Washington and Lee Law Review

Volume 47 | Issue 4 Article 12

Fall 9-1-1990

Eliminating Distinctions Between Commercial And Political Speech: Replacing Regulation With Government Counterspeech

ELIMINATING DISTINCTIONS BETWEEN COMMERCIAL AND POLITICAL SPEECH: REPLACING REGULATION WITH GOVERNMENT COUNTERSPEECH

The first amendment to the United States Constitution protects an individual's right to engage in free speech without fear of government retribution.[1] Historically, the first amendment provides full protection to political speech based on the belief that freedom of expression is necessary both to obtain a political truth and to promote a representative and participatory government.[2] Although political speech continues to maintain a preferred status,[3] the courts have not afforded the same protections to certain other types of speech.[4] In particular, in 1942 the United States Supreme Court initially determined that "purely commercial advertising" was not worthy of any first amendment protection.[5] Thirty-five years later,

---

1. U.S. CONST. amend. I. The first amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

2. *See* Whitney v. California, 274 U.S. 357, 374 (1927), *rev'd*, 395 U.S. 444, 449 (1969) (Brandeis, J., concurring) (elaborating on history of framers' intent in enacting first amendment as preferring form of government in which deliberative forces prevail over arbitrary ones); *infra* note 15 (discussing exceptions to unqualified protection of political speech).

3. *See* Boos v. Barry, 485 U.S. 312, 318 (1988) (commenting on central importance of protecting speech on public issues); Connecticut Citizens Action Group v. Town of Southington, 508 F. Supp. 43, 47 (D.Conn. 1980) (noting that, in first amendment analysis, political speech holds preferred position).

4. *See* New York v. Ferber, 458 U.S. 747, 756-64 (1982) (holding that, because of child pornography's effect on physical and mental health of children, states granted wide latitude to regulate pornographic publications); NLRB v. Gissel Packing Co., 395 U.S. 575, 618, *reh'g denied*, 396 U.S. 869 (1969) (holding that employers' threats of retaliation for labor activities of employees are subject to regulation as unfair labor practice); Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969) (holding that states constitutionally may review incitement to riot); Roth v. United States, 354 U.S. 476, 481-85, *reh'g denied*, 355 U.S. 852 (1957) (holding that first amendment does not protect obscenity); Beauharnais v. Illinois, 343 U.S. 250, 265-67, *reh'g denied*, 343 U.S. 988 (1952) (upholding statute that proscribed publications portraying class of citizens in defamatory light); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (holding that fighting words are distinct type of speech punishable without implicating first amendment).

5. *See* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (holding that Constitution does not limit state and municipalities' regulation of use of streets for purely commercial advertising). In *Valentine*, the Supreme Court considered whether restricting distribution of commercial speech is an unconstitutional abridgment of freedom of speech. *Id.* at 54. The respondent in *Valentine* distributed handbills that solicited visitors to view his submarine exhibit. *Id.* at 52-53. Respondent subsequently was prosecuted for violating a New York City ordinance that proscribed the distribution of handbills containing commercial advertisements. *Id.* at 53-54. Respondent claimed in his defense that because he added information of "public interest" to the flip side of the handbill, he did not violate the ordinance. *Id.* at 55.

In determining whether the respondent had violated the ordinance, the Supreme Court

however, the Supreme Court deviated from its original position and moved toward granting commercial speech[6] the same treatment that the Court afforded to political speech under the first amendment.[7] Thus, without completely overruling the nonprotected status of commercial speech, the Court broadened the first amendment protection afforded to commercial speech, which at the very least tempered the Court's prior restrictions on commercial speech.[8]

---

reasoned that, although the government may not interfere with the dissemination of public interest information in public thoroughfares, the Constitution does not preclude such interference when the information is of a commercial nature. *Id.* at 54. Although not expressly stated, the Court focused the distinction between "public interest" information and "commercial" information on two issues. *Id.* First, the Court reasoned that commercial speech traditionally does not address political or social issues. *Id.* at 55. Second, the Court further reasoned that motivation for commercial speech primarily, if not solely, is to generate profit rather than to participate in public discourse. *Id.* Therefore, the Supreme Court concluded that the double-sided handbill the respondent distributed containing commercial matters adequately constituted commercial speech to violate the city ordinance. *Id.*

6. *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385, *reh'g denied*, 414 U.S. 881 (1973) (defining commercial speech as speech that does no more than propose commercial transaction); *also* BLACK'S LAW DICTIONARY 245 (5th ed. 1979) (defining commercial speech as "speech that advertises a product or service for profit or for business purpose").

7. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976); Bigelow v. Virginia, 421 U.S. 809, 818 (1975); *also infra* note 8 (discussing extent of unqualified protection given to commercial speech). The Supreme Court in *Virginia Pharmacy* considered whether a Virginia statute that prohibited licensed pharmacists from advertising the prices of prescription drugs was unconstitutional under the first and fourteenth amendments to the United States Constitution. *Id.* at 749-50. In *Virginia Pharmacy* appellees were drug consumers who claimed that they would benefit if the State Pharmacy Board lifted the prohibition on advertising prescription drug prices. *Id.* at 753. The appellees further claimed that the first amendment protects prescription drug users' right to receive information from pharmacists. *Id.* at 753-54. Appellants, the State Pharmacy Board, contended that drug price information was commercial speech, and therefore did not merit full first amendment protection. *Id.* at 758.

In determining whether consumers have a first amendment right to receive prescription drug prices, the United States Supreme Court initially noted that, because of extensive state regulations overseeing the conduct of pharmacists, release of drug price information would not affect adversely the professionalism of pharmacists. *Id.* at 766-69. The state legislature, the Court offered, may protect the health and well-being of its citizens by regulating pharmacists' conduct, but not by suppressing otherwise legal information of drug pricing. *Id.* at 769. The Court conceded that commercial speech is not immune from state regulation, but reasoned that when a statute uses the content of speech to bar its dissemination, that statute is unconstitutional. *Id.* at 770.

Therefore, the *Virginia Pharmacy* Court concluded that speech which does "no more than propose a commercial transaction" does not lack first amendment protection. *Id.* The Court further held that consumers and society in general have an interest in the free flow of commercial information which allows all individuals to make the most educated and informed private economic decisions. *Id.* at 770-73.

8. *See Virginia Pharmacy*, 425 U.S. at 755 (holding that decisions subsequent to *Valentine* relax nonprotected status of commercial advertising in favor of protection when first amendment interest in free flow of information outweighs state interest in regulating); Bigelow v. Virginia, 421 U.S. 809, 819-20 (1975) (asserting that holding in *Valentine* permitted

The Supreme Court deviated from its original nonprotectionist position and moved toward granting commercial speech first amendment protection on the ground that states have no constitutionally derived interest in depriving consumers of truthful, nonmisleading information necessary for the consumers' informed decisionmaking.[9] The Court reasoned that individual consumers' and the general public's constitutional interest in the free flow of commercial information outweigh the state's interest in regulating commercial speech.[10] The Court, therefore, rejected the contention that, because advertisers speak to make money and not to participate in democratic government, the advertisers' economic motive disqualifies them from protection under the first amendment.[11]

After the Supreme Court's grant of first amendment protection to commercial speech,[12] the Court subsequently retreated by affording only qualified protection to commercial speech.[13] Instead of allowing complete protection for commercial speech, the Supreme Court upheld state regulation of certain commercial speech by identifying compelling state interests that outweigh the first amendment interest of listeners to receive information.[14]

---

governmental regulation of commercial advertising, but that not all such regulations would be immune from constitutional challenge); *also Valentine*, 316 U.S. at 54 (holding that only regulation of "purely commercial advertising" would be immune from review). The *Bigelow* Court is implying that the *Valentine* decision would support regulation of "partially" commercial advertising. *Bigelow*, 421 U.S. at 820 n.6.

9. *See Virginia Pharmacy*, 425 U.S. at 763-64 (referring to consumer's and society's interest in free flow of commercial information); Bigelow v. Virginia, 421 U.S. 809, 822 (1975) (same).

10. *See Virginia Pharmacy*, 425 U.S. at 463-65 (holding that free flow of information is necessary to enlighten public decisionmaking in democracy and, therefore, outweighs state interest in regulation); *also* Bigelow v. Virginia, 421 U.S. 809, 826-27 (1975) (holding that *Bigelow* Court did not have to decide expressly that first amendment interest outweighs public interest in regulation, but that future courts must balance two interests and, in some cases, first amendment interest could prevail).

11. *See Virginia Pharmacy*, 425 U.S. at 762-63 (holding that advertisers' economic interests should not disqualify advertisers' speech from first amendment protection); Bigelow v. Virginia, 421 U.S. 809, 818-21 (1975) (holding that advertisers' motive of financial gain should not narrow first amendment protection of commercial advertising); *also* Note, *Developments in the Law: Deceptive Advertising*, 80 HARV. L. REV. 1005, 1027 (1967) (disclaiming profit motive or desire to influence private economic decisionmaking as means of distinguishing commercial speech from political speech).

12. *See supra* notes 9-11 and accompanying text (discussing Supreme Court's peak protection for commercial speech).

13. *See infra* note 14 and accompanying text (discussing Supreme Court's gradual withering of support for protection of commercial speech).

14. *See* Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 342-43 (1986) (holding that state can ban truthful advertising of casino gambling to reduce demand for casino gambling and to protect health, safety and welfare of citizens); Metromedia, Inc. v. San Diego, 453 U.S. 490, 503-12 (1981) (holding that state can ban commercial billboards to improve traffic safety or aesthetics of city, regardless of lack of regulation of political billboards); Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561-66 (1980) (holding that state can regulate commercial informational advertising by electric utility as long as regulation advances state's substantial interest in energy conservation); *cf.*

Thus, the Court's recognition that certain state interests could override an individual's first amendment interest gradually has eroded the constitutional guarantee of free commercial speech that the Court earlier had espoused.[15]

The Supreme Court based its retreat from protecting commercial speech on a "commonsense" distinction between commercial speech and other types of speech.[16] The Court supported the distinction on the grounds that commercial speech is both more "verifiable"[17] and more "durable"[18] than political speech.[19] First, in elaborating on verifiability, the Court reasoned that because commercial speakers create and produce the products advertised, commercial speakers do not need to compete in a commercial "marketplace of ideas"[20] to provide an accurate and verifiable advertisement.[21]

Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 540-43 (1980) (holding that state cannot prohibit discussion of controversial political issues in billing envelopes just to protect singular view from being forced on captive audience).

15. *See supra* note 14 (listing cases in which court has deferred to asserted governmental interest in regulating commercial speech despite individual's first amendment interest); *cf.* New York Times Co. v. United States, 403 U.S. 713, 730 (1971) (developing exception to protection of political speech if speech will cause direct, immediate, and irreparable harm); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that advocacy of use of force or law to effect political and economic change is not protected if speech is intended to produce imminent lawless action and is likely to produce such action); Near v. Minnesota, 283 U.S. 697, 716 (1931) (creating exception to protection of political speech under first amendment if speech obstructs recruiting of military or if speech publishes sailing dates of troops).

16. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976) (distinguishing speech that does nothing more than propose commercial transaction from other types of speech).

17. *See infra* notes 20-24 and accompanying text (defining and discussing verifiability as grounds for distinguishing commercial from political speech).

18. *See infra* notes 26-28 and accompanying text (defining and discussing durability as second ground for distinguishing commercial from political speech).

19. *Virginia Pharmacy*, 425 U.S. at 771 n.24; *see also* Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n, 447 U.S. 557, 565 n.6 (1980) (stating that, because commercial speech is offspring of economic self-interest and other types of speech are not, commercial speech is different and theoretically more resilient when regulated).

20. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (outlining Court's first use of "marketplace of ideas" analysis). Holmes argues that truth is the power of thought to become accepted publicly after a free trade of ideas, and therefore, competition in a marketplace of ideas results in ultimate good. *Id.*

21. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 772 n.24 (1976). The *Virginia Pharmacy* Court reasoned that the goal of freedom of expression is to insure the free flow of truthful and legitimate information. *Id.* The Court further reasons that, because commercial speech is distinct from other types of speech, the Court must afford commercial speech a different degree of protection to insure that the initial goal of unimpaired truthful information is realized. *Id.*; *see also* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (stating that first amendment preserves uninhibited marketplace of ideas in which truth ultimately prevails); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776-77, *reh'g denied*, 438 U.S. 907 (1978) (holding that speech from corporation rather than from individual is still indispensable to decisionmaking in democracy); *Virginia Pharmacy*, 425 U.S. at 765 (holding that free flow of commercial information insures public interest in rational decisionmaking); Bigelow v. Virginia, 421 U.S. 809, 828-29 (1975) (holding that policy of first amendment favors dissemination of information and opinions free from

The Court further reasoned, however, that political speakers such as the press[22] rely on soliciting information from others before disseminating the information to the public.[23] Therefore, the Court concluded that the ability of commercial speakers independently to create advertisements makes commercial speech more verifiable than political speech which requires the input of others before entering the marketplace of ideas.[24]

In addition to the verifiability of commercial speech, the Court maintained that durability is a second ground for distinguishing commercial speech from political speech.[25] The Court reasoned that commercial speech is more durable than political speech because to a commercial speaker advertising is absolutely imperative as the medium to gain product visibility and eventual sales, neither of which is a primary goal for a political speaker.[26] Therefore, the Supreme Court reasoned that the state's interest in insuring clarity in advertisements by limiting the freedom of commercial expression never will force the seller into entirely foregoing advertising.[27] Conversely, the Court reasoned that limiting political speech permanently undermines the possibility of a participatory democracy dependent on the free exchange of ideas.[28]

Later, the Supreme Court further expanded the distinction between commercial and political speech by determining that, although the free flow of truthful, legitimate information is important,[29] the state nonetheless may limit the flow of truthful commercial advertising if such limitation furthers

---

governmental action). *See generally* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (stating theory of United States Constitution that free trade of ideas results in collective good).

22. *See* Mill v. Alabama, 384 U.S. 214, 219 (1966) (defining constitutional role of press as political speaker in informing and educating public, in offering criticism, and in providing forum for discussion and debate).

23. *Virginia Pharmacy*, 425 U.S. at 772 n.24.

24. *See supra* notes 16-23 and accompanying text (distinguishing verifiability of commercial and political speech).

25. *Virginia Pharmacy*, 425 U.S. at 772 n.24.

26. *Id.*

27. *Id.* The *Virginia Pharmacy* Court assumes that commercial speakers are so dependent on advertising to maintain profit margins that commercial speakers would rather comply with state regulations than forego advertising altogether. *Id.*

28. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978) (stating that individuals making contributions to political campaigns or to groups organized on behalf of express interests are engaging in protected speech indispensable to democratic decisionmaking); Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) (stating that speech concerning public affairs is essence of self-government); Associated Press v. United States, 326 U.S. 1, 20, *reh'g denied*, 326 U.S. 802 (1945) (stating that self-government is undermined when government suppresses competing views on public issues from opposing scrutiny); *supra* note 21 (listing cases where protection of political speech preserves a functioning democracy); *also* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 24-26 (1948) (stating that first amendment primarily thought to be instrument designed to enlighten public decisionmaking in democracy).

29. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 772 n.24 (specifying goal of freedom of expression as free flow of truthful information).

a substantial state interest.[30] The Court determined, however, that if a state is regulating commercial speech that is neither misleading nor illegal, the state not only must have a substantial interest in regulating the speech but the state also must narrowly tailor the regulation to protect the substantial interest.[31]

---

30. *See* Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563-65 (1980). In *Central Hudson*, the Court considered whether a regulation of the Public Service Commission of the State of New York that completely banned an electric utility's advertisements promoting the use of electricity violated the first and fourteenth Amendments of the United States Constitution. *Id.* at 559. The *Central Hudson* Court noted that while banning promotional advertising, the Commission's order explicitly permitted "informational" advertising designed to level electrical consumption from peak periods to low periods. *Id.* at 561. The Court reasoned that, because of the commonsense distinction between commercial and political speech, the former is accorded lesser protection than other constitutionally guaranteed expressions. *Id.* at 563-64. Therefore, the Court further reasoned that the protection available for particular commercial expression turns on the nature of both the expression and the governmental interests which the regulation served. *Id.*

The *Central Hudson* Court then outlined a four-part analysis for commercial speech cases. *Id.* at 567. First, the reviewing court should determine whether the expression is subject to first amendment protection. *Id.* The Court noted that this prong requires that the speech be both lawful and not misleading. *Id.* Second, the reviewing court must determine whether the asserted governmental interest is substantial. *Id.* The Court cautioned that the reviewing court must answer both prongs affirmatively to proceed to the third prong of whether the regulation directly advances the governmental interest asserted. *Id.* The final question for the reviewing court is whether the regulation is more extensive than necessary to serve the asserted interest. *Id.*

In applying the four-pronged test, the *Central Hudson* Court conceded that the promotional advertising was truthful and legal information. *Id.* The Court also recognized that the state's interest in energy conservation was substantial and that the order restricting promotional advertising advanced the state's interest. *Id.* at 569. However, the Court reasoned that a complete ban on promotional advertising is not the least restrictive means to achieve the desired end of energy conservation. *Id.* at 570-71. Thus, in striking down the Commission's order, the Court concluded that the order could not withstand constitutional scrutiny because advertisements that would not impede energy conservation indiscriminately were prohibited as well as the advertisements which did impede the state's interest. *Id.* at 567-72.

31. *Id.* at 564-65. *But cf.* Board of Trustees of State Univ. of New York v. Fox, 109 S. Ct. 3028 (1989) (holding that means need only be "reasonable fit" with end rather than "narrowly tailored" to end). In *SUNY*, the Court considered whether governmental restrictions upon commercial speech need to be the least restrictive means necessary to achieve a desired end. *Id.* at 3030. SUNY claimed that by holding a "Tupperware party" (sale of household goods) in a student's dormitory room, American Future Systems, Inc. violated university regulations that prohibit the use of school property for private commercial enterprise. *Id.* In response, students claimed SUNY violated their first amendment rights by prohibiting "commercial invitees" from entering students' rooms. *Id.*

In determining whether the regulation violated the students' first amendment rights, the Supreme Court analyzed the propriety of SUNY's restrictions on commercial speech by using the four-pronged test outlined in *Central Hudson*. *Id.* at 3032; *also supra* note 29 (outlining *Central Hudson* four-prong test). Under the first prong, the parties agreed that the speech at issue was legal and not misleading, and, therefore, was entitled to first amendment protection. *Id.* Under the second and third prongs, the Court maintained that the asserted governmental interest in supporting an educational rather than a commercial atmosphere at the University

As the Supreme Court shifted from maximum first amendment protection of commercial speech to its current position of qualified protection, the Court created a bright line distinction between commercial and political speech.[32] In making that distinction the Court relied on its assumptions that commercial speech is both more verifiable and more durable than political speech.[33] Because the Court has created clear delineations between commercial speech and political speech and afforded commercial speech a lesser value under the first amendment, the Court effectively has relegated commercial speech beyond the bounds of most first amendment protection.[34]

By using the bright line distinction between commercial speech and political speech to restrict the first amendment protection of commercial speech, the Supreme Court unjustifiably has retreated from its previous position of granting commercial speech full first amendment protection.[35] First, the Court's retreat is unjustifiable because the Court's determination that commercial speech is both more verifiable and more durable than political speech is based on faulty assumptions.[36] Second, even if the Court's determination regarding the verifiability and the durability of commercial speech is correct, the Court does not possess the ability to differentiate accurately between the two types of speech.[37]

---

was substantial and was advanced by the regulation. *Id.*

However, with regard to the final prong that the regulation be no more extensive than necessary, the Court reasoned that a state need not impose the "least restrictive means" to comply with the language of the *Central Hudson* Court. *Id.* at 3032-34. Rather, the Court required only a "reasonable fit" between the legislature's ends and the means chosen to accomplish those ends. *Id.* at 3035. The Court justified the liberalization of the test by placing the affirmative burden of establishing the reasonableness of the fit on the government. *Id.* Therefore, the Court remanded the case to the Court of Appeals to determine whether the means reasonably fit with the asserted ends to justify the university regulation. *Id.* at 3038.

32. *See supra* notes 16-31 and accompanying text (discussing Supreme Court's distinctions between commercial and political speech).

33. *See supra* notes 16-28 and accompanying text (discussing Supreme Court's grounds and rationale for believing that commercial speech is both more verifiable and more durable than political speech).

34. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56, *reh'g denied*, 439 U.S. 883 (1978) (holding that commercial speech is afforded only a limited measure of protection consistent with speech's subordinate position in scale of first amendment values); *cf.* Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U.L. REV. 1212, 1219 (1983) (stating that although Supreme Court endorsed different treatment of commercial and political speech, Court equated constitutional value of each type of speech). *But see supra* notes 20-21 and accompanying text (discussing how free flow of information in marketplace of ideas is crucial to obtaining truth and sustaining participatory democracy).

35. *See infra* notes 38-65 and accompanying text (discussing failings of Supreme Court's two distinctions between commercial and political speech); *also supra* notes 6-11 and accompanying text (discussing Supreme Court's granting commercial speech full first amendment protection despite competing governmental interests).

36. *See infra* notes 38-65 and accompanying text (discussing improper foundation for Supreme Court's belief that commercial speech is both more verifiable and more durable than political speech); *also supra* notes 16-28 and accompanying text (discussing Court's position on commercial speech's greater verifiability and durability).

