ABHANDLUNGEN

The U.S. Commercial Speech Doctrine

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I. Why Commercial Speech Doctrine Matters

It is commonplace that the world we live in is becoming more and more commercialized, and that it is dominated by speech and communication. Our TV programs are filled with commercials and our mailboxes are filled with unsolicited junk mail. Sponsoring not only permeates sport stadiums and car race tracks, but creeps into concert halls and even schools and universities. More recently, one hears concerns that the internet may also become more commercialized.[1]

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[1] R.G. Wright, Selling Words. Free Speech in a Commercial Culture, 1997, 108ff.; J.A. Marcus, Commercial Speech on the Internet: Spam and the First Amendment, 16 Cardozo Arts & Entertainment L.J.245 (1998).

Quite naturally, the question of how to deal with this kind of speech in legal terms has become more pressing. Examples proving the importance of this question come easily to mind: The EC recently passed a controversial directive that almost completely bans tobacco advertising.[2] This ban is heavily disputed and raises, apart from problems of Community powers and Art. 30, 59 ECT issues, concerns about freedom of expression which is recognized as a fundamental right at the EC level.[3] The German Constitutional Court has dealt with warning requirements from a constitutional point of view, denying the applicability of the free speech provision (in Art. 5 I GG).[4]

The European Court of Human Rights, following the lead of the European Commission of Human Rights,[5] in recent years has moved in the direction of bringing commercial speech within the purview of Art. 10 ECHR,[6] although the precise boundaries remain open to debate. The German Constitutional Court is currently deliberating free speech aspects of a German Supreme Court (BGH) decision holding that certain Benetton advertisements violate fair trade law and therefore may be prohibited by a court injunction.[7] EC regulations concerning labeling of genetically altered products[8] are also under attack for not requiring the producer to provide consumers with adequate information.

At this point, it seems worthwhile to look at the U.S. experience and its commercial speech doctrine as it has developed since the now famous decision in *Valentine* v. *Chrestensen*[9] and again since the reversal that was concluded in *Virginia State Board*.[10]

It is not without reason that the European Court of Human Rights,[11] the Canadian Supreme Court[12] as well as for example the German Constitutional

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[2] Directive 98/43/EG, 6 July 1998, Official Journal 1998, L 213/9.

[3] See, e.g. T. Stein, Freier Wettbewerb und Werbeverbote in der Europäischen Union. Kompetenzrechtlicher Rahmen und europarechtlicher Grundrechtsschutz, EuZW 1995, 435; R. Wägenbaur, Werbeverbot für Tabakerzeugnisse: Betrachtungen eines Nichtrauchers, EuZW 1998, 33; G. Perau, Werbeverbote im Gemeinschaftsrecht. Gemeinschaftsrechtliche Grenzen nationaler und gemeinschaftsrechtlicher Werbebeschränkungen, 1997.

[4] BVerfG, NJW 1997, 2871.

[5] Opinion of the Commission of Human Rights in the case of *Barthold*, 13.7.1983, EuGRZ 1984, 15; case of *Marktintern*, 18.12.1987, ECtHR Series A Vol. 165 (1989), annex p. 32ff.; case of *Hempfing*, 7.3.1991, EuGRZ 1991, 524; case of *Jakubowsky*, 7.1.1993, ECtHR Series A Vol. 291, annex p. 18.

[6] Case of *Barthold*, 25.3.1985, EuGRZ 1985, 170; case of *Marktintern*, ECtHR, 30.3.1989, Series A Vol. 165, 4 (17); case of *Casado Coca*, ECtHR 24.2.1994 Series A Vol. 285, 6 (16); case of *Jakubowsky*, ECtHR, 23.6.1994, Series A Vol. 291, 5 (12). See J.A. Frowein/W. Peukert, EMRK, Kommentar, 2nd. ed. 1996, Art. 10 at 9 (Frowein); M.W. Janis/R.S. Kay/A.W. Bradley, European Human Rights Law, 1995, 205ff.

[7] BGH (Federal Supreme Court), NJW 1995, 2488; 2490; 2492.

[8] See e.g. Regulation 258/97, 27.1.1997, Official Journal 1997 N. L 43/1, Art. 8.

[9] *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942).

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

[11] E.g. *Barthold* v. *Germany*, (1985) E.H.R.R. 383, 408 (dissent by Pettiti citing *Virginia State Board*, *Bates* and *Central Hudson*).

[12] E.g. *Attorney General of Quebec* v. *Irvin Toy Ltd.*, (1989) 1 S.C.R. 927, 968.

Court[13] now and again refer to U.S. Supreme Court decisions, especially in the area of free speech. Free speech has been accorded a prominent role among basic rights in the U.S., much more so than in Canada or in European countries. Given the importance accorded the first amendment – the term as used in these pages is meant to refer only to the free speech and press clause –, questions of how to treat commercial speech are more acutely and poignantly asked, and the implications are more closely looked at than, as a rule, in European legal systems.

To be sure, no simple transfer of questions asked and answers given is possible. Because we usually do not hold free speech in such high esteem and are more prone to protecting privacy or government secrecy and penalizing libel, there is a basic difference in approach that has to be taken into account. This is so even though decisions of the European Court of Human Rights and of our Constitutional Court, also influenced by the U.S. Supreme Court, tend to accord free speech an elevated position. But the U.S. experience gives a more lively and detailed picture of the problems involved and the different aspects of those problems. So it seems rewarding to have a closer look at it. Precisely because U.S. courts look upon purely economic regulation with a very deferential attitude, influenced in part by the ghost of "Lochnerism", but strictly scrutinize regulation of speech with regard to the facts as well as to the legal justifications and the balancing, the problems of commercial speech come to light clearer than under German law where there is not nearly as strong a difference between regulations falling under Art. 12 GG and regulations governed by Art. 5 I GG. But since we too protect speech more thoroughly – otherwise there would be no dispute on whether only to apply Art. 12 or, in addition to Art. 12, Art. 5 I GG with respect to advertising –, the question must be dealt with and deserves a closer look.

II. Supreme Court Decisions on Commercial Speech

In dealing with U.S. free speech law it is unavoidable to have a closer look at Supreme Court decisions. If one tried to avoid going into the details of the cases and the concurring or dissenting opinions one would miss the essential point. Although it might seem exhausting at times, leaving the level of abstract doctrine and theories and delving into the commercial speech cases provides invaluable insights and creates a basis upon which to build doctrinal arguments.

1. The *Valentine* v. *Chrestensen* era

The so-called "commercial speech-doctrine" originated with the *Chrestensen* decision in 1942. At that time, the first amendment had not yet really attained today's predominant position in Supreme Court decisions. The first amendment had been held to bind the states (as opposed to just the federal government) only

[13] E.g. BVerfGE 7, 198 (208).

since 1925.[14] Court decisions in the aftermath of World War I approved of far-reaching suppression of speech brought about especially by the Espionage Act of 1917 based on the "German" and "Bolshevist scare". It was only during the 30s and 40s that the doctrine of preferred freedoms that included the first amendment developed.[15] The final recognition of the pre-eminent role the first amendment plays among basic rights occurred only in the sixties.[16]

During the 60s and early 70s the Supreme Court still adhered to the view expressed in *Chrestensen*.[17]

In that case, a conviction for violating a municipal ordinance forbidding, for "sanitary" reasons, distribution in the streets of commercial handbills, was upheld. As to the free speech and free press clause of the first amendment, the Court had this to say: "... streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraints on government as respects purely commercial advertising".[18]

This contrasts strongly with decisions that protected the distribution of handbills having noncommercial content on public streets. There the Court held: "We are of the opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it".[19]

This distinction still held true in 1971, when a District Court upheld the Public Health Cigarette Smoking Act of 1969. This act banned all cigarette advertising on electronic media. The Court argued, "the act has no substantial effect on the exercise of petitioner's first amendment rights (...) Petitioners, themselves, have lost no right to speak – they have only lost an ability to collect revenue from others for broadcasting their commercial messages (...) [the act] does not prohibit them from disseminating information about cigarettes".[20] Apparently the decision did not turn on the fact that the broadcaster and not the tobacco producer or advertiser had brought the suit, as can be seen from the dissent.

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[14] *Gitlow* v. *New York*, 268 U.S. 652 (1925).

[15] D.M. Rabban, The Emergence of Modern First Amendment Doctrine, 50 Univ.Chicago L.Rev.1205 (1983).

[16] See generally L. Tribe, American Constitutional Law, 2nd ed. 1988, 785ff.

[17] *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942).

[18] Id. at 54.

[19] *Schneider* v. *State*, 308 U.S. 147 (1939), concerning handbills with political or religious content and an ordinance that forbade any distribution of handbills.

[20] *Capital Broadcasting Co.* v. *Mitchell*, 333 F.Supp. 582 (D.D.C.1971), at 584, aff.d without opinion 405 U.S.1000 (1972). But see Judge Skelly Wright's dissent arguing that cigarette advertising implicitly states a position on a matter of public controversy and should be placed "within the core protection of the First Amendment", id. at 587.

2. Bringing commercial speech under the first amendment

A few years later the Court clearly moved in the opposite direction. After leaving open the possibility that first amendment interests might be served by an ordinary commercial proposal,[21] it stated in *Bigelow* v. *Virginia*[22] that an advertisement in a Virginia newspaper indicating that in New York State abortions were legal (as opposed to Virginia) and offering low cost abortions there was protected by the first amendment. Justice Blackmun, writing for a seven justices majority, stressed the fact that the advertisement did more than simply propose a commercial transaction. With regard to the much debated issue of abortion it "contained factual material of clear 'public interest'".[23] The dissent, Justices Rehnquist and White, insisted that the content of the advertisement should make no difference.

Although *Bigelow* seemed to rest upon whether the content of the advertisement was related to a public dispute, the seminal decision in *Virginia State Board of Pharmacy* abandoned the *Chrestensen* holding altogether.[24] In that case, a Virginia law that prohibited the advertising of prescription drug prices by licensed pharmacists, was held to violate the first amendment. The Court stated that neither the fact that money is spent to project the speech, nor the profit motive or the fact that the content of the speech is a commercial subject could affect first amendment protection under the Court's decisions. It acknowledged that the interest of the speaker as well as the listener in this case was purely an economic one. The case dealt with speech that does "no more than propose a commercial transaction". In alluding to its own emphasis on the role of the first amendment for democratic self-government, the Court argued that in a free enterprise economy it is a matter of public interest that private economic decisions be well-informed and that this serves the goal of enlightened public decision-making in a democracy. Justice Blackmun, writing for the majority, made his point quite strongly: "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."[25]

The justification for the ban put forward by the State was not deemed sufficient to override the first amendment interest. As to whether commercial speech was to receive the same protection as other speech the Court's position at first view could seem somewhat ambiguous if one looks at the strong proposal that commercial information might be as important to the individual and to self-government as political speech. But there are clear statements as to the special role and more limited

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[21] *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S.376, 389 (1973), concerning an illegal advertisement that because of its illegality was not protected.

