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Summary of Contents



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We deal here with the law of advertising, the advertising of sex, drugs, and alcohol.[1] The United States Supreme Court has parsed, diced, and chopped the first amendment into manageable pieces, but only occasionally has the Court smoothed the amendment's edges for later reassembly. As a result, first amendment protection for advertising has come to depend upon categorization. This trend has led to the creation of a new category of first amendment speech, commercial speech; a category in which some but not all of the first amendment rules apply.

In this article I will examine the commercial speech doctrine, its theoretical basis, and its counter arguments. I will compare the goals behind the doctrine to those underlying other categories of speech and will suggest that one of the Court's concerns is guaranteeing the state's ability to regulate commercial speech that proposes unlawful conduct. Further, I will develop an analogy between the treatment of subversive noncommercial speech and commercial speech advocating unlawful conduct. By comparing the practical realities of noncommercial subversive speech with unprotected commercial speech, I will show that both types of unprotected speech possess the common element of likely harm, usually referred to as a clear and present danger. Finally, I will argue that the state should be able to regulate any speech that creates a clear and present danger of harm regardless of the speech's classification as noncommercial or commercial.

## I. Two Theories of Freedom of Expression and Their Treatment of Commercial Speech

### *A. The Democratic Process Theory*

According to the democratic process theory, the first amendment protects only expression that furthers the democratic process. This theory assumes that the amendment's meaning is not clear and that the amendment does not absolutely prohibit all regulation of speech[2] even though the first amendment appears at first glance to be straightforward: "Congress shall make no law . . . abridging the freedom of speech or of the press."[3]

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1. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981).

2. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 Stan. L. Rev. 299, 306-08 (1978).

3. U.S. Const. amend. I.

While it would probably be unfair to attribute this theory to any one commentator, the theory is most widely associated with Judge Robert Bork.[4] Judge Bork's position is that the language of the first amendment is indeterminate and that its scope must, therefore, be discerned from other rights given us by the constitution and from the purposes and structure of our form of government. Judge Bork has argued that there are two apparent methods of deriving rights from the Constitution. The first is to examine the Constitution for specific values that are capable of being translated into principled rules and that the Constitution's text or history demonstrates were contemplated by the Framers.[5] The second method is to examine the governmental processes established by the Constitution in order to discover the rights that are necessary to those processes.[6] While the rights discovered by the second method are secondary or derived—since they are not values evident by a simple reading of the Constitution—according to Judge Bork they are essential and no less powerful.[7] First amendment rights are a product of the second method.

Judge Bork's conclusion that the first amendment protects only expression that furthers the democratic process implies that a wide range of expressive activities that more traditional first amendment theories would protect should not be protected. Although Judge Bork does not specifically address commercial speech, it can be inferred that under his theory the first amendment would not protect commercial speech. Moreover, the democratic process theory would not extend first amendment protection to art, scientific research, fictional literature, or other expressive endeavors that do not directly contribute to, or relate to evaluation of, the democratic process.[8] While these expressive activities might be beneficial or even make individuals more capable of contributing to the democratic process, the protective

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4. Professor of Law at Yale University until 1982, now Judge, United States Court of Appeals for the District of Columbia Circuit and Adjunct Professor of Law, Yale University.

While Judge Bork is the most visible of the present advocates of the democratic process analysis, he is not its only advocate. *See* Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255-57; *see also* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT (1948).

5. Bork, *Neutral Principles in First Amendment Theory*, 47 IND. L.J. 1, 17 (1971).

6. *Id.*

7. *Id.*

8. *Id.*

cover of the first amendment must be limited or it would extend to activities that clearly merit no protection.[9] Judge Bork phrases the argument in this way:

> I agree that there is an analogy between criticism of official behavior and the publication of a novel like *Ulysses*, for the latter may form attitudes that ultimately affect politics. But it is an analogy, not an identity. Other human activities and experiences also form personality, teach and create attitudes just as much as does the novel, but no one would on that account, I take it, suggest that the first amendment strikes down regulations of economic activity, control of entry into a trade, laws about sexual behavior, marriage and the like. Yet these activities, in their capacity to create attitudes that ultimately impinge upon the political process, are more like literature and science than literature and science are like political speech. If the dialectical progression is not to become an analogical stampede, the protection of the first amendment . . . must be cut off when it reaches the outer limits of political speech.[10]

Other commentators have attempted to refine the analysis of the democratic process theory. For example, it has been suggested that, while the first amendment was not intended to protect activities other than speech that furthers the democratic process, some speech otherwise undeserving of protection must be protected in order to ensure that speech definitely within the ambit of the first amendment is protected.[11] Alternatively stated, because the foundation of the first amendment is the integrity of the democratic process, activity that urges action contrary to that process is illegitimate. However, distinguishing this illegitimate speech from protected speech is so difficult that the first amendment's circle of protection must be drawn larger to ensure that all legitimate political speech is protected.[12]

Professors Jackson and Jeffries have concurred in the formulation of first amendment protection in terms of the demo-

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9. The opportunity to practice law is apparently such an activity. *See id.* at 27.

10. *Id.*

11. BeVier, *supra* note 2, at 331-42.

12. *See id.* BeVier argues that the line cannot be drawn quite as sharply as Bork would draw it because of the Court's institutional inability to precisely differentiate between political and nonpolitical speech. However, this inability is not a reason to abandon the analysis; she suggests it simply points to the need to extend first amendment protection to some expression that would otherwise be unprotected to ensure that political speech is fully protected. *Id.* at 351-52.

cratic process.[13] In rejecting first amendment protection for commercial speech, Jackson and Jeffries argue that commercial speech does not contribute to self-government because the typical advertisement does not offer any information relevant to political matters.[14]

If the democratic process theory of the first amendment is correct, the first amendment does not protect expression that furthers other goals because such expression does not directly contribute to the democratic process.[15] However, the Supreme Court has not accepted the democratic process theory.[16] Com-

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13. Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 9-11 (1979).

14. *Id.* at 15. Jackson and Jeffries recognize that a more fundamental value of individual self-realization may underlie even the democratic process value. But even so, they argue that there is no justification for protecting commercial speech under either principle. *Id.* at 11-14. Regarding the democratic process value, the authors disagree with the language and implicit holding of Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), that commercial information may enlighten public decisionmaking. Jackson & Jeffries, *supra* note 13, at 16-18. However, Jackson and Jeffries accept as conclusive the absence of the self-realization value as one of the reasons offered by the Court in *Virginia Pharmacy* for protecting commercial speech. *Id.* at 14-15. This analysis seems a bit perfunctory to say the least. If the authors truly accept individual self-realization as a possible value upon which the first amendment is founded as they suggest, *id.* at 11-14, then they should at least respond to some of the better enunciations of argument. *See, e.g.*, Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971). Jackson and Jeffries do not appear sincerely to try to answer Redish's argument for the self-realization value; rather they rely on the Court's failure to articulate this value in *Virginia Pharmacy*. They conclude that because no accepted theory of the first amendment dictates protection of commercial speech, extending protection to commercial speech simply reinstates economic regulation by the courts in the guise of enforcing first amendment values. *See* Jackson & Jeffries, *supra* note 13, at 30-33.

15. This is not to say that you could not reach the conclusion that commercial speech is beneficial to the democratic process. Professor Michael Perry has suggested that if the test is whether the expression "plausibly" furthers the democratic process then commercial speech should he protected because the price and availability of commodities affects formation of political attitudes. Lectures of Michael J. Perry, Professor of Law, Northwestern University Law School, (Fall, 1982); *see also* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976). For the present discussion it is not necessary to decide which of these sources better articulates the democratic process value formulation of the first amendment. The issue here is whether a particular type of commercial speech, that is, commercial speech concerning an unlawful activity, fits in the general scheme of the first amendment and whether treatment in harmony with the democratic process value reduces the burden of those commentators who wish to show that all commercial speech should be fully protected.

16. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

mercial speech is protected, although to a lesser degree than noncommercial speech.[17]

Some commentators reject the narrow democratic process theory of the first amendment and criticize the Court's allocating less protection to commercial speech.[18] This rejection and criticism springs from the theory that the first amendment was intended to protect a value broader than just the democratic process. This view of a broader first amendment value is the subject of the next section.

### *B. The Self-Realization Theory*

Opposing the democratic process theory is the theory that the first amendment protects far more than expression related to the democratic process. Nonpolitical expression, whether it be art, literature, scientific research, or commercial advertising, has value for the very reason rejected by those who favor the democratic process formulation of first amendment protection. Nonpolitical speech contributes to the intellectual growth of the individual, and this growth is beneficial because an informed and intellectually mature polity is desirable.

The first amendment seeks more than informed decisionmaking by the electorate. As one proponent of this theory said:

> The right to freedom of expression is justified first of all as the right of an individual purely in his capacity as an individual. It derives from the widely accepted premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being. . . . It is through [this] development . . . that man finds his meaning and his place in the world.[19]

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17. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).

18. *See infra* notes 19-26 and accompanying text.

19. Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1973). Emerson continues:

> The right to freedom of expression derives, secondly, from basic Western notions of the role of the individual in his capacity as a member of society. Man is a social animal, necessarily and probably willingly so. . . . His right to express his beliefs and opinions, in this role as a member of his community, follows from two fundamental principles. One is that the purpose of society, and of its more formal aspect the state, is to promote the welfare of the individual. Society and the state are not ends in themselves; they exist to serve the individual. The second is the principle of equality, formulated as the proposition that every individual is entitled to equal opportunity to share in common decisions which affect him.
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> . . . .

Professor Martin Redish concludes that commercial speech is protected because it furthers the goal of self-realization; self-realization being the value the first amendment protects. Redish's analysis began with Professor Alexander Meiklejohn's original theory that the first amendment was intended only to ensure the proper functioning of the political process through discussion of political issues,[20] and continued to Meiklejohn's later position that the first amendment is sufficiently broad to include art, science, and literature.[21] Through Meiklejohn's change in belief, Redish emphasizes the extraordinary difficulty of settling on a test of protection and establishing the bounds of that protection when the value underlying the first amendment is not based on an articulated goal.[22] Redish accepts the self-realization value in part for what it says about the individual's sense of self-worth, but self-worth is only one of the ways in which freedom of expression is ultimately legitimated.

Although rational development may be good in and of itself,

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> Two basic implications of the theory need to be emphasized. The first is that it is not a general measure of the individual's right to freedom of expression that any particular exercise of the right may be thought to promote or retard other goals of the society. The theory asserts that freedom of expression, while not the sole or sufficient end of society, is a good in itself, or at least an essential element in a good society. . . .
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> The second implication . . . is that the theory rests upon a fundamental distinction between belief, opinion and communication of ideas . . . and different forms of conduct . . . . For shorthand purposes we refer to this distinction . . . as one between "expression" and "action."

*Id.* at 880.

Therefore, freedom of expression is first a value in itself because it is a necessary or at least widely accepted Western precondition to individual liberty. It also serves the goal of fixing a person's position in society. The implications are that freedom of expression is not measured by the other goals of society that it may promote, that there must be a distinction between expression in action and expression in belief, opinion, and communication. The second implication, that of distinguishing between communication and action, must be understood. This distinction is, in part, the basis for Bork's challenge to the self-realization formulation of first amendment values. Bork argues that if the goal of self-realization is a sufficient basis for protecting expression, activities such as work should be protected. *See* Bork, *supra* note 5, at 27. Emerson's response, as suggested above, is that Bork's conclusion is not required because the first amendment is clearly directed at only communication of beliefs, opinions, and ideas and does not include other types of conduct, or "action" to use Emerson's shorthand phrase. *See* Emerson, *supra*, at 880. Whether this would be true in the United States without the language of the first amendment and the long history and development of the distinction between action and so-called pure expression is a more difficult question.

20. *See* Redish, *supra* note 14, at 434-36.

21. *Id.* at 436-37.

22. *See id.* at 437-38.

> ideally the individual asserts his dignity most strikingly when he uses his power of reason to decide how his life should be run and then carries out those decisions or, if circumstances warrant, has them carried out for him. This freedom to act as one wishes for the sake of the good as he sees it has been labeled by a modern restatement of liberty as the "freedom of self-realization."[23]

Commercial speech is valuable because it contributes to this process of self-realization, which develops the reasoning process and contributes to the proper working of the democratic system.[24] In turn, the democratic system contributes to the self-realization of the polity.[25]

While the Supreme Court has rejected the position that commercial speech deserves no protection, the Court has yet to accept the theory that commercial speech has a value equal to that of noncommercial speech.[26] Thus, the Court has not accepted either the democratic process theory or the self-realiza-

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23. *Id.* at 442.