37. *See infra* notes 66-97 and accompanying text (discussing Supreme Court's inability

With regard to the Court's first assumption that commercial speech is more verifiable than political speech, the Court fails to recognize the distinction between a commercial speaker's ability and a consumer's ability to verify the truth of commercial speech, or more specifically, the ability of the product to perform adequately.[38] The Court properly recognizes that the commercial speaker intuitively is able to depict accurately a product or service that the particular speaker developed.[39] The Court, however, fails to recognize that the speech is unverifiable to the listener that has not first purchased the product.[40] Instead, the Court reasons that the seller's unique ability to access its internally generated resources to obtain accurate information about the product offered is beneficial to the listener.[41] Regardless of the potential benefit, the Court's reasoning discounts that the seller has the power to refrain from divulging all of the objective information available to the seller.[42] Further, regardless of the truth of what a seller ultimately divulges to a consumer, the commercial marketplace of ideas, unlike the political marketplace of ideas, is not organized to allow a reciprocal exchange of information between the consumer and the seller.[43]

A recent example of the superiority of the political marketplace of ideas in verifying information lies in the debate over the safety of the Suzuki Samurai.[44] For instance, in the commercial context, where a consumer views

---

to differentiate accurately between commercial and political speech); *also supra* notes 16-28 and accompanying text (discussing Supreme Court's position on commercial speech's verifiability and durability).

38. *See infra* notes 39-58 and accompanying text (discussing failings of Supreme Court's "verifiability" ground for distinguishing commercial speech from political speech); *also supra* notes 20-24 and accompanying text (discussing Supreme Court's position on commercial speech's greater verifiability).

39. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 772 n.24 (1976) (asserting that truth of commercial speech is more verifiable because advertiser is relaying information about product or service that he personally provides and presumably knows more about than anyone else); *Id.* at 777 (Stewart, J. concurring) (distinguishing commercial speaker from political speaker because former knows products and verifies information before disseminating to public).

40. *See infra* notes 41-58 and accompanying text (discussing consumer's inability to verify information received through commercial advertising).

41. *See Virginia Pharmacy*, 425 U.S. at 772 n.24 (claiming that ability of commercial speaker to verify advertisement benefits listener because latter receives more accurate message); *also id.* at 777 (Stewart, J., concurring) (stating that commercial advertiser verifies accuracy of factual representations before disseminating message to public).

42. *See id.* at 775 (Burger, C.J., concurring) (stating that advertising itself is inherently deceptive because of variability of information released from advertiser to advertiser regarding given product).

43. *See id.* at 765 (stating that advertising is dissemination rather than exchange of information regarding who is producing and selling given product, for what use, and at what cost); *also infra* notes 45-58 and accompanying text (demonstrating inadequacy of commercial marketplace of ideas to allow exchange of information between consumers and product or service providers).

44. *See infra* notes 45-58 and accompanying text (paralleling verifiability of information in both political and commercial marketplace in context of Suzuki Samurai defects).

an advertisement for Suzuki Samurais[45] that describes the fun and versatility of the vehicle, the consumer has no forum to channel queries about the tendency for the Samurai to tip when rounding corners.[46] More specifically, if the consumer believes that the advertisement is untruthful or misleading[47] (the vehicles do in fact tip when they round corners), the consumer has no practical forum in the commercial context to actively counterspeak.[48] In addition to the absence of a forum in which the consumer can speak, the consumer has no incentive to speak because the cost of speaking far outweighs the marginal benefit to the consumer as an individual.[49] Instead, the consumer simply fails to purchase the vehicle (an individual economic decision), but the misleading advertisements continue to deceive and potentially to harm other consumers.[50]

The political marketplace of ideas deals more efficiently with the same defect in Suzuki Samurais.[51] For example, a consumer who is dissatisfied with the performance of Suzuki Samurais may contact at minimal cost a legislator about the dangers of the vehicle.[52] Because of the minimal cost, a variety of consumers will have the incentive to speak to their legislators, while alternately, because of the extreme cost of television advertisements or public information campaigns, consumers will have no incentive in a commercial marketplace to air publicly their discontent with Suzuki.[53] The

---

45. Suzuki Samurai is a light-weight, four-wheel drive sport-utility vehicle designed and manufactured by Suzuki Motors Co., Ltd. (a Japanese corporation) and United States Suzuki Motor Corp. (an American subsidiary). *See* Rudd, *Suit Here Targets Suzuki Samurai*, Chicago Trib., Jan. 7, 1989, at C 8 (referring to Suzuki Samurai as four-wheel drive sport-utility vehicle); In Re Suzuki Samurai Products Liability Litigation, 1989 WL 79847 (E.D. Pa.) (noting that Samurais are manufactured by Japanese corporation, Suzuki Motors Co., Ltd., and American subsidiary, Suzuki Motor Corp.).

46. *See infra* notes 47-58 and accompanying text (discussing commercial marketplace's inability to provide forum for consumer exchange with advertiser and political marketplace's ability to provide an indirect forum for channeling consumer discontent to advertiser).

47. *See* Rudd, *supra* note 45, at C 8 (quoting plaintiff's attorney saying that Suzuki Motor Corp. knew vehicle could overturn at forty miles per hour, but Suzuki deceived customers by failing to warn them).

48. *See WARNING: The Suzuki Rolls Over Too Easily*, 53 CONSUMER REP. 424, July 1988 (giving Suzuki Samurai first unacceptable rating in decade because of tendency to overturn in accident avoidance maneuvers and calling Samurai unfit for intended use).

49. *See infra* notes 52-53 (noting both disincentive to counterspeak in commercial context because of extreme cost and incentive to counterspeak in political context because of minimal cost).

50. *See* L.A. Times, July 7, 1988, § 4, at 1, col. 5 (reporting that Samurai sales plunged 70.6% from year earlier). *But see* N.Y. Times, Dec. 17, 1988, § 1, at 52, col. 3 (reporting that because poor publicity decreased sales, manufacturer reduced sticker price by $2000 and 18,500 people then were willing to purchase Samurai).

51. *See infra* notes 52-55 and accompanying text (discussing efficiency of political marketplace in verifying information otherwise unavailable to consumers).

52. *See* Stearns, *Roe v. Wade: Our Struggle Continues*, 4 BERKELEY WOMEN'S L.J. 1, 9 n.35 (urging women to mobilize specifically for pro-choice by contacting legislators either through listed phone numbers or listed addresses).

53. *See supra* notes 47-50 and accompanying text (discussing how cost of counterspeak outweighs benefits to consumer in commercial marketplace of ideas).

amassing of consumer discontent, which is difficult to catalyze in a purely commercial context, is catalyzed actively in a political marketplace if enough consumers complain.[54] Within the political process, a sufficient public outcry can result in a congressional hearing that petitions the presentation of statistics on the number of accidents involving Suzuki's vehicles versus other kinds of vehicles, and perhaps gives Suzuki officials an opportunity to explain any discrepancy.[55] Consequently, through the political marketplace of ideas, the consumer ultimately obtains the type of information that the commercial speaker could have or should have released in the original offer to sell the product.[56] Thus the varying machinations between the commercial and political marketplace of ideas confirm that commercial speech may be more verifiable to the speaker, but not to the listener.[57] Therefore, to the extent that the Supreme Court based its bright line distinction on the determination that commercial speech possesses greater verifiability, the Court's bright line distinction is applied inconsistently.[58]

The Court's second assumption that supports the distinction between commercial and political speech, greater durability,[59] also is deficient in providing a means of distinguishing the two types of speech.[60] The Supreme Court reasons that, because business ventures depend on advertising for market exposure, commercial speech is more durable than political speech.[61]

---

54. *See* Lankard & Wilson, *Target of Opportunity*, AUTOWEEK, Oct. 17, 1989, at 18 (reporting that National Highway Traffic Safety Association gets statistics from fatal accident reporting system that 26 deaths are associated with Samurai rollovers).

55. *See id.* (reporting that Senator Tim Wirth's (D-Colo.) two-part petition seeks "vehicle stability standard" and calls for National Highway Traffic Safety Administration investigation into all sport-utility vehicles); *also* DeLorenzo, *Suzuki Stands Tough on Rollover Charges*, AUTOMOTIVE NEWS, Mar. 3, 1988, at 3 (stating that Suzuki officials attribute rollovers to drivers' use of alcohol, failure to wear seatbelts, age and traffic citations).

56. *See* L.A. Times, Mar. 24, 1989, § 4, at 1, col. 5 (reporting Suzuki's American subsidiary settled lawsuit by agreeing to include warning statements about handling of their sport-utility vehicles in all future advertising). All radio and television advertisements for not only the Samurai model, but also the Sidekick model, must include the following statement: "This vehicle handles differently from ordinary passenger cars. Federal law cautions to avoid sharp turns and abrupt maneuvers." *Id.* This after-the-fact remedy reflects information that Suzuki should have released to the consumers without resort to a lawsuit. *See id.* (announcing that Suzuki's settlement to include warnings about vehicle's safety came 10 months after suit commenced).

57. *See supra* notes 45-55 and accompanying text (discussing inability of consumer to verify information received through commercial advertising in context of Suzuki Samurai).

58. *See supra* notes 37-55 and accompanying text (outlining invalidity of Court's assumption that commercial speech is more verifiable than political speech); *also supra* notes 17-24 and accompanying text (discussing Supreme Court's assumption that commercial speech is more verifiable).

59. *See supra* notes 25-28 and accompanying text (discussing Supreme Court's position that commercial speech is more durable than political speech).

60. *See infra* notes 61-65 and accompanying text (discussing invalidity of Supreme Court's assumption that commercial speech is more durable than political speech).

61. *See* Virginia State Bd. of Pharmacy v. Virginia Consumers Citizen Council, Inc., 425 U.S. 748, 772 n.24 (1976) (discussing how commercial speaker's dependency on profits makes regulation unlikely to chill commercial speech); *also supra* notes 25-28 and accompanying text (same).

Thus, the Court further reasons that, regardless of the extent of regulation, the regulation will not completely suppress commercial speech.[62] The Court, however, fails to recognize that political speakers are primarily dependent on media exposure to insure reelection or merely to encourage donations used for a reelection campaign just as commercial speakers are dependent on the exposure to maximize profits.[63] Consequently, to the extent that the Court bases the bright line distinction between commercial and political speech on commercial speech's durability, the bright line distinction is arbitrary and ignores practical reality.[64] Thus, because the Court's determination regarding the durability and verifiability of commercial speech is unfounded, courts continue to protect political speech yet regulate commercial speech based on an unsupported contention that a quantifiable distinction exists.[65]

A second reason to question the Supreme Court's bright line distinctions between commercial and political speech, is that, even if the underlying assumptions are valid,[66] the Court does not possess the ability to differentiate accurately between commercial and political speech.[67] The problem is that

---

62. *Virginia Pharmacy*, 425 U.S. at 772 n.24.

