled true or false, but we would be shocked at the suggestion that it is therefore entitled to a lesser degree of protection. If you want, you can proclaim that the sun revolves around the earth, that the earth is flat, that there is no such thing as nitrogen, that flounder smoke cigars, that you have fused atomic nuclei in your bathtub—you can spout any nonsense you want, and the government can't stop you.

Other sorts of speech are equally capable of being ascertained as true or false, but are nevertheless fully protected. Waiting in line at

the supermarket checkout counter, for instance, one discovers an entire publishing industry that prints nothing but the most absurd falsehoods: people with two heads, four-year-old grandmothers, tea with little green men from Mars.[40] Even some claims made by television evangelists are subject to objective verification.[41] Every day on the radio, we hear predictions of the weather; we can determine their truth or falsity by the end of the day, but we don't have a separate first amendment standard for weather reports. The idea that commercial speech is more objective than other forms of speech does not survive the most rudimentary reality-check.

And even if it did, what difference would that make? Why should the objectivity of speech counsel in favor of affording it less protection? One could well argue the contrary. To the extent certain speech is easily susceptible to debunking by counterspeech, there seems to be *less*, not more, justification for government interference. For one thing, speakers are likely to be more careful, lest they be forced to eat their words when a rival shows them to be lying. For another, listeners are far less likely to be misled about matters they can check out by

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[40] See infra note 59.

[41] The Reverend Richard Roberts of Tulsa, Oklahoma, for example, offers relief to those afflicted with pain or illness. A television program, broadcast during March 1990 on local stations in various parts of the country, features a woman by the name of Clay Barnes who tells of her life-long battle with arthritis pain; the pain suddenly and permanently ceased as she watched Reverend Roberts on television. On the strength of this testimonial, Reverend Roberts urges viewers suffering pain or illness to join the Abundant Life Prayer Group in order to obtain similar relief.

While some of the claims made by Rev. Roberts, such as the power to invoke divine intervention to cure pain or illness, are not objectively verifiable, others are. For example, is Clay Barnes a real person or an actress? Was she afflicted with arthritis since childhood or not? Is she, or is she not, completely cured? That Ms. Barnes gave her testimonial on behalf of an evangelist makes her claim no less verifiable than if it had been made in support of a doctor, chiropractor, or pharmaceutical company.

Examples like this abound. Not long ago, one of the authors was given a handbill touting the powers of a certain Mrs. Lucas, Indian Reader and Advisor, who "Guarantees to Restore Your Lost Nature." The handbill includes pictures of three people, under which are the following testimonials:

- "I lost my nature and my loved one left me. But thank God after one visit I've regained my nature and we are back together and very happy."
- "I was flat on my back/suffering from an incurable disease. There was no hope until I saw this gifted healer. Thank God for him [sic]. I am well."
- "We were unsuccessful in marriage and separated for years. After one visit, we are back together and very happy."

These claims are verifiable (except perhaps the claim of having lost and regained one's nature), but we don't accord them reduced first amendment protection.

reference to objective facts than about such intangibles as the leadership qualities of a political candidate or the divine inspiration of a television evangelist.

Thus, even if we grant the first distinction suggested by the Supreme Court in *Virginia State Board of Pharmacy*, it tells us very little about why objective verifiability is a quality that should cause speech to be less protected. With that in mind, we turn to the second asserted justification for the distinction between commercial and noncommercial speech—the contention that commercial speech is more durable than other forms because it is engaged in for profit.

This justification is even shakier than the first. Much expression is engaged in for profit but nevertheless receives full first amendment protection. Anyone paying attention to the consolidation of the newspaper industry in recent years will recognize that newspaper publishing is big business. A look at the salaries of television anchorpeople will tell you the same about news broadcasting. Film producers, book publishers, record producers—all who engage in their chosen profession for profit—are fully protected. Profit motive is clearly not a factor very useful for classifying speech.

Moreover, the durability of speech is not purely a function of the economic interest behind it; other interests can be just as strong as economics, sometimes stronger. History teaches that speech backed by religious feeling can persist in extraordinarily hostile climates; sacred texts survive in places where dire consequences attend their possession, consequences that would easily overcome a mere profit motive. Artistic impulses can also cause expression to persist in the face of hostile government regulation. The claim that economic motives render speech more durable than other motives is based on an empirical assumption, but one for which it is difficult to find much support.

But, again, suppose commercial speech really were more durable than other forms of expression. Why would that cause us to afford it less protection? The durability of commercial speech may mean that we would lose less speech in the gray zone between protection and nonprotection if we had some other reason for protecting it less, but durability is not itself a reason for protecting it less. Thus, the Supreme Court's only two proffered justifications for affording commercial speech a lower level of protection, that it is more objective and more durable than noncommercial speech, really provide no sup-

port for treating it differently than noncommercial speech.[42]

So far, we have concluded that the commercial/noncommercial distinction has no basis in the text or history of the Constitution and cannot be justified by reference to any attribute of commercial speech. But, as every student learns in the first year of law school, the law is full of distinctions unsupported by good explanations. Perhaps the absence of a plausible justification is not enough to kill a distinction. We should therefore take a close look at the distinction itself to see if we can pin down exactly what is being distinguished from what.