[22] *Bigelow* v. *Virginia*, 421 U.S.809 (1975).

[23] Id. at 822.

[24] *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S.748, 763 (1975). For a more comprehensive analysis of the development from *Chrestensen* to *Virginia State Board* see T.W. Merrill, First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine, 44 Univ.Chicago L.Rev. 205, 207–213 (1976).

[25] Id. at 763.

protection of commercial speech. The Court, after citing its remark in *Pittsburgh Press*,[26] that there are "commonsense differences" between commercial speech and other varieties went as far as to say, "even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary". The Court then added a rationale for this different treatment: "The truth of commercial speech, for example, may be more easily verifiable [...]. Also, commercial speech may be more durable than other kinds".[27] "What is at issue [in this case] is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients". As to other professions, a footnote remarked that physicians' or lawyers' advertising might be more susceptible to confusion or deception and therefore need to be restricted.[28] Rehnquist's dissent pointed to the first amendment's importance for enlightened public decision-making and argued that problems of where to draw the line between commercial and noncommercial speech does not bring purely commercial advertisements within the first amendment reach.[29]

The reach of *Virginia State Board* is not clearly self-evident. First, there is the reservation that only truthful, nonmisleading commercial speech will be protected. Traditionally fully first amendment-protected speech is not limited to nonmisleading statements – many political statements might be intentionally misleading. Second, there is the remark as to the "commonsense differences" between commercial speech and other varieties of speech. Third there is the reservation with regard to lawyers and physicians. And finally, Blackmun dismissed the TV advertising bans under *Capital Broadcasting* as "special problems of the electronic broadcast media"[30] leaving open another part of the question.

Two opinions handed down the following year seemed to imply that a broad reading of first amendment protection should be given to commercial speech although these decisions also hinted at some limitations. In *Linmark Associates*[31] Justice Marshall, writing for a unanimous court, struck down a township ordinance that prohibited, among other things, "for sale" signs on the land of the premise to be sold. This prohibition had been added when "panic selling" took place by white residents because of the increase of a nonwhite population in integrated neighborhoods. Whether the prohibition stopped "white flight" was disputed. Marshall opined that there was the same interest in the free flow of information as in *Virginia State Board* and that the prohibition did not constitute a mere time-place-manner restriction to promote esthetic values, but was instead based on the content of the signs and on the fear of its primary effect. The "highly

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[26] 413 U.S. at 385 (note 21).
[27] Id. at 771–772.
[28] Id. at 773.
[29] Id at 787f.
[30] Id. at 773.
[31] *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977).

paternalistic approach" to bar truthful information from the people was, as in *Virginia State Board*, held not to be in accord with the first amendment. The city's aim could be furthered by other means.

Bates v. *State Bar of Arizona*[32] dealt with lawyers' advertising, one question left open in *Virginia State Board*. Two attorneys, both members of the Bar of Arizona, advertised in contravention of Arizona law their prices for routine services. The Court, in an opinion written by Justice Blackmun, applied the *Virginia State Board* reasoning and held that legal newspaper advertisements, which included prices, are protected by the first amendment. But the reasoning seemed to be more cautious. The opinion stressed the point that neither claims to the quality of legal services nor in-person solicitations were at issue.

In addition, in the context of applying the overbreadth doctrine that plays a special role within the first amendment, Blackmun expressly referred to the "commonsense differences between commercial and other speech". In doing so, Blackmun added another element that argues for special treatment[33]. Justice Powell, in a dissent joined by Chief Justice Burger, argued that the inevitably misleading character of price advertising by lawyers was relevant because of the individualized content and quality of services.[34] Rehnquist, on the other hand, reiterated his opposition to bringing advertising under the first amendment.[35]

The ambiguity built into the *Virginia State Board* decision turned up one year later in *Ohralik*, a case which again concerned lawyer advertising, and more specifically, a prohibition under Ohio State Bar rules of in-person solicitation.[36] Ohralik after learning about a car accident went to see the parents of the victim, and he later on went to the hospital to see the 18-year-old victim herself where she signed an agreement to be represented by Ohralik. Powell alluded to the danger of diluting first amendment principles by treating commercial speech as other speech and saw in-person solicitation as a "business transaction in which speech is an essential but subordinate component".[37]

The prophylactic rule forbidding in-person solicitation was seen as being based on the legitimate interest to prevent fraud, undue influence, and intimidation. There was no dissent, but Marshall in his concurrence underlined the importance of the free flow of information in the context of lawyer solicitation and favored a much narrower reasoning based on the special facts of the appellee's behaviour.

Other unexpected consequences of the *Virginia State Board* decision showed up in *Friedman* v. *Rogers*.[38] In this case, optometrists in Texas were required to meet the same licensing requirements whether they operated as "professional" or "com-

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[32] *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 366 (1977).
[33] Id. at 381.
[34] Id. at 391 ff.
[35] Id. at 404 ff.
[36] *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447 (1978).
[37] Id. at 457.
[38] 440 U.S. 1 (1979).

mercial" optometrists. Commercial optometrists were distinguished by their practice of setting up chains of identically operated and designed stores which were managed on a leasing basis and used a trade name instead of the professional's name. The law was changed to prohibit the practice of optometry under a trade name without otherwise forbidding the practice of "commercial optometry", and Rogers, who operated more than 100 optometry offices under the trade name "Texas State Optical", challenged the prohibition. The District Court relied on *Virginia State Board* and *Bates* and held the statute unconstitutional because it inhibited the free flow of information. Powell, writing for seven justices, underlined the limited protection of commercial speech under the first amendment; he even mentioned with approval a related law review article that had pointed to the elements of "Lochnerism" inherent in recent commercial speech doctrine.[39] Powell, arguing that a trade name "has no intrinsic meaning" and "conveys no information about the price and nature of the services"[40] and pointing to numerous possibilities for deception – the public did not know about change in optometrist personnel or could get a false impression of ownership and competition among the shops confidently concluded that the prohibition was constitutional. Blackmun joined by Marshall dissented on first amendment grounds. He deemed the interests of the optometrist as well as the public's interest to know about the "commercial" character by way of the trade name as important since use of the trade name was "dissemination of truthful information"; any misleading aspects stemmed from not requiring the use of the professional's name in addition to the trade name.

So the Court after adopting the new commercial speech doctrine in *Virginia State Board* struggled with its inherent ambiguities und unresolved questions, but it also seemed to be divided as to the underlying value judgments.

One year later the Court tried to provide for a doctrinal framework that, in view of the conflicting assumptions and visions concerning the first amendment and taking into account the multifaceted nature of the commercial speech area was quite flexible. In *Central Hudson*, Justice Powell, writing for five justices, stated the oft-cited four-part test: "At the outset, we must determine whether the expression is protected by the first amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest".[41]

At question was a regulation that banned electric utilities from advertising to promote the use of electricity, but allowed information that was not intended to

[39] T.H. Jackson/J.C. Jeffries, Commercial Speech: Economic Due Process and the First Amendment, 65 Va.L.Rev. 1 (1979).

[40] Id. at 12.

[41] *Central Hudson Gas and Electric Corp.* v. *Public Service Commission of New York*, 447 U.S. 557, 566 (1980).

promote sales. In applying the test set out above and after defining commercial speech as "expression related solely to the economic interests of the speaker and its audience"[42] Powell noted that the interest in energy conservation was substantial but then struck down the ban because it was more extensive than necessary to prohibit, for example, advertising energy-saving devices like heat pumps.[43] Blackmun, joined by Brennan and Stevens, in concurring stuck to the principle that truthful information might not be prohibited under the first amendment absent a clear and present danger. He thereby applied general first amendment doctrine and not the newly-created four-part test.[44] Stevens joined by Brennan brought to attention the definitional aspect and favoured a narrower circumscription of the less protected commercial speech.[45] Rehnquist dissented on the grounds that an electric utility as a state-created monopoly does not enjoy first amendment protection. In addition he alluded to the ghost of "Lochnerism" and held that, given lower value of commercial speech, the regulation met the constitutional requirements.[46]

It is evident that *Central Hudson* provided some doctrinal structure but could not solve the inherent problems. The proposed test itself leaves much room for differing application: "true, not misleading statements", "substantial interest", "directly advancing", "not more extensive than necessary" are broad notions well known for their indeterminacy, partly from our proportionality principle ("Verhältnismäßigkeitsprinzip"). And only five justices agreed on the test with the other justices favoring either more or less protection. So it is no wonder that *Central Hudson* became the starting point for many of the later cases but could not provide a basis for sufficiently coherent and predictable decisions.

3. After *Central Hudson* – unresolved tensions and diverging indications

In looking at some of the more important cases decided after *Central Hudson*, it is not easy to get a clear sense of the direction the Court is moving in. Some decisions apply the *Central Hudson* test in a generous way whereas others provide for more first amendment protection and even move partially away from the test. Some justices plead in favor of openly doing away with it. No clear majority has been discernible, individual justices take seemingly different stands in different cases.

Similarly it is not at all clear to what degree or whether at all the issue of first amendment protection of commercial speech can be brought in line with the very general liberal/conservative divide, especially since conservatives tend to favor the free marketplace of goods but not free speech and the liberals vice versa. In addi-

[42] Id. at 561.
[43] Id. at 570.
[44] Id.at 575, 578.
[45] Id. at 579ff.
[46] Id. at 583ff.

tion, it might be a matter of speculation in some cases whether broad statements of principle can be read literally or whether the much narrower facts of a case have more explanatory weight. Not astonishingly, in this hotly disputed area comments often turn on this distinction.[47] And one might suspect that the different cases' situations such as lawyer advertising, casino, lottery or alcohol advertising, billboards, racks on sidewalks, food labeling requirements, also affect the outcome of a case.