63. *See* Buckley v. Valeo, 424 U.S. 1, 19 (1976) (reasoning that electorate's increasing dependence on mass media for news and information makes all channels of communication indispensable mediums for effective political speech); *also id.* (holding that every communication requires expenditure of money and, therefore, restricting expenditures likewise restricts speech); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973) (stating that profit motive is irrelevant to inquiry of whether content of speech is commercial or political). *See generally* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 783 (1978) (revealing how political speech may be tied to profit motive). *But see* Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391, 1394-95 (1990) (upholding statute that prohibits corporations from using corporate treasury funds for independent expenditures in support of or in opposition to any state political candidate). The Court reasoned that corporations should not be able to use wealth amassed in a economic marketplace to obtain tactical advantages in a political marketplace. *Austin*, 110 S. Ct. at 1397. The Court focused the inequity on the lack of correlation between economic support for a corporation's product or service and political support for a corporation's ideas. *Id.* However, in response to the Court's decision a noted first amendment scholar, Steven Shiffrin, commented that no corporation puts out speech without intending to profit in one way or another. Sugawara, *High Court Curbing Companies: Decisions Are Shrinking First Amendment Rights of Businesses*, Washington Post, April 5, 1990, at E12, col. 4.

64. *See supra* notes 60-63 and accompanying text (supporting invalidity of Supreme Court's assumption that commercial speech is more durable than political speech).

65. *See supra* notes 37-58 and accompanying text (discussing Court's flawed assumptions that commercial speech and political speech quantifiably are different). *But see supra* note 15 (listing exceptions to first amendment protection of political speech).

66. *See supra* notes 16-28 and accompanying text (discussing Court's assumptions as if valid); *cf. supra* notes 37-65 and accompanying text (discussing invalidity of Court's assumptions).

67. *See infra* notes 68-97 and accompanying text (discussing Court's inability to differentiate accurately between commercial and political speech); *also* Metromedia, Inc. v. San Diego, 453 U.S. 490, 536 (1981) (Brennan, J., concurring) (charging that, because distinction between commercial and political speech is unclear, plurality erred in assuming that governmental unit can distinguish between them).

the assumptions' validity in theory depends on the speech appearing in a pure political or commercial form.[68] However, because speech rarely appears in a "pure" form due to the often mixed motives of the speaker,[69] the theoretical validity of the assumptions is irrelevant.[70] Because the actual content of a message contains varying proportions of each motive, the Court should not "draw lines" and allow free exchange for one type of speech and not for the other type.[71] Consequently, the Court is engaging in a fiction by labeling speech either "political" or "commercial".[72] Labeling speech is completely dependent upon the factual context, thereby making an arbitrary categorization impracticable and imprecise.[73]

---

68. *See* United States Southwest Africa/Namibia Trade & Cultural Council v. United States, 708 F.2d 760, 769 (D.C.Cir. 1983) (stating that distinction between commercial and political speech is not entirely unworkable because distinction can operate successfully at extremes of patently political and wholly commercial speech). For example, a lawyer's in-person solicitation of a client often is considered wholly commercial speech or "pure" commercial speech. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 454 (1978). However, the attorney's solicitation could be made political if the client's position represents one side of an issue that is hotly contested in the community. *See* NAACP v. Button, 371 U.S. 415, 442 (1963) (striking down malpractice statute that made attorney's solicitation of employment from organization primarily created to eliminate racial discrimination illegal if client was not party to suit or had no pecuniary interest in suit). Similarly, an attorney's solicitation is politicized if securing the client will assist in pursuing political association or office. *See In Re* Primus, 436 U.S. 412, 422-25 (1978) (granting first amendment protection as political expression to lawyer soliciting prospective female litigants and advising women of legal rights resulting from improper sterilization).

69. *See* United States Southwest Africa/Namibia Trade & Culture Council v. United States, 708 F.2d 760, 769 (D.C.Cir. 1983) (stating that commercial speech is capable of simultaneously communicating political and social messages); *supra* notes 68-69 (discussing inherent overlap of issues and mixed motives present in all speech).

70. *See* Penthouse Int'l, Ltd., v. Koch, 599 F. Supp. 1338, 1344 (S.D.N.Y. 1984) (stating that because of inherent overlap of commercial, social, and political messages, distinction between commercial and political speech is not always clearcut); Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc., 472 U.S. 749, 788 (1985) (recognizing that even pure advertising may include public issues); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 64-68 (1983) (reasoning that communications may be commercial speech regardless of discussions of compelling public issues); Metromedia, Inc. v. San Diego, 453 U.S. 490, 538-39 (1981) (recognizing potential political aspect when commercial speakers attempt to influence commercial preferences). The *Metromedia* Court pondered the difficulty of labeling commercial or political a United Auto Workers billboard that stated: "Be a patriot—do not buy Japanese-manufactured cars." *Id.*; *see also* Eastex, Inc. v. NLRB, 437 U.S. 556, 570 n.20 (1978) (stating that almost every issue can be seen by certain parties as political).

71. *See Namibia Trade Council*, 708 F.2d at 769 (stating that hazy line divides commercial from political speech).

72. *See supra* notes 66-71 and accompanying text (discussing inability to distinguish commercial from political speech).

73. *Cf.* Eastex, Inc. v. NLRB, 437 U.S. 556, 570 n.20 (1978) (stating that same issue may be political in one context and may be interpreted quite differently in another context); Ollman v. Evans, 750 F.2d 970, 977-78 (D.C.Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985) (noting court's inability to draw bright line distinctions between fact and opinion because same words convey different meanings in different contexts); *see infra* notes 74-97 and accompanying text (discussing possible factual disputes affecting how speech is labelled).

A practical example of the incumbent factual disputes the Court creates by labeling speech as political or commercial is the abortion issue, which courts predominantly have typified as political[74] and not commercial.[75] However, looking beyond the surface adversarial nature of pro-choice versus pro-life, the actual abortion issues litigated often are commercial in nature.[76] For example, a commercial issue often commingled with the political abortion issue is a private abortion clinics' dependence on and need to maintain government funding.[77] Similarly, hospitals that rely on government funding to operate may not be able to continue offering abortion services.[78] More indirectly, clinics in states that continue to support abortion services might have difficulty advertising in states that do not support abortion services.[79] Finally, and more generally, the ability of clinics to act as a going concern is seriously jeopardized without the exposure obtained through advertising, especially for those clinics located at state borders.[80] Thus, any entity—

---

74. *See In Re* United States Catholic Conference, 885 F.2d 1020, 1022 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1946 (1990) (challenging Church's tax exempt status under Internal Revenue Code because of Church's participation in political campaigns for anti-abortion); Portland Feminist Women's Health Center v. Advocates for Life, Inc., 859 F.2d 681, 685 (9th Cir. 1988) (claiming that abortion is one of most hotly contested issues of day); Coalition for Abortion Rights and Against Sterilization Abuse v. Niagara Frontier Transp. Auth., 584 F. Supp. 985, 989 (W.D.N.Y. 1984) (holding that bus company had allowed other political messages to appear on advertising space of buses, therefore company must let abortion rights group so advertise).

75. *See infra* notes 76-93 and accompanying text (discussing difficulty in labeling abortion as purely political or purely commercial).

76. *See infra* notes 77-81 and accompanying text (discussing commercial elements of abortion issue).

77. *See* Harris v. McRae, 448 U.S. 297, 306-11 (1980) (holding that states participating in Medicaid are not required to pay for medically necessary abortions that are not reimbursable under federal Hyde Amendment); *also* Hyde Amendment, Pub. L. No. 94-439, 90 Stat. 1434 (1976) (codified as amended at 42 U.S.C. §§ 1396 *et. seq.* (1982) (refusing to reimburse states through Medicaid program for medically unnecessary abortions).

78. *See* Webster v. Reproductive Health Serv., 109 S. Ct. 3040, 3050-53 (1989) (upholding Missouri statute that prohibits use of public facilities, employees, or funds to perform abortions); Maher v. Roe, 432 U.S. 464, 469-80 (1977) (upholding Connecticut regulation allowing Medicaid funding for childbirth but not for abortion).

79. *See* Posadas de Puerto Rico Assoc. v. Tourism Co., 478 U.S. 328, 345-46 (1986) (holding that states' greater power to ban product includes lesser power to ban advertising); *also* Capital Broadcasting, Inc. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971) (banning cigarette advertising without banning manufacture of cigarettes). *But see* Carey v. Population Serv. Int'l, 431 U.S. 678, 700-02 (1977) (holding that ban on advertising contraceptives is unconstitutional suppression of speech that is unjustified by offensive and embarrassing nature of product). *Compare* Bigelow v. Virginia, 421 U.S. 809, 822 (1975) (holding that abortion clinic in New York where abortion was legal could advertise in Virginia where abortion was not legal) *with* Webster v. Reproductive Health Serv., 109 S. Ct. 3040 (1989) (upholding Missouri statutes that regulate not only abortion services, but also regulate indirect influences on abortion such as public facilities, employees and funding).

80. *See* Stearns, *supra* note 52, at 4 n.13 (stating that in first two years that abortion was legal in New York State, nearly two-thirds of 400,000 abortions were performed on nonresident women).

private or otherwise—that offers abortion services, yet relies on government funding, faces not only the political ramifications from continuing to offer the service (protestors picketing the property and harassing patients), but also the more existence threatening problem of obtaining subsidies if the government withdraws its previous support.[81]

In 1975 the United States Supreme Court in *Bigelow v. Virginia*[82] faced a mixed-motive abortion advertisement.[83] The *Bigelow* Court considered whether both political and commercial elements exist in abortion advertising, and if so, whether both elements merit first amendment protection.[84] In *Bigelow* the plaintiff, a newspaper editor, published in *The Virginia Weekly* an advertisement for a New York City abortion clinic.[85] As a result, the State of Virginia prosecuted the plaintiff for violations of a Virginia statute prohibiting circulation of publications that encourage or prompt women to have abortions.[86] In considering whether the plaintiff violated the statute, the Supreme Court reasoned that the advertisement relayed information of value to a wide range of people, not just to those in need of services.[87] In addition, the Court reasoned that speech is not automatically beyond the

---

81. *See supra* notes 75-81 and accompanying text (discussing commercial side-effects that coexist in what traditionally is viewed as political issue).

82. 421 U.S. 809 (1975).

83. *See* Bigelow v. Virginia, 421 U.S. 809, 812 (1975). In *Bigelow* the State of Virginia prosecuted the plaintiff for publishing an advertisement in a Virginia newspaper that encouraged nonresident women to have abortions in New York:

> "UNWANTED PREGNANCY
> LET US HELP YOU
> Abortions are now legal in New York.
> There are no residency requirements.
> FOR IMMEDIATE PLACEMENT IN ACCREDITED
> HOSPITALS AND CLINICS AT LOW COST
> Contact
> WOMEN'S PAVILION
> 515 MADISON AVENUE
> NEW YORK, N.Y. 10022
> or call any time
> (212) 371-6670 or (212) 371-6650
> AVAILABLE 7 DAYS A WEEK
> STRICTLY CONFIDENTIAL. We will make all arrangements for you and help you with information and counseling."

Id. at 808.

84. *Bigelow*, 421 U.S. at 819-26.

85. *Id.* at 811-12.

86. *Id.* at 812-13.