IV. Defining the Distinction

Before the *Virginia State Board of Pharmacy* Court defined what commercial speech is, it provided a number of definitions of what commercial speech is not. It is not speech that money is spent to project;[43] if it were, all paid advertisements would be commercial speech and the Court would run up against *New York Times Co. v. Sullivan*[44] and *Buckley v. Valeo*.[45] It is not speech in a form sold for profit; if it were, most books and newspapers would consist of commercial speech.[46] It is not speech that solicits money;[47] if it were, the Court would be contradicting a line of cases involving political and religious groups, cases like *NAACP v. Button* [48] and *Cantwell v. Connecticut*.[49] It is not speech on a commercial subject, or else business section editorials would be commercial speech; and it isn't even factual speech on a commercial subject, or else business section news reporting would be commercial speech.[50]

Now that we have a firm grip on what commercial speech is not, we can venture the more difficult task of trying to figure out what it is. The settled definition comes from *Pittsburgh Press*: Commercial speech is speech that does "no more than propose a commercial trans-

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[42] We weren't the first to figure this out. See Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. U.L. Rev. 1212, 1218 & nn. 37-38 (1983).

[43] *Virginia State Bd. of Pharmacy*, 425 U.S. at 761.

[44] 376 U.S. 254 (1964).

[45] 424 U.S. 1 (1976).

[46] *Virginia State Bd. of Pharmacy*, 425 U.S. at 761.

[47] Id.

[48] 371 U.S. 415 (1963).

[49] 310 U.S. 296 (1940).

[50] *Virginia State Bd. of Pharmacy*, 425 U.S. at 761-62.

action."[51] At first blush, this definition sounds plausible enough. It covers the paradigm case, where the shopkeeper announces his willingness to sell widgets for a quarter. But the definition starts breaking down once we move beyond this simple example.

First, the definition corresponds very little with the way advertising is currently conducted. Consider one typical television commercial, starring well-known actor Michael J. Fox.[52] An attractive woman knocks on the door of his apartment and asks if he has a Diet Pepsi. He tells her he does, but opens his refrigerator and discovers that he doesn't; this sets him off down the fire escape and through a series of close calls and near mishaps before he obtains a can of Diet Pepsi and returns to his apartment, soaking wet and exhausted, to give the can to his startled neighbor. That's the commercial, now let's apply the law: Is this speech that does no more than propose a commercial transaction?

On one level, the commercial does not propose a transaction at all. It is a thirty-second minidrama that can stand on its own as a piece of film. At no point do any of the actors advocate that television viewers go out and buy Diet Pepsi, no one mentions any of Diet Pepsi's qualities, and the commercial does not disclose the price of Diet Pepsi or where it can be obtained. Extraterrestrial beings who should happen to intercept the commercial as the first transmission from Earth would be unable to discern that Diet Pepsi is a drink sold commercially at a price within reach of the average consumer. If we look at it this way, the commercial is not commercial speech at all because it does not even meet the threshold requirement of proposing a commercial transaction.

Pshaw, you might say, the commercial was obviously *intended* to propose a transaction: Pepsi is not in the theater business; it financed the creation and the transmission of the commercial for one purpose and one purpose only—to promote the consumption of Diet Pepsi. Under this reasoning, the commercial is easily classified as commercial speech because it exists solely for the purpose of enriching Pepsico's shareholders. But if we say this, we've adopted an intent standard, one of the definitions of commercial speech the Supreme

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[51] Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973).

[52] See King, For Colas, the Fault Is in Too Many Stars, Wall St. J., Jan. 24, 1990, at B1, col. 3.

Court has expressly told us we're not free to adopt.[53] The commercial speech distinction cannot turn on the profit motive of the speaker; the labeling of speech as commercial has to be the result of an examination of the speech itself, not the speaker's purpose. Once we begin dissecting the motive behind the speech, we have moved into forbidden territory. We thus can't call it commercial speech because of our suspicions—logical though they may be—about the forces motivating the folks at Pepsi.

On another level, the commercial may stray out of the category's bounds in the opposite direction, as it does *more* than propose a commercial transaction. The commercial is a very short fiction film; it promotes Diet Pepsi by associating the product with youth, vitality, chic cinematic style, and so on, but it also tells a coherent story. It may not be a very detailed story, but that's a limitation of the film's length, not the filmmaker's skill. People pay good money to see many feature films that tell stories not much more thought-out, and that also prominently display commercial products whose manufacturers have paid a fee to the film producers.[54] Such feature films clearly aren't commercial speech. To say the Diet Pepsi commercial is commercial speech comes perilously close to making the distinction turn on the running time of the medium, a distinction that jeopardizes the

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[53] See *Virginia State Bd. of Pharmacy*, 425 U.S. at 761-65. Once the commercial/noncommercial distinction is accepted, the Court's rejection of a definition based on profit motive has to follow. It is reasonable to assume that most widely circulated speech is engaged in for profit by someone we can call a speaker, whether the writer, the editor, the publisher, or someone else. If all this speech is labeled commercial, the first amendment would lose much of its force.