24. *Id.* at 445. The theory of the marketplace of ideas is implicit in this analysis. The greater amount of information available to people, the more likely their decisions are to be reasonable. *See* Meiklejohn, *Commercial Speech and the First Amendment*, 13 CAL. W.L. REV. 430, 440 (1977) (this author should not be confused with Alexander Meiklejohn whose views were discussed above); *see also* Redish, *supra* note 14, at 434.

25. Redish, *supra* note 14, at 432-43. On a less theoretical level, some might say that commercial speech "intuitively" deserves less protection than noncommercial speech. Others may argue that to the vast majority of people in our country, how they look, smell, and feel, as well as the price of food, clothing, housing, and medical and legal care, are more important and have more to do with making political and social judgments than, for example, an article about the legitimacy of activist Supreme Court decisions. Kushner, *Freedom to Hear: The First Amendment, Commercial Speech and Access to Information*, 28 WAYNE L. REV. 137, 141 (1981). Kushner argues that the qualitative difference between learning that legislators are gouging their electorate by examining the price of goods in advertisements and learning of this through editorials is nil. If the information is the same, it seems incorrect to say one means of learning it is of greater value.

> Notions that there exists a dichotomy between commerce and politics are simplistic at best. Who can say for sure whether the labor union picket presents us with a political message or a commercial message? We live in a complex society; economic policy is pervasively regulated by government and the conclusion is inescapable that all issues that affect access to needed goods and services are political issues. Economics is politics. Commerce is politics.

*Id.* at 176 (footnotes omitted).

If this second argument is more accurate, is it reasonable simply to conclude that commercial speech is less valuable than noncommercial speech?

26. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

tion theory. In the following section I will review the Supreme Court's treatment of commercial speech.

## II. A History of Commercial Speech

In 1942 the United States Supreme Court, without citation of authority and in what can fairly be termed a casual way, declared: "We are . . . clear that the Constitution imposes no . . . restraint on government as respects [regulation of] purely commercial advertising."[27] In this three page opinion in *Valentine v. Chrestensen*,[28] the Court cast commercial speech adrift from the main body of first amendment theory.

Chrestensen owned a former United States Navy submarine that he displayed to the public for the price of an admission. In 1940 he brought the submarine to New York City and moored it at a dock in the East River. When he attempted to distribute handbills advertising the submarine, he was stopped and informed that a New York sanitation ordinance prohibited distribution of commercial or business advertising handbills. Chrestensen then had the handbills reprinted with the same advertisement on the front, but on the reverse side he printed a message protesting the city's denial of his request to moor the submarine at city wharfage facilities. He was again ordered to stop distributing.[29]

The Supreme Court declared that the states' ability to regulate dissemination of opinions on public streets must not be unduly burdensome, but concluded that the Constitution imposed no such limitation on state regulation of commercial advertising.[30] The Court rejected Chrestensen's claim that the restriction burdened his right to comment on the wharfage denial, a matter of legitimate public concern, ruling that the record was clear that this was merely a subterfuge to circumvent the ordinance.[31]

The next significant commercial speech case was *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*.[32] The press company challenged the validity of Pittsburgh's Human Relations Ordinance, which declared unlawful any discrimina-

27. Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).
28. *Id.*
29. *Id.* at 52-53.
30. *Id.* at 54.
31. *Id.* at 55.
32. 413 U.S. 376 (1973).

tion on the basis of sex in employment or employment advertising.[33] The ordinance also prohibited aiding an employer in unlawful discrimination.[34] The Commission on Human Relations had issued an order prohibiting the *Pittsburgh Press* from continuing its practice of listing some classified job advertisements under sex designated categories.[35] In upholding the order, the Supreme Court rejected the press company's argument that the order interfered with the newspaper's editorial and news operation. The Court also rejected the Commission's argument that the newspaper's profit motive in running the classified ads made the ads commercial speech.[36] Referring to *Valentine v. Chrestensen,* the Court distinguished between advertisements that do nothing more than propose a commercial transaction and those that express a position on matters of social or political policy.[37] If profit motive were determinative, the Court declared, every aspect of a newspaper's operation would be subject to regulation.[38] Thus, the Court held that the substance of the idea communicated and not its motivation determines whether it is commercial.[39]

The Supreme Court refused to extend first amendment protection to the sexually discriminatory speech because it was speech proposing a violation of the law.[40] The Court may already have been uncomfortable with the conclusory reasoning of *Valentine* and may have wished to shift the analysis away from commerciality and toward the illegality of the speech. In any event, the Court concluded that the speech was unprotected because it was a solicitation to violate the antidiscrimination ordinance. The Court analogized: "We have no doubt that a newspa-

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33. *Id.* at 378.

34. *Id.*

35. *Id.* at 380.

36. *Id.* at 381-85.

37. *Id.* at 385.

38. *Id.*

> If a newspaper's profit motive were determinative, all aspects of its operations—from the selection of news stories to the choice of editorial position—would be subject to regulation if it could be established that they are conducted with a view toward increased sales. Such a basis for regulation clearly would be incompatible with the First Amendment.

*Id.*

39. This holding was a reiteration of New York Times Co. v. Sullivan, 376 U.S. 254, 265-66 (1964).

40. *Pittsburgh Press,* 413 U.S. at 388-89.

per constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes."[41]

Two years after *Pittsburgh Press* the Court was asked to reexamine its assumption that commercial speech was essentially unprotected. *Bigelow v. Virginia*[42] involved Bigelow's newspaper, the *Virginia Weekly*, which had published an advertisement in violation of a Virginia statute that made it illegal, by the sale or circulation of any publication, to encourage or prompt procuring an abortion.[43] When presented with an advertisement for this controversial service, the Court's discomfort with the categorization approach became apparent.[44] One commentator has suggested that the *Bigelow* opinion was more the result of the Court's desire to add credence to its recent, controversial decision concerning the right to abortion than it was an embracing of the idea that commercial speech is protected by the first amendment.[45] Still, the ad did no more than simply advertise an abortion referral agency that operated for profit. The advertisement did not criticize the Virginia legislature for prohibiting abortions[46] nor explain the laws of New York that

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41. *Id.*

42. 421 U.S. 809 (1975).

43. *Id.* at 812-13.

44. *See id.* at 818, 822.

45. Schiro, *Commercial Speech: The Demise of a Chimera*, 1976 SUP. CT. REV. 45. Professor Schiro wrote:

> *Bigelow* was one more in the line which failed to confront the commercial speech question and resolve it on its own merits or lack thereof. The opinion followed the reasoning in *Sullivan*, with the result that this allegedly commercial advertisement was transformed into an editorial advertisement on one of the crucial issues of the day. And that issue well explains the decision. . . . [T]he fact that the contested advertisement was for an abortion referral agency[,]. . . far more than the tattered condition of the commercial speech doctrine, must have been foremost in the Court's mind. . . . [T]he decision is best viewed as an attempt to buttress, or at least avoid undermining, the abortion decisions.

Id. at 78.

46. In fact, given the nature of the business advertised, it was probably in the agency's financial interest that states neighboring New York continued to prohibit abortions so that it could draw prospective customers from those states. Had abortions been more available, it is likely that the commercial service of the agency would have been unnecessary.

If the Court's reasoning was that this very mundane solicitation to enter into a commercial transaction became valuable speech because the transaction was one of controversy, then the same protection must logically be given to advertisements for the sale of Chrysler automobiles because of the role of the federal government in ensuring that the corporation is in business in the United States. It is more likely, as Professor Schiro suggests, that the Court wished to emphasize the importance of the right to abortion.

allowed abortions.[47] Even though the ad was commercial in nature, the Court concluded that the speech was of fundamental importance and was protected.[48]

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[49] the Supreme Court squarely addressed the issue of whether commercial speech is "wholly outside the protection of the First Amendment." The case involved commercial advertising of prescription drug prices in contravention of a Virginia statute. The Court first proposed that speech does not lose its protected status because money is spent to communicate it or because it is sold for a profit.[50] Thus, the Court ended any

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But if this is so, the Court should have set forth its reasoning that the subject matter advertised made the expression less subject to restrictive regulations. The Court could have prevented confusion in this area by articulating its reasoning.

In *Pittsburgh Press* and in *Virginia Pharmacy* the Court said commercial speech concerning unlawful transactions is unprotected. This being the case, the Court should have upheld the conviction in *Bigelow* because it was illegal in Virginia to provide advice on how to obtain an abortion. The Court may have been concerned that upholding the conviction would undermine its recent decision in Roe v. Wade, 410 U.S. 113 (1973), making the right to obtain an abortion fundamental. Instead of setting forth its concern, the Court wrapped its decision in the rhetoric of the first amendment and held that Virginia had no legitimate state interest sufficient to restrict the flow of information about a service that was legal in another state. *See Bigelow*, 421 U.S. at 827-29. The articulated reason for the decision should have been that Virginia had no legitimate interest sufficient to prevent dissemination of information about the exercise of a fundamental right. It was not necessary to hold that Virginia's attempt to limit discussion of a service available elsewhere was unconstitutional. The predicate for reversal should have been the subject matter, not the service's availability, because the opinion ignores the state's legitimate interest in prohibiting commercial speech concerning unlawful activity, an interest recognized by the Court in *Pittsburgh Press, Virginia Pharmacy,* Bates v. State Bar, 433 U.S. 350 (1977), and Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980). *See infra* notes 167-74 and accompanying text.

47. *Bigelow*, 421 U.S. at 811-12.

48. *Id.* at 822.

49. 425 U.S. 748, 761 (1976).

50. *Id.* The majority wrote:

> Our question is whether speech that does "no more than propose a commercial transaction" is so removed from any "exposition of ideas" and from " 'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,' " that it lacks all protection. Our answer is that it is not.

*Id.* at 762 (citations omitted). The Court went on to state its reasons for this conclusion, including the observation that in even such mundane economic disputes as that between labor and management both employer and employee are protected by the first amendment. As seen above, the presence of a profit motive does not remove that protection. Just as the profit motive of an industry and, in the end, the industry's existence are at issue in the labor dispute and depend on resolution of that dispute, they also depend on the industry's ability to advertise its products. If the discussion of economic issues deserves protection in the one context, it also deserves it in the other context.

uncertainty about the effect of a profit motive on the protection offered a particular expression. For the first time the Court also stated its belief that "the particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate."[51]

The Court thus acknowledged that proper allocation of resources in a free market economy requires information. Protecting information about how the economic system is working is as important as protecting information about the regulation of the economic system by government.[52] In short, the marketplace of ideas theory applies as forcefully to the actual marketplace as it does to political and social theory.[53] So long as our nation is committed to individual choice in the purchase of services and products and so long as these choices are important to individuals, the need for information to make rational choices cannot reasonably be denied.[54]

The Court recognized that commercial speech is valuable but nonetheless did not give it full first amendment protection.[55] The Court held the Virginia statute to be constitutionally invalid, but declared that commercial speech that is untruthful or deceptive or that concerns unlawful conduct is not protected.[56]

In *Linmark Associates, Inc. v. Willingboro*,[57] *Bates v. State Bar*,[58] *Ohralik v. Ohio State Bar Association*,[59] *In re Primus*,[60] and *Friedman v. Rogers*,[61] the Supreme Court reiterated that commercial speech was no longer wholly unprotected, but did not significantly amplify the definition of commercial speech.

Then, in two 1980 decisions,[62] the Court seriously attempted

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51. *Id.* at 763.

52. *Id.* at 765.

53. *See* Redish, *supra* note 14, at 433.

54. *Virginia Pharmacy*, 425 U.S. at 765.

55. *Id.* at 770-73.

56. *Id.* at 771. This raises the issue that this article is intended to confront. How can the Court's desire to refuse protection to commercial speech about unlawful transactions be reconciled with treatment of noncommercial speech (such as subversive expression) in such a way that eliminates the need to categorize speech as commercial to permit the additional regulation?

57. 431 U.S. 85 (1977).

58. 433 U.S. 350 (1977).

59. 436 U.S. 447 (1978).

60. 436 U.S. 412 (1978).

61. 440 U.S. 1 (1979).

62. Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

to establish the limit on the states' ability to regulate commercial speech. The Court announced a test intended to define protected commercial speech and to set the limits on regulating that speech. The test was phrased as follows:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[63]

This test excludes from protection commercial speech concerning unlawful activity.[64] However, the Court did not offer its reasons for not protecting commercial speech concerning unlawful activity in either of its 1980 decisions. The test is more of an incantation of earlier language than a holding, but it is nonetheless a very real stumbling block to those who seek a level of protection for commercial speech equal to that given noncommercial speech.