87. *See Bigelow*, 421 U.S. at 822 (recognizing that advertisement by an out-of-state abortion clinic benefited individuals other than those in need of services). For example, the *Bigelow* Court refers to those with either general curiosity about or general interest in abortion or in seeking reform specifically in Virginia. *Id.* The Court refers to persons more indirectly benefited as those with a general curiosity or general interest in laws of another state or in the development of laws in another state. *Id.*

protection of the first amendment simply because the advertisement solicited readers to purchase a product[88] or because the commercial speaker paid for the advertisement[89] or sought financial reward.[90] Therefore, the Court concluded that Virginia constitutionally could not prohibit the publication of an advertisement that served the public's constitutional interests to receive information, whether commercial or political.[91]

In later decisions, however, the Court substantially retreated from *Bigelow*'s protection for commercial speech.[92] Further, by failing to recognize that speech simultaneously can possess both commercial and political qualities, the Court has allowed legislatures selectively to regulate the content of commercial speech, depending on the relevant policy considerations rather than on ascertainable distinctions between the two types of speech.[93] For example, Congress has instituted several regulations on cigarette labeling and advertising because such advertisements are seen as harmful commercial speech.[94] However, because cigarettes implicate the public policy of protecting the health and safety of citizens, legislatures alternatively could have labeled cigarette advertising as political speech and not regulated the speech.[95]

---

88. *See* Murdock v. Pennsylvania, 319 U.S. 105, 110-11 (1943) (holding that solely because religious literature is sold rather than donated does not make religion commercial enterprise).

89. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (stating that advertising which expresses opinion and grievance on treatment of civil rights demonstrators while soliciting readers for donations cannot be regulated as commercial speech solely because advertiser paid for advertisement); Smith v. California, 361 U.S. 147, 150 (1959), *reh'g denied*, 361 U.S. 950 (1960) (holding that dissemination of books and print materials is form of constitutionally protected freedom, regardless of commercial context).

90. *Bigelow*, 421 U.S. at 818; *see also* Thomas v. Collins, 323 U.S. 516, 531, *reh'g denied*, 323 U.S. 819 (1945) (holding that first amendment protections are not reserved solely for religious or political goals, but also for business or economic activity).

91. *Bigelow*, 421 U.S. at 822-25; *see also* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762-65 (1976) (holding that both individual consumer and society in general have interest in free flow of commercial information).

92. *See supra* notes 12-31 and accompanying text (discussing Supreme Court's shift from full first amendment protection to qualified first amendment protection of commercial speech); *also supra* note 14 (listing cases that manifest Supreme Court's retreat from *Bigelow*'s protection of commercial speech).

93. *See* C. BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 196 (1989) (concluding that inconsistent application of regulation against seemingly similar types of speech affords too much discretion to legislatures); *infra* notes 94-98 and accompanying text (discussing underlying policy considerations for commercial advertising of cigarettes and referring to overlap of commercial and political elements in speech).

94. *See* Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. § 1331-1339 (1988) (regulating labeling and advertising of cigarette advertising). The United States Congress' purpose in enacting the Public Health Cigarette Smoking requiring the labeling of cigarette packages with the statement "Caution: Cigarette Smoking May Be Hazardous to Your Health," is to provide the public with adequate warning of cigarette smoking's potential hazards. Federal Cigarette Labeling and Advertising Act of 1965, S. REP. No. 449, 89th Cong., 1st Sess., *reprinted in* U.S. CODE CONG. & ADMIN. NEWS 2350, 2350 (1965) [*hereinafter* Cigarette Labeling Act].

95. *See* Cigarette Labeling Act, *supra* note 94, at 2351 (stating that Surgeon General

The government chooses to label cigarette advertisements as commercial speech, therefore, not because the distinction between the different types of speech is clear, but because this legislation has far reaching implications in a variety of commercial sectors in the United States economy.[96] The Court's inconsistent application of labels to uphold policy-driven state regulation is not limited to product advertising, but also encompasses service industry advertising.[97] Therefore, the Court has categorized various service industries' advertising as both commercial and noncommercial, not because of any quantifiable differences in speech, but because of different policy considerations prevailing at the time.[98]

The abortion and cigarette advertising examples of the Court's inconsistent application of labels highlight the inappropriateness of regulating commercial speech.[99] By continuing to regulate commercial speech, the Court has splintered the goal of the first amendment into "truth"[100] for commercial expression, but "freedom of expression"[101] for political expression.[102] The

---

appointed advisory committee to study relationship of smoking to health); *also supra* note 94 (referring to policy of Public Health Cigarette Smoking Act outlined in legislative history).

96. *See* Cigarette Labeling Act, *supra* note 94, at 2352 (stating that, despite broad public health implications of cigarette smoking, hazardous nature of smoking also implicates tobacco raising and manufacturing industries as well as those who market tobacco products). Without expressly stating that economic concerns are superior to public health concerns, Congress is balancing the quantifiable commercial speech effects on the economy against the amorphous public health risks. Congress compromises by banning the advertising to minimize health risks, but maintaining production to maximize economic benefit. *Id.* at 2351-52.

97. *See* Bates v. State Bar of Arizona, 433 U.S. 350, 372-75, *reh'g denied*, 434 U.S. 917 (1977) (upholding constitutional right of lawyers to advertise prices of certain routine services); Virginia State Bd. of Pharmacy v. Virginia Consumer Citizens Council, 425 U.S. 748, 773 (1976) (striking down prohibition on pharmacists' release of prescription drug prices as violative of first amendment); *cf.* Friedman v. Rogers, 440 U.S. 1, 11-13 (1979) (upholding statute that prohibits optometrists from operating under trade names as valid state interest of preventing public deception); Williamson v. Lee Optical, 348 U.S. 483, 489-91, *reh'g denied*, 349 U.S. 925 (1955) (upholding state restrictions on advertisement of prices for eyeglass frames); Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608, 611-12 (1935) (upholding state restrictions on both advertisement of prices for dentists' services and on claims of superior professional performance).

98. *See supra* note 97 (listing cases in which courts inconsistently have upheld or struck down limitations on similar service industry advertising).

99. *See supra* notes 74-98 and accompanying text (discussing intermingling of commercial and political issues in context of abortion and cigarettes).

100. *See* Red Lion Broadcasting v. FCC, 395 U.S. 367, 390 (1969) (stating that first amendment preserves uninhibited marketplace of ideas in which truth ultimately prevails); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (articulating primary goal of first amendment as truth competing successfully over falsehood).

101. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (considering case against background of national commitment to wide-open, robust and uninhibited debate of public issues); United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (stating that first amendment presupposes that correct conclusions result only from many viewpoints, rather than from governmental selection).

102. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978) (holding that first amendment guarantee of free speech serves significant societal interests distinct from individual speakers' interest in self-expression); *infra* notes 103-115 and accompanying text

Court's distinction finds some textual support in the Bill of Rights, which indirectly recognizes political freedom.[103] An objective "truth," however, is a much more subtle social want that the Court now requires in commercial speech,[104] but only desires in political speech.[105]

The Court's assertion of different goals for both commercial and political speech is deficient in two respects.[106] First, "truth" and "freedom of expression" do not have to be mutually exclusive goals of the first amendment.[107] Rather, the two could be concurrent goals, because freedom of expression ultimately is just a medium eventually to ferret out truth.[108] Second, assuming that truth is the ultimate goal for any type of speech,[109] regulation is not the most rational and efficient way to attain truth.[110]

Contrary to the Court's belief that regulation assists in the search for truth, regulation instead suppresses speech and influences public decision-making through manipulation of the availability of necessary information.[111] In other words, the Court's regulation, especially of truthful, nonmisleading, informational advertising, indirectly sets the political agenda by limiting consumers' access to valuable information—true or false—needed for many

---

(discussing inaccuracy of splintering goals as well as viability of concurrent first amendment goals).

103. *See supra* note 1 (asserting that concept of "political freedom" is derived from text of first amendment). The specific derivation of "political freedom" within the text of the first amendment is the "right to peaceably assemble" and the "right to petition the Government for a redress of grievances". U.S. CONST. amend. I.

104. *See* Virginia State Bd. of Pharmacy v. Virginia Consumer Citizens Council, Inc., 425 U.S. 748, 772 n.24 (1976) (noting that although state may not completely suppress commercial speech, state may regulate to insure unimpaired flow of TRUTHFUL information) (emphasis added).

105. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 285-92 (1964) (holding that first amendment tolerates factual errors in political speech, therefore plaintiffs need to meet high standard of proof (actual malice) to recover for violation of constitutional tort of libel). By holding that factual errors within political speech do not negate first amendment protection of such speech, the *Sullivan* Court determined that truth should not be the primary goal of political speech. *Id.* Rather, to prevent self-censorship and to allow political speakers "breathing space," the first amendment must tolerate nontruths. *Id.*

106. *See infra* note 108 and accompanying text (explaining deficiency of splintering first amendment goals).

107. *See infra* note 108 and accompanying text (explaining why truth and freedom of expression do not have to be mutually exclusive goals of first amendment).

108. *See* Bose Corp. v. Consumers Union, 466 U.S. 485, 503-04 (1984) (stating that freedom to speak one's mind is essential to common quest for truth); *also* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-7 (1971) (suggesting that unrestricted speech inextricably is bound to individual's search for truth).

109. *See supra* note 100 (claiming that collective good is realized if truth remains ultimate goal of first amendment).

110. *See infra* notes 111-205 and accompanying text (discussing rational and efficient alternatives to regulation of commercial speech).

111. *See* Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n, 447 U.S. 557, 579 (1980) (Blackmun, J., concurring) (stating that no differences between commercial and political speech justify suppressing former and manipulating access to information); *also* Village of Skokie v. Nat'l Socialist Party, 69 Ill.2d 605, 615, 373 N.E.2d 21, 24 (1978) (quoting Cohen v. California, 403 U.S. 15, 24-26 (1971)) (declining to assume that forbidding certain words likewise will not increase risk of suppressing ideas).

day-to-day personal economic decisions.[112] For instance, a state's paternalistic protection of its citizens depends in large part on consumers' acquiescence to Government's idea of what information commercial speakers should and should not release to consumers rather than on consumers gathering their own information and independently making decisions.[113] Although the Supreme Court recognizes the Government's role as purveyor of information, the Court paternalistically reasons that state and federal regulation is required to diligently protect the accurate, "free" flow of information to consumers.[114] The Court errs, however, in assuming that regulation of commercial speech is the only way to preserve the truthful, unimpaired flow of information to consumers.[115]

Rather than regulating commercial speech, several possible alternatives exist to create an efficient "marketplace of ideas" for commercial speakers while eradicating court-made distinctions between commercial and political speech.[116] Opponents of regulated commercial speech argue that one alternative to government regulation of commercial speech is to allow the tort system to remedy any resulting harms.[117] The tort theory proponents contend that, by allowing all purveyors of ideas freely to compete against each

---

112. *See* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (claiming that evils of falsehood in speech averted by more speech rather than enforced silence); *also* C. BAKER, *supra* note 92, at 194 (positing theory that consumers gain experience in accurate decisionmaking in political arena by being able to make their own private economic decisions).