With regard to lawyer advertising, there are clearly different views within the Court as to what amount of protection it should be afforded.[48]

In *Zauderer*[49] the appellant lawyer had been sanctioned, *inter alia*, for advertising his legal services with respect to the then well known Dalkon Shield medical scandal. Zauderer was sanctioned in part because he used an illustration of the Dalkon shield and in part for guaranteeing that fees would be refunded if the case was lost. White, in writing for the Court, relied on *Bates* and similar decisions and found, in applying the *Central Hudson* test, that the Disciplinary Rules that severely limited advertising were overly broad.[50] But White upheld the sanction insofar as it was based on the ground that the fee part of the ad was misleading; a layman mostly would likely not know the difference between fees and costs and therefore assume that if he lost the case there were also no costs. To be sure the right not to speak is as protected under the recognized first amendment doctrine as the right to speak. But "because the extension of first amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides [...] appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal".[51]

Whereas Brennan, joined by Marshall, concurred on other grounds, O'Connor, joined by Burger and Rehnquist, would uphold not all, but most of the restrictions on advertising. O'Connor based her argument on the special characteristics of professional services and the inherent danger of misleading advertising.[52]

Brennan writing for six justices in *Shapero* went further in protecting lawyers commercial speech.[53] He held that sending a letter to a potential client who had a foreclosure suit filed against him and indicating in this letter some of the legal issues involved in the foreclosure was protected commercial speech and might not be banned, distinguishing this ban from the ban that was upheld in *Ohralik*. Jus-

[47] See e.g. the interpretation given to the *44 Liquormart* decision by K. Sullivan, Cheap Spirits, Cigarettes, and Free Speech: the Implications of 44 Liquormart, 1996 S.Ct.Rev. 123 (140).

[48] See the analysis, partly in economic terms, of the earlier cases by F.S. McChesney, Commercial Speech in the Professions: The Supreme Court's unanswered Questions and questionable Answers, 134 Univ.Pa.L.Rev. 45 (1985).

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

[50] Id. at 644, 648.

[51] Id. at 651.

[52] Id. at 673ff.

[53] *Shapero* v. *Kentucky Bar Association*, 486 U.S. 466 (1988).

tice O'Connor, joined by Rehnquist and Scalia, proposed in her dissent to overrule *Bates* and treat professional services different from "standardized consumer products" that were at issue in *Virginia State Board.*[54]

Against this backdrop, the decision in *Edenfield* v. *Fane*[55] was really not a surprise. The Court struck down a law that banned uninvited, in-person (including via phone) solicitation of prospective clients by certified public accountants. Kennedy, writing for seven justices, found the prohibited conduct differed from the *Ohralik* situation and posed only small dangers to potential clients so that the prophylactic rule did not meet the *Central Hudson* requirements.[56] O'Connor in dissent reiterated her conviction that "this Court took a wrong turn with *Bates*" and that the professions should be treated differently under the commercial speech doctrine.

But on the next occasion, in *Florida Bar* v. *Went for it*[57] O'Connor wrote the opinion of the Court. Joined by four justices, O'Connor upheld a Florida Rule that prohibited personal-injury-lawyers from sending targeted direct-mail solicitations to victims and their relatives following an accident or disaster.The interest in protecting privacy and the "integrity of the profession" was substantial. The ban was more restrictive than in the *Ohralik* and *Shapero* situations and the Bar had come forward with substantial evidence of the dangers involved. Kennedy, joined by three justices, deplored that the Court "unsettle[d] leading first amendment precedents, at the expense of those victims most in need of legal assistance"[58] and concluded, "[i]t is most ironic that, for the first time since *Bates* v. *State Bar of Arizona*, the Court now orders a major retreat from the constitutional guarantees for commercial speech in order to shield its own profession from public criticism".[59] Kennedy thereby pointed to quite another aspect of bans on legal advertising.

It seems fair to say that at this moment the commercial speech doctrine as applied to lawyers advertising remains very much in limbo.

In a quite different context, mailing of unsolicited advertising was an issue in *Bolger* v. *Young's.*[60]

This case concerned a federal statute that prohibited unsolicited contraceptive advertisement to be delivered by mail. Marshall first addressed the definitional issue. The appellee's advertising of condoms included information on venereal diseases, so it was not merely a proposal to engage in commercial transactions. Neither the fact that the pamphlet consisted of advertisement, nor the reference to a specific product, nor the economic motivation by itself rendered the pamphlet commercial speech. "The combination of all these characteristics, however",

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[54] Id. at 487.
[55] *Edenfield* v. *Fane*, 507 U.S.761 (1993).
[56] Id. at 770.
[57] *Florida Bar* v. *Went for it, Inc.* 515 U.S.618 (1995).
[58] Id. at 635.
[59] Id. at 644.
[60] *Bolger* v. *Young's Drugs Products Corp.*, 463 U.S.60 (1983).

allowed for regarding it as commercial speech only.[61] In applying the *Central Hudson* test he regarded the privacy interest as carrying little weight in such a situation. The parents' educational interest was deemed to be substantial but would in most instances not be affected because of their control of the mailbox. Therefore, the ban was held to be unconstitutional as applied.[62] There was no dissent but three justices concurred. Stevens criticized the rigid classification and preferred to see the information as fully protected speech. But even when it was considered as commercial speech, Stevens would not tolerate that the statute "censor[ed] ideas".[63]

There are other forms of commercial speech intruding into one's home that have not yet reached the Supreme Court. Automatic dialing and announcing devices (ADAD) that place automated advertising calls have proved to be a major nuisance because the automated calls do not respond to human voices, may fill the entire tape of an answering machine and sometimes will not disconnect for a long time after the called party hangs up the phone. Statutes and regulations severely restricting the use of ADADs have been upheld by the Court of Appeals as a valid regulation of commercial speech under *Central Hudson*.[64]

Disclosure requirements other than those regarding the professions were dealt with in *Riley*.[65] The North Carolina Charitable Solicitations Act set limits to the fee a professional fundraiser could charge to a charitable organization and required the professional fundraiser to disclose to potential donors the percentage of gross receipts the fundraiser had retained as fees for all charitable solicitations during the previous twelve months. Brennan, writing for the Court, held that the disclosure requirement violated the first amendment. The fact that the disclosure relates only to the fundraiser's profit did not make it commercial speech. Decisive was the nature of the speech "taken as a whole". With regard to charitable solicitations, it was "inextricably intertwined" with informative and perhaps persuasive speech. Therefore, full first amendment protection was to be granted, and the requirement was struck down. Rehnquist's dissent, joined by O'Connor, did not really dispute the conclusion that fully protected speech was at issue but instead thought the requirement well justified.[66]

It might be appropriate in order to complete the picture concerning forced disclosure to mention a Court of Appeals decision. In *Amestoy*[67] the Court of Appeals for the Second Circuit invalidated a Vermont statute that required dairy manufacturers to indicate on labels that the product was or may have been derived from dairy cows treated with a synthetic growth hormone used to increase milk

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[61] Id. at 66f.

[62] Id. at 75.

[63] Id. at. 83f.

[64] *Moser* v. *Federal Communications Commission*, 46 F 3rd 970 (9th Cir.1995), reversing the District Court's contrary judgment; similarly *Bland* v. *Fessler*, 88 F 3rd 729 (9th Cir.1996).

[65] *Riley* v. *National Federation of the Blind*, 487 U.S.781 (1987).

[66] Id. at 811.

[67] *International Dairy Foods Association* v. *Amestoy*, 92 F 3rd 67 (2nd Cir.1996).

production. The majority, consisting of two judges, left open the question of whether this factual statement was purely commercial speech. Even if it was, there was some protection, as to the right not to speak, under *Central Hudson*. Vermont in defending the statute relied not on health concerns, since the FDA had concluded that the hormone had no appreciable effect on the composition of the milk, but on strong consumer interest and the public's "right to know". The Court deemed the mere interest of the public to know "insufficient to justify compromising protected constitutional rights".[68] The dissent disagreed strongly, pointing to a nationwide debate on the use of this hormone and its partly undisputed negative effects on bovine health, on small farmers, and the level of milk production, quite apart from the unknown long-term health effects.

It was well-established that restrictions on billboards do not present first amendment problems. *Metromedia*, the first decision concerning billboards after *Virginia State Board*, did not, however, provide a clear answer.[69] San Diego had enacted an ordinance prohibiting outdoor advertising display signs (with exceptions as to some non-commercial speech and on-site signs) in order to avoid drivers' distraction and to improve the appearance of the City. White, writing for five justices, distinguished between commercial and non-commercial advertising affected by the ordinance. He held that the ban of billboards with regard to commercial advertising was compatible with the *Central Hudson* test but finally held the ban invalid because it discriminated within the noncommercial speech area in granting exceptions.[70] Stevens partial dissent aptly remarked that according to the majority, the ordinance would have survived if it had abridged more speech. Stevens was prepared to accept a total ban on billboards in order to protect the environment.[71] Burger's and Rehnquist's dissent pointed in the same direction.

A much more principled approach, that might present its own problems, was taken in *Discovery Networks*.[72] Discovery and another petitioner had placed free magazines, which mainly contained advertisements for their business, in newsracks on sidewalks. The city later revoked the permission to install the newsracks because of an ordinance that prohibited the distribution of commercial handbills or booklets etc. – but not of newspapers – on public property. At that time there were about 1500 to 2000 newspaper racks as compared to 62 "commercial handbill" racks on the city's sidewalks. Stevens, writing for six justices, in affirming the Court of Appeals judgement, held the ban invalid. Stevens started by questioning the nature of the speech involved. It seemed not evident why the newspaper exception wouldn't apply to the advertiser's magazines that contained some editorials when newspapers contain many advertisements. The distinction amounted to a matter of degree. Stevens argued against drawing too bright a

[68] Id. at. 73.
[69] *Metromedia* v. *City of San Diego*, 453 U.S. 490 (1981).
[70] Id. at 512.
[71] Id. at 552.
[72] *City of Cincinnati* v. *Discovery Networks, Inc.*, 507 U.S. 410 (1993).

line, "The city's argument attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimates the value of commercial speech".[73] Leaving that aside and assuming that only commercial speech was involved, Stevens held the city's interest in promoting safety and esthetics by limiting the number of newsracks to be substantial. But he could see "no relationship whatsoever" between the commercial-noncommercial distinction and these interests since all newsracks are the same in that respect. The harm involved is not a "commercial harm". Therefore, Stevens noted, the asserted low value of commercial speech is not a sufficient justification for the selective and categorical ban.[74] If that sounds as if in those situations the value difference would never matter, this impression immediately was corrected: "we do not reach the question whether, given certain facts and under certain circumstances, a community might be able to justify differential treatment of commercial and noncommercial newsracks".[75] The fact that in this case "commercial handbill" newsracks constituted about only 3 % of all newsracks may have been quite important.

Blackmun, in concurring, reiterated his views as expressed in *Central Hudson* that truthful commercial speech should be accorded full first amendment protection, mentioning by the way that this would not include cigarette advertising.[76] Rehnquist, joined by White and Thomas, dissented on the grounds that commercial speech is less central to first amendment interests and that conferring equal status upon it might weaken the first amendment by inducing a leveling process.[77] Interestingly, none of the justices mentioned the fact that with regard to the newspaper racks, as opposed to the "commercial handbill" racks, the commercial transaction itself took place on the sidewalks.