In the first of these two cases, *Consolidated Edison Co. v. Public Service Commission*,[65] the New York Public Service Commission sougbt to regulate information being mailed to utilities consumers by banning certain billing inserts. The commission's regulation disallowed the inserts if they dealt with controversial subjects, including political and nuclear power issues. The commission approved this regulation rather than agree to the request of a public interest organization to include an insert responding to an earlier mailing that favored nuclear power.[66] The commission candidly asserted that it would prohibit controversial speech that it deemed not to be as useful to consumers as information on noncontroversial subjects, such as energy conservation.[67] In its argument to the Court, the commission suggested that this regulation was permissible because it evenhandedly

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63. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980).

64. *Id.*

65. 447 U.S. 530 (1980).

66. *Id.* at 532-33.

67. *Id.* at 536-37.

limited discussion of both sides of the controversial issue and was therefore content neutral.[68] The Court rejected this argument. Because the regulation prohibited all discussion of the topic, the Court held it to be as much a regulation of content as a restriction on particular viewpoints would have been.[69]

This treatment should be contrasted with the treatment given a regulation of commercial speech in the second of the 1980 decisions, *Central Hudson Gas & Electric Corp. v. Public Service Commission.*[70] In *Central Hudson* the New York commission prohibited utilities from using any advertising that promoted the use of electricity.[71] Recall that in *Consolidated Edison* the regulation purported to prevent discussion of all controversial topics, whether commercial or noncommercial.[72] The Court's discussion rejecting the content neutrality argument in *Consolidated Edison* was replaced in *Central Hudson* by an examination of the specific worth of commercial speech in providing information. The Court held that commercial speech that does not accurately inform the public or that concerns unlawful activity may be regulated or prohibited.[73] Further, the Court held that even if the commercial speech is shown to be neither misleading nor related to unlawful activity, the state may yet regulate the speech if the state shows that: (1) the regulation will serve a substantial state interest, (2) the regulation is designed to achieve that interest, and (3) the regulation sweeps no more broadly than necessary.[74] That is, the regulation must directly advance the interest and the interest cannot be served as well by a less restrictive regulation.[75] The Court found that all but the last requirement had been fulfilled in *Central Hudson.*

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68. *Id.* at 537.

69. The Court wrote:

> As a general matter, "the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." . . . If the marketplace of ideas is to remain free and open, governments must not be allowed to choose "which issues are worth discussing or debating . . . ."

*Id.* at 537-38 (citation omitted).

70. 447 U.S. 557 (1980).

71. *Id.* at 558-59.

72. *Consolidated Edison*, 447 U.S. at 532-33, 537.

73. *Central Hudson*, 447 U.S. at 563-66.

74. *Id.* at 564-66.

75. *Id.* at 564.

Because the state's interest could be served as well by less restrictive means, the regulation failed.[76]

Before applying the substantive portion of this announced test of commercial speech regulation, the Court first asks whether the speech concerns unlawful activity or is misleading.[77] My thesis is that one impediment to full protection of commercial speech can be removed by analogizing the requirement that commercial speech concern lawful activity to the treatment of noncommercial subversive speech representing a similar danger of unlawful activity.

## III. A Short History of Subversive Speech

This section surveys the origin and the theoretical basis of the subversive speech doctrine. World War I provided the impetus for the first Supreme Court case in the area of subversive speech. During the war a dissident named Schenck was convicted of willfully conspiring to print and circulate to men who had been called and accepted into military service a document intended to cause insubordination and obstruction of the draft process.[78] Schenck urged, in language the Court described as impassioned, the inductees not to submit to the draft, which he characterized as an unconstitutional attempt to send our citizens to "foreign shores to shoot up the people of other lands."[79] In upholding Schenck's conviction, the Court found that Schenck would not have sent the document had he not intended it to influence the inductees to obstruct the draft.[80] The Court held that the words used were unprotected during a time of war be-

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76. *Id.* at 569-71. Although both *Consolidated Edison* and *Central Hudson* decided that the regulations were unconstitutional interferences with the freedom of expression, the results were approached from very different directions. In *Consolidated Edison* the Court recognized that the restriction was related to content and proceeded to strike it down because it did not serve a compelling state interest in the least restrictive manner. *See Consolidated Edison*, 447 U.S. at 540-43. In *Central Hudson* the Court never expressly recognized the character of the regulation as content related, apparently because the Court understands and accepts that any regulation directed at commercial speech alone must necessarily be content biased. The Court concluded that so long as the regulation directly advances a substantial state interest and is no more extensive than necessary, the regulation will be valid. *Central Hudson*, 447 U.S. at 564.

77. *See Central Hudson*, 447 U.S. at 566.

78. Schenck v. United States, 249 U.S. 47, 48-49 (1919). Two other charges were involved: (1) use of the mails for unmailable materials, and (2) unlawful use of the mails to mail the document.

79. *Id.* at 51.

80. *Id.*

cause they were "used in such circumstances and were of such a nature as to create a clear and present danger that they [would] bring about the substantive evils that Congress has a right to prevent."[81]

Schenck's call to obstruct the draft did not specify any time for action or even what action should be taken.[82] Schenck had no way of gauging his audience's reaction or of building on any positive reaction he received. There was, therefore, no immediate threat. Rather, Schenck simply abstractly recommended action at some indefinite future time. In order to act on the expression, the inductees would have had to decide what action was appropriate and put that action into practice without Schenck's guidance. The Court recognized this absence of an immediate threat, but corrected this deficiency by supplying its own conclusion regarding the intended effect of the urging.[83] *Schenck v. United States* allowed prohibition of, and punishment for, speech that was nothing more than pure advocacy of undefined or at least unspecified action to be taken at some indefinite future time.

In *Whitney v. California*,[84] Whitney had attended a Communist Labor party convention at which the party's resolutions committee, of which she was a member, adopted the national party platform. The platform contained a resolution calling for the overthrow of the government. Whitney remained on the committee without protesting the platform even though she had earlier sponsored a much milder platform that urged American workers to remain within the political system to elect Communist Labor party candidates.[85] Whitney was tried and convicted of criminal syndicalism. The Supreme Court affirmed her conviction. In a concurring opinion Justice Brandeis, joined by Justice Holmes who had authored the *Schenck* opinion, relied on the clear and present danger test to justify the conviction.[86]

During the post-World War II period the Supreme Court was asked several times to determine the validity of ordinances

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81. *Id.* at 52.

82. *See id.* at 51.

83. The Court wrote: "Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have on persons subject to the draft except to influence them to obstruct the carrying of it out." *Id.*

84. 274 U.S. 357 (1927).

85. *Id.* at 364-66.

86. *Id.* at 379.

outlawing varying aspects of communist involvement ranging from merely holding membership in the Communist party to urging the violent and immediate overthrow of the government. In *Dennis v. United States*,[87] leaders of the Communist party in the United States were convicted of violating the Smith Act, which prohibited advocating the government's overthrow or organizing any group to so advocate.[88] After reviewing the development of the clear and present danger test, the Court concluded that the test was not intended to be "crystallized into a rigid rule to be applied inflexibly without regard to the circumstances of the case."[89] The Court upheld the Smith Act convictions in *Dennis* and adopted Chief Judge Learned Hand's reformulation of the clear and present danger test from the circuit court's opinion: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[90]

Communists are not the only persons who have been prosecuted pursuant to criminal syndicalism statutes.[91] In *Brandenburg v. Ohio*,[92] a leader of a Ku Klux Klan group was convicted of advocating violent terrorism as a means of accomplishing political reform.[93] In its per curiam opinion reversing the conviction, the Supreme Court relied on previous subversive advocacy opinions and restated the rule of protection as follows:

> These . . . decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to

87. 341 U.S. 494 (1951).

88. *Id.* at 496.

89. *Id.* at 508.

90. *Id.* at 510. The Supreme Court again considered the Smith Act in Yates v. United States, 354 U.S. 298 (1957). In that case the Court did not address the issue of whether the Constitution required a finding of incitement to action; rather it construed the Smith Act as requiring the incitement element for conviction. *Id.* at 319-20. The membership clause of the Smith Act was considered in Scales v. United States, 367 U.S. 203 (1961) and in Noto v. United States, 367 U.S. 290 (1961). Neither of these cases adds to the discussion of this article.

91. It has been suggested that the Court chose a right-wing advocate to reemphasize the protections of the first amendment for pure advocacy. *See* Comment, Brandenburg v. Ohio: *A Speech Test for All Seasons?* 43 U. CHI. L. REV. 151 (1975).

92. 395 U.S. 444 (1969).

93. *Id.* at 444-45.

> inciting or producing imminent lawless action and is likely to incite or produce such action.[94]

While the Court may have intended to merely restate its earlier holdings, its language appears inconsistent with the holdings and tests of *Schenck* and *Dennis*. In *Schenck* the expression was unprotected because the words were used in such circumstances and were of such a nature as to create a clear and present danger of an evil whose occurrence was not imminent.[95] In *Dennis* the test became whether the gravity of the evil discounted by its improbability justified the infringement of expression.[96] It has been suggested that *Brandenburg* introduced a requirement of imminence and that, while the Court has not consistently imposed this requirement, the imminence test best accommodates the conflict between freedom of expression and the state's interest in preventing unlawful conduct.[97]

Professor Redish has recently praised the clear and present danger test but has decried the gloss of imminence added to it by *Brandenburg* and other more recent opinions.[98] Redish writes that the Supreme Court has never explicitly laid out its understanding of what constitutes a clear and present danger but that recent cases have changed the emphasis of the skeletal test by requiring that the harm urged be imminent.[99] He finds this all-purpose imminence requirement unacceptable and prefers an interpretation of the word "present," as used in the test, that is apparently less protective of speech.[100]

Professor Redish rejects the imminence gloss to the clear and present danger test because it is not sufficiently deferential to the state's legitimate and strong interest in preventing substantive evils. He argues that the deficiency created by the im-

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94. *Id.* at 447. The test has been said to be: "Speech is unprotected under *Brandenburg* only when it (a) advocates imminent lawless action, and (b) is likely to produce imminent lawless action." *See* Comment, *supra* note 91, at 164.

95. *Schenck*, 249 U.S. at 52; *see also supra* text accompanying notes 82-83.

96. *Dennis*, 341 U.S. at 510.

97. *See* Comment, *supra* note 91, at 179, 187-90.

98. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CALIF. L. REV. 1159 (1982). Because my own reaction to the imminence requirement is much the same as, and indeed was significantly prompted by, Redish's analysis, it is important to touch the relevant highlights of his arguments.

99. *See id.* at 1175-81.

100. *Id.* at 1180-82.

minence requirement would lead to inability to sanction clearly inappropriate and dangerous speech.[101]

> My theoretical objection to the *Brandenburg*-style "imminence" requirement is that it harks back to the "marketplace of ideas" rationale for protecting unlawful advocacy. For it assumed that so long as there is sufficient time for rebuttal and reasoned consideration, we can rest assured that "truth" will best "falsity." Only when danger is so "imminent" that there is not time for response and discussion should suppression be upheld. . . . [H]owever, there is simply no basis for the conclusion that the opportunity for reasoned response will always defuse unlawful advocacy. Requiring imminence in every case in the belief that if it is not present the advocacy will never lead to harm is theoretically unjustifiable.[102]

Professor Redish develops several hypothetical situations in support of this argument, including one in which a racist suggests, months in advance of the bicentennial celebration, that blacks be killed on the bicentennial to celebrate American independence.[103] It is apparent that the harm is not imminent; there is time for reflection and counter argument. However, there is a substantial risk that the evil will occur if properly deranged minds are sparked. Redish concludes that requiring imminence in every case is unjustifiable.

I will take up the importance of the change from the clear and present danger test to the imminence requirement later in the discussion of the appropriate standard to be applied to unlawful commercial speech.[104]

## IV. Defining Commercial Speech and Commercial Speech Concerning Unlawful Activities

Courts and commentators have repeatedly attempted to define commercial speech.[105] The attempts have in common the

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101. *Id.* at 1180-81.

102. *Id.* at 1181.

103. *Id.*

104. *See infra* notes 207-12 and accompanying text.

105. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Barrett, *"Uncharted Area"—Commercial Speech and the First Amendment*, 13 U.C.D. L. Rev. 175 (1980); Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U. Ill. L.F. 1080 (1976); Comment, *Standard of Review for Regulations of Commercial Speech:* Metromedia, Inc. v. City of San Diego, 66 Minn. L. Rev. 903 (1982) [hereinafter cited as *Standard of Review*]; Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine,*

conclusion that it is difficult if not impossible to formulate a test that will permit regulation of commercial speech while not chilling noncommercial speech about matters that partially concern commerce. In other words, it is difficult to create a test of commercial speech that is neither over- nor underinclusive.