113. *See* Virginia State Bd. of Pharmacy v. Virginia Consumer Citizen Council, Inc., 425 U.S. 748, 769 (1976) (stating that state's protectiveness of citizens depends on state maintaining citizens' ignorance). *See generally* S. LUKES, POWER: A RADICAL VIEW (1974) (positing that most effective use of power is to prevent observable conflict from arising by shaping and manipulating cognitions and preferences in fashion that leaves minority accepting their role in status quo). Lukes states that the easiest way to prevent observable conflict while shaping perceptions is to suppress information of whatever variety. *Id.* at 24.

114. *See* Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564-65 (1980) (holding that because commercial speech serves only informational function, there is no first amendment violation to suppress inaccurate advertising that provides inaccurate information). *But see* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) (claiming that under first amendment, no such thing as false idea).

115. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) (holding that because under first amendment no such thing as false idea, however seemingly pernicious an opinion, correction of falsities depends on competition of ideas, not on conscience of judicial system); *infra* notes 117-205 and accompanying text (discussing alternatives to regulation as means of preserving free flow of information to consumers).

116. *See infra* notes 117-205 and accompanying text (discussing three possible alternatives to government regulation of commercial speech).

117. *See* Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n., 447 U.S. 557, 598 (1980) (Rehnquist, J., dissenting) (stating that marketplace of ideas will expose misleading speech, perhaps not early enough to avoid harm to numerous people, but delay is risk accepted against benefits of democratic society). *See generally*, Note, *Constitutional Law* - Eimann v. Soldier of Fortune *and 'Negligent Advertising' Actions: Commercial Speech in an Era of Reduced First Amendment Protection*, 64 NOTRE DAME L. REV. 157 (1989) (attributing emergence of negative advertising tort actions to reduced first amendment protection for commercial speech).

other, the competition will expose and eradicate misleading advertisements.[118] Tort theory proponents recognize that one drawback to the tort system is that discovery of the deception may not always precede, and therefore prevent, harm to many people.[119] However, the proponents argue that insistence on a democratic society presupposes that the benefits of protecting free speech outweigh any risk of harm to democracy's beneficiaries.[120] Therefore, the proponents of the tort system alternative to commercial speech regulation state that, because a tort system is ready and able to compensate victims of fraudulent or harmful wrongs, government regulation of commercial speech is unnecessary.[121]

In *Eimann v. Soldier of Fortune Magazine, Inc.*[122] the United States Court of Appeals for the Fifth Circuit recently reviewed the effectiveness of an "after-the-fact" tort remedy as compensation for harms resulting from misleading speech.[123] In *Eimann* the Fifth Circuit considered whether *Soldier of Fortune* magazine published an ambiguous advertisement[124] that a reader may have construed as a proposal to engage in criminal activity.[125] A husband responded to the advertisement by requesting his wife's murder, and the advertiser complied.[126] Consequently, the deceased wife's relatives brought a wrongful death action against the magazine, alleging that the magazine was negligent for failing to predict that such criminal activity could occur.[127] In response, the publisher and several staff testified to the magazine's lack of knowledge that the advertisement was a solicitation for criminal activity.[128] Rather, the advertising manager claimed to have viewed the advertisements as possible offers for security guard employment.[129]

---

118. *See supra* notes 20 and 100 (defining competition in marketplace of ideas as truth prevailing over falsity).

119. *See Central Hudson*, 447 U.S. at 598 (Rehnquist, J., dissenting) (conceding inability of marketplace of ideas to consistently expose truth before anyone is harmed).

120. *Id.*; *see also* Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1025-26 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988) (Jones, J., dissenting) (arguing that equating pornography with commercial speech for purpose of permitting lawsuits does not mark demise of participatory democracy).

121. *See Herceg*, 814 F.2d at 1025 (Jones, J., dissenting) (contending that state may choose to impose civil liability on harms caused by pornographic business industry); *supra* notes 114-18 and accompanying text (discussing tort system alternative to remedy harms resulting from commercial speech).

122. 880 F.2d 830 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 729 (1990).

123. Eimann v. Soldier of Fortune Magazine, Inc., 880 F.2d 830, 831, (5th Cir. 1989), *cert. denied*, 110 S. Ct. 729 (1990).

124. *Id.* at 831. In *Soldier of Fortune*, the magazine published in the September, October, and November of 1984 issues of SOLDIER OF FORTUNE an advertisement that read as follows: "EX-MARINES—67-69 Nam Vets, Ex-DI, weapons specialist—jungle warfare, pilot, M.E., high risk assignments, U.S. or overseas. (404) 991-2684." *Id.* The *Soldier of Fortune* court noted that "Ex-DI" meant ex-drill instructor; "M.E." meant multi-engine planes; and "high risk assignments" referred to work as a bodyguard or security specialist. *Id.*

125. *Id.* at 833.

126. *Id.* at 831-32.

127. *Id.* at 832-33.

128. *Id.* at 833.

129. *Id.*

The *Eimann* trial court instructed the jury that for the plaintiffs to recover the jury must determine that a reasonable, prudent publisher in the same or similar circumstances would have concluded that the advertisement in question was an offer to commit crimes and, therefore, should not have been published.[130] After finding that a reasonable publisher should not have published the advertisement, the jury determined that the publisher was liable to the plaintiffs.[131] Consequently, the trial court held that, because SOLDIER OF FORTUNE's negligent publication of the advertisement was a proximate cause of decedent's death, the magazine's actions represented gross negligence.[132]

By upholding the jury's verdict, the trial court's decision placed a burden on all publishers to discern the appropriateness of ambiguous advertisements.[133] On appeal, because of the pervasiveness of advertising in our society and the impracticability of publishers adequately to assess the potential criminal intent of a myriad of advertisers,[134] the Fifth Circuit reasoned that the lower court's decision placed an undue burden on publishers.[135] Thus, the court of appeals reversed the trial court's decision.[136]

In reversing the trial court's decision, however, the Fifth Circuit failed to address the publisher's claim that imposing tort liability for publishing an ambiguous advertisement violated the magazine's first amendment free speech rights.[137] On the other hand, the appellate court refused to let the plaintiffs recover because the court reasoned that protected commercial speech would be a fiction if the protections lapsed whenever the product advertised was susceptible of illegal use.[138] In balancing the competing interests, the Fifth Circuit feared opening the door to a plethora of litigation, but likewise feared giving publishers immunity from future harms that may occur as a result of more direct and less ambiguous commercial advertising

---

130. *Id.*

131. *Id.* The jury in *Soldier of Fortune* awarded plaintiffs $1.9 million in compensatory damages and $7.5 million in punitive damages. *Id.*

132. *Id.* In finding the magazine's actions grossly negligent, the court relied on a definition of "gross negligence" as "conscious indifference." *Id.*

133. *See id.* at 834 (claiming that jury's verdict did not place duty to investigate on publisher, but rather did impose more rigorous standard of care that publisher had duty to recognize potentially criminal advertisements and refrain from printing those advertisements).

134. *Id.* at 832-33. In *Soldier of Fortune* the plaintiffs presented expert testimony from Dr. Park Dietz, a forensic psychiatrist who had studied SOLDIER OF FORTUNE, its advertisements, and readership. *Id.* Although Dr. Dietz claimed that an average SOLDIER OF FORTUNE subscriber likely would interpret certain advertisements as solicitations for illegal activity, Dr. Dietz conceded that he had abandoned any attempts to distinguish lawful SOLDIER OF FORTUNE classified advertisements from criminal ones on the basis of specific code words such as "gun for hire," "mechanic" and "hunter" because some advertisements were too ambiguous assuredly to assign an illegal meaning to them. *Id.* at 833.

135. *Id.* at 835-37.

136. *Id.* at 838.

137. *Id.* at 836.

138. *Id.* at 837.

than that at issue in *Eimann*.[139] As the Fifth Circuit concluded, the tort system remedy is not a promising alternative to regulation first because the remedy allows speakers to avoid liability only through self-censorship, and second because the system redresses harms that potentially are preventable.[140]

Instead of externally compensating for the failings of the commercial speech marketplace of ideas by flooding courts with tort litigation, as the first alternative suggests,[141] a better alternative is to add to the marketplace of ideas a government-sponsored voice to counterbalance the singular voice of the seller.[142] The Beef Promotion and Research Act of 1985[143] (the Act) provides one example of a government-sponsored voice designed to act in the public interest by financing a program to promote and research the beef industry.[144] The Act imposes a one dollar per head assessment on cattle producers and importers to finance beef industry advertising and research, regardless of whether the producers and importers agree with the government's promotional pitch.[145]

In *United States v. Frame*[146] the United States Court of Appeals for the Third Circuit considered whether the Beef Research and Promotion Act, specifically the government-sponsored voice, contravened the free speech clause of the first amendment.[147] In *Frame* the government brought an action against Frame, a cattle producer and buyer, for failing both to collect and pay the per head assessments on the sale of cattle.[148] Frame argued

---

139. *See id.* at 837-38 (holding that risk and gravity of harms from potentially criminal advertisements are outweighed by onerous burden on publisher to predict readers' perceptions of advertisements).

140. *Id.*; *see also* Florida Star v. B.J.F., 109 S. Ct. 2603, 2612 (1989) (stating that potential imposition of tort liability likely will result in self-censorship); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 496 (1975) (holding that punishing publishers for printing truthful information will invite timidity and self-censorship).

141. *See supra* notes 137-40 and accompanying text (discussing potential of tort remedy to overburden courts).

142. *See infra* notes 143-80 and accompanying text (discussing second alternative of government counterspeech through private parties).

143. Beef Promotion and Research Act of 1985, Pub. L. No. 99-198, 99 Stat. 1597, (codified as amended at 7 U.S.C. §§ 2901-18) (1988).

144. *See* Beef Research and Promotion Act of 1985, S. REP. No. 99-145, 99th Cong., 1st Sess. 3, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 1676, 2165-66 (stating that Congress intended that financing program would ensure that beef and beef products readily would be available and efficiently marketed to ensure that citizens receive adequate nourishment). Congress stated in the legislative history that the goal of the advertising program, more specifically, is to inform the public that consumption of beef is desirable, healthy and nutritious. *Id.*

145. Beef Research and Promotion Act, 7 U.S.C. § 2904(8)(C) (1988). *But see* Pacific Gas & Elec. Co. v. Pub. Util. Comm'n of Cal., 475 U.S. 1, 10-18 (1986) (holding that order of Public Utilities Commission compelling utility to place newsletter containing views of third party in its billing envelopes penalized expression of utility's own points of view and forced utility to alter its speech to conform with agenda utility did not set).

146. 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 1168 (1990).

