

A CALL FOR A VALUE-BASED TEST OF COMMERCIAL SPEECH*

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The commercial speech doctrine made its first appearance over forty-three years ago in *Valentine v. Chrestensen*¹ and it lay virtually dormant until *Pittsburgh Press Co. v. Pittsburgh Commission On Human Relations*,² decided in 1973. With such scant Supreme Court precedent for direction it is not surprising that in 1976 the Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* preserved the distinction between commercial and noncommercial speech, but announced limited protection for commercial speech.³

The grant of limited protection of commercial speech has made the distinction between commercial and noncommercial speech less important.⁴ In some ways, however, the distinction has become more important because the Court's decision implicitly embraces unarticulated normative values in constitutional interpretation.⁵ Had commercial speech remained wholly unprotected, an opportunity to inquire into normative values to explain the lack of protection would have existed. Although the sanctions on commercial special speech would have been broader if commercial speech were unprotected, the lack of protection would not have offered a more significant opportunity to explore normative values underlying constitutional doctrine. With limited protection, the possibility exists that particular speech will fall into the less protected class of speech and be subject to the same sanctions that it would have

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

2. 413 U.S. 376 (1973). See also *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (noting the doctrine and observing that profit motive alone does not render speech commercial).

3. See 425 U.S. 748 (1976).

4. See Comment, *Commercial Speech: A Proposed Definition*, 27 How. L.J. 1015, 1017 (1984) [hereinafter cited as Comment, *Commercial Speech*].

5. See Barnes, *Commercial Speech Concerning Unlawful Conduct: A Clear and Present Danger*, 1984 B.Y.U. L. REV. 457, 476-93 (1984) [hereinafter cited as *Unlawful Commercial Speech*]. See also Barnes, *Regulations of Speech Intended to Affect Behavior*, 63 DEN. L.J. 1 (1985).

without protection. Similarly, the possibility exists that some people will speak in the belief that their speech is fully protected, but will find that because of the Court's definition of commercial speech their speech is subject to unanticipated regulation.

The challenge then in defining commercial speech is to formulate a test that will permit regulation of commercial speech without chilling non-commercial speech.⁶ This Article reviews the cases that attempt to define commercial speech, as well as cases that indicate the normative values supporting the creation and continuance of the commercial speech doctrine. These and other cases will be analyzed to determine the normative values that may have led to the development of the commercial speech doctrine. This Article concludes that the Court should not develop a test of commerciality until it more fully articulates these underlying values. To illustrate the need for normative development, this concluding section focuses on *Dun & Bradstreet v. Greenmoss Builders, Inc.*⁷

I. PRIOR SUPREME COURT TESTS

In *Chrestensen*,⁸ the Supreme Court declared that regulation of "purely commercial advertising" does not violate constitutional protections.⁹ Chrestensen owned a former United States Navy submarine that he displayed to the public for paid admission.¹⁰ In 1940 he moored it at a New York City pier and attempted to distribute handbills advertising the submarine. Acting under the authority of a New York sanitation ordinance prohibiting distribution of handbills advertising commercial or business ventures, the police commissioner forced Chrestensen to cease distribution.¹¹ Chrestensen reprinted the advertisement with a protest

6. Both courts and commentators have attempted to define commercial speech. See, e.g., *Virginia Pharmacy*, 425 U.S. at 748; Barrett, *The 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 Regulation of Commercial Speech*, 66 MINN. L. REV. 903 (1982); Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205 (1976) [hereinafter cited as Comment, *First Amendment*]. See generally Barnes, *Unlawful Commercial Speech*, *supra* note 5; Comment, *Commercial Speech*, *supra* note 4.

7. 105 S. Ct. 2939 (1985).

8. 316 U.S. 52 (1942).

9. *Id.* at 54.

10. *Id.* at 53.

11. *Id.*

against the city's denial of his request to moor the submarine.¹² The City again prohibited Chrestensen from distributing the handbills.¹³ In concluding that pure commercial advertising enjoyed no first amendment protection, the Court rejected characterization of the handbill as protected speech. The Court found that the protest included on the second handbill was merely a subterfuge to circumvent the ordinance, and was not a genuine comment on a matter of legitimate public concern.¹⁴

Since the very inception of the commercial speech category, the concern has arisen that some expression may be viewed as both commercial and noncommercial. Yet the Court in *Chrestensen* had no trouble determining that the handbill was commercial. In a variety of factual settings since *Chrestensen*, the Court has reiterated that inclusion of matters that are of legitimate public concern does not transform otherwise commercial speech into fully protected speech.¹⁵ The *Chrestensen* decision fails to provide any guidance as to how to distinguish commercial from non-commercial speech. Not all expression concerning matters of public interest is automatically protected. The Court is willing to withhold constitutional protection when necessary to foster regulation of otherwise valuable commercial speech. This theme of definition dictated in part by deference to state regulation is one often repeated in later cases.