In *Virginia Pharmacy*[106] the Supreme Court dealt with commercial speech as if the category included only expression that "does no more than propose a commercial transaction."[107] One commentator has echoed this test, but has added the refinement of purpose. Thus, a commercial message is one whose purpose is to sell particular goods or services. If discussion of issues of public interest is included, the discussion is treated as part of the inducement to buy and does not change the nature of the speech.[108]

More recently, in *Bolger v. Youngs Drug Products Corp.*,[109] the Court returned to the question of what constitutes commercial speech. The Court began by using the "nothing more than a commercial proposal" test but went further to list other charac-

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44 U. CHI. L. REV. 205 (1976) [hereinafter cited as *First Amendment Protection*].

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

107. *Id.* at 762 (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)).

108. *See* Barrett, *supra* note 105, at 205. Professor Rotunda believes defining commercial speech to be futile. *See* Rotunda, *supra* note 105, at 1101; *see also* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 536-37 (1981) (Brennan, J., concurring). Justice Brennan did not specifically say that judicial attempts at a definition are futile, but he did write that he was uncomfortable with allowing a ban of commercial billboards. His discomfort arose in part because governmental officials would be permitted to decide what constituted commercial speech. He offered the following warning:

> I would be unhappy to see city officials dealing with the following series of billboards and deciding which ones to permit: the first billboard contains the message "Visit Joe's Ice Cream Shoppe"; the second, "Joe's Ice Cream Shoppe uses only the highest quality dairy products"; the third, "Because Joe thinks that dairy products are good for you, please shop at Joe's Shoppe"; and the fourth, "Joe says to support dairy price supports: they mean lower prices for you at his Shoppe."

*Id.* at 538.

Justice Brennan then suggested other troublesome examples including: a billboard by San Diego Padre fans with no connection to the team that reads, "Support the San Diego Padres, a great baseball team"; one by the United Auto Workers that reads, "Be a patriot—do not buy Japanese-manufactured cars"; the same billboard offered by Chrysler; "Support America's First Environment Strike. Don't Buy Shell!" paid for by the Oil, Chemical, and Atomic Workers International Union of the AFL-CIO; and the same billboard paid for by Exxon. *Id.* at 538-39 & n.14.

109. 103 S. Ct. 2875 (1983).

teristics of commercial speech.[110] Because Youngs Drug's pamphlets advertising contraceptives went beyond an offer to sell and discussed issues of wider social importance, such as contraception and the danger of venereal disease, the Court sought other indicia of commerciality.[111] The Court determined that the combination of three characteristics strongly supported the district court's finding of commerciality, although no one characteristic by itself was enough.[112]

Two of the three characteristics had been seen before. The Court cited *New York Times Co. v. Sullivan*[113] in support of its statement that the fact that the pamphlets were paid advertisements did not necessarily mean that they were commercial speech.[114] Similarly, the Court's rejection of economic motivation as conclusive of commerciality was old teaching, having first appeared in *Bigelow v. Virginia*.[115] What was new was the Court's consideration of the effect of mentioning a product by name. While the Court stated that "the reference to a specific product does not by itself render the pamphlets commercial speech,"[116] the Court included this reference as one of the characteristics indicating commerciality. The possibility of basing a test of commerciality on such an objective characteristic was new to the Supreme Court, but not to commentators.[117] However, because this novel characteristic is buried among very subjective characteristics, it should not be accorded too much significance.[118] It is one of three factors offered only as gloss to what has almost become the rubric definition of commercial speech: "speech that does no more than propose a commercial transaction."[119] These additional characteristics appear to be nuances of *Virginia Pharmacy*'s commercial purpose test rather than signals of a move toward a more objective test of commerciality.

One commentator has argued that there are three possible

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110. *Id.* at 2879-81.

111. *Id.* at 2879-80.

112. *Id.* at 2880.

113. 376 U.S. 254, 265-66 (1964).

114. *Bolger*, 103 S. Ct. at 2880.

115. *Id.*

116. *Id.*

117. *See, e.g., First Amendment Protection, supra* note 105, at 230-32.

118. The distinction between subjective and objective characteristics is a central part of this article. The full discussion appears at *infra* notes 125-62 and accompanying text.

119. *Bolger*, 103 S. Ct. at 2880.

tests of commerciality: (1) speech that does nothing more than propose a commercial transaction;[120] (2) speech of interest only to a nondiverse consumer audience, that is, speech of interest primarily to the potential market;[121] and (3) speech about a brand name, product, or service.[122] The first test is underinclusive because inclusion of gratuitous social comment would remove plainly commercial speech from the commercial category: "Buy Compudollars word processing equipment, now on sale at your dealer—we support nuclear rearmament." The second test, which defines commercial speech by examining audience interest, is also underinclusive not only because it is subject to the same abuse as the first test but also because commercial advertising can attract a wide audience by virtue of publicity about its misleading nature.[123] Moreover, the second test presents a practical problem of determining diversity of audience appeal. The third test is overinclusive because it would categorize as commercial speech comments on brands by consumer organizations and news reports as well as any other traditionally noncommercial speech that fortuitously included a brand identification.

In this article, I offer alternative tests of what constitutes commercial speech. Any test defining commercial speech must be based on either a subjective test (whether the speech urges a commercial transaction) or an objective test (whether the speech concerns commercial products and transactions even though its purpose may not be to induce a commercial transaction).

While explaining the normative values behind classifying commercial speech is important, I leave this task to those who argue that commercial speech deserves less protection than noncommercial speech. I take the position that, if protection depends on the political nature of the expression, analysis of the content must rely on either the subjective or the objective analysis presented below. Similarly, if the test is whether the expression does nothing more than propose a commercial transaction, then analysis of the content must be by resort to one or a combination of these two analyses no matter what normative value is selected. Because protection for commercial speech must turn on

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120. *First Amendment Protection*, *supra* note 105, at 228-29. This test was used in *Pittsburgh Press*, 413 U.S. at 385, and *Virginia Pharmacy*, 425 U.S. at 771 n.24.

121. *First Amendment Protection*, *supra* note 105, at 229-30. This test was suggested in *Bigelow*, 421 U.S. at 822.

122. *First Amendment Protection*, *supra* note 105, at 230-31.

123. *Id.* at 229-30.

analysis of the expression by either the subjective or the objective test presented below, it is not necessary to decide on a normative value before discussing the efficacy of the commerciality test.[124]

### *A. A Subjective Test of Commerciality*

Subjectivity in this context refers to an examination of the speaker's intent and purpose. This test is not the only way to analyze the subjective factors of commerciality, rather it is a generic pattern that any test looking at the speaker's purpose and motivation must follow. This generic pattern may be phrased in this way: When the speech's purpose would not be as well served if the audience did not enter into a commercial transaction, the speech is commercial. In other words, the speech is commercial if its purpose is to induce a commercial transaction.[125]

Commercial purpose may be exhibited in a number of ways. For example, commercial purpose is present in the drug store owner's offering to fill a prescription at a certain price. Almost as clearly commercial is the general announcement of available products and services by brand name, what is thought of as a classic solicitation advertisement.[126] Slightly more ambiguous are advertisements concerning types of goods or services or the sellers of these types of goods or services: "Obsidian Oil products, the best there is, available only at the finest service stations." Even more ambiguous, but still having a commercial purpose, are general advertisements announcing that a good or

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124. Yet another commentator has suggested that an adequate definition of commercial speech must satisfy three criteria: (1) the definition must be clear enough that ordinances imposing greater burdens on commercial speech will not chill noneconomic expression, (2) the definition must prevent evasion of regulation by subterfuge, and (3) it must permit an explanation of why commercial speech is less valuable than noncommercial speech. The third criterion's purpose is to require that any definition be consistent with a principled distinction between commercial and noncommercial speech, with the result that the difference in treatment of the two categories be based on the lesser value attributed to commercial speech. *Standard of Review, supra* note 105, at 919.

125. This category would not cover messages that relate to a specific product or service, but are so value neutral or incomplete that they do not fairly prompt or discourage a transaction. An example would be a billboard with the word "egg" next to a picture of one. Certainly it may be an ad by egg producers to prompt purchase of their product, but it could as easily be an attempt to discourage egg sales because of their cholesterol levels. The ad could also be intended as a public service to help children associate the verbal signal with the object it represents. The message is so poorly communicated or intentionally ambiguous that it cannot be fairly deemed to have a commercial purpose.

126. For example see the advertisement in *Bigelow v. Virginia* reproduced *infra* at note 170.

service is available or extolling virtues without referring to brand name, price, or even where the good or service is available. For example: "Washington State apples are sweeter and crunchier than ever." Extending this line of examples leads eventually to apparently noncommercial messages such as: "Save the whales. Don't buy Japanese cars."

Professor Barrett noted that this subjective analysis produces a test of content that asks whether the speech proposes a commercial transaction.[127] However, he refined the test by evaluating the purpose of the speech so that speech including extraneous noncommercial messages is included in the commercial category.[128] If Barrett's modified test is furthered changed to ask whether the speech's purpose is to promote a transaction—or in other words, whether the purpose of the speech would not be as well served if no transaction occurred—then the test's subjective focus becomes clear. This subjective test can be represented by intersecting four categories of purpose with four categories describing the message's subject. The following chart illustrates this intersection of purpose and subject and indicates how messages should be categorized if a subjective test is chosen. The reader should be aware that any possible application will involve the same dangers of over- or underinclusiveness so long as the test is subjective. These dangers will be discussed below.

| | Good or Service | Good or Service for other than Characteristic of Good or Service | Marketer for Characteristic of Good or Service | Marketer for other than Chracteristic of Good or Service |
|---|---|---|---|---|
| Positive Promotion | 1 Commercial | 2 Commercial | 3 Commercial | 4 Commercial |
| Positive Critique | 5 Noncommercial | 6 Noncommercial | 7 Noncommercial | 8 Noncommercial |
| Negative Promotion | 9 Commercial | 10 Commercial | 11 Commercial | 12 Commercial |
| Negative Critique | 13 Noncommercial | 14 Noncommercial | 15 Noncommercial | 16 Noncommercial |

Subjective Test—Purpose and subject are evaluated.

127. *See* Barrett, *supra* note 105, at 205.
128. *See id.* at 204.

By classifying a message according to its purpose and subject, the message may be categorized as commercial or noncommercial. Thus, all offers, as that term is used in contract terminology, are commercial.[129] Also, a positive statement about a good or service is commercial so long as the statement's purpose is served only if the consumer is encouraged to enter a transaction to purchase a good or service.[130] However, it is not necessary to the purpose of the message that the transaction be for the particular good, service, or marketer[131] mentioned. Furthermore, a positive statement about a marketer is commercial if made with a promotional purpose.[132] A negative statement about a good, service, or marketer is also commercial so long as the statement's purpose is served only if the consumer is induced to turn to another good, service, or marketer in competition with the criticized commodity.[133]

Commercial speech, as established by this subjective test, would not include criticism of a product, service, or marketer when the purpose is informational only.[134] Turning to a competitor may be the natural consequence of such speech, but so long as the speech's purpose is served equally well if no transaction is entered into, that speech is noncommercial. Furthermore, a message that praises a good, service, or marketer can be noncommercial, even though the result may be an increased number of transactions, so long as the purpose would be as well served if the audience had chosen not to enter into any transaction.[135]

This subjective test is not offered as a schematic definition to end all questions. Each application of the test requires inquiry into the critical element of purpose or intent. If the message's purpose is to encourage a particular transaction or to create a market for future transactions (a purpose not as well served if no transaction occurs), then the message is commercial. Informational messages—that is, messages whose purpose is as well served if no transaction occurs—are treated as noncommer-

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129. Subjective Test Chart box 1, *supra* p. 481.

130. Subjective Test Chart box 1, *supra* p. 481.

131. For the purposes of this article, marketer has been adopted as a shorthand term for manufacturers, producers, wholesalers, retailers, and all others who have any part in manufacturing or distributing goods or services.

132. Subjective Test Chart boxes 3 or 4, *supra* p. 481.

133. Subjective Test Chart boxes 9-12, *supra* p. 481.

134. Subjective Test Chart boxes 13-16, *supra* p. 481.

135. Subjective Test Chart boxes 5-8, *supra* p. 481.

cial. The prime examples of this latter type of message are news reports and consumer testing and evaluation services.

It might be beneficial to use the chart and the subjective test to examine the series of examples offered by Justice Brennan in *Metromedia, Inc. v. City of San Diego*.[136] "Visit Joe's Ice Cream Shoppe" is a promotion of the marketer encouraging a transaction and is therefore commercial.[137] "Joe's Ice Cream Shoppe uses only the highest quality dairy products" is another promotion, this time based on the product, but still commercial.[138] "Because Joe thinks that dairy products are good for you, please shop at Joe's Shoppe" is again promotional and commercial even though it appeals to qualities of the marketer rather than the specific good or service.[139] "Joe says to support dairy price supports; they mean lower prices for you at his Shoppe" is a mixed message. Because it includes a promotion of the shoppe, albeit a weak one, it must be considered commercial.[140] If Joe wishes to be treated like a noncommercial speaker, he must excise the reference to his shoppe.