Three decisions between 1986 and 1990 seemed to indicate that the majority of the Court might retreat considerably from granting commercial speech meaningful first amendment protection. The fact that two of the decisions concerned advertising of casino gambling and of lotteries may have played a role in the outcome.

The most sweeping retreat can be found in *Posadas*. In this case[78], Rehnquist, in a 5–4 decision, upheld a Puerto Rico statute that prohibited advertising of lawful casino gambling directed at the Puerto Rico public but allowed for such advertising directed at foreigners. Advertising for other gambling, including the State-run lottery, was legal. In applying the *Central Hudson* test, the Court found the interest in preventing excessive casino gambling among local residents substantial in view of the fact that casino gambling is illegal in the vast majority of the 50 States. Seeing an immediate causal link between advertising and demand,

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[73] Id. at. 419.
[74] Id. at 424ff., 428.
[75] Id. at 428.
[76] Id. at 431, 436f.
[77] Id. at 439.
[78] *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986).

the Court saw sufficient reason to distinguish between different kinds of gambling and singling out casino gambling. As to the least-restrictive means requirement, it did not accept the argument that counterspeech – government warnings of casino gambling – was sufficient and distinguished this holding from *Bigelow* where the underlying conduct, family planning, was constitutionally protected by the right of privacy. Rehnquist went on to say what has since come under heavy criticism: "the Puerto Rico Legislature surely could have prohibited casino gambling by the residents of Puerto Rico altogether. In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling".[79]

Brennan, joined by Marshall and Blackmun, wrote a vigorous dissent mainly repeating the view that commercial speech, which provided truthful, nonmisleading information, should be accorded full first amendment protection. But even if *Central Hudson* was to be applied, he saw fatal flaws in the statute that seemed mostly to protect the State-run lottery.[80] Stevens, joined by Marshall and Blackmun, in dissent preferred not to touch upon the greater-lesser argument, "[w]hether a State may ban all advertising of an activity that it permits but could prohibit – such as gambling, prostitution, or the consumption of marijuana or liquor – is an elegant question of constitutional law".[81] Stevens saw the ban for other reasons as "grotesquely flawed regulation of speech".[82]

In 1993, the Court in *Edge*[83] upheld a federal statute that prohibited the broadcast of lottery advertisements by a broadcaster licensed to a state that does not allow lotteries. Edge, situated at the border of North Carolina, where lotteries are illegal, and Virgina, where a state-run lottery exists, ran advertisements for the Virginia lottery. 92% of Edge's listeners resided in Virginia. White overturned the lower courts' opinions that saw a first amendment infringement and upheld the ban. The substantial interest involved consisted of supporting the policy of nonlottery states, and the underlying "vice" activity implicated no constitutional right.[84] This interest was directly advanced, in White's opinion, since "in response to the appearance of state-sponsored lotteries, Congress might have continued to ban all radio or television lottery advertisements.[85] The fact that North Carolina residents could listen to Virginia radio stations and that only 9% of Edge's listeners were North Carolina residents was not seen to affect the validity of the restriction. Stevens, joined by Blackmun in dissent, held that truthful advertisement of a legal activity were protected under *Bigelow*.[86]

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[79] Id. at. 345.
[80] Id. at 348, 350, 352ff.
[81] Id. at 359.
[82] Id. at 363.
[83] *U.S.* v. *Edge Broadcasting Co.*, 509 U.S.418 (1993).
[84] Id. at 426.
[85] Id. at 428.
[86] Id. at 437.

The last of the three decisions that indicate a quite generous approach to commercial speech restrictions is *Fox*.[87] This case took place in an entirely different setting. State University of New York regulations prohibited private commercial enterprises from operating on campus, with exceptions for bookstores or laundries etc. A private business firm selling housewares conducted a so-called Tupperware party in Fox's dormitory room, in order to sell its products and at the same time providing some information on "home economics". Scalia, writing for six justices, saw commercial speech as the only issue since the additional information could have been easily separated from the advertising. In applying *Central Hudson* he found the interest in promoting an educational rather than commercial atmosphere on campus, promoting safety, and preventing commercial exploitation of students to be substantial. He then stated that the "fit" between the means and the end has to be only "reasonable" and asserted such a reasonable fit. Blackmun's dissent, joined by Brennan and Marshall, expressly left undecided the question of whether the least-restrictive-means test should be applied because Blackmun regarded the ban as overbroad, potentially covering even music lessons in a student's room.[88]

Two recent decisions have struck down bans on prohibition of certain truthful information concerning alcoholic beverages in seemingly applying more stringent standards. In the *Coors* case[89] a federal statute passed after the end of Prohibition in 1935 banned the disclosure of the alcohol content of beer in advertisements or on the label. The District Court and the Court of Appeals upheld the prohibition as to advertisements but struck it down with regard to labels; only this latter point was brought before the Supreme Court by the federal government which argued that the prohibition was intended to prevent "strength wars" so that beer drinkers might not choose a beer solely for its alcohol content. Thomas, writing for eight justices, applied the *Central Hudson* test to hold that the interest in preventing "strength wars", although it was open to question whether this was the original intent of the ban, was substantial. Thomas, however, denied that the ban directly advanced this interest because of its "overall irrationality". Thomas believed that the ban was irrational in several aspects: it allowed the states to permit disclosure of alcohol content of beer in ads; it did not forbid breweries to signal high alcohol content by using the term "malt liquor"; and it did not apply to wines and spirits, where it even required to disclose the alcohol content in some cases. In addition, there was no sufficient "fit" since less intrusive means with regard to the first amendment as e.g. directly limiting the alcohol content were available. Interestingly, Thomas mentioned, among those less intrusive means, "prohibiting marketing efforts emphasizing high alcohol strength" evidently holding such a restriction of commercial speech to be constitutional.

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[87] *Board of Trustees of the State University of New York* v. *Fox*, 492 U.S. 469 (1989).

[88] Id. at 487.

[89] *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995), 115 S.Ct. 1585.

Stevens concurred arguing that in the commercial context disclosure requirements that protect the consumer are important. And he again questioned the use of categorically distinguishing commercial speech if truthful information is concerned. "The speech at issue here is an unadorned, accurate statement ... The majority does not explain why the words '4.73 % alcohol by volume' are commercial".[90] Since the disclosure would in no way be misleading it should be entitled full first amendment protection.

If the statute at issue in *Coors* looks strange if not outright irrational, much the same holds true for the one invalidated in *44 Liquormart*.[91] In that case, a 1956 state statute prohibited advertising the retail prices of alcoholic beverages by vendors licensed in Rhode Island as well as by out-of state manufacturers, wholesalers or shippers. An exception applied to signs at the licensed entity's place of sale if they were not visible from the street. The ban applied equally to media with a principal place of business in Rhode Island. As to the invalidity of the ban the Court was unanimous. The opinions, however, were quite fragmented. Stevens, writing for the Court, was able to induce two justices to join him in applying a stricter test than the *Central Hudson* test, "when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process", without, however, asserting full first amendment protection.[92] "The first amendment directs us to be especially sceptical of regulations that seek to keep people in the dark for what the government perceives to be their own good".[93] The interest to reduce alcohol consumption passed muster, but it was not sufficiently advanced by the ban. The Court acknowledged that, as the State was arguing, the ban of price advertising might keep prices high and consequentially restrain consumption, but it held that "without any findings of fact" the advancement was not significant enough. In addition there were less intrusive means, for example, direct regulation, taxes or educational campaigns.[94] In addition and maybe most important, Stevens explicitly stated that "*Posadas* errouneously performed the first amendment analysis" and then added with regard to the greater/lesser priciple "banning speech may sometimes prove far more intrusive than banning conduct".[95]

Thomas' concurring opinion went even further, "[i]n cases such as this, in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace" the *Central Hudson* test should not be applied. "Rather, such an 'interest' is per se illegitimate".[96] O'Connor, joined by Rehnquist, Souter and Breyer, preferred

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[90] 115 S.Ct at 1595.
[91] *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S.484 (1996).
[92] Id. at 501.
[93] Id. at 503.
[94] Id. at 507.
[95] Id. at 511.
[96] Id. at. 518.

to stick with the *Central Hudson* test and found no reasonable fit.[97] Scalia, however, referred to his dissent in *McIntyre*[98] where he stated his view of fundamental principles guiding first amendment interpretation such as not departing from "long accepted practices of the American people where the core offense of suppressing particular political ideas is not at issue".

So the precedential force of *44 Liquormart* might be regarded as quite limited since five justices were not willing to accord more protection than granted under *Central Hudson*. It is therefore quite understandable that a Circuit Court, after the Supreme Court had remanded a case in order to review it in light of *44 Liquormart*, again upheld a ban on outdoor advertising of alcoholic beverages in "publicly visible locations".[99]

The most recent decision once again brought the distinction between restricting speech and regulating the economy to the forefront and cast some doubts on where the majority of the Court stands as to different aspects of commercial speech. In *Glickman*[100] Stevens, joined by four justices, rejected first amendment claims made against a 1937 federal statute that had set up a market organization for agricultural products including mechanisms to provide for uniform prices, limitation of quantity of production, research, advertising and promotion etc. The statute held that orders must be approved by two thirds of the affected producers and are implemented by committees composed of producers and handlers etc. The expenses are paid from funds to which the producers and handlers were assessed. Wileman, a California fruit producer, refused to pay its assessment arguing that being forced to pay for a generic advertisement he had not approved of violated his first amendment rights. The Court of Appeals had applied the *Central Hudson* test and struck down the statute. "The first amendment right of freedom of speech includes a right not to be compelled to render financial support for other's speech".

Stevens underlined the fact that the generic advertising was part of "a broader collective enterprise". In addition, he noted that the producers were neither constrained in communicating whatever they wanted to, nor compelled to engage in speech nor compelled to endorse any "political or ideological views".[101] That fact distinguished this case from cases where the views one was forced to finance conflicted with one's own views. Therefore, only economic regulation that required judicial deference to Congress' policy judgements was at issue.[102] Souter, joined by Rehnquist, Scalia and Thomas, dissented on the ground that the advertising constituted commercial speech that Wileman was forced to finance. In applying *Central Hudson* he found, *inter alia*, that the government's interest was

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[97] Id. at 528ff.

[98] *McIntyre* v. *Ohio Elections Commission*, 514 U.S.334, 375 (1995).

[99] *Amheuser-Busch Inc.* v. *Mayor of Baltimore*, 101 F 3rd 325 (4th Cir.1996), cert. denied 117 S.Ct. 1569 (1997).

[100] *Glickman* v. *Wileman Brothers*, 117 S.Ct. 2130 (1997).

[101] Id. at 2138.