[54] Perhaps the prime example of this is *Leonard Part 6*, a movie so bad that even Bill Cosby, the film's star, counseled fans not to rush out to see it. The film, produced by Coca Cola-owned Columbia Pictures, prominently and repeatedly features Mr. Cosby enjoying the producer's principal product. See Matthews, Watered-Down Convention in Coca-Cola Land, L.A. Times, Nov. 24, 1987, at pt. 6, p.1, col. 6. Also of note is *Back to the Future II*, starring Michael J. Fox of Diet Pepsi fame. In addition to Pepsi, the film features more than a half-dozen brand names, from Pizza Hut to AT&T. See Broeske, 'Future' Consumption, L.A. Times/Calendar, Nov. 26, 1989, at 31, col. 4. The phenomenon also works in reverse: Manufacturers more and more frequently promote their products by tying them to popular films. See Lipman, Movie Merchandising Takes Off, Bat-Style, Wall St. J., Jan. 5, 1990, at B2, col. 3. It is often difficult to tell where art leaves off and promotion begins. The videotape version of *Indiana Jones and the Last Crusade*, for example, is preceded by a 90-second Diet Coke commercial that incorporates scenes from the upcoming movie, as well as many of the film's special effects. It's a tossup which is more entertaining, the movie or the commercial.

first amendment protection of films shorter than standard length.[55]

The Diet Pepsi commercial is an example of speech that is obviously commercial, speech we would want to include in any coherent definition of commercial speech, but that can evade classification as commercial speech under the category's current definition. We can approach this problem from the opposite direction as well, by considering an entire art form, one we would not usually think of as commercial speech, but one that may well be encompassed by the definition of that term as announced in *Pittsburgh Press*. We refer, of course, to the music video.

Right now there are two nationwide cable television networks devoted exclusively to showing videotaped renderings of popular songs. These three-minute films sometimes tell stories, sometimes depict the musicians performing their songs, sometimes are little more than mind-numbing collections of smoke and special effects. Music videos serve one overriding purpose: to promote record sales. But they are nevertheless a form of expression we instinctively think of as deserving as much protection as full-length films; some have been directed by well-known film directors, some feature well-known actors, and some employ innovative techniques. Many more are pure trash, painful to the eye and ear.[56] In other words, they are not different, in principle, from full-length feature films. At the same time, everything we've said about the Diet Pepsi commercial applies equally to these videos; on one level they propose a commercial transaction, but they can be interpreted on more than one level. The distinction between commercial and noncommercial speech is extraordinarily difficult to make in any satisfactory way.

But these are only the easy cases, where we can look at the speech in question and form an instinctive idea as to whether it is commercial or not. We have not even begun to consider the hard cases, where commercial speech is explicitly interwoven with other forms of speech. This can occur—has occurred—in a variety of ways. We

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[55] Anyone who has attended college in the last two decades is familiar with the cult classic, *Bambi Meets Godzilla*. Without giving away the punchline, suffice to say it is a very short animated film whose plot is considerably less complicated than the Diet Pepsi commercial. It would be monstrous to squash the filmmaker's free speech rights because his subject did not lend itself to a weightier story line.

[56] See Pareles, After Music Videos, All the World Has Become a Screen, N.Y. Times, Dec. 10, 1989, at E6, col. 1.

consider a few, first drawing on actual cases and then posing some hypotheticals.

First, consider a case from the Seventh Circuit, *National Commission on Egg Nutrition v. FTC*,[57] which presented a situation bound to pop up again. The Commission on Egg Nutrition is an egg industry organization formed to counteract the drop in egg consumption caused by the widespread belief that eggs are unhealthy. The Commission produced a number of advertisements claiming that no scientific evidence links eating eggs with heart disease. The FTC determined the advertisements were false and misleading, and ordered the Egg Commission to stop.

On appeal, the Seventh Circuit faced the threshold question of whether the advertisements were commercial speech. The court did not find this at all a difficult question: It held, without much explanation, that the category of commercial speech includes "false claims as to the harmlessness of the advertiser's product asserted for the purpose of persuading members of the reading public to buy the product."[58] But is it really that simple? For one thing, the court based its conclusion on what it perceived to be the motive of the speaker, which we know we can't do without jeopardizing the protection of much obviously noncommercial speech.