In the case of a billboard rented by San Diego Padre fans that reads, "Support the San Diego Padres, a great baseball team," the message promotes a service, the entertainment service provided by the Padres. Even though the fans' purpose is altruistic, the billboard is promotional and therefore commercial because the fans' purpose would not be as well served if no transaction were entered into.[141]

The AFL-CIO's billboard, "Support America's First Environment Strike. Don't Buy Shell!" is not commercial. While the message criticizes a particular product and marketer and will probably result in others benefiting, the purpose of the advertisement will be served equally well if no transaction occurs with a competitor.[142] If Exxon places the ad, the question becomes more difficult, requiring an inquiry into Exxon's motives. When Exxon discourages the transaction for a particular good or service, an appropriate presumption might be that the message's purpose is to cause the consumer to avoid Shell's product and to

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136. 453 U.S. 490, 538-39 & n.14 (1981). These examples were referred to *supra* note 108.

137. Subjective Test Chart box 3 or 4, *supra* p. 481.

138. Subjective Test Chart box 3, *supra* p. 481.

139. Subjective Test Chart box 4, *supra* p. 481.

140. Subjective Test Chart box 4, *supra* p. 481.

141. Subjective Test Chart box 1, *supra* p. 481.

142. Subjective Test Chart box 15 or 16, *supra* p. 481.

purchase Exxon's. Thus, the message is negatively promotional and is therefore commercial.[143]

Here lies the acknowledged weakness of the subjective test. In some cases the test will require the weighing of facts to determine the speaker's purpose. In the majority of cases the purpose will be readily apparent from the message and its content. However, in some cases discovery of the message's purpose will require evaluation of such factors as who placed the ad, to whom was the message directed, did the message take the place of other marketing devices, and what was the source of funds for publication. As the message's content becomes less concerned with a product or service and more concerned with qualities of the marketer unrelated to the product or service and as the issue commented upon becomes more important to the audience without regard to commerciality, the message is less likely to be deemed commercial. For instance, "Don't buy Obsidian Oil's gasoline. It will ruin your engine" is more likely to be commercial than "Don't buy Obsidian Oil's gasoline. They polluted the Permian Basin."

Mixed messages—messages that consist of parts that individually could be considered commercial and noncommercial—are necessarily treated as commercial. An example is: "Support the fight against third world hunger. Buy United World bread. For every loaf bought, we donate one cent." A speaker who wishes the full protection of the first amendment must not confuse the issue by including commercial concerns. This result is dictated by necessity rather than any determination that mixed messages are less valuable than purely noncommercial messages. Characterizing mixed messages as noncommercial would invite speakers to abuse and evade regulation by adding gratuitous noncommercial statements to their messages.[144] Justice Powell, writing for the majority in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, emphasized that commercial speech does not become noncommercial by inclusion of material concerning issues of national inter-

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143. Subjective Test Chart box 11 or 12, *supra* p. 481.

144. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 538-39 (1981) (Brennan, J., concurring) (citing examples in which the speaker might escape application of the commercial speech doctrine); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 764-65 (1976) (suggesting that a pharmacist could pose as a social commentator); Valentine v. Chrestensen, 316 U.S. 52, 53 (1942) (Chrestensen attempted to evade the statute by printing a protest on the back of the commercial handbill).

est.[145] Justice Stevens correctly concluded in his concurring opinion that a test of commerciality that focuses on the presence of any type of promotion will include speech on topics traditionally seen as noncommercial.[146] However, any other treatment of mixed messages would result in a definition easily evaded by the addition of gratuitous and unrelated noncommercial speech. So long as the Court retains a separate commercial speech category, mixed messages must inevitably be classified as commercial speech.

The Court appears to be committed to retaining the commercial speech category. In *Central Hudson*,[147] and one year later in *Metromedia, Inc. v. City of San Diego*,[148] the Court emphasized that heightened scrutiny of commercial speech is necessary to prevent diluting the protection offered to noncommercial speech. If commercial and noncommercial speech were not distinguished, dilution would be required to allow the level of regulation of commercial speech that the Court believes is necessary.[149] It is difficult to dismiss the Court's concern that the state be allowed to ensure that the stream of commerce "flow[s] clearly as well as freely."[150] Any definition of commercial speech would be too broad if it included speech on the edge of commerciality such as commentary on products or services without the purpose of promoting a sale. Similarly, if a speaker with a promotional purpose can avoid regulation merely by casting himself as a social commentator, the definition is too narrow.

### *B. An Objective Test of Commerciality*

The objective test attempts to examine only objective elements of the speech; this test rejects consideration of purpose. Under the objective test, if the speech's content is promotional

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145. 447 U.S. 557, 562 n.5 (1980). Thus, the Court rejected Justice Stevens's argument that commercial speech inviting greater use of electricity might become noncommercial if the justification offered for the greater use were the environmental concern that switching to wood stoves would increase air pollution. *Id.* at 580-81 (Stevens, J., concurring).

146. *Id.* at 579-80 (Stevens, J., concurring).

147. 447 U.S. at 563 n.5 (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)).

148. 453 U.S. 490, 506 (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)).

149. This judgment is apparently shared by Professors Jackson and Jeffries. *See* Jackson & Jeffries, *supra* note 13, at 18 n.58.

150. *Central Hudson*, 447 U.S. at 563 n.5 (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 424 U.S. 748, 772 (1975)).

the speech is commercial even though its purpose is purely informational and its motive altruistic. Thus, when a consumer service rates a product highly, the rating is as much a commercial message as when an oil company says its gasoline is good.[151] When a product is criticized solely on the basis of its characteristics, that is, its suitability for its intended purpose, and when there is no issue of wider importance, the message is commercial because the content promotes a competitor's product by negative implication.[152] A message criticizing a company for characteristics unrelated to the commercial suitability of the products the message sells[153] is not commercial because its content is nonpromotional even though the indirect result of the message may be increased sales of a competitor's product. Thus, negative criticism, such as "Don't buy Obsidian gasoline. It is bad gasoline," is commercial, while "Don't buy Obsidian gasoline. Save the Permian Basin from pollution" is noncommercial.

However, even though a message may contain such noncommercial criticism, the message becomes commercial if it is linked to a competitor's product so that the effect is to promote the speaker's product. An example is "Support the environmental boycott of Obsidian Oil. Buy Jet gasoline." The message becomes commercial not because of a change in the content of that portion of the message that criticizes, but because a promotional element has been added. This rule regarding mixed messages is necessary to ensure that the test is not subject to abuse by evasion.

The following chart illustrates two formulations of an objective test of commerciality.[154]

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151. Objective Test Chart box 1, *infra* p. 487.

152. Objective Test Chart box 5a, *infra* p. 487. It is possible to formulate an objective test that ignores this promotion by negative implication. This alternate formulation excludes negative criticism of a product, service, or marketer from the commercial speech category. Objective Test Chart boxes 5b through 8b, and particularly 7b, *infra* p. 487.

153. Objective Test Chart box 6a, *infra* p. 487.

154. A word of caution is appropriate here about the scope of the definitions offered. While they draw from the commercial world for key concepts, these terms and their definitions are meaningless beyond the highly artificial world in which they are offered. For example, in actual life the country of origin of an automobile may be associated with its status. Because the automobile has, for some, come to have as one of its purposes a status symbol function, it might be argued that this factor is one that could be included with those determinative of commercial suitability. This argument is reasonable if the purpose of this test is ignored. Only factors objectively determinative of suitability are included. Thus appeals to the personal taste of consumers are not based on commercial characteristics unless the good or service is intended for a use in which the taste of the

| | Good or Service | Good or Service for Other Than Characteristic of Good or Service | Marketer for Characteristic of Good or Service | Marketer for Other Than Characteristic of Good or Service |
|---|---|---|---|---|
| Positive Statement | 1 Commercial | 2 Commercial | 3 Commercial | 4 Commercial |
| Negative Statement | 5a Commercial | 6a Noncommercial | 7a Commercial | 6a Noncommercial |

The second formulation would replace the second line with the following:

| | | | | |
|---|---|---|---|---|
| Negative Statement | 5b Noncommercial | 6b Noncommercial | 7b Noncommercial | 8b Noncommercial |

Objective Test—Only content is evaluated.
Characteristic—Only such factors as would be considered by a buyer who is concerned only with how the good or service will satisfy its intended purpose; includes such factors as safety, efficiency, and cost.

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consumer determines suitability. An example would be a work of art. This is not to say that such appeals are not a typical advertising technique or that they are not effective. They are excluded from the category of commercial characteristics because this type of appeal could include such matters as the producer's pollution or civil rights record. Rather than distinguish between types of personal appeals based on whether there is an issue of social importance, it is easier, and just as valid, to exclude any personal appeals from the category of characteristics relevant to commercial suitability.

Two separate approaches are represented on the objective test chart above. In the first two lines even negative statements about goods, services or their marketer are treated as commercial because no interchange of ideas wider than the commercial suitability of the goods or services is involved. This treatment comports with the Court's apparent view that in order to be categorized as noncommercial, a message must contain something more than a commercial concern. Separated from these two lines is the third line (which alternatively replaces the second line) representing a distinctly different approach. Under this approach when comments are negative, they cannot be intended to promote a transaction and therefore should be treated as noncommercial even though no wider issue is involved. The key to this line is the Court's language that speech that does nothing more than propose a commercial transaction is commercial. Because a negative message cannot fairly be said to propose a commercial transaction unless coupled with a positive comment about a competitor's good or service, one could adopt the approach that plain negative statements do more than propose a commercial transaction: they serve a public interest function by disseminating information that would not be disseminated by the seller.

To illustrate the different results obtained by these approaches, consider the following example: "Obsidian gasoline is high in glysium that can damage your car's engine." If the first approach, the one that focuses on the breadth of the issue, is adopted, the message will be commercial because it discusses only the commercial suitability of the good. If the negative statement approach, the second approach, is adopted, the message is noncommercial because it cannot fairly be said to promote a commercial transaction.

Two results that may at first appear particularly startling are those represented by boxes two and four on the chart. An example of box two is "Buy Obsidian gasoline. It pollutes less when burned." An example of box four is "Buy Obsidian gasoline. Obsidian is the only company cleaning up the Permian Basin." Both are commercial because of their promotional content even though they are concerned with noncommercial as well as commercial issues. The technique is a classic promotional strategy. Allowing these messages to be treated as noncommercial speech would invite evasion by a very attractive advertising technique.[155]

This objective test has much to recommend it even though the test is far from what the Court appears to contemplate. It would also be a dramatic change in theory to treat news reports, consumer ratings, and other nonpromotional information as commercial when they concern only a product's qualities. Even negative statements would be commercial if they relate only to the commercial suitability of the good or service. In this test objectivity is all important. In the same sense that the name-brand test recommended by one of the commentators discussed above is objective,[156] this test is objective because all that need be determined is the speech's content. No inquiry need be made into the speaker's purpose as is required by the subjective test advanced earlier.[157] An objective approach eliminates the discretion inherent in a test that examines the speaker's subjective purpose and reduces the risk of overinclusiveness and the hazard of chilling noncommercial speech.

Some may object to including public service messages such as news reports and consumer advocate reports (so-called altruistic speech) in the commercial speech category. Nevertheless, there is some logic in this result considering the Supreme Court's position that commercial speech is speech that does nothing more than propose a commercial transaction. The Court

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155. Inviting this shift of the issues discussed in product advertising might appear to be a desirable side effect of the commercial speech doctrine. Consider, however, that noncommercial treatment means less regulation would be permitted including less regulation of messages of this type that may be found to be misleading. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-72 (1976). Consider whether it would be desirable to prohibit regulation of messages such as the following when they are misleading: "Buy Obsidian Unleaded Gasoline. It is an environmentally sound choice."

156. *See First Amendment Protection, supra* note 105, at 228-31.

157. *See supra* notes 125-50 and accompanying text.

has said that the importance of commercial speech, and the reason it is protected at all, is its informational function. Commercial speech allows consumers to make better informed decisions in allocating their scarce resources.[158] Commercial speech is not protected because it furthers any political debate or contributes to the interchange of ideas. Rather, it is protected because it is useful in the marketplace of commercial ideas. It is, therefore, ascribed a position on the scale of first amendment values below that given to political and social commentary.[159]

Very little in the Court's decision to put commercial speech in a separate category justifies greater protection for altruistic discussion of products than for commercially motivated discussion. The informational function of commercial speech is already taken into consideration with the result that some measure of protection is given. Unless we are willing to say that consumer advocate reports deserve full first amendment protection because they are apparently trustworthy, justifying greater protection for this special type of commercial speech is difficult. Providing it greater protection on the basis of trustworthiness would be illegitimate given the Court's belief that the purpose of greater regulation is ensuring that only trustworthy messages survive. This winnowing should occur because misleading and false commercial speech are specifically unprotected.[160] Lack of falsity and ability to mislead are preconditions to the protection offered to commercial speech. Thus, no legitimate reason appears to exist for protecting more fully altruistic commercial speech simply because it is more likely to be accurate, trustworthiness having been the predicate for any protection.