[102] Id. at 2142.

not substantial enough.[103] Thomas, in a separate dissent, again favored a more rigid test in evaluating commercial speech restrictions.[104]

It might not be possible to bring the decisions since *Virginia State Board* into harmony. It seems quite clear that there are substantially divergent views on the Court on how much first amendment protection to provide commercial speech although interestingly the individual justices do not in all cases decide according to a pattern. But a few core issues are easily discernible. First, the question of definition – what constitutes commercial speech as opposed to other speech, but also as to economic conduct; is it the content of the speech, its surroundings, its aim, or the interests involved in that matter? Second, what are possible reasons to treat commercial speech different from other varieties, is it the "profit motive", the "durability" and verifiability, or simply its lower value? One can see that those two questions are not independent of each other. Should commercial speech remain outside of first amendment protection, be fully protected or be granted a somewhat lower level of first amendment protection? If so, what general first amendment rules should not be applied in cases of commercial speech?

Before trying to deal with these questions in the light of the insight gained from these decisions, it seems appropriate to have a look at the theoretical and doctrinal debate surrounding commercial speech.

III. The Doctrinal Discussion

1. General free speech doctrine

The doctrinal battle over commercial speech is part of the general, wide-ranging and never-ending debate on the meaning of the first amendment. To be sure, seen historically the first amendment was not even held to apply to the states until the late 1920s, and it only gained its elevated position in court during the 1930s and 1940s.[105] But the philosophical debate over the need to protect free speech and the press, from Milton's Areopagitica (1644) to J.St. Mill's On Liberty (1859) and Chaffee's On Free Speech in the U.S. (1941) has never vanished. It received strong endorsement when the Supreme Court became willing to give the first amendment a dominant position. Meiklejohn's book on Free Speech and its Relation to Self-Government (1948) influenced the Court in granting political speech a preferred place. In Meiklejohn's view, a view that he later tried to expand and adapt somewhat, "the principle of the freedom of speech springs from the necessities of the program of self-government" (id. at 27). A broader vision that has gained wide acceptance was developed in Th.I. Emersons influential treatise on

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[103] Id. at 2142, 2153.

[104] Id. at 2155.

[105] A. Kozinski/S.Banner, The Anti-History and Pre-History of Commercial Speech, 71 Texas L.Rev. 747 (1993) provide a very lively account of this development. G.E. White, The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America, 95 Mich.L.Rev 299 (1996), gives an in-depth analysis of the built-in tensions and unresolved problems.

The System of Freedom of Expression (1970). According to his view the "system of freedom of expression in a democratic society rests upon four main premises": expression is "a means of assuring individual self-fulfillment"; it "is an essential process for advancing knowledge and discovering truth"; it "is essential to provide for participation in decision making by all members of society" (Meiklejohn's only basis and aim of free speech); and it "is a method of achieving a more adaptable and hence a more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus".[106]

In the lively and ever-broadening discussion of first amendment interpretation several trends have emerged. Some of the commentators favor one of these values more heavily or even regard a particular value as exclusive.[107] At the other end of the spectrum, some commentators deny that the first amendment should be accorded an elevated position within the bill of rights although today not many support this view.[108]

Within the framework provided by the underlying value or values of the first amendment, there are different approaches as to the limits government may put on free speech. The "absolutist" position denies any (or almost any) limits, coping with the consequences mainly by defining speech more narrowly, exempting for example speech-related conduct, and libellous or obscene speech.[109] Instead, many acknowledge that some balancing is unavoidable, but stress the fact that free speech should be accorded much weight in this balancing procedure. Some would like the balancing to be more restricted by having some strict rules applied – as for example that limitations may not be based on the content of the speech –, whereas others favor a more flexible approach that would not be restricted by any per-se rule.[110]

2. Commercial speech doctrine

a) Preparing for Virginia State Pharmacy

It is within the broader framework of different approaches to the first amendment that the debate on how to treat commercial speech takes place. But there is one important additional aspect to it, namely whether commercial speech is to be treated as speech at all or whether one should think of it rather as simply an eco-

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[106] Th.I. Emerson, The System of Freedom of Expression, 1970, 6f.

[107] See the account given by Tribe (note 16) at 785–789 or by K. Greenawalt, Speech, Crime, and the Uses of Language, 1989, 9–34. For a recent evaluation see White (note 105) at 299.

[108] See e.g. Wigmore's answer to Justice Holmes' dissent in *Abrams* v. *U.S.*, 14 Ill.L.Rev. 539 (1920), mentioned by White (note 105) at 299f.

[109] Most famous in this regard is the position taken by Justice Black; compare his concurrence in *Smith* v. *California*, 361 U.S.147, 157 (1959) to his dissent in a "commercial speech" case, *Breard* v. *Alexandria*, 341 U.S.622, 650 (1950).

[110] See e.g. J.P. Stevens, The Freedom of Speech, 102 Yale LJ 1293 (1993); S. Shiffrin, The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment, 78 Nw.U.L.Rev. 1212 (1983).

nomic activity. Kozinski and Banner have pointed out that in the few decisions from the first fourty years of this century concerning situations that might involve what today is called commercial speech, the first amendment was rarely even argued in court. Cases involving advertising on billbords or buses raised questions only of due process with regard to property and the liberty to carry on one's business; prohibitions on mailing certain materials at the U.S. Post Office – e.g. lottery advertisements – provoked occasional remarks on free speech and the press. Most of the commercial handbill cases at the time of *Chrestensen* were not seen as raising first amendment questions.[111]

At that time the prevailing opinion in academia did not regard commercial speech as speech within the meaning of the first amendment. Emerson stated: "Such activities fall within the system of commercial enterprise and are outside the system of freedom of expression".[112] But in a 1971 article, Martin Redish, apparently provoked by a decision concerning TV tobacco advertising restrictions, relied on rational self-fulfillment as the foremost first amendment value as well as on the listener's interest in being informed in order to argue in favor of according truthful, nonmisleading commercial speech (primarily advertising) substantial, although limited first amendment protection.[113]

Following the 1976 Supreme Court's decision in *Virginia State Board*, many commentators accordingly saw commercial speech, however it was defined, within the first amendment ambit.[114]

b) Arguing against first amendment protection for commercial speech

Not all commentators, however, followed that lead. Baker attacked *Virginia State Board* arguing in a very principled way that the first amendment is meant to protect speech as a manifestation of individual freedom and choice. Since commercial speech, defined as "profit-motivated" speech, "lacks the crucial connections with individual liberty and self-realization ..., a complete denial of first amendment protection for commercial speech is not only consistent with, but is required by first amendment theory".[115]

Jackson and Jeffries, starting from the premise that the first amendment protects only the values of effective self-government and individual self-fulfillment, which they find both absent from advertising, think that *Virginia State*

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[111] Kozinski/Banner (note 105) at 747, 763–772. According to Kozinski and Banner, the term commercial speech was used for the first time by Judge Skelly Wright in 1971, see *Business Executives' Move for Vietnam Peace* v. *FCC*, 450 F 2nd 642 (D.C.Cir. 1971).

[112] *Supra* note 106 at 311; but see the more extensive treatment id. at 413–417.

[113] M.H. Redish, The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression, 39 Geo.Wash.L.Rev. 429 (1971), at 438, 443 ff., 452; and see Note, Freedom of Expression in a Commercial Context, 78 Harv.L.Rev. 1191 (1965); Note, Developments in the Law, Deceptive Advertising, 80 Harv.L.Rev. 1005 (1967).

[114] Cf. L. Tribe, American Constitutional Law, 1st ed.1978, 651–656.

[115] C.E. Baker, Commercial Speech: A Problem in the Theory of Freedom, 62 Iowa L.Rev. 1, 3 (1976).

Board was wrongly decided. In addition, they make a strong argument that the decision really amounts to the rather strict judicial review of economic regulation that was abandoned in 1937. "In short, the Supreme Court has reconstituted the values of *Lochner* v. *New York* as components of freedom of speech".[116]

This point is taken up by Cox who speaks of the "futility of attempting to maintain a general constitutional distinction between commercial advertising and other commercial activity" and deplores "the degree to which judicial opinion is substituted for the state regulatory authority".[117]

Some air their doubts more cautiously. Schauer, for example, sees several different values underlying the first amendment and concludes that commercial speech, which might need to be defined more broadly than the Supreme Court's definition in *Virginia State Board*, "is not a central theoretical concern of the first amendment". He then points to the danger in including it in protected speech and at the same time providing for exceptions thought to be necessary for commercial speech. He believes this might weaken the first amendment altogether. He concludes by remarking, "[a]lthough it should be clear that I am no enthusiastic proponent of including commercial speech within the boundaries of the first amendment, nor do I consider myself a strong opponent".[118]

Similarly, in explaining why from an economic perspective it makes sense to accord commercial speech less protection than other speech, Posner postulates, "[a] more radical proposition is possible: that there should be no constitutional protection for commercial advertising". That is to say that regulation of advertising should be treated like other economic regulation.[119]

One could also name Blasi who sees the first amendment as primarily based on the idea that free speech can serve in checking the abuse of power by public officials – the "checking value" theory. Following this line of reasoning one would not, for example, have "to extend the mantle of constitutional protection to a wide range of promotional activities by lawyers seeking to represent private interests".[120]

c) Arguing for full first amendment protection for commercial speech

At the other end of the spectrum are those that deny that there is any reason to accord commercial speech less first amendment protection than other speech. The "commonsense distinction" the Supreme Court often alludes to is, in this view, without a constitutional foundation. Over the years Redish has become a strong

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[116] Jackson/Jeffries (note 39) at 1.

[117] A. Cox, The Supreme Court 1979 Term, Foreword: Freedom of Expression, 94 Harv.L.Rev. 1, 33, 35 (1980).

[118] F. Schauer, Commercial Speech and the Architecture of the First Amendment, 56 Univ.Cincinn.L.Rev. 1181, 1203 (1988); idem, Free Speech: A Philosophical Enquiry, 1982.

[119] R.A. Posner, Free Speech in an Economic Perspective, 20 Suffolk Univ.L.Rev. 1, 40 (1986).