147. United States v. Frame, 885 F.2d 1119, 1121-22 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 1168 (1990).

148. *Id.* at 1124-25.

that, because the government collected the funds for a nationwide media campaign to solidify and hopefully to increase beef and beef products' market share, the Act violated his first amendment rights by compelling Frame to participate in a message with which he disagreed.[149] Consequently, although several other promotion and research programs existed for agricultural commodities,[150] Frame alleged that the Act was unconstitutional because the Act violated his first amendment rights to free association and free speech.[151]

In determining whether the Act conflicted with the first amendment, the district court in *Frame* reasoned that no rational basis existed for allowing the first amendment to limit the government's right to speak when the amendment simultaneously protects and expands other speakers' rights.[152] For example, the district court stated that the Beef Promotion advertising campaign was no different than the campaigns of the armed forces, Social Security, or Voice of America advertisements, all of which Frame indirectly subsidized with his tax dollars.[153] The district court concluded that, because the campaign was a form of "government speech," the campaign did not force the individual to embrace the ideological position as the individual's own, rather the campaign communicated only the viewpoint of the federal government.[154]

The Third Circuit disagreed with the district court's finding that, because the funding of expressive conduct through the Act is government speech, the Act does not implicate Frame's first amendment rights.[155] The Third Circuit reasoned that, to avoid violating Frame's first amendment rights, the government must be compelling payment only on projects in which the government is acting as a representative of the people.[156] The Court of Appeals further reasoned that the Cattleman's Board and the Operating Committee are only representative of one segment of the population, namely the beef industry.[157] The court determined that, because the speech in which

---

149. *Id.* at 1129; *see also* Wooley v. Maynard, 430 U.S. 705, 716-17 (1977) (holding that citizen has constitutional right to refrain from speaking and that state may not require dissenting citizen to bear state slogan, "Live Free or Die," on automobile license-plate); *supra* note 146 (citing legislative history of Beef Research and Promotion Act and indicating that Congress intended Act to promote beef industry).

150. *Frame*, 885 F.2d at 1122; *see also* 7 U.S.C. §§ 2101-18 (1988) (subsidizing cotton); 7 U.S.C. §§ 2611-27 (1988) (subsidizing potatoes); §§ 7 U.S.C. 2701-18 (1988) (subsidizing eggs); 7 U.S.C. §§ 4501-13 (1988) (subsidizing dairy products); 7 U.S.C. §§ 4601-12 (1988) (subsidizing honey); 7 U.S.C. §§ 4801-19 (1988) (subsidizing pork); 7 U.S.C. §§ 4901-16 (1988) (subsidizing watermelons).

151. *Frame*, 885 F.2d at 1129.

152. *Id.*

153. *Id.* at 1129-30.

154. *Id.* at 1129.

155. *Id.* at 1131-32.

156. *Id.*; *see also* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 259 n.13 (1977) (Powell, J. concurring) (providing that compelled support of private associations is fundamentally different from compelled support of government).

157. *See Frame*, 885 F.2d at 1131-32 (defining Cattleman's Board as representative of one

the Cattleman's Board engaged was not government speech, Frame's first amendment rights were in fact implicated.[158] Nonetheless, in *Frame* the Third Circuit denied Frame's first amendment challenge to the Act because the government's interest in maintaining and expanding beef markets is sufficiently compelling to override Frame's first amendment interest.[159]

Although the Third Circuit failed to recognize a violation of Frame's first amendment right against compelled speech, the *Frame* court correctly recognized that consumers benefit when a "federal" view joins the marketplace of ideas. However, that benefit is lost if the consumer cannot determine whether a private party is engaging in free speech or whether the government is engaging in counterspeech.[160] When the commercial speaker is indeterminable, the government is engaging in the very misleading advertising that initially compelled the government to regulate commercial speech.[161] Thus, although the second alternative to government regulation adds a voice to commercial debate, compelling that voice through private individuals creates new and equally harmful, deceptive practices.[162]

The public deception of government-compelled speech through private individuals is dissipated if the public does not falsely perceive that a private individual is speaking.[163] For example, in *Pruneyard Shopping Center v. Robins*[164] the United States Supreme Court considered whether an ethnic group's gathering of political petition signatures in a shopping mall violated the mall owner's first amendment right to prevent the state from forcing the mallowner to provide a forum for the speech of others.[165] The defendant mall owner enforced a strict prohibition against any party engaging in publicly expressive activity unrelated to the commercial purposes of the mall.[166] Despite the plaintiffs' peaceful activity, security guards at the mall

---

segment of population because members of Board and Operating Committee are members of private sector and selected from State organizations that have history of stability and whose overriding purpose is to promote economic welfare of cattle producers).

158. *Id.* at 1132-33. The *Frame* court also noted that the airing of the Act's advertisements reinforced the link of the "beef is healthy" message to the cattle producers by indicating that "Beef Industry Council and Beef Board" fund the advertisements. *Id.* at 1133 n.11. The advertisement did not mention the Secretary or the Department of Agriculture, despite the government's administration of this program through these agents. *Id.*

159. *Id.* at 1133-37.

160. *See supra* notes 154-58 and accompanying text (noting that government speech is protected as long as the speech itself is representative of general public and not just one segment of population).

161. *See supra* note 114 (asserting that commercial speech's role is informational, and therefore, state can regulate if inaccurate).

162. *See supra* notes 141-61 and accompanying text (discussing second alternative to regulation, allowing government to counterspeak through private individuals).

163. *See infra* notes 164-80 and accompanying text (discussing consumer deception involved in government compelled speech through private individuals).

164. 447 U.S. 74 (1980).

165. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 80 (1980); *see also id.* at 77 (referring to plaintiffs as high school students seeking to solicit support for opposition to United Nations resolution against Zionism).

166. *Id.*

requested that the petitioners leave the premises.[167] Plaintiffs alleged that denying access to the mall violated the plaintiffs' first amendment rights, while the defendant alleged that the plaintiffs do not have the privilege of asserting these constitutional rights on private property.[168]

In considering the first amendment claim, the *Pruneyard* Court first reasoned that the mall owner voluntarily opened his property to the public.[169] The Court then noted that mall patrons likely would not equate the views of those passing out the pamphlets with the views of the private owner.[170] Therefore, the Supreme Court held that, because the state did not dictate a specific message that the mall owner must display on mall property, the ethnic group's petitioning did not force the mall owner to speak against the owner's will.[171] Thus, the Supreme Court denied the mall owner's first amendment claim.[172]

Although both the Supreme Court in *Pruneyard* and the Third Circuit in *Frame* denied the respective first amendment claims, the Supreme Court in *Pruneyard* based its decision on several facts not present in *Frame*.[173] First, although in *Frame* the state apportioned the defendant's property[174] by requiring the defendant financially to support a commercial message, the involuntary "donation" in *Frame* falls short of the voluntary "publicness" of the mall present in *Pruneyard*.[175] Second, in the shopping mall

---

167. *Id.*

168. *See id.* at 85-86 (describing defendant's first amendment claim against compelled speech); *id.* at 77-78 (describing plaintiff's first amendment claim of free speech).

169. *Id.* at 80-81.

170. *Id.* at 87.

171. *Id.* at 86-87. The *Pruneyard* Court, in holding that the plaintiffs' petition did not force the mallowner to speak against his will, offered the mallowner a practical self-help remedy of posting signs to actively disavow any connection with plaintiffs' political position. *Id.*

172. *Id.* at 77.

173. *See infra* notes 174-80 and accompanying text (distinguishing Supreme Court's reasoning in *Pruneyard* from Third Circuit's reasoning in *Frame*); *also Pruneyard*, 447 U.S. at 87 (distinguishing case at bar from *Wooley v. Maynard*, 430 U.S. 705 (1977), in which Supreme Court held that a state constitutionally may not require an individual to participate in dissemination of ideological message ("Live Free or Die") on individual's property, namely license plate, if message is intended to be viewed by and for public). The *Frame* court cited *Wooley* as a case similar to *Frame* and stated that a close nexus between the message and the apparent (but not actual) speaker is deceptive to viewers and constitutionally should not be allowed. *Frame*, 885 F.2d at 1132-33; *see also* Wooley v. Maynard, 430 U.S. 705, 713-15 (1977) (holding that state-issued license plates are not government speech because government is compelling individual to present ideological message on individual's private property).

174. *See Pruneyard*, 447 U.S. at 82-85 (dismissing plaintiff's claim that allowing petitioners to solicit signatures on private property constitutes taking in violation of fifth amendment).

175. *See id.* at 77 (describing extent of Pruneyard mall's publicness: mall covered 21 acres of land with 65 specialty shops, 10 restaurants, and movie theater); *see also* Marsh v. Alabama, 326 U.S. 501, 506-10 (1946) (introducing analysis of "publicness" of behavior as a limitation on individual property rights for benefit of public's first amendment rights). The *Marsh* Court stated that the more a private owner voluntarily opens up his property to the public, the more his rights become circumscribed by statutory and constitutional rights of the public who use the property. *Id.*

case shoppers rarely perceive that the mall is privately-owned let alone attribute the ideas of solicitors to that of the mall owner.[176] On the other hand, viewers of the beef advertisements certainly will equate the sales pitch with the producers themselves because the commercial itself attributes the producers with funding the advertisement, in addition to being the parties most likely to benefit from increased sales.[177] Finally, unlike a mall, where many differing viewpoints seek to solicit the attention of shoppers, the federal government in *Frame* is dictating a consistently specific message with the defendant's property; that consumption of beef is nutritious and healthy,[178] a message with which the defendant disagrees and, therefore, should not have to subsidize.[179] Thus, the two decisions based on distinct factors are consistent in that the courts disfavor compelled speech when the speech deceives consumers about who actually is speaking.[180]

Given the limitations of the first two alternatives, that the tort system allows only for an after-the-fact remedy that fails to narrow the class of potential plaintiffs, and that unidentified compelled speech creates new and equally harmful deceptive practices, a final alternative optimally resolves these limitations by requiring the government to speak, but on the government's behalf.[181] Under the final alternative, the government, depending on the nature of consumer response, could choose between offsetting the commercial speech of the original commercial speakers with counterspeech

---

176. *Pruneyard*, 447 U.S. at 87 (discounting infringement on mallowner's first amendment right to speak only as the owner chooses because mall patrons will not link solicitor's message with mallowner).

177. *See supra* note 157 (citing deception of advertisement's apparent sponsor of advertisement versus actual sponsor).

178. United States v. Frame, 885 F.2d 1119, 1129 (3d Cir. 1989).

179. *See id.* (referring Frame's claim that first amendment right to refrain from speaking, allegedly was violated because Beef Research and Promotion Act forces him to contribute to administration and financing of national media campaign to typify beef as "desirous, healthy, nutritious").

180. *Compare* Pruneyard Shopping Center v. Robins, 447 U.S. 74, 88 (1980) (claiming no violation of first amendment rights against compelled speech, first, if party is not compelled to present a particular message, second, if no connection between speaker and message and, third, if party compelled has ability to disavow) *with Frame*, 885 F.2d at 1133-37 (holding that first amendment rights are implicated if government compelled speech is not representative of people in general, but instead is representative of only one segment of population). The Third Circuit in *Frame* denied the first amendment claim only because of a compelling government interest that outweighs the individual's interest, not because speech was not compelled. *Frame*, 885 F.2d at 1134-35.

181. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-4, at 807-12 (2d ed. 1988) (claiming that first amendment right against compelled speech does not preclude government from adding its own voice to many others in marketplace of ideas). *But see* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988) (claiming that foundation of first amendment assumes that government remain neutral in marketplace of ideas and quoting FCC v. Pacifica Foundation, 438 U.S. 726, 746 (1978)). *See infra* notes 182-205 and accompanying text (discussing third alternative of government counterspeech); *also supra* notes 139-78 and accompanying text (discussing government compelled speech through private individuals alternative); *supra* notes 115-40 and accompanying text (discussing tort remedy alternative).

or encouraging the original speech with additional favorable speech.[182] Such government speech gives consumers the ability to weigh the two messages in the context of the individual consumer's private economic decisionmaking capacity.[183] The purpose of counterspeech is not to impose state-determined "rationality" on individuals, but to allow the state to provide consumers with the otherwise inaccessible information that consumers need to make informed decisions.[184] As a form of political check on government counterspeech, a party may rebut the presumption that the government should speak if the party can show that the government is drowning out other commercial voices just as useful to the consumer's decisionmaking process.[185]

The benefits of counterspeech over the previously stated alternatives are exposed when reviewing the Suzuki hypothetical.[186] For example, Suzuki advertises the adventurous, four-wheeling lure of the Samurai, but a listener cynically questions the Samurai's ability to corner safely at certain speeds.[187] After consumers have voiced a sufficient number of complaints in the interest of the citizens' welfare, the government is incited to counter the deceptive message by revealing certain facts.[188] For example, the government advertises that Samurais tip five out of ten times when rounding a corner at thirty miles per hour, but tip seven out of ten times at forty miles per hour and so on.[189] The government's voice heightens the consumers' awareness of a feature that the original commercial speaker has no incentive to discuss.[190] Beyond counterspeech, if the defect rises to the level of unmerchantability because the vehicle tips ten out of ten times, the government

---

182. *See* Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 344 (1986) (contending that first amendment requires advancing state interest not by suppressing commercial speech that might encourage undesired results, but by instigating additional speech—counterspeech—to discourage undesired results).

183. *See* C. BAKER, *supra* note 92, at 194 (discussing private economic decisionmaking in marketplace of ideas).

184. *See supra* notes 51-56 and accompanying text (discussing best method to verify information needed for private economic decisionmaking).

185. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 789 (1978) (claiming that potential of corporations as singular voice in marketplace of ideas is to use wealth and power to drown out other points of view); *see also* L. TRIBE, *supra* note 181, § 12-4, at 807-12 (limiting right of government to counterspeak when government drowns out private communications).

186. *See supra* notes 44-56 (setting out Suzuki hypothetical); *infra* notes 187-205 (discussing benefits of counterspeech in response to public issues).

187. *See* CONSUMER REPORTS, *supra* note 48, at 424 (giving Suzuki Samurai first unacceptable rating in decade for tendency to overturn when rounding corners).

188. *See* AUTOWEEK, *supra* note 54 at 18 (reporting that National Highway Traffic Safety Association revealed that 26 deaths were associated with Samurai rollovers).

189. *See* CONSUMER REPORTS, *supra* note 48, at 424 (reporting that Suzuki Samurais tip when rounding corners at 40 miles per hour and therefore, Samurais are not fit for intended use).

190. *See supra* note 47 (referring to Suzuki's awareness of defect, but failure to disclose). *But see supra* note 56 (noting that in settling lawsuit, Suzuki agreed to include warning statements about maneuverability of its sports-utility vehicle).

has a duty not only to speak, but to ban the advertisements and the manufacture of the product as well.[191] Barring such unmerchantability, however, the consumer is still free to purchase the vehicle, regardless of the seeming irrationality of the decision.[192]

A current example of the effectiveness of government counterspeech in practice is the policy-making of C. Everett Koop, Surgeon General under former President Reagan.[193] Koop, as a public health official, dealt primarily with politically controversial issues.[194] During Koop's eight-year term, Koop formulated specific policy positions on abortion, tobacco products, and the AIDS epidemic, first by distancing himself from his own personal, religious, and moral views on the respective issues,[195] and second and more importantly, by directly and informatively speaking to the public about issues and data otherwise unavailable.[196]

For example, on January 9, 1989, Koop presented President Reagan with a report on the psychological effects of abortion.[197] Koop presented his own data based on medical evidence which showed that studies supporting the existence of postabortion trauma are flawed.[198] In fact, Koop countered the conclusions of the traditional studies by stating that many women felt that having an abortion was literally the best decision the women ever made.[199] By addressing a flawed foundation for a visible political issue, Koop's report provided a medium for countering the information presently available to the public while mitigating any possible misconceptions.[200] Thus, while avoiding deciding the issue per se, Koop simply added another voice to the abortion marketplace of ideas that members of the public individually may weigh in their own rational decisionmaking.[201]

Because subjective social, political, religious, or moral predispositions often influence an individual's position on other visible issues like tobacco and AIDS, Koop's stance merely attempts to present objective medical data

---

191. *See supra* note 79 (holding that state has power not only to ban manufacturing of product or service, but to ban advertising as well).

192. *See supra* note 50 (citing statistics of increased sales of Samurais at lower price despite reports of vehicle's safety problems).

193. *See* Judis, *Nice Guys: An Officer and a Gentleman; C. Everett Koop*, NEW REPUBLIC, Jan. 23, 1989, at 19 (extolling virtues of Koop's tenure as Surgeon General).

194. *See* 42 U.S.C. § 241 (1982) (defining surgeon general's duties as public health officer entrusted to promote research, experiments and studies relating to causes, diagnosis, treatment, control and prevention of physical and mental diseases and impairments of people, including environmental issues).

195. Judis, *supra* note 193 at 19.

196. *Id.* at 22.

197. *Id.* at 19.

198. *Id.* at 19.

199. *Id.*

200. *See supra* notes 180-92 and accompanying text (discussing critical element of government counterspeech as voice consolidating inaccessible information for public benefit).

201. *See* C. BAKER, *supra* note 92, at 194 (discussing value of individual decisionmaking).

as another piece of information that consumers require to make rational decisions.[202] For example, Koop called for a smoke-free society by the year 2000 not because Koop advocated the economic decline of any tobacco-dependent state, but because he advocated reporting to the public the medical evidence on passive smoking.[203] Similarly, despite allegations that Koop was corrupting the nation's youth, the Surgeon General openly advocated the use of condoms to prevent the spread of AIDS.[204] Koop focused again on the objective medical evidence that use of a condom reduced the possibility of spreading the virus—a fact distinct from encouraging premature sexual activity.[205] Thus, using Koop as an example, the government should join the commercial marketplace of ideas by speaking to counter any significant deception in commercial speech.[206]

In considering the first amendment protection of commercial speech, the Supreme Court initially granted the speech no protection, then reconsidered to grant commercial speech the same full protection afforded to political speech, but finally and most recently, quantifiably limited the first amendment protection of commercial speech, allowing states to regulate the speech freely.[207] Because the Court determined that commercial speech is fundamentally different than political speech, the Court attempted to draw bright lines between the two types of speech, allowing commercial speech to be regulated and political speech to be protected.[208] However, because

---

202. *See supra* notes 196-201 and accompanying text (showing how additional information can alter decisionmaking process of abortion).

203. Judis, *supra* note 193, at 20. Koop's calling for a smoke-free society arguably may be seen as going beyond presenting objective evidence for consumers to utilize in informed decisionmaking). *See also* Specter & Farhi, *Critics Say Results of Targeted Tobacco Sales Pitches are Deadly*, Washington Post, Jan. 21, 1990, at 4, col. 1 (paralleling Health and Human Services Secretary, Louis W. Sullivan, with former Surgeon General, C. Everett Koop, in attacking smoking as country's most lethal and preventable habit). Sullivan angrily spoke out against R.J. Reynolds Tobacco Co.'s new cigarette brand, Uptown, which Reynolds marketed solely for blacks. *Id.* Secretary Sullivan claimed that blacks as a segment of the population are already 20% more likely to smoke, 33% more likely to have high blood pressure, 38% more likely to have heart disease, and 28% more likely to have cancer. NBC NIGHTLY NEWS (NBC television broadcast, Jan. 18, 1990). Sullivan concluded that targeting a high-risk health group that already suffers a disproportionate share of the health and economic problems related to smoking is unconscionable. Specter, *Reynolds Cancels Plan to Market New Cigarette*, Washington Post, Jan. 22, 1990 at 3, col. 1. As government counterspeech, Sullivan's enraged speech against smoking was even more effective than Koop's previous attempts because Sullivan's outburst forced R.J.R. to cancel marketing of the new cigarette. *Id.*

204. Judis, *supra* note 193, at 20.

205. *Id.* at 21-22.

206. *See supra* notes 186-205 and accompanying text (discussing benefits of counterspeech as single source of public health information on which public can choose to rely).

207. *See supra* notes 1-31 and accompanying text (discussing Supreme Court's progression of opinions from originally granting liberal protection to commercial speech toward more qualified protection).

208. *See supra* notes 32-37 and accompanying text (discussing Supreme Court's use of bright lines to distinguish commercial from political speech and potential failings of Supreme Court's bright line method).

the Court distinguishes between commercial speech and political speech based on a faulty determination that the former is both more verifiable and more durable than the latter, the Court's bright line scheme has become imprecise and unworkable.[209]

As alternatives to regulating commercial speech, the Court could rely solely on the tort system to remedy harms. However, because the tort model provides only post-injury remedies and does not narrow the potential class of plaintiffs, more consumers will be harmed without adequate redress in the overburdened judicial system.[210] A second alternative of allowing government compelled counterspeech through private individuals attempts to prevent harms before they occur while adding additional voices to the marketplace of ideas.[211] The deficiency in the second alternative, however, is that government compelled counterspeech creates new forms of deception in advertising because consumers are confused about whether the government or the private individual is the actual speaker.[212] The final and most preferential alternative to regulation of commercial speech is for government itself to join the marketplace of ideas by engaging in counterspeech on its own behalf for the benefit of the public.[213] Under the final alternative, the deception inherent in the compelled speech alternative is eradicated, and the commercial marketplace of ideas is allowed to function as efficiently as the political marketplace of ideas in consolidating otherwise inaccessible information into a singular voice upon which the public may rely.[214]

HELEN MCGEE KONRAD

209. *See supra* notes 38-115 and accompanying text (discussing both invalidity of Supreme Court's assumptions relied on to draw bright lines and inability of Court to differentiate between commercial and political speech even if assumptions were valid).

210. *See supra* notes 116-40 and accompanying text (discussing first alternative to regulation as externally compensating for failings of commercial marketplace of ideas through tort system).

211. *See supra* notes 141-54 and accompanying text (discussing government compelled speech through private individuals as medium to express "federal" point of view within marketplace of ideas).

212. *See supra* notes 155-80 and accompanying text (discussing second alternative to regulation in government compelled speech through private individuals as creating consumer deceptions if advertisements are unclear on whether government or private individuals are sponsoring advertisement).

213. *See supra* notes 181-85 and accompanying text (discussing mechanics of government joining marketplace of ideas to channel otherwise inaccessible information to consumers).

214. *See supra* notes 186-206 and accompanying text (discussing application of third alternative of government counterspeech to specific examples as means of making otherwise inaccessible information available to consumers).