One commentator has suggested that commercial speech advances the interests of political self-government, discovery of truth, and individual growth through perception, all three of

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158. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 779-81 (1976); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 556-68 (1980); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 505 n.12 (1981).

159. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 505 n.12 (1981). The Court could legitimately reject this lower position for commercial speech on the basis that it is difficult to distinguish between noncommercial and commercial speech. The examples chosen by Justice Brennan in his concurring opinion in *Metromedia* point out the blurriness of the line between the commercial messages and social and political comment. *Id.* at 538-39 (Brennan, J., concurring). This difficulty would justify the Court in rescinding its policy of giving commercial speech less protection.

160. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-72 (1976); Bates v. State Bar, 433 U.S. 300, 381-82 (1977).

which are identified as values underlying free expression. The commentator concludes that commercial speech is less protected than noncommercial speech because it does not further the fourth value underlying the first amendment—that of self-realization through expression—as does noncommercial speech.[161] Because the "hawking of wares" is not individual expression, it is argued, it cannot advance this fourth value.[162] To the extent this analysis is correct, it is as true for altruistic commercial speech. Altruistic commercial speech does not develop one's intellect, interest, tastes, or personality any more than profit-motivated commercial speech, at least not in the context most familiar to us—that is, reports of consumer groups on available goods and services. A spontaneous comment by one neighbor to another about a newly purchased automobile may advance self-realization by expression of taste and interest, but this comment is very different from compilations of test results or marketing surveys by a consumer group. To the extent self-realization is advanced, it is equally advanced by promotional commercial speech as by altruistic speech about commercial matters. Moreover, should this value of self-realization through expression be present in some altruistic commercial speech, the Court's judgment would remain unchanged because not even altruistic commercial speech implicates the interchange of more "dignified" ideas on which the Court seems to have focused.

### *C. Why Neither Test of Commerciality is Acceptable*

Together, these alternative tests of commerciality demonstrate that it is impossible to formulate one test that will allow greater regulation of commercial speech without being impracticably vague or overly rigid. Depending on the factors chosen as indicators of commerciality, both tests can be over- or underinclusive.

The danger in a subjective test patterned on the one above, which necessarily involves an examination of purpose, is in administering the test. A subjective test focuses on purpose and intent but determines these criteria from objective factors such as audience, speaker, source of funds, and technique employed. Determining purpose from objective factors will sometimes re-

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161. *See* Note, *Constitutional Protection of Commercial Speech*, 82 COLUM. L. REV. 720, 744 (1982).

162. *Id.*

sult in finding promotional purpose when none exists. Administration of the subjective test is therefore likely to be overinclusive. This overinclusiveness may chill, if not directly curtail, noncommercial speech.

When purpose is excluded as a criterion, the test becomes objective and loses much of its flexibility. Depending on which objective factors are chosen, the objective test will be severely over- or underinclusive. Examination of content alone with defined criteria leaves no discretion and little flexibility. For example, to prevent evasion of regulation, all positive statements about a good, service, or marketer must be treated as commercial. This result is necessary even when the statement is made by an altruistic evaluator because the speaker's motivation cannot be considered and motivation is the only factor setting this message apart from self-interested advertising. Therefore, positive consumer advocacy reports and even positive news reports about products would be considered commercial.

Similarly, negative comments about the commercial suitability of goods or services must be uniformly treated as either commercial or noncommercial to avoid consideration of subjective factors such as intent, purpose, and motivation. Consequently, the policy of allowing greater regulation of traditional commercial speech must accommodate the need to establish a category of speech that is neither under- nor overinclusive. Thus, as the second line of the objective chart illustrates, all negative statements that focus only on characteristics of the good, service, or marketer are treated as commercial.[163] This formulation of the objective test accommodates the Court's apparent concern that greater regulation be permitted when the speech does not involve the interchange of noncommercial ideas. The third line of the objective chart, a possible substitute for the second line, represents another accommodation. Here less regulation is allowed because negative comments about the commercial suitability of goods will be considered noncommercial. This formulation allows altruistic negative comments to receive greater protection at the cost of extending the same increased protection to profit-motivated negative comments. The rationale for this greater protection is that negative speech serves a function distinct from that served by traditional advertising's glossy

163. *See* Objective Test Chart boxes 5a-8a, particularly boxes 5a and 7a, *supra* p. 487.

positive statements about commercial suitability. By presenting the negative side of the commercial suitability issue, this type of speech does more than propose a commercial transaction. You might say it does more by doing less, by discouraging rather than encouraging a commercial transaction.[164]

Because of the likelihood of abuse by marketers, the commercial speech category must include all positive statements, even those whose motive is altruistic. Thus, positive comments about a corporation's hiring practices, environmental policy, or possibly even economic policy are commercial. Here lies the weakness of the objective test. The political or social importance of these issues goes beyond their mere commercial significance. Yet treating such statements as noncommercial would unacceptably extend the noncommercial label to obviously commercial speech such as "Obsidian Oil products, good products from an environmentally sound company."

To avoid this problem of over- and underinclusiveness in the objective test, subjective factors such as purpose, motivation, and discussion of a wider issue should be examined. However, considering these subjective factors introduces all the problems of discretion and chilling discussed above. The only middle ground is a test combining subjective and objective factors, which arguably would involve the shortcomings of both types of tests.

Thus, any test of commerciality must be subjective, objective, or both, and must be a compromise of policies and goals. This compromise explains the Court's inability effectively to allow regulation of commercial speech while prohibiting infringement of noncommercial speech. Perhaps this unsuccessful compromise is necessary, but the Supreme Court should assess whether first amendment values suffer greater damage than the benefit of increased regulation warrants.

While my main purpose is not to argue that commercial speech should be fully protected, one implication of the alternative tests advanced above[165] is that it will be difficult if not im-

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164. It is important to note that under the objective test the slightest mention of the sponsor's product in this type of negative message must result in treating the message as a positive statament about the sponsor's product, and the message must therefore be categorized as commercial. This is, again, a practical result dictated by the need to prevent evasion by a very attractive advertising technique. Consider for example the recent advertising campaigns by MCI and Burger King, which focused on the negative aspects of competing products.

165. See *supra* notes 125-62 and accompanying text.

possible to achieve the Court's current goal of allowing regulation of commercial speech without diluting the desired protection for noncommercial speech.[166] I submit that if the Court continues to distinguish between commercial and noncommercial speech, the subjective test better facilitates the underlying reasons for the separate treatment.

How commercial speech is defined is important for the purposes of this article because that definition determines what the Court means when it uses the phrase "commercial speech concerning unlawful transactions." Just as the first amendment protects abstract discussion of unlawful noncommercial actions, so too should it protect abstract discussion of unlawful commercial transactions. Otherwise news reports about prostitution could be regulated or even prohibited. Once commercial speech is defined in a way that excludes speech that abstractly discusses unlawful commercial transactions, the reason why commercial speech that directly proposes unlawful transactions is unprotected can be better understood. The reason is that commercial speech concerning unlawful activities involves the same risk to a legitimate state interest as that involved in noncommercial speech that promotes or encourages unlawful action.

## V. Commercial Speech Concerning Unlawful Activities

Commercial speech concerning unlawful activities[167] can be disguised in as many ways as can commercial speech concerning lawful activities. The Supreme Court was faced with commercial speech concerning an unlawful activity in *Bigelow v. Virginia*.[168] Bigelow's newspaper, the *Virginia Weekly*, carried an advertisement for abortion counseling and referral services. The services and their advertisement violated a Virginia statute that made it a misdemeanor to encourage or prompt the procuring of an

166. In Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), the Court rejected full protection for commercial speech on the grounds that, because of the need to regulate commercial speech, fully protecting commercial speech would necessarily lead to dilution of the protection afforded noncommercial speech. Rather than spark this dilution, the Court reinforced the subordinate position of commercial speech apparently assuming that this categorization would continue the degree of protection traditionally afforded noncommercial speech while allowing some regulation of commercial speech.

167. The terms "commercial speech concerning unlawful activities" and "unlawful commercial speech" are used interchangeably and are intended to convey the same meaning.

168. 421 U.S. 809 (1975).

abortion by the sale or circulation of any publication.[169] The advertisement was nothing more than a pure commercial message in its most mundane form.[170]

It cannot be argued that the advertisement constituted commercial speech about a lawful transaction. The services advertised included counseling on the need for an abortion and referral to medical care providers who would perform the abortion. This service encouraged or prompted abortion, which was illegal in Virginia.[171] Rather than allow the state to regulate the unlawful commercial speech, the Court held that Virginia had no legitimate state interest in insulating its citizens from information about services legally available in other jurisdictions.[172]

Two years earlier in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,[173] the Court relied on the fact that the commercial speech proposed a violation of the law as the basis for excluding the speech from first amendment protection.[174] Clearly the cases are distinguishable. The advertisement in *Bigelow* was for an out-of-state enterprise offering services that were legal in its home state. Yet the *Bigelow* Court did not expressly base its conclusion on a holding that a state cannot legitimately ban commercial speech concerning a transaction be-

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169. *Id.* at 812-13.

170. The advertisement read:

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 812. The advertisement did not discuss the fundamental nature of the right to an abortion, state the reasons why abortions are permitted in New York, criticize Virginia law, or urge that the Virginia law be repealed.

171. *Id.* at 812-13.

172. *Id.* at 824-25.

173. 413 U.S. 376 (1973).

174. *Id.* at 388-89; *see also supra* notes 32-41 and accompanying text.

cause the transaction is legal elsewhere. The conclusion may be sound, but the lack of an articulated basis for it has led to inconsistent decisions in the lower federal courts.[175]

Courts must assess the legitimacy of one state stifling speech about activities that are unlawful in its own jurisdiction but that are legal in the jurisdiction where the activities would occur. Judicial opinions will appear unprincipled and inconsistent without articulation of the limits on the power of the prohibiting state to control speech in that state by a speaker in another state. The following cases point out the difficulties inherent in attempts to establish those limits.

*Princess Sea Industries v. State*[176] dealt with advertising by Nevada houses of prostitution. In Nevada houses of prostitution were permitted, but only in counties of fewer than 250,000 people. Because of this population limit, prostitution was illegal in Clark County where Las Vegas is located.[177] Also, advertising of brothels legally located in the less populous counties was prohibited in the more populous counties.[178] In *Princess Sea Industries* a brothel owner and two newspapers sought an injunction against enforcement of the Nevada state statute that prohibited them from advertising the brothel in Clark County where brothels were illegal.[179] The Nevada Supreme Court upheld the advertising prohibition. The court relied on the distinction between commercial and noncommercial speech, but perhaps the more important factor in the Nevada court's decision was the United States Supreme Court's failure to set the precise extent to which the first amendment permits regulation of advertising of activities that a state can legitimately prohibit.[180]

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175. *Compare* Casbah, Inc. v. Thone, 651 F.2d 551, 564 (8th Cir. 1981), *cert. denied*, 455 U.S. 1005 (1982); Nova Records, Inc. v. Sendak, 504 F. Supp. 938, 944 (S.D. Ind. 1980), *aff'd*, 706 F.2d 782 (7th Cir. 1983); World Imports, Inc. v. Woodbridge Township, 493 F. Supp. 428, 434 (D.N.J. 1980) (all of which allow regulation of commercial speech concerning unlawful sales of drug paraphernalia even though sales may be legal elsewhere), *with* Record Revolution No. 6, Inc. v. City of Parma, 638 F.2d 916, 937 (6th Cir. 1980), *vacated*, 456 U.S. 968 (1982); Kansas Retail Trade Coop. v. Stephan, 522 F. Supp. 632, 642 (D. Kan. 1981) (neither of which permit regulation of commercial speech about the unlawful sale of drug paraphernalia).

176. 97 Nev. 534, 635 P.2d 281 (1981), *cert. denied*, 456 U.S. 929 (1982).

177. *Id.* at 538, 635 P.2d at 284 (Manoukian, J., concurring).

178. *Id.* at 535, 635 P.2d at 282.