[120] V. Blasi, The Checking Value in First Amendment Theory, 1977 American Bar Foundation Research Journal, 523, at 647.

advocate of treating commercial speech exactly as noncommercial speech, allowing for almost no exceptions. He sees no inherent difference as to the values (concerning the speaker as well as the listener) or dangers of commercial speech. Redish's position explicitly rejects the reasoning of Jackson and Jeffries.[121] In his more recent articles, Redish questions the exceptions as to false or misleading advertising and the restrictions on making disputed scientific statements on product labels.[122] But it is remarkable that even this outspoken supporter of indiscriminate treatment of commercial speech admits some reservations. "It should be clear at this point that a corporation's health claims for its products receive full first amendment protection, at least under certain circumstances", specifying those circumstances that would allow for a more generous approach.[123]

A very pronounced statement against treating commercial speech any different than other speech may be found in an article by Kozinski and Banner.[124] The thesis "that the commercial/noncommercial distinction makes no sense"[125] is based on three grounds, quite similar to Redish's approach. First, the reasons offered by the Court for why commercial speech should be protected less, namely that it is more easily verifiable and because of the profit motive more "durable", are not valid. This is shown by the near impossibility of verifying that a cigarette brand "tastes good", and conversely by the durability of many strongly-held artistic or religious opinions.[126] Second, in many instances it is impossible to draw the line between commercial and noncommercial speech, especially with regard to today's lifestyle advertising, sponsoring, or movies that contain advertising elements.[127] Third, the dangers imagined should commercial speech be accorded full first amendment protection are unreal since libel or fraud law would provide sufficient consumer protection.[128] But interestingly, the authors close with a caveat, the fear "that unrestrained speech in the commercial arena will cause graver harm than unrestrained speech in other areas [...] may be justified. But, as we have attempted to demonstrate, it may not". And we therefore, so the argument goes, should at least try to treat it as other kinds of speech.[129]

Farber made a somewhat similar attempt to treat commercial speech and noncommercial speech as identical ten years earlier, although he added an important restriction that in the end brings him closer to those arguing for only limited protection. Since in his opinion "contract law consists almost entirely of rules attach-

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[121] M.H. Redish, Freedom of Expression, 1984, 60ff.; idem, The Value of Free Speech, 130 Univ.Pa.L.Rev. 591, 635 (1982).

[122] M.H. Redish, Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech, 43 Vand.L.Rev 1433 (1990): id., Tobacco Advertising and the First Amendment, 81 Iowa L.Rev 590 (1996).

[123] Redish, 43 Vand. L.Rev 1433, 1454f. (1990) (note 122).

[124] A. Kozinski/S.Banner, Who's Afraid of Commercial Speech?, 76 Va.L.Rev. 627 (1990).

[125] Id. at 628.

[126] Id. at 634ff.

[127] Id. at 638ff.

[128] Id. at 651f.

[129] Id. at 653.

ing liability to various uses of language"[130], he considers advertisement regulation or disclosure requirements as being outside the scope of the first amendment if they serve a "contractual function". "Thus, the problem is to devise a test which will distinguish between regulations involving the first amendment informative aspect of advertising and those involving its non-first amendment, contractual aspect".[131] Since Farber is prepared to see the regulation at case in *Ohralik*[132] as serving a contractual function[133] and therefore not covered by the first amendment, one gets the impression that in effect his position would not change much as compared to the Supreme Court's position. More recently Farber chose a public choice approach that affirmed to a large degree that it makes sense to accord commercial speech lesser than full first amendment protection.[134]

In a remarkable essay, R. Coase looked at the problem from an economist's point of view and had no doubts that advertising belongs to the marketplace of ideas and has informational value. But Coase went on and asked why consumers that are in the market for ideas are assumed to be able to choose whereas consumers that are in the market for goods need to be protected by government regulation. He equally asked why government regulation of speech is seen with utter distrust whereas government regulation of the economy is not supposed to suffer from the same lack of competence and proper motive.[135]

This argument, of course, cuts across the basic assumptions of those who want to grant commercial speech the same elevated, special place that is reserved for the first amendment.It is most difficult for a U.S. constitutional law scholar to swallow since it questions the deeply-held belief that courts should not interfere with economic regulation except in rare instances of arbitrariness. Making commercial speech and other speech based on this rationale equal could well go in an unexpected direction and lower the standard of traditional first amendment protection.

d) Arguing for limited first amendment protection of commercial speech

Most commentators, to be certain, follow the Supreme Court in its belief that commercial speech is speech within the first amendment but needs to be treated differently from other speech.[136]

The doctrinal foundations diverge, of course, as do the modifications that are regarded necessary. Sunstein, for example, wants to reconnect free speech and democratic theory and would therefore not accord commercial speech full first

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[130] D.A. Farber, Commercial Speech and First Amendment Theory, 74 Nw.U.L.Rev 372, 386 (1979).

[131] Id.at 387.

[132] *Supra* note 36.

[133] Id.at 405f.

[134] D.A. Farber, Free Speech without Romance: Public Choice and the First Amendment, 105 Harv.L.Rev. 554, 565–567 (1991).

[135] R.H. Coase, Advertising and Free Speech, 6 J.Legal Studies 1 (1977).

[136] See e.g. Greenawalt (note 107) at 133–134, 321–322; Merrill (note 24) at 205.

amendment protection. He would exclude especially false or misleading advertising.[137]

Neuborne sees the Supreme Court commercial speech decisions as mainly hearer-centered (as opposed to the predominantly speaker-centered general first amendment line of reasoning) and supports restricting some forms of commercial speech that have no hearer-centered first amendment value. His examples are mostly taken from SEC restrictions concerning securities.[138]

Smolla argues that one should start from the premise that commercial speech is speech. So then, Smolla believes that the burden of the argument should lie with those who want to exclude commercial speech from full first amendment protection. He only sees a theoretically sound basis for limiting first amendment protection for the subclass of advertising that does "no more than propose a commercial transaction" because "it is only the linkage between commercial speech and a commercial transaction that gives government the theoretical leverage to presume to regulate the speech at all". If advertising is not selling only "transactional" information but instead "selling fantasies, lifestyle, identities", this reasoning doesn't apply.[139] This is a real inversion of the common argument that it is the informational aspect of advertising that brings advertising within the first amendment ambit. In the end Smolla almost seems to favor rather full first amendment protection.

Other authors question the appropriateness of an all-encompassing theory, especially given the multiple and widely divergent situations that involve commercial speech as well as the multiple aspects of freedom of speech. Shiffrin takes a seemingly modest stand: "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".[140] After exposing his methodology, a methodology that favors balancing and an implicit eclecticism[141], he deals with different commercial speech situations and their relevant features by asking, for example, whether there is a danger of partisan bias on the part of the regulating government.

Starting from somewhat similar methodological premises, but relying more heavily on economic public choice theory, Cass focusses primarily not on the type of speech involved and its value to the speaker or listener, but on the charac-

[137] C.R. Sunstein, Democracy and the Problem of Free Speech, 1993, 135, 220; White (note 105) at 299, 376ff., 390–392, mainly agrees and sees commercial speech as one of several "unexpected beneficiaries" of expansive first amendment doctrine.

[138] B. Neuborne, The First Amendment and Government Regulation of Capital Markets, 55 Brooklyn L.Rev. 5 (1989); see critical remarks by Monaghan and Pinto, ibid. at 65.

[139] R.A. Smolla, Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech, 71 Texas L.Rev. 777, 780f. (1993); id., in: id./Nimmer, Freedom of Speech, 3rd ed. 1996, looseleafe, at 20: 43, 20–94ff.; and see his general insistence on the emotive aspects of expression, R.A. Smolla, Free Speech in an Open Society, 1992, 46ff.

[140] S. Shiffrin, The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment, 78 Nw.Univ.L.Rev. 1212, 1216 (1983); Tribe (note 16) at 896 seems to agree.

[141] Id. at 1251ff.

teristics of the regulation at issue. "There is widespread agreement that limitation of official bias is the principal aim of the first amendment."[142] He sees self-interest and intolerance, concededly not always easy to verify[143], as the criteria of illegitimate government regulation of speech. Consequently, he analyzes commercial speech situations in these terms in applying economic concepts like the principal/agent theorem and especially cost-benefit-analysis.[144] The unavoidable balancing may, done in this way, become more rational. In the end, Cass agrees with many of the results the Court has thus far reached.

Posner, upon whom, among others, Cass relies, refined the formula Judge Hand had used in a 1950 decision concerning the Communist Party in terms of an economic analysis of the law. The formula asks that the costs of regulation, including the loss from suppression of valuable information, be compared to the probability that the speech will do harm, and to the magnitude (social cost) of that harm.[145] Taking into account questions of property rights with regard to information, problems of externalities that are far more common for political than for commercial information, and the possible harm as well as the error costs, Posner agrees that commercial advertising deserves less, if any at all, first amendment protection.[146] And he takes up the point made by Coase but uses it in the opposite way. "It seems paradoxical therefore to allow virtually unlimited regulation of the product (its price, quality, quantity, the conditions under which it is produced, etc.) but to impose a constitutional obstacle (granted, a somewhat porous one) to the regulations of the sales materials for it".[147]

IV. The Emerging Features and Problems of Commercial Speech

It is not this article's aim to answer the commercial speech questions in the U.S. constitutional context. But it seems appropriate to try to extract from the case law and from the doctrinal arguments the main features and problem areas in order to provide a basis for adequately approaching the subject matter.

1. The definitional problem

If one asks whether commercial speech should fall within the first amendment at all, and if so, whether it should be treated like other varieties of speech, one immediately confronts the question of how to define commercial speech.[148]

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[142] R.A. Cass, Commercial Speech, Constitutionalism, Collective Choice, 56 Univ.Cincinn.L.Rev. 1317, 1352 (1988).

[143] Id. at 1354.

[144] Id. at 1361ff.

[145] Posner (note 119) at 1, 7f.

[146] Id.at 40.

[147] Id.at 40.

[148] Merrill (note 24) at 205, 222–236, has dealt extensively with this problem. For a more recent evaluation see e.g. D.F. McGowan, A Critical Analysis of Commercial Speech, 78 Cal.L.Rev. 359, 382–402 (1990).

The value to be accorded commercial speech evidently depends on how it is defined, as do, at least to some extent, the follow-up questions concerning the relation between speech and commercial conduct regulation, the importance of the listener's interest or the role that a profit motive might play. It seems that the notion of commercial speech is too broad to allow it to be taken as a doctrinal shorthand for just one single problem that can be solved uniformly. That does not make definition superfluous, but it might be necessary to define different kinds of commercial speech that need to be treated differently.[149]

And there is, as in many legal definitions, an element of circularity. We have to define commercial speech before we can ask how to treat it, but we only need a definition if we think it necessary to treat it differently. Therefore we define it with the consequences in mind.

Virginia State Board[150], rejecting as irrelevant the content, the profit motive, and the fact that money is spent, referred to the interest of both speaker and listener as a purely commercial one and stated by way of defining commercial speech that the case dealt with speech that does "no more than propose a commercial transaction". One could argue that this has become the core definition. Looked at more closely, it seems to go to the content of the speech, and it might not be as precise as it appears. In *Friedman*[151] the prohibition to practice optometry under a trade name was regarded as concerning commercial speech although the use of a trade name does not really propose a commercial transaction. Similarly, in *Central Hudson* the Court held that advertising to promote the use of electricity did not propose a transaction if this notion is interpreted literally.[152] The same holds true for lifestyle or image advertising or sponsoring.[153] Whether restrictions on the flow of information concerning, for example, earnings estimates to prospective investors in a capital market would meet the definition, seems doubtful.[154] Disclosure requirements, for example information on the content of the product on the label, cannot be said to be speech that proposes a commercial transaction. And yet even the most ardent proponents of full first amendment protection for commercial speech tend to acknowledge that this kind of forced speech might require special treatment.