There are also problems with the court's analysis more specific to the case. What if the plaintiff had been a medical researcher set on debunking what he believed to be popular misconceptions regarding eggs? The advertisements would then clearly be noncommercial scientific speech; the nature of the speech thus turns on the identity of the speaker. Now suppose the researcher's future income depends entirely on securing a teaching position, which he can acquire only by attaining a position of prominence in the field. In such a case, the researcher has no less of a profit motive than the egg producers. Do the advertisements become commercial speech? Better yet, suppose the researcher will soon be publishing a book called *Our Friend the Egg*, which will laud eggs as providing nutrition without increasing the risk of heart disease. He places the advertisements about the health benefits of eggs in order to stimulate public discussion, upon

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[57] 570 F.2d 157 (7th Cir. 1977), cert. denied, 439 U.S. 821 (1978).

[58] Id. at 163.

which he hopes the book will capitalize. Now is it commercial speech?

It doesn't take much imagination to come up with half a dozen other such questions,[59] but we can find difficulties with the court's analysis even limiting ourselves to the facts of the case. The issue of whether eggs increase the risk of heart disease is a subject of no small public concern. We would all agree that the values underlying the first amendment are best served when we permit vigorous public debate over whether eggs are good or bad for you. The Seventh Circuit may be right in viewing with skepticism the asserted "public service" nature of the Egg Commission's advertisements. On the other hand, the court effectively excluded one sector of society from participating in the public debate. Whether eggs cause heart disease is an important scientific question; the opinion of one of the groups most interested in the debate has been obliterated from public view.[60]

There has lately been such a proliferation of these sorts of advertisements that a whole new word has been coined to describe them: advertorials.[61] Cigarette companies advertise that no scientifically credible evidence links smoking to cancer. Oil companies advertise, often on the editorial page, the dangers of particular alternative sources of energy. American automobile companies editorialize on the benefits to the economy of purchasing domestically produced

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[59] See, e.g., Russell, Cut Cholesterol by 1/3 in Just Two Months—and Enjoy Eggs Again, Too, Globe, Jan. 16, 1990, at 9, col. 5. For what it's worth, the front page of each week's *Globe*, available at most supermarkets, announces that the paper is "Fun . . . Fascinating . . . Factual."

[60] As this Article went to press, two similar issues on the border of scientific and commercial speech became subjects of public debate. First, the American Heart Association began placing its seal of approval, for fees of up to $640,000, on food products meeting undisclosed guidelines relating to heart disease. American Hearts, Wall St. J., Jan. 26, 1990, at A14, col. 1; Burros, Heart Group Begins Food Labeling Amid Outcry, N.Y. Times, Feb. 1, 1989, at A1, col. 2. At last report, the Heart Association had decided to abandon this program, after the Food and Drug Administration threatened to ban it. Angier, Heart Association Cancels Its Program to Rate Foods, N.Y. Times, Apr. 3, 1990, at A1, col. 1. Second, the Secretary of Health and Human Services announced the resumption, after a three-year hiatus, of regulations forbidding food producers from making most disease-prevention claims. Hilts, In Reversal, White House Backs Curbs on Health Claims for Food, N.Y. Times, Feb. 9, 1990, at A1, col. 1. Should either of these government actions be challenged on first amendment grounds, the decision to label the speech in question as commercial may determine the outcome, but that decision looks difficult to make in any principled way.

[61] See, e.g., Mobil Corporation, Capital Follows Opportunity, Wall St. J., Jan. 4, 1990, at A10, col. 4.

automobiles. This is all expression relating to important public issues, but on behalf of entities with an economic interest in one side of the debate. Whether or not to call it commercial speech is not an easy question.

The difficulty is underscored by the fact that our usual method of correcting for bias in public debate is not to suppress speech but to encourage counterspeech. The marketplace of ideas philosophy so often urged as supporting the first amendment is premised on the notion that good ideas will drive out bad ones, that the common weal is served by permitting interested parties to speak and letting the public choose whom to believe.[62] We don't, for example, silence white supremacists out of fear that the gullible public might be misled by their beliefs; on the contrary, we provide police protection for their parades. Why should we be more paternalistic when the speaker is the egg industry? Readers are smart enough to know that egg producers are likely to take a none-too-impartial view of eggs' health benefits. In this instance, the classification of mixed commercial and noncommercial speech as commercial leads to a result seemingly at odds with the principles underlying the first amendment.

A different sort of classification problem arose in another Seventh Circuit case of a few years back, *Briggs & Stratton Corp. v. Baldrige*.[63] To police a trade boycott of Israel, a number of Arab countries sent questionnaires to companies they suspected of violating the boycott, asking about the companies' relationships with Israeli firms and with other companies doing business with Israel. If a company failed to answer the questionnaire or answered it unsatisfactorily, the company would be blacklisted by the Arab countries. The Commerce Department promulgated regulations forbidding companies from answering the questionnaires. Briggs & Stratton challenged the regulations' constitutionality. Is this commercial speech?