179. *Id.*

180. *Id.* at 535-37, 635 P.2d at 282-83. In his concurring opinion, Justice Manoukian urged the Court to face squarely the first amendment issue and, because the majority did not do so, analyzed the statute in light of the Supreme Court cases on unlawful commercial speech. Of particular interest to him were the Court's reasons for protecting the ad

In *Dunagin v. City of Oxford*,[181] a class action lawsuit challenged the constitutionality of a Mississippi law banning the advertising of alcoholic beverages.[182] Mississippi law banned the sale of certain alcoholic beverages, but allowed counties and certain other political subdivisions to remove the ban in their areas by majority vote of the area's citizens.[183] One of the areas that permitted liquor sales was the county in which the city of Oxford and the University of Mississippi were located. State law also banned the advertisement of alcoholic beverages throughout the state. *The Daily Mississippian*, a student newspaper published in Oxford where liquor sales were permitted, wished to run liquor ads and challenged the prohibition of the advertising of alcoholic beverages.[184] The district court held that the state may regulate the advertising of liquor because liquor advertising promotes an activity illegal in large portions of the state. The district court was unimpressed with the argument that the ads would not be run in "dry" counties. Even if protected in "wet" areas, the court assumed that the advertising must contribute to violation of the law in "dry" areas.[185]

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in *Bigelow v. Virginia*. *Id.* at 537-41, 635 P.2d at 283-86 (Manoukian, J., concurring). Justice Manoukian advanced two basic reasons for differentiating between the ad for a brotbel and the ad for an abortion service. First, the Nevada atatute did not undertake to regulate information from outside the state. The Nevada legislature was exercising its police power internally. Second, the *Bigelow* ad concerned a fundamental constitutional interest that was coincident with the constitutional interest of other Virginia citizens while the Nevada ad concerned a practice that had been given limited constitutional protection. Thus, the interest of the state of Nevada far outweighed the interest in disseminating information, which was not coincident with the constitutional interests of Nevada citizens other than those interested in the services. *Id.* at 540-41, 635 P.2d at 285-86 (Manoukian, J., concurring). Future United States Supreme Court cases involving regulation of unlawful commercial speech that is lawful elsewbere will have to confront these issues to elaborate whether in *Bigelow* it was the fundamental right or the extension of the paternalistic police power beyond the boundaries of the state, or both, that formed the basis of the Court's holding that the unlawful commercial speech was protected.

181. 489 F. Supp. 763 (N.D. Miss. 1980), *aff'd*, 718 F.2d 738 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 3553 (1984).

182. 489 F. Supp. at 765.

183. *Id.* at 770-71.

184. *Id.* at 765.

185. *Id.* at 771-72. In an interesting footnote the district court judge argued at length that even if completely suppressing the speech were impermissible simply as a regulation of commercial speech concerning an unlawful activity, it would still he possible extensively to regulate this speech given its low position on the scale of first amendment values and tha state's strong and legitimate interest in curhing the evils of disease and accident proven to be associated with alcobol consumption. Against this strong state interest the court halanced the interest in commercial speech, which could only have as

On appeal the Fifth Circuit affirmed the trial court's decision. While the court of appeals did not agree with all the trial court's conclusions and reasoning,[186] it affirmed on the basis that the regulation was permitted by *Central Hudson*'s four-part test for validity of commercial speech regulations.[187] By applying the *Central Hudson* test and adding the deference given to state liquor regulation under the twenty-first amendment, the Fifth Circuit was able to uphold the ban on advertising without relying on the illegality of liquor consumption in some parts of Mississippi.[188] The court of appeals indicated, even though it skirted the issue, that it might not have agreed with the trial court's reliance on the illegality of the advertised transactions in some counties as a basis for upholding the advertising ban.[189]

*Princess Sea* and *Dunagin*, as well as other cases,[190] demonstrate the difficulty of determining the extent to which a state may regulate advertising of illegal activities. The issue is espe-

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its purpose the increased sale of alcoholic beverages with a concomitant increase in the incidence of the evils sought to be controlled. In the court's view, this value of commercial speech about alcoholic beverages was far removed from the salutary effect of lowering prices that the ad in *Virginia Pharmacy* was likely to have. *Id.* at 771 n.11.

The district court's reasoning ignored the interest of the people who had voted to legalize sales of alcoholic beverages, an interest in information about availability and price of a product legally available to them. Had the legislative judgment been express that the evils of alcohol consumption outweighed its benefits, and had that judgment been backed by a ban, without exception, on sales within the state, then the reasoning of the court would be wholly appropriate. So long as the legislative judgment was that alcoholic beverages would be available to the public, the interest of the public in the information contained in commercial ads was no less strong than that present in *Virginia Pharmacy*.

186. Dunagin v. City of Oxford, 718 F.2d 738, 742-43 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 3553 (1984).

187. *Id.* at 746-51.

188. *Id.* at 743-51. The court of appeals specifically rejected, as bases for decision, illegality of consumption in some areas and stimulation of violations of the law. Instead the court granted the legality of advertising a product that was not legal in a "dry" county and proceeded to argue that Mississippi could lawfully restrict advertising because of the general increase in problems associated with alcohol consumption. *Id.* at 742-43.

189. *Id.* at 743. It seems a bit unfair to give much credence to the court's analogy to advertising of peanut butter that might be used as a weapon. It makes light of a very substantial state interest. This state interest is not the same when the product advertised is linked to illegal activity only because it is used in a manner not contemplated by the advertiser. *See generally infra* notes 193-206 and accompanying text (discussing when commercial speech may raise a danger of imminent unlawful activity).

190. *See* cases cited *supra* nota 175; *see also* New England Accessories Trade Ass'n Inc. v. City of Nashua, 679 F.2d 1 (1st Cir. 1982); Record Museum v. Lawrence Township, 481 F. Supp. 768 (D.N.J. 1979); Opinion of the Justices, 121 N.H. 542, 431 A.2d 152 (1981).

cially troublesome when the advertisement is for an activity that, although prohibited in the regulating state, is completely lawful in the state where the activity would occur. The struggle will continue so long as the reason for not protecting unlawful commercial speech remains unarticulated. In the following two sections I will develop an analogy to the clear and present danger test and propose a rationale for leaving most illegal commercial speech unprotected.

## VI. Commercial Speech Concerning Unlawful Activities and the Clear and Present Danger Test

If an observer unaffected by the Supreme Court's attempts to categorize speech became involved in a debate over the limits of legitimate state regulation of expression, he would not likely immediately draw upon commercial speech as a concept to extend the state's power to regulate speech. In this neutral setting, the observer would probably not differentiate commercial speech from other speech important to the individual or society. He would more likely be concerned with the predicate for state interference with the freedom of expression. The natural choice for this predicate would be harm. When harm is inherent in the speech, the state would have a legitimate basis for regulation not tied to the specific content or viewpoint of the speech.[191]

Both subversive noncommercial speech[192] and unlawful commercial speech raise the clear and present danger of substantive harm. An analogy between the two is appropriate if the following premise is accepted: Commercial speech concerning unlawful activities is unprotected because it creates a substantial risk that unlawful conduct will result from its publication. For example, if a prostitute is allowed to hawk her services on television, there is a substantial risk that a listener will take up the solicitation and consummate the illegal transaction. The elements that make the speech commercial in this situation are the same as those that raise a clear and present danger that an unlawful activity will occur. My thesis is that this element of likely harm is shared by the categories of unlawful commercial speech and subversive speech.

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191. *See, e.g.*, Record Revolution No. 6, Inc. v. City of Parma, 638 F.2d 916, 937 (6th Cir. 1980), *vacated*, 456 U.S. 968 (1982); Kansas Retail Trade Coop. v. Stephan, 522 F. Supp. 632, 642 (D. Kan. 1981).

192. *See supra* notes 78-104 and accompanying text.

### *A. What Makes Unlawful Commercial Speech Both Commercial and Dangerous?*

This section is designed to address the meaning and underlying policy of the Supreme Court's holding that commercial speech is unprotected when it concerns unlawful transactions,[193] and to demonstrate that, while the Court's conclusion is correct, more thought about the basis for this conclusory statement is needed. I argue that beneath this conclusion lie two layers of analysis. First, in the limited context of speech concerning unlawful activity, speech is commercial because it proposes a commercial transaction or by its publication raises a substantial likelihood that a commercial transaction will occur. Second, because it concerns an illegal activity, it presents a clear and present danger that the evil of the illegal action will occur, thereby implicating the state's compelling interest in preventing the evil.

The practical differences between commercial speech and noncommercial speech must not be forgotten.[194] These differences include the existence of a willing seller who advertises in order to induce a sale, a genuine commercial purpose to induce a transaction, an available good or service, and an audience receptive to the advertisement. These differences are the factors that lend "commerciality" to the speech. Use of the clear and present danger test in the subversive speech setting focuses on certain factors in the factual setting of the speech: the speaker, the audience, the surrounding circumstances, the mood, and the ability of the listeners to carry out the action urged. In many instances the factors that lend commerciality to unlawful commercial speech are also the factors that determine the existence of a clear and present danger.[195] When the speech proposes an unlawful commercial transaction, the presence of these commerciality factors indicates that the speech will create a clear and present danger of the unlawful transaction's occurrence.

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193. As discussed above, commercial speech could be defined to include both positive and negative statements. But for the purposes of drawing the analogy between unlawful commercial speech and subversive speech, only such speech as legitimately can be said to prompt a commercial transaction is considered even though the category of commercial speech may include more. *See supra* notes 125-66 and accompanying text.

194. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 506 (1981); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976).

195. I do not suggest that there is a complete identity of elements in a subjective test of commerciality and the Court's clear and present danger test, only that there is a coincidence of at least two of the primary elements: urging and capacity.

Commerciality supplies elements that are supplied by the factual setting of subversive speech, the elements necessary to the existence of clear and present danger.

Consider the archetypal situation of advocacy representing a clear and present danger of harm: an impassioned mob being urged to lynch the prisoner in a nearby jail. The speaker, the son of the murdered victims, uses strong and impassioned language to a crowd of several dozen armed vigilantes whose manhunt was unsuccessful only because the sheriff found the fugitive first. The prisoner is in jail, secretly brought to town by the sheriff who now guards him alone. While the son is speaking, the bodies of the loved and respected couple are carried by on the way to the mortuary. Most members of the crowd served honorably in the army, and they know the suspect is a deserter.

Now consider a commercial message about a brothel. The speaker owns an establishment catering to people who come to his resort for one or more days of entertainment. The brothel is located within one driving day and one flying hour of Las Vegas and Los Angeles. The brothel employs both male and female prostitutes. Most of the business is from regular customers with new patrons learning about the enterprise by word-of-mouth advertising. The brothel is fully licensed by the state, which permits brothels if they comply with all economic, safety, and health regulations. The owner has decided to expand operations by opening a brothel in a neighboring state that does not allow prostitution. In order to generate the needed business, the owner desires to advertise in Las Vegas and Los Angeles newspapers and in some adult magazines with national circulation. A public relations firm develops a tasteful advertisement that cannot be construed as obscene but which makes it clear that sexual services will be made available to the customers. Discount rates are offered to new customers during a limited period between the scheduled first appearance of the advertisements on May 1 and June 15, which marks the beginning of the usual peak period of business.

Both messages implicate the state's interest in preventing a substantive evil because both messages present a clear and present danger. In both cases there is an urging to action calculated under the circumstances to induce the action. In the first situation there is a shared passion and in the second a calculated and well-conceived persuasion. Both messages are presented to receptive audiences. Action can, in both cases, occur immediately

or after some reflection, but the urging has made the danger clear and present. While conceivably in either case there might be delay, some members of the audience may act immediately. If they do, little effective opposition will be mounted against the illegal action. In both cases, whether imminent lawless action will likely be produced or incited will depend on the particular content of the message. In the lynching hypothetical, the son may urge everyone to go home and prepare to burn down the jail if the culprit is not convicted. The ad for the brothels may be seen in April but limit its offer to a new brothel that will not open until June 1. Thus, no element of imminence would be present in either message.

There is a very sound basis for the Court's offhanded condemnation of all commercial speech about unlawful transactions. Such speech essentially solicits an unlawful commercial transaction, or otherwise presents a clear and present danger that the transaction will occur. It may be prohibited because it presents the danger of an illegal transaction, not because, being commercial, it is of less value.

### *B. The Clear and Present Danger Test Applied to Unlawful Commercial Speech*

I will argue below[196] that even with the gloss of imminence the clear and present danger test can be applied to unlawful commercial speech. However, my primary position is that the clear and present danger test, as it was applied before *Brandenburg*, is the better formulation and can explain the Court's unwillingness to protect unlawful commercial speech. I reached this conclusion by examining the purposes and effects of the clear and present danger test.

A factor motivating the clear and present danger test's creation was the recognition that words can have all the force and effect of physical action. When words have this effect, they are entitled to no more protection than the action itself. As a part of its power to protect against substantive evil, the state can incidentally curtail speech by a regulation that is addressed to correcting the evil and is not a disguised attempt to regulate speech.[197] The prerequisites for regulation are a substantive evil

196. *See infra* notes 207-12 and accompanying text.