The definition used in *Central Hudson*[155] – expression solely related to the economic interests of the speaker and its audience – is broader and much less precise. Who is going to define the interests involved? Is lifestyle advertising, from the listeners perspective, not really related much more to her/his lifestyle, going well beyond a purely economic interest? Advertisements by lawyers have been

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[149] This point is often made, see e.g. Shiffrin (note 140) at 1212, 1219ff., or Neuborne (note 138) at 5.

[150] *Supra* note 24.

[151] *Supra* note 38.

[152] See Shiffrin (note 140) at 1212, 1214f.

[153] See Kozinski/Banner (note 124) at 627, 638ff.

[154] Shiffrin (note 140) at 1212, 1214f., 1265f.

[155] *Supra* note 41.

partly justified because the audience needs information about legal services – a concern well beyond mere economic interests.

The profit motive as such is, to be sure, much too universal as to allow for defining commercial speech. Otherwise newspapers, books, and theatre would fall under the definition.[156]

Thus, it seems difficult to formulate a definition that includes all of the cases that arguably might warrant different treatment. For those who see no need or justification to treat commercial speech differently, that comes as no surprise and may even be considered a confirmation of their position.[157]

From the opposing view, it means that there is no single class called commercial speech and no single problem, but that we have to deal with a spectrum that has to be defined by using several criteria. And it need not be defined in a strict sense at all since there may be a continuum of situations requiring flexible evaluation.

Nevertheless one could, starting from the everyday notion of "advertising", expand the definition given in *Virginia State Board* in defining commercial speech as speech made by or on behalf of someone who wants to sell a product (goods or services) and that is closely related to and meant to further the selling.[158] In order to cover disclosure requirements, one must add, inversely, speech that is required by law (because it might not further but rather impede the selling) and closely related to the proposed sale of the product. Most of the Supreme Court decisions on commercial speech reported above would fit this definition. The disclosure requirement in *Riley*[159] concerning the fees of professional fundraisers would probably not be covered since it goes to the potential donors and not to a buyer. But one might argue that this case does not involve a true commercial speech situation.

Using this definition, the puzzle of the newspapers and books that evidently are published "for profit" as well as political speech made in the end for personal profit[160] vanishes. Newspapers are made for profit, but the speech contained in newspapers does not fit the proposed definition. Whether advertising to buy a newspaper, which is covered by the definition, should be treated differently because it concerns the special product "newspaper", may be worth thinking about.[161]

In any case, here as elsewhere, difficulties in drawing a line are not a sufficient reason to refrain from making distinctions if there are material differences. If one is prepared to treat commercial speech flexibly according to differences as to the factors involved, the definitional problem loses some of its importance.

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[156] See Redish (note 113) at 429, 452.

[157] See e.g. Kozinski/Banner (note 124) at 627, 639–647.

[158] Merrill (note 24) at 205, 236, arrives at a tripartite definiton: commercial speech is speech that refers to a specific brand name product or service, made by the speaker with a financial interest in the sale of the product or in the distribution of the speech, and that does not advertise an activity itself protected by the first amendment.

[159] *Supra* note 65.

[160] Redish (note 113) at 429, 452, and Kozinski/Banner(note 124) at 627, 637.

[161] Evidently Merrill (note 24) at 205, 235, thinks it should.

2. Reasons to treat commercial speech differently

As we have seen, cases that would be regarded as involving commercial speech nowadays were dealt with up to the 1960s and early 1970s according to the tests which were normally applied to economic regulation, in part because commercial speech was seen more as part of the conduct of selling. Farber has taken up some of this reasoning by trying to separate the "speech" or informational aspects of advertising from advertising that is part of the contractual arrangement.[162] He has a valid point in mentioning that the whole of contract formation law is part of the problem. But evidently it is difficult to separate the informational and the contractual function, as well as speech and conduct in general.[163]

An argument for protecting commercial speech less is rooted in several different factors: its lower value, its greater potential for causing harm, and its being less vulnerable to the dangers involved in regulation and generally less in need of protection. The lower value argument is often related to general first amendment doctrine. Commercial advertising as a prominent example of commercial speech is almost totally unrelated or, depending on one's view, inversely related[164] to political self-government. It does not serve the speaker's interests in self-fulfillment or freedom of self-expression. The money gained in the ensuing sale may, of course, serve those interests. But at this point, the listener's interest in information comes into the picture.[165]

This switch from the speaker to the listener has not been given much attention but this may in fact indicate that commercial speech is different. First amendment doctrine relies most heavily on the speaker's interest. Without a doubt, the notion of self-government and the press clause both include the process of opinion-building and therefore speakers as well as listeners. The emphasis, however, is on the speaker. In commercial speech situations the speakers' interest goes only to selling the product in order to make a profit, leaving aside rare instances where purely commercial transactions involve ideological issues as it might happen in selling bio-food, for example. Seen from this perspective, the "profit motive" argument becomes somewhat more plausible. Admittedly, politicians often act and speak for their "profit" in a larger or even narrower sense, and books and newspapers are printed "for profit". But the book or newspaper you buy contains speech, just as the politician you "buy" by voting for her or him acts in using speech, and the author (the "seller") typically has a keen interest in this speech aspect. Commercial speech is spoken only to induce people to buy the product and the profit arises immediately out of this transaction. This uniform and close relationship between commercial speech and the profit motive may make the latter more relevant in this context.

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[162] Farber (note 130) at 372, 386f.
[163] Cass (note 142) at 1317, 1341ff.
[164] For this view, see e.g. Wright (note 1) at 5ff., 135ff.
[165] *Virginia State Board* (note 24) at 763.

The Supreme Court, in allowing broader regulatory powers with respect to commercial speech, has stated that the truth of commercial speech "may be more easily verifiable" and that commercial speech "may be more durable".[166] Many do question these assumptions.[167] But these assumptions seem not too far from the point. According to Posner, there are fewer externalities in the advertising market than in the general information market, and the profit motive will assure that the level of information will not be far from optimal. Product-related claims will be easily verified in most instances – much more so than, for example, claims in the political sphere. As to scientific product-related claims that may not be easy to verify, consumers are ill-equipped to evaluate them, and competing producers, "unlike competing scientists in the market for scientific ideas", may have weak incentives to interfere.[168]

The lack of consumer experience supports the greater harm argument. It can be opposed on the ground that political speech may cause much greater harm if the clear and imminent danger test is strictly applied. But if seen together with the question of what harm regulation of commercial speech may create, it might be accorded some relevance. The "harm to consumers" argument applies mostly to disclosure requirements or to forbidding misleading advertisements. The *Zauderer* case[169] provides a telling example. In addition, it shows that the argument often used in the first amendment context – the cure to evil speech is not forbidding it but having more speech or government counterspeech – would be of no help in this kind of situation. A consumer suffering from an allergy has a strong interest in knowing about the product's ingredients beforehand. This consumer could not be effectively protected in any other way than by requiring indications on the label.

With regard to the dangers involved in regulating commercial speech, it seems plausible that they are mostly the same as in other kinds of economic regulation. The ban on lawyer advertising or on advertising prescription drug prices may favor the vested interests of the profession and hamper competition – but that holds true for much of economic regulation.[170] That was the reason for Coase to ask for treating both kinds of regulation indifferently.[171] On the other hand, the dangers of self-interest and intolerance, as defined by Cass, or the danger of partisan decision-making as referred to by Shiffrin, are usually not at issue in commercial speech regulation to the degree they are in other speech regulation.[172]

When one sees these characteristics of commercial speech and its regulation, and if one does not take each aspect individually and point out its maybe uncertain

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166 *Virginia State Board* (note 24) at 771f.

167 For example Redish, 130 Univ.Pa.L.Rev 591, 633 (1982) (note 121); Kozinski/Banner (note 124) at 627, 634ff.

168 Posner (note 145) at 1, 39f.

169 *Supra* note 49.

170 Jackson/Jeffries (note 39) at 1, 25ff.

171 Coase (note 135) at 1, 5ff.

172 Cass (note 142) at 1317, 1354ff.

boundaries, one may well think that there are sufficient reasons to treat commercial speech differently from varieties.

3. Economic regulation and regulation of commercial speech

It has become, in reaction to "Lochnerism" and after the turn that the Court took in 1937, a seldom questioned truth that economic regulation should receive deferential judicial treatment whereas restrictions on free speech should require strict scrutiny. In the present context it is unnecessary to evaluate whether this different treatment is vulnerable to Coase's criticism which sees no reason to treat the marketplace of goods different from the marketplace of ideas and mistrusts government regulation of both markets.[173] There simply is no chance at present that this bifurcated approach will be abandoned.

Instead, given this bifurcation, it is the similarity of regulating the economy and regulating advertisements that troubles many commentators who see protecting commercial speech under the first amendment as a way of reviving the *Lochner* approach to economic regulation.[174] Jackson and Jeffries have pointed out that in the *Virginia State Board* situation the same result – protecting smaller pharmacies from price competition – could be reached by setting fixed prices on prescription drugs. Such a regulation would without question muster any constitutional test.[175] Since many economic activities involve some kind of speech – even concluding a contract is made by "speech" – there is evidently a tension inherent in this dichotomy. To treat an economic activity, as soon as speech is involved, entirely different from other economic activity seems not very plausible. On the other hand, there are different degrees of speech involved in different situations. This makes it hard to neglect the speech aspect in any case that involves commercial speech especially if the term is only loosely defined. This may be an additional argument for measuring commercial speech on a flexible scale.

Leveling to some degree the distinction between regulation of commercial speech and economic regulation also affects the "paternalism" logic. Since paternalistic regulation that forbids, for example, selling cigarettes or liquor is accepted without further questioning[176] as is the law that prohibits certain fee arrangements agreed upon by a lawyer and his client, it becomes harder to explain why restricting advertising should be so much more paternalistic. In both situations, the government imposes its view of what is good for the public and restricts individual choice. One might argue, of course, that restricting speech is of a different quality since it restrains the discourse that might lead to changing the law. But as mentioned above, banning advertising is not banning talk about whether the advertisement ban should be lifted.

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[173] Coase (note 135) at 1, 5–8. But see the opposite view presented by Posner (note 119) at 1.

[174] Jackson/Jeffries (note 39) at 32–34; Cox (note 117), at 1, 33–35.

[175] Jackson/Jeffries (note 39) at 32–34.