It isn't speech proposing a commercial transaction. It *is* made with an eye to future commercial transactions, but we know that that characteristic alone cannot place expression in the commercial category. The court examined the motives of Briggs & Stratton and determined

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[62] See, e.g., Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981); Dennis v. United States, 341 U.S. 494, 584-85 (1951) (Douglas, J., dissenting); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[63] 728 F.2d 915 (7th Cir.), cert. denied, 469 U.S. 826 (1984).

that they were solely economic; it concluded that the speech was commercial.

But response to the questionnaire could well be the manifestation of a sincere political or religious belief. Suppose the management of Briggs & Stratton supported the creation of a Palestinian state, or were devout Moslems, and had contended that their desire to respond to the questionnaire was motivated by these concerns as much as by economic ones. Would responding to the questionnaire be commercial speech? Change the countries around: Imagine the European Community is boycotting Libya, and an American company that exports ninety-five percent of its product to Europe wishes to respond to an EC questionnaire to demonstrate its condemnation of terrorism. The economic interest is the same, but would the result change? Or imagine a related hypothetical: Companies A and B compete in the widget market. Company A sells some widgets to South Africa. Company B advertises: "Don't support apartheid, buy from Company B, not Company A."[64] Is that commercial speech?

Finally, consider the political-speech analogue of the Diet Pepsi commercial, a nationwide television campaign currently run by the Philip Morris Company. In 1971, Congress banned all cigarette advertising from television. Philip Morris, as everyone old enough to smoke knows, makes cigarettes. The commercials in question, however, do not mention the word cigarettes; they are not about smoking; they are selling nothing at all. Indeed, they give something away for free—copies of the Bill of Rights. The commercials discuss the importance of the Bill of Rights to our way of life and encourage viewers to become acquainted with its provisions. Each advertisement ends by displaying the Philip Morris logo and offering free copies of the Bill of Rights to anyone who writes to the company.[65]

Is this commercial speech? Arguably, the advertisements are not commercial because they do not purport to sell cigarettes. But think about it for a minute: Is Philip Morris running the commercials, at considerable expense to its shareholders, simply as a public service? Or is there a hidden agenda? Like the Diet Pepsi commercial, the Philip Morris ads allow the company name to reach the favorable

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[64] Justice Brennan raised a similar hypothetical classification problem in Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 539 & n.14 (1981) (Brennan, J., concurring).

[65] This is a multimedia campaign. See, e.g., L.A. Times, Dec. 7, 1989, at D20. It has not gone unnoticed. See Collins, A Tangled Web, Nat'l L.J., Jan. 15, 1990, at 13, 14.

attention of millions of potential consumers. These same consumers may well remember the name when they shop for cigarettes and be induced to buy Philip Morris brands rather than brand X. In the final analysis, is this type of ad really much different from ads that show rugged cowboys smoking Marlboros on the range, or tanned and beautiful people smoking Newports while sailing the blue seas? Many smokers of Marlboros will never ride a horse, and many Newport smokers will never set foot on a yacht. And most Philip Morris smokers will never bother to read the Bill of Rights.

As always, it is a question of image, an important consideration when it comes to differentiation among brands that are intrinsically not all that different. It would not be a far leap at all to conclude that the Philip Morris ads are simply commercial speech, presumably subject to banning from the airwaves. Yet, given the educational and political nature of the speech involved, this seems a result oddly contrary to our notions of how the first amendment ought to operate.[66]

So far we've seen the distinction break down at the intersection of commercial and scientific speech, and at the intersection of commercial and political speech. Now consider a third intersection, that of commercial and religious speech. This time, the example comes not from the *Federal Reporter* but from the front page of the *Wall Street Journal*, which reported not long ago on the practices of a group the *Journal* called "minor-league evangelists."[67] Less well-known than the Jimmy Swaggarts and Jim Bakkers, over a thousand evangelists nationwide make a very nice living in a variety of unusual ways:

—A fellow named Jim Whittington makes a million dollars a year selling shreds of his blessed handkerchiefs for one hundred dollars each,[68] offering to enter a closet and pray for believers who pay a fee

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[66] Cigarette advertising is a fertile source of such issues. On January 17, 1990, page A7 of the *New York Times* was occupied entirely by an advertisement for Kent cigarettes. The ad consisted of a blown-up clipping from the previous week's *Wall Street Journal*, which described the use of Kents as a black market currency in Romania. Underneath the clipping ran the legend "In Romania, Kents are too valuable to smoke. Fortunately, we live in America." Commercial speech? News reporting? Editorial commentary? Does it make any sense to be asking these questions?

[67] Johnson, Minor Evangelists, Out of TV's Glare, Have Major Flocks, Wall St. J., Oct. 10, 1988, at 1, col. 4; Johnson, 'Rev. Al' Won't Let You Ever Forget Your Gift to Him, Wall St. J., Oct. 10, 1988, at 7, col. 1.

[68] Mr. Whittington is very precise. Each of his handkerchiefs is good for exactly 40 shreds: " 'Only 40 can get in on this,' he says. 'Not 41.' " Johnson, Minor Evangelists, supra note 67, at 1, col. 4.

of thirty-three dollars (that's one dollar for each year Jesus lived), and soliciting donations in letters claiming that people who oppose his ministry die.