197. *See* Schenck v. United States, 249 U.S. 47, 52 (1919); *cf.* Police Dep't v. Mosley, 408 U.S. 92, 98-100 (1972) (reasonable time, place, and manner restriction will be upheld,

that the state may legitimately prevent and a relationship between the speech sought to be regulated and the substantive evil. Ever since the decision in *Schenck*, the Court has struggled to articulate the nature and extent of the relationship necessary to allow regulation. Until *Brandenburg* the necessary circumstance was creating a clear and present danger.[198] In *Brandenburg* the circumstance was advocacy directed to inciting or producing imminent lawless action when there is a likelihood that such action will be incited or produced.[199] Underlying both the clear and present danger test and the imminence test is a halance between the state's interest in preventing the evil and society's interest in free expression of ideas even though those ideas urge unlawful resistance to the state's power.

What follows is an application of the clear and present danger test to the facts of *Bigelow v. Virginia*.[200] In *Bigelow* the advertisement notified Virginia residents that abortions were legal in New York and offered counseling and medical services to obtain abortions in New York.[201] Although it concerned a controversial topic of national interest, the ad did no more than announce that for a fee the advertiser could make an abortion more convenient for the reader. The counseling and referral service was illegal in Virginia. Any interested reader of the ad was made aware that the illegal service was available and that only a telephone call was necessary to enter into an unlawful commercial transaction.[202] Because there was a willing seller who was presumably capahle of providing the service, the availability of which had been communicated, the danger of the illegal action was clear and present. Even the elements of the *Brandenburg* test were present: the speech advocated or was directed to inciting or producing imminent unlawful action. It sought to complete the transaction for illegal services as soon as the reader responded, and there were no impediments to that response.[203]

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but not one that distinguishes between the messages of the speakers).

198. *See* Hartzel v. United States, 322 U.S. 680, 686-87 (1944).

199. Brandenhurg v. Ohio, 395 U.S. 444, 447 (1969).

200. 421 U.S. 809 (1975).

201. *Id.* at 821-25

202. *Id.* at 812-14.

203. In this sense commercial transactions are peculiarly susceptible to the *Brandenburg* analysis hecause while there might be overreaction to political harangue, or a speaker migbt become overinvolved and go beyond what was intended in urging action, commercial speech has as its reason for existence the prompting of transactions. Therefore, regulation of unlawful commercial speech is not as likely to sweep too broadly and

Why then did the Court not permit Virginia to punish the publisher? While the speech concerned services technically illegal in Virginia, it provided information helpful to procuring an abortion outside Virginia. Virginia, therefore, had no interest sufficient to inhibit discussion of services of constitutional importance available elsewhere.[204] The Court considered the speech to concern not only a lawful activity but an activity in furtherance of an individual right, the furtherance of which coincided with the public's interest in its availability.[205] Despite the imminent nature of the breach of a Virginia law, the Court did not permit regulation of the advertisement because Virginia's interest was not sufficiently weighty to prevent discussion of services legal in New York.[206]

### *C. Commerciality Tests and the Clear and Present Danger Test*

The Court's distinction between mere advocacy on the one hand and urging that creates a clear and present danger on the other requires reexamination of the commerciality tests proposed above and inquiry into whether these tests of commerciality impair application of the clear and present danger test or the

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encompass speech that is pure advocacy. Regulation of unlawful commercial speech is also unlikely to discourage such pure advocacy by threatening mistaken regulation. This is not to say that it will never sweep too broadly. It may, for instance, include speech that is not commercial. But so long as commercial speech is properly defined, application of the imminent danger test is not as likely to impede free expression in borderline cases because there is little risk that pure discussion of the merits of a transaction will be mistaken for commercial speech. The speaker will either be seeking a commercial transaction or will not, and this will usually be readily apparent.

204. *Id.* at 821-25. *Contra id.* at 832-35 (Rehnquist, J., dissenting). Justice Rehnquist quite reasonably argued in his dissent that Virginia's interest in regulating the commercial message was compelling and legitimate even though the transaction would have been entered into in New York. To bolster his point he relied on several Supreme Court decisions upholding prohibitions of advertising of extraterritorial services and goods that were illegal in the state where they were advertised. There is an independent interest in preventing advertisement of an illegal activity because any other rule would allow a commercial enterprise to avoid regulation in one state by operating from another stete and advertising in the atate that regulates the activity. Justice Rehnquist gave several examples of undesirable practices that would escape regulation, including usurious loans and circumvention of securities laws. These evils would occur even though a state had carefully drawn its statutes to protect its citizens from the practices. *Id.* at 835. This is an important issue beyond the scope of this article, one that commentators and the Court should consider carefully before *Bigelow* with all its implications is accepted.

205. *Id.* at 822-23.

206. *See id.* at 821-25; *see also supra* notes 168-75 and accompanying text. *But see Bigelow*, 421 U.S. at 829-36 (Rehnquist, J., dissenting).

imminence test to commercial speech. As discussed above,[207] a subjective test of commerciality facilitates the analogy between unlawful commercial speech and subversive speech, but the analogy can also be drawn if the Court chooses an objective test. The discussion that follows examines this issue more closely and attempts to differentiate between commercial speech to which the clear and present danger test should be applied and commercial speech to which it should not be applied.

If a subjective test of commerciality were adopted—that is, a test that examines such criteria as motivation, purpose, and commitment to discussion of a wider issue—the clear and present danger test could easily justify prohibiting commercial messages that concern unlawful transactions. This is because the subjective test categorizes speech as commercial only if it is shown that there is some commercial purpose, some urging that the transaction take place. If the transaction that the speaker intends to induce is unlawful, this urging fulfills a portion of the clear and present danger test. The speaker has gone beyond mere advocacy to urging.[208] Because commerciality supplies many of the factors necessary to establish a clear and present danger,[209] when a message calling for an unlawful transaction is tested for commerciality on the basis of purpose and is found to be commercial, a clear and present danger of violation of the law will exist upon publication of the message.

Application of the clear and present danger test to speech deemed commercial under a subjective test is more difficult when the imminence gloss is added. While the practical aspects of commerciality make the danger clear and present, they do not necessarily indicate imminence. As shown by the examples above,[210] the speech may invite acceptance at a remote time or require travel or preparation for acceptance. If the Court is applying a true imminence test, a further question must be asked: Did the Court intend to allow prohibition of unlawful commercial speech when imminent unlawful action is not likely? The answer to this question is probably yes, but this answer requires no more than a retreat to the clear and present danger test.

If an objective test of commerciality were used, applying the clear and present danger test to unlawful commercial speech

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207. *See supra* notes 125-62 and accompanying text.
208. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
209. *See supra* notes 193-95 and accompanying text.
210. *See supra* note 195 and accompanying text.

would be analytically more difficult. Applying *Brandenburg*'s imminence requirement would be more difficult still. If all positive statements about unlawful goods and services are treated as commercial without regard to the speaker's underlying purpose (as is the case under the objective test of commerciality), even a psychiatrist's suggestion on a talk show that hiring a prostitute might be beneficial in sex therapy could be treated as commercial. Similarly, an editorial about the benefits of an illicit drug would be commercial. However, because in these examples the speaker is not a willing seller with commercial purpose, there is no reason to believe the speaker would be able to supply the good or service and the assumption that the audience would be receptive is unwarranted. It is, of course, ridiculous to believe that publication of the message makes the danger of the unlawful transaction clear and present. *A fortiori* it is even more fantastic to assert the likelibood of imminent lawless action.

Does this mean that if an objective test of commerciality were adopted there would be no place for the clear and present danger analysis in determining whether unlawful commercial speech is unprotected? No. The Court would merely have to recognize that adopting an objective test is a radical shift of emphasis. If commercial purpose is not to be the test of commerciality, then the Court cannot flatly state that commercial messages about unlawful transactions can he prohibited. More extended analysis will be required to distinguish between messages that are commercial merely because they objectively concern commercial subjects and those that are commercial because they are published with the purpose of encouraging a commercial transaction. Thus, if an objective test is adopted, the Court should not merely declare all commercial speech about unlawful activities to be unprotected. The Court should substitute a clear and present danger test for the former crutch of commerciality in determining whether the unlawful commercial speech is protected. This substitution is necessary to prevent chilling speech traditionally seen as more valuable than the normal commercial advertisement.

A subjective test of commerciality by its nature is a test of purpose, and it encourages analysis of the likelihood of harm. An objective test, however, requires a second stage of analysis to inquire into the likelihood of harm. This two-step analysis would entail an initial determination of commerciality: Does the speech concern a commercial product or service and present a positive

message? Then the analysis would shift to inquire whether this positive commercial message urges a particular unlawful transaction. Thus, the question of promotion and urging supplied by the subjective test would he an independent part of the analysis. By this independent analysis the requirements of the clear and present danger test would be examined, and if they were met, the speech could be banned.

This is not to suggest that either type of test of commerciality will produce the balance the Court seeks between permissible regulation of commercial speech and protection of noncommercial speech. As discussed in the previous sections,[211] neither test will properly accommodate these competing concerns.[212]

The Court uses commercial purpose as a substitute for analysis of what commercial speech is and for a normative explanation of why it should not be fully protected. Commercial purpose is similarly used as a crutch in the Court's conclusory determination that unlawful commercial speech is wholly unprotected. I suggest that unlawful commercial speech be prohibited only when it raises a clear and present danger of the occurrence of a substantive evil.

Since the Court's conclusion that unlawful commercial speech is unprotected is thus far dicta, the Court can still fully develop definitions of commercial speech for different contexts should it desire to do so. When the Court squarely addresses why unlawful commercial speech is unprotected, it must not merely rely on the word "commercial." Rather, the Court sbould establish that, in this context at least, commerciality is in effect a shorthand phrase for speech that raises a substantial likelihood that the unlawful transaction will occur. The Court can easily establish this idea if the Court is willing to commit itself to a subjective test of commerciality. This test explains, and provides a more sound basis for, the Court's conclusory statement that commercial speech about unlawful transactions is unprotected.

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211. *See supra* notes 163-66 and accompanying text.

212. Both tests are seriously flawed. A subjective test relies on evaluation of purpose and intent, placing discretion with local officials who may be incapable of making sound distinctions that rest on very nebulous factors. The result will probably be overinclusiveness and chilling of noncommercial speech. An objective test, by definition, cannot take into account the most important factor of purpose, thus leaving advertising content as the only determining factor. To adequately cover messages that are clearly commercial, the objective test must treat as commercial some messages traditionally seen as noncommercial.

## VII. Conclusion

If one accepts the argument of Judge Bork[213] and Professors BeVier,[214] Jackson, and Jeffries[215] that all commercial speech is unprotected, then unlawful commercial speech need not be given any particular place in first amendment theory. By force of reason, it is even less deserving of protection than the general category of commercial speech.

However, the Supreme Court has not accepted this position, and protection for commercial speech appears firmly based on the value the Court sees in the informational function of commercial speech.[216] So long as individuals must make economic decisions, commercial speech will be at least as important as much of what has been classified as political speech.[217]

For those who believe that commercial speech should be protected to the same extent as noncommercial speech,[218] the task is to establish a principled basis for distinguishing unlawful commercial speech from unlawful noncommercial speech such as subversive speech,[219] which has received some protection.[220] The Supreme Court has offered no adequate explanation of the distinction,[221] apparently because the Court believes that commercial speech occupies a lower position than noncommercial speech on the scale of first amendment values[222] Therefore, there is no pressing need to explain this difference in treatment between the two forms of unlawful speech.

I have attempted to offer a principled explanation for the Court's summary conclusion that commercial speech about unlawful activities is unprotected and have moved toward integrating the commercial speech category with the older body of first amendment cases concerning noncommercial speech. If the view

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213. *See supra* notes 4-10 and accompanying text.

214. *See supra* notes 11-12 and accompanying text.

215. *See supra* notes 13-14 and accompanying text.

216. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

217. *Id.*

218. *Id.* at 763.

219. *See supra* notes 19-25 and accompanying text.

220. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); *supra* notes 78-104 and accompanying text.

221. *See, e.g.*, Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561-64 (1980); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1976).

222. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).

that commercial speech should be fully protected is to prevail, an explanation must be developed for the superficially different treatment of unlawful commercial speech from that received by subversive noncommercial speech. By recognizing the similarity between the state's interest in preventing unlawful commercial speech and in preventing subversive speech representing a clear and present danger of a substantive evil, an analogy has been developed that points out the propriety of similar treatment for the two types of speech. In justifying the Court's view that unlawful commercial speech is unprotected, I have attempted to remove one impediment to commercial speech becoming part of a more uniform first amendment.