[176] See e.g. the state statute at issue in *Lamar Outdoor Advertising* v. *Mississippi State Tax Commission*, 701 F 2nd 314 (5th Cir.1983).

Two more aspects have to be taken into account. A ban on tobacco advertising is usually defended particularly on the ground that tobacco advertisements are aimed at, or most likely to influence, children.[177] Since children are exposed to educational efforts which in turn could be defined as containing "paternalistic" elements, the anti-paternalism argument loses some of its weight here. Second, with regard to disclosure requirements one has to acknowledge that they do not really contain elements of paternalism.[178] Forcing the seller to provide more information that the consumer might use in making her or his choice is not paternalistic in the sense that the notion is used here. The government does not keep information from the public and does not take away the public's right and ability to choose, but instead enhances it. In additon, it is remarkable that the self-determination versus paternalism rationale is not applied to advertising that may contain manipulative elements.

Bringing commercial speech closer to economic regulation might, in addition, affect the level of scrutiny applied to the legislative facts regarding the aim and the "fit" between the means and end of the legislation. Not surprisingly, this question arises again and again in commercial speech cases. It is seen as one of the weaknesses or, depending on one's view, as a strength of the *Central Hudson* test that it does not really define the level of scrutiny. In *Posadas*,[179] the Court dealt with this point in a very generous way and received much criticism for it. Whether it applied the test in a more stringent way in *Coors*[180] and *44 Liquormart*, as some assume[181], does not seem so self-evident. The statutes at issue in these two cases were really hard to defend, especially given the narrowly defined end they were thought to achieve, the numerous exceptions, and the overall irrational scheme. The Canadian Supreme Court was split with regard to the question of which level of scrutiny to apply in advertisement bans.[182] The same holds true for, for example, the Circuit Court decision on disclosure requirements concerning hormone treatment of cows.[183] If one accepts the premise that commercial speech is not to be accorded full first amendment protection, it seems logical to apply a more flexible standard in this respect too.

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[177] See e.g. D.H. Lowenstein, "Too Much Puff": Persuasion, Paternalism, and Commercial Speech, 56 Univ.Cincinnati L.Rev. 1205, 1212ff. (1988), and the reasoning in the Canadian Supreme Court decision striking down as unconstitutional the act that totally banned tobacco advertising in *R.J.R. Macdonald, Inc.* v. *Attorney General of Canada*, (1995) 3 S.C.R. 199, at 344f.

[178] See Lowenstein (note 177) at 1237ff.; D.W. Garner/R.J. Whitney, Protecting Children from Joe Camel and his Friends, 46 Emory Law Journal 479 (1997).

[179] *Supra* note 78.

[180] *Supra* note 89.

[181] Sullivan (note 47) at 123, 126.

[182] *Attorney General of Quebec* v. *Irvin Toy Ltd.*, (1989) 1 S.C.R. 927, 979 ff, 992ff, 1007; *R.J.R. MacDonald, Inc.* v. *Attorney General of Canada*, (1995) 3 S.C.R. 199, at 282ff. 343.

[183] *International Dairy Foods Association* v. *Amestoy*, 92 F. 3rd 67 (2nd Cir.1996) (note 67).

4. The "greater includes the lesser" rationale

Interestingly enough, Jackson and Jeffries used this argument already in their 1979 article. Starting from "the familiar notion that the greater power normally includes the lesser" they think it appropriate to apply this notion in a situation "in which the legislature has not exercised its 'greater power' over the underlying economic activity" by prohibiting it but only banned advertising it.[184] The use of this argument in *Posadas*[185] has met with heavy criticism[186]. Stevens, who in *Posadas* saw "an elegant question of constitutional law" inherent in the greater-lesser argument[187] called its use in *Liquormart*[188] an erroneous performance of first amendment analysis because "banning speech may sometimes prove far more intrusive than banning conduct". Usually it is argued that by forbidding speech the government tries to achieve surreptitiously what it can not achieve by acting in the open, and that although some action might be prohibited it does not follow that speech should be prohibited that advocates legalizing the action or that even argues in favor of violating the ban.[189]

There is much to this argument. The first amendment values of self-government and self-fulfillment require that in some situations speech has to be uninhibited, even if the action it is related to is unlawful. But it is not quite evident that this applies to all forms of commercial speech. An indication of some difference might be found in the Court's continuing insistence that in commercial speech cases only "truthful information about lawful activity" is covered by the first amendment – a limitation that does not exist in general first amendment doctrine.[190] As Jackson and Jeffries put it, "[i]f independent first amendment significance did exist in this instance [sc. in advertising an activity the state could forbid], it would also exist when the state has declared the underlying transaction unlawful". Evidently, however, no one assumes this.[191]

It is worth quoting what J.St. Mill as one of the strongest defenders of free speech had to say with regard to this issue: "Whatever it is permitted to do, it must be permitted to advise to do. The question is doubtful only when the instigator derives a personal benefit from his advice; when he makes it his occupation, for subsistence or pecuniary gain, to promote what society and the State consider to be an evil ... Fornication, for example, must be tolerated, and so must gam-

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184 Ibid. at 34/5.

185 *Supra* note 78.

186 See for example P. Kurland, *Posadas de Puerto Rico* v. *Tourism Co.*: "Twas Strange", "Twas passing strange", "Twas wondrous Pitiful", 1986 Sup.Ct.Rev. 1, 13.

187 *Supra* note 78 at 363; and one should remember that Blackmun in *Bigelow* (note 22) at 825 expressly left open the "precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit".

188 *44 Liquormart, supra* note 91, at 511.

189 See e.g. M.L. Miller, Note, First Amendment and Legislative Bans of Liquor and Cigarette Advertisements, 85 Col.L.Rev. 632, 651 (1985).

190 See e.g. *Bigelow* (note 22), *Virginia State Board* (note 24), *Central Hudson* (note 41).

191 Jackson/Jeffries (note 39) at 1, 65.

bling; but should a person be free to be a pimp, or to keep a gambling-house? ... There are arguments to both sides".[192]

Seen from the speaker (the advertising business firm) as well as from the listener (the consumer) forbidding smoking impinges much more heavily upon their rights or interests than forbidding advertising. For both persons involved there seems to be a clear greater-lesser situation. It would be only from an institutional or functional perspective, not from the perspective of the individuals involved, that a ban of advertising could be seen as more intrusive. And if one looks closer at the parallel of advocating unlawful action that takes place in the field of hate speech, for example, the difference becomes evident. It is highly dubious whether any producer might want to advertise cigarettes once smoking is prohibited.

On the other hand, it is quite clear that a ban on smoking cigarettes does not affect the tobacco companies' first amendment right to argue in favor of lifting the ban and to influence people in ways that might be called "indirect advertising" to pressure politicians to lift the ban. But this is not commercial speech as circumscribed above – i.e. closely related to making a commercial transaction – but speech related to changing the law so that subsequent commercial transactions would be legal.

5. "Truthful and nonmisleading statements"

The second part of the phrase often used by the Court restricts first amendment protection of commercial speech to truthful and nonmisleading statements. False or misleading statements are *a limine* outside the first amendment. Forbidding them amounts only to economic regulation. Proponents of full first amendment protection for commercial speech cannot accept this deviation from general first amendment doctrine where it is undisputed that in order to protect free speech effectively it is essential to protect some kind of error.[193] The *New York Times v. Sullivan* decision granted first amendment protection to speech accusing a public official of unlawful behaviour even though that speech contained some false statements of fact. Otherwise a robust public discussion on matters of public interest would not be possible.[194]

The reason for not extending this protection to commercial speech may be based on the almost total absence of the speaker's first amendment interest. Since the listener – the consumer – is interested only in accurate advertisement information, there seems to be no need to protect misleading commercial speech.

This *a limine* exception is not without problems. In some instances, and they may not be so rare, it might be quite difficult to assess whether commercial speech is misleading, either because of what it says or of what it does not say. Some believe tobacco advertising to be inherently misleading because it does not, in spite

[192] J.St. Mill, On Liberty, cited in: Lowenstein (note 177) at 1205, 1246.

[193] Redish, 43 Vand.L.Rev. 1433, 1454–1460 (1990) (note 122); Sullivan (note 47) at 123, 152ff.

[194] *New York Times Co.* v. *Sullivan*, 376 U.S.254 (1964).

of the required warnings, tell the truth about the dangers of addiction.[195] In the lawyer advertisement cases, some justices saw the advertisements as inherently misleading given the layman's understanding and the role that quality of service plays here.[196]

Given this uncertainty, it might be more appropriate not to draw a sharp line and take potentially misleading statements *a limine* outside the first amendment. Of course this presupposes that commercial speech is not accorded full first amendment protection. Applying the *New York Times v. Sullivan*, or a similar rationale to commercial speech would endanger consumer protection. Conversely, the approach that Stevens prefers, namely to grant truthful, nonmisleading information and advertising full first amendment protection would equally seem to put too much trust in this line. Consequently the majority's approach may, in the end, be the most appropriate one.

V. Conclusion

Commercial speech is a fascinating subject. The U.S. commercial speech doctrine and case law provides a lively picture of its special features. Oscillating between speech and economic activity, it evades a clear-cut answer because of its bifurcated approach to these modes of human activity. Its ambivalent character makes itself felt in the definitional problem as well as in the "greater-includes-lesser" puzzle or the reasons that are given to support either full first amendment protection, no first amendment protection at all, or an intermediate level of protection. The Supreme Court 25 years after *Virginia State Board* is still struggling to find the proper approach. In some instances it tends to provide some commercial speech substantial first amendment protection whereas sometimes it treats it more like economic regulation. The divergence may be partly explainable in terms of the kind of regulation involved, but to a substantial degree it is tied to differing conceptions of the problem and its place within constitutional law. The doctrinal views are still more diverse, ranging from advocating for (nearly) full first amendment protection to denying it any first amendment value. A closer look at the case law and the proffered arguments with regard to the definitional problem, the underlying value judgements, and some of the prominent rationales, as is provided here, may allow for a more rational evaluation of this puzzling area of constitutional law.

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[195] V. Blasi/H.P. Monaghan, The First Amendment and Cigarette Advertising, 256 Journal of the American Medical Association 502, 505–507 (1986). Blackmun in concurring, in: *Discovery Networks* (note 72) at 437, referred to his remark in *R.A.V.* v. *St.Paul*, 505 U.S.377, 415 (1992) that "the Court will never provide child pornography or cigarette advertising the level of protection customarily granted political speech", thereby removing it from his advocacy for full first amendment protection for "truthful, nonmisleading" advertising.

[196] See *Bates v. State Bar* (note 32), at 391ff. (dissent by Powell); *Zauderer* (note 49 at 673ff. (dissent by O'Connor).