—An elderly couple by the name of Hunter travels throughout the country passing around donation buckets and selling inspirational tapes to the tune of $3.5 million a year, using the motto "Until God gets your money, he doesn't get you."

—The Reverend Al Wyrick sells plastic prayer necklaces, blessed socks, miraculous corn meal, and six-inch lengths of cord that he claims will cause God to shower financial blessings on the purchaser.

Are these evangelists' sales pitches commercial speech? On one hand, they certainly propose a transaction. Whether or not to call the transaction "commercial" depends on how we define commercial; if we assume that the word covers any sale of a product for money, then it's hard to escape the conclusion that this is commercial speech. On the other hand, it is also clearly speech on a religious topic. One of the fundamental principles of the Supreme Court's religion cases is that we can't scrutinize someone's religious beliefs; no matter how wacky a religious creed looks, we have to accept it if it is sincerely held.[69] If an evangelist and his flock profess to believe that the purchase of a bag of corn meal will ensure the Lord's good favor, the government has no business saying otherwise.[70]

So how do we evaluate government regulation of this sort of evangelism? Classifying it as commercial speech could have important consequences, but whether or not to so classify it looks like a question we could convincingly answer either way. This is then another area where the distinction between commercial and noncommercial speech, a distinction that often determines a case's outcome, breaks down when we move beyond the paradigm example.

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[69] See, e.g., Thomas v. Review Bd., 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.").

[70] An interesting sidelight to this issue is presented by that other chronicle of the free enterprise system, *Fortune* magazine. In a recent article, *Fortune* reports that mainline churches are losing parishioners to more off-beat competitors. Stewart, Turning Around the Lord's Business, Fortune, Sept. 25, 1989, at 78. In an effort to shore up attendance, many of these churches are turning to modern marketing techniques, including opinion surveys, advertising, and the use of management consultants. In a nation of fundamentalist amusement parks and Episcopal marketing strategies, it is an interesting question to what extent advertising in the name of the Lord can be regulated under the commercial speech doctrine.

We have a distinction, then, with no basis in the Constitution, with no justification in the real world, and that must often be applied arbitrarily in any but the easiest cases. Still, we could live with the distinction if it led to the same degree of protection speech would receive without it. Unfortunately, such is not the case.

V. DIMINISHED PROTECTION

We frequently hear the argument that protecting commercial speech is unwise because it will dilute the protection afforded to noncommercial speech.[71] It is urged that protecting the two forms of speech identically will cause some sort of leveling process, which will inevitably drain some protection from noncommercial speech.[72] It is difficult to understand why this should be so. The argument seems to assume that the total amount of first amendment protection available for judges to draw upon is constant, so that protecting speech in one place will leave less protection for speech in another place where we might really need it.

Instead, the opposite is true. Protecting commercial speech less than noncommercial speech leads exactly to what you would think—not enough protection for speech implicating economic concerns. Let's consider two examples from recent cases.

In Puerto Rico, casino gambling is legal but advertising casino gambling is not, thanks to the 1986 *Posadas* case.[73] This is because the Puerto Rico legislature, in its wisdom, has decided that casino gambling is good enough for tourists but dangerous to the moral fiber of resident Puerto Ricans. It remains to be seen what other types of expression the legislature will determine are unsafe for the electorate to make up its own mind about; perhaps to advance the collective interest in dental hygiene the legislature will prohibit the advertising of brands of toothpaste it deems less effective.

Before *Posadas*, one might have thought that the first amendment required the legislature, if it honestly believed casino gambling to be harmful, to choose some other method of looking after the public wel-

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[71] See, e.g., Symposium—Liberty and Justice for All: Protecting Individual Rights Under the Constitution, 41 Rutgers L. Rev. 715, 750-51 (1989) (Floyd Abrams); id. at 752 (Burt Neuborne).

[72] See, e.g., Board of Trustees of the State Univ. of N.Y. v. Fox, 109 S. Ct. 3028, 3035 (1989); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).

[73] Posadas de P.R. Assocs. v. Tourism Co., 478 U.S. 328 (1986).

fare, such as running its own advertisements discussing the dangers of gambling. Gambling can't endanger the welfare of Puerto Ricans any more than the Ku Klux Klan endangers the welfare of members of minority groups, yet in the latter case we counter speech with speech, not with suppression. Why shouldn't the same be true of gambling?[74]

The second example is a case in which one of the authors played a role at the circuit level, *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*.[75] In that case, the Court upheld a statute giving the Olympic Committee exclusive rights to the word "Olympic" against the challenge of an organization that wished to conduct an athletic competition called the Gay Olympic Games. The promoters of the Gay Olympics argued that the word connoted a healthful, wholesome image; their use of the word was thus a political statement to the effect that homosexuals deserve a place in mainstream society. This claim seemed accurate enough.[76] The Court, however, dismissed it in two paragraphs by categorizing the use of the word Olympic as primarily commercial.[77]

Posadas and *San Francisco Arts & Athletics* are instances where the commercial speech distinction, rather than shoring up the protection given to noncommercial speech, provides a convenient avenue for denying protection to speakers who may have had something unpopular to say.[78] The more things we find to be commercial speech, the

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[74] *Posadas* also produced this quasi-mathematical theorem: "[T]he greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." Id. at 345-46. While a full discussion of this proposition would be longer than this Article, two points are worth noting. First, it is not clear that the power to regulate a specific economic activity necessarily comprises the power to regulate speech about that activity. After all, the Constitution does not forbid legislation abridging the freedom of gambling; it does forbid legislation abridging the freedom of speech. See id. at 354 n.4 (Brennan, J., dissenting). Second, as Philip Kurland has pointed out, since the demise of substantive due process, just about any economic activity is subject to extensive regulation. If the *Posadas* theorem is true, government can censor *all* advertising. Kurland, Posadas de Puerto Rico v. Tourism Company: " 'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful," 1986 Sup. Ct. Rev. 1, 13.

[75] 483 U.S. 522 (1987).

[76] See International Olympic Comm. v. San Francisco Arts & Athletics, 789 F.2d 1319, 1321 (9th Cir. 1986) (Kozinski, J., dissenting from the denial of rehearing en banc.).

[77] 483 U.S. at 535-37.

[78] A recent district court opinion illustrates that the commercial speech doctrine can also be used to sidestep areas of first amendment jurisprudence more conducive to protecting speech. In *United States v. Northrop Corp.*, No. CR 89-303-PAR, 58 U.S.L.W. 2513 (C.D. Cal. Feb. 15, 1990) (Memorandum of Decision and Order) the court ordered a corporate criminal defendant to stop running a series of television commercials that, in general terms and without

more expression we can suppress under the cover of economic regulation. Rather than continuing down this road, we should consider how the world would look if we stopped making the distinction between commercial and noncommercial speech.

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referring to the case, touted the corporation's employees as industrious and responsible. As the court saw it,

> the commercials go directly to the reputation and credibility of a party to the case—Northrop, and to the state of mind of its employees, who are also defendants. The focus of the entire campaign is the reputation and state of mind of Northrop and its employees about the central issue in this action: quality control, testing, reliability.

Id. at 8. The court reasoned that the commercials in question were

> particularly sophisticated and, like all advertisements, have the ability to influence on a subconscious level and to plant in the minds of the jurors, before they have heard any evidence at all, the idea of how Northrop people think. This form of partiality or prejudice is much more difficult to uncover in voir dire, and is therefore more insidious than, for example, press releases by Northrop representatives proclaiming the defendants' innocence.

Id. at 8-9. See generally Judge in Jury Trial Orders Northrop to Halt TV Ads, N.Y. Times, Feb. 17, 1990, at 35, col. 1.

While prior restraints in the pretrial context are theoretically permissible, they have rarely, if ever, been upheld. Moreover, all the prior restraint cases have involved attempts to suppress matters relating directly to the litigation, in contrast to the general-purpose commercials in *Northrop*. See, e.g., Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (reporting of defendant's confession before jury impaneled); Columbia Broadcasting Systems v. United States Dist. Ct. for C.D. of Calif., 729 F.2d 1174 (9th Cir. 1984) (broadcast of videotape showing DeLorean purchasing cocaine); Seattle Times v. United States Dist. Ct. for W.D. of Wash., 845 F.2d 1513 (9th Cir. 1988) (sealing of briefs and affidavits).

A pretrial restraint based on a party's subliminal media messages broadcast to a market encompassing the Central District of California, containing Los Angeles and six other California counties populated by a total of 6,215,551 registered voters as of January 1990, is remarkable and quite unprecedented. To reach its conclusion, the court had to find that the commercials in question so polluted the minds of potential jurors that lesser measures such as vigorous voir dire could not assure the selection of an impartial jury from among the enormous available pool and/or prevent a warping of "the public's perception of the fairness of the *Northrop* trial and impartiality of the trial proceedings." *Northrop*, No. CR 89-303-PAR at 5.

While the court developed its theory in the context of a commercial speech case, its logic surely sweeps much farther: If one accepts the view that certain types of speech not directly connected with litigation can interfere with the operation of our system of justice by carrying subliminal messages to the public, this could well justify prior restraints in situations where the speech is not commercial in nature. Mere speculation? An idle fear? Not so. Near the end of its opinion the district court, in rather conclusory terms, held that the same rationale would suffice to uphold the restraint even if commercial speech were not involved. Id. at 13. *Northrop* provides a concrete example of how reduced protection for commercial speech can undermine the protection the first amendment provides for noncommerical speech.

The *Northrop* case was rendered moot by a plea bargain while the district court's order was on appeal.

VI. ABANDONING THE DISTINCTION

The final line of defense of the commercial speech distinction is usually phrased as a parade of horribles. Good heavens, we hear, if the first amendment fully protects commercial speech, government will be helpless in the fight against fraud. Entire statutes covering the fields of consumer protection and securities regulation will be wiped right off the books, as government will lose the power to prevent sellers from making false claims about products or to require publicly held corporations to disclose information.[79] Such claims are generally not supported by any legal analysis, and for good reason, because they don't stand up. If we treat speech as speech, commercial or not, we fall back on standard content-neutral analysis: Government regulation is constitutional where it furthers an important governmental interest, the governmental interest is unrelated to the suppression of free expression, and the restriction on expression is no greater than necessary.[80] If we were to apply the test to the fields of consumer fraud and securities regulation, it is not at all certain that very much would change.

First, consider a simple consumer fraud statute prohibiting false representations about a product. Would the statute unconstitutionally abridge the freedom of speech? Prevention of consumer fraud is unquestionably a substantial governmental interest; even the most ardent libertarians agree that it is a legitimate role of government to prevent citizens from cheating one another. The governmental interest is unrelated to the suppression of expression; the seller is free to say whatever he likes about the product, true or not, as long as he doesn't induce sales in reliance on what he says. And last, it should not be difficult to tailor a fraud statute narrowly to suppress no more speech than is necessary. Extending full protection to commercial speech, despite dire predictions from some quarters, will not give free rein to unscrupulous salesmen.

In this regard, commercial speech is much like libel, which not so long ago was outside the scope of the first amendment.[81] Extending

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[79] See, e.g., Hutchinson, Talking the Good Life: From Free Speech to Democratic Dialogue, 1 Yale J.L. & Liberation 17, 29 (1989).

[80] E.g., United States v. O'Brien, 391 U.S. 367, 377 (1968); see L. Tribe, American Constitutional Law 977-86 (2d ed. 1988).

[81] See Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

protection to libel[82] has not unleashed a torrent of libel; it *has* made it a little harder for public figures to recover, but the libel laws are still on the books and still being enforced. It's not clear why the same wouldn't be the case with consumer fraud.

Second, consider a simplified securities regulation statute, requiring a corporation to disclose periodically a whole lot of information it wouldn't disclose in the statute's absence. We know that compelling speech is not constitutionally different from suppressing speech,[83] but that need not preempt a narrowly tailored disclosure statute. Such a statute should meet the *O'Brien* requirements: Providing an accurate flow of information to the market seems analogous to providing accurate tax information to the IRS, or obtaining and carrying a driver's license.[84] It may be that the current scheme of securities regulation will have to be modified in minor respects to ensure that it provides a narrowly tailored means of promoting honesty and efficiency in the financial markets, but that's a question of fine-tuning that does not reach the heart of the issue. There is no reason to fear that abandoning the commercial speech distinction will have any significant effect on the regulation of the securities markets.

VII. Concluding Thoughts

The commercial speech doctrine is the stepchild of first amendment jurisprudence: Liberals don't much like commercial speech because it's commercial; conservatives mistrust it because it's speech. Yet, in a free market economy, the ability to give and receive information about commercial matters may be as important, sometimes more important, than expression of a political, artistic, or religious nature. Aaron Director, the father of the law and economics movement, made this point eloquently a quarter of a century ago:

> [T]he bulk of mankind will for the foreseeable future have to devote a considerable fraction of their active lives to economic activity. For these people freedom of choice as owners of resources in choosing within available and continually changing opportunities, areas of employment, investment, and consumption is fully as important as freedom of discussion and participation in government.[85]

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[82] See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[83] See Wooley v. Maynard, 430 U.S. 705, 714-15 (1977).

[84] See *O'Brien*, 391 U.S. at 375.

[85] Director, The Parity of the Economic Market Place, 7 J.L. & Econ. 1, 6 (1964).

The Supreme Court recognized this point as well in *Virginia State Board of Pharmacy*:

> As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate.[86]

It's a point that is difficult to dispute. Yet, for reasons that have never been adequately explained, both judges and commentators have seen fit to give commercial speech a lower level of protection than other types of speech.

It is possible that underlying this reticence is an unspoken mistrust of the free market, a fear that unrestrained speech in the commercial arena will cause graver harm than unrestrained speech in other areas. The fear may be justified. But, as we have attempted to demonstrate here, it may not. In any event, as long as the assumption remains unspoken and unexamined, it will govern this area of the law even though it may be empirically false. To the extent the assumption is correct, there should be no objection to articulating it, debating it, and, if appropriate, modifying it in light of insights gained therefrom. To the extent the assumption is false, we have every reason to want to bring it out into the open so that it may be debunked.

As we have also attempted to demonstrate, the commercial speech doctrine, like all other shortcuts in the law, is not cost free. It gives government a powerful weapon to suppress or control speech by classifying it as merely commercial. If you think carefully enough, you can find a commercial aspect to almost any first amendment case. Today's protected expression may become tomorrow's commercial speech.

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[86] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 763 (1976).