The Court has offered little guidance as to what constitutes commercial speech since *Chrestensen*. The limited development of this concept can be roughly broken into three stages. The first stage is the entry or neophyte exploration contained in *Bigelow v. Virginia*¹⁶ and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*¹⁷ The factual setting or the procedural posture of the cases unfortunately rendered the need to distinguish commercial from noncommercial speech unnecessary. *Bates v. State Bar of Arizona*,¹⁸ *Ohralik v. Ohio State Bar*,¹⁹ *In re Primus*,²⁰ and *Central Hudson Gas and Electric v. Public Service Corp.*,²¹ illustrate the uncertainty during the intermediate stage of devel-

12. *Id.*

13. *Id.* at 52-53.

14. *Id.* at 55.

15. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). *But cf. Virginia Pharmacy*, 425 U.S. at 784 (Rehnquist, J., dissenting).

16. 421 U.S. 809 (1975).

17. 425 U.S. 748 (1976).

18. 433 U.S. 447 (1978).

19. 436 U.S. 447 (1978).

20. 436 U.S. 412 (1978).

21. 447 U.S. 557 (1980).

opment. Because these cases involved distinctions between types of commercial speech and, in *Central Hudson*, the Court attempted to establish the standard of review for commercial speech, the Court could have logically and appropriately eliminated some of the confusion surrounding the commercial speech doctrine by exploring the values leading to creation of the doctrine.

In the third stage of development, the Court has focused on the meaning of commercial speech and its normative foundations. As a result of this retrenching and reconsideration stage, the commercial speech category has a more apparent configuration. This "mature period" of development reflects the recognition of some members of the Court of a need for a commercial speech test and for articulation of norms in searching for a test.

A. *The Entry or Neophyte Exploration Stage*

In *Bigelow*, the state of Virginia charged the managing editor of the *Virginia Weekly* with violating a statute making it a misdemeanor to encourage or prompt procuring of abortions.²² The *Weekly* had carried an advertisement for abortions in New York, where they were legal. In holding that the advertisements were protected speech, the Court declared that commercial speech does not lose all first amendment protection merely because it is commercial in nature.²³ The content of the advertisements, which included information of "clear 'public interest',"²⁴ was instrumental in persuading the Court.

The Court, perhaps mistakenly, proposed a "public interest" test for commercial speech in distinguishing the earlier cases of *Chrestensen* and *Pittsburgh Press*. The Court found that the advertisement in *Bigelow* did more than simply propose a commercial transaction; it "contained factual material of clear public interest."²⁵ The opinion defined public interest in terms of both audience size and subject matter.²⁶ The Court

22. The statute provided: "If any person by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any manner, encourages or prompts the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor." VA. CODE ANN. § 18.1-63 (1960) (repealed 1975).

23. See *Bigelow*, 421 U.S. at 818.

24. *Id.* at 822.

25. *Id.*

26. The Court in analyzing the advertisement stated:

[v]iewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience—not only for readers possibly in need of services offered, but

declared that the audience must be diverse and that the subject matter must provoke a general interest.²⁷ There was no attempt to define commercial speech other than the distinction between public interest speech and general speech.

The Court did not apply the public interest test in *Virginia Pharmacy*;²⁸ it simply stated that commercial speech is that “which does ‘no more than propose a commercial transaction’.”²⁹ *Virginia Pharmacy* involved a challenge to a Virginia statute that barred pharmacists from advertising prescription prices. The plaintiff, a consumer group, argued that advertising would lead to competition and reduced prices; the state argued that the statute promoted Virginia’s legitimate interest in maintaining professionalism of its licensed pharmacists. The Court, observing that a “free flow of commercial information is indispensable,”³⁰ recognized the need for only “limited” protection of commercial speech to serve this informational function,³¹ and thus neglected the short-lived public interest test.

The Court recognized that while not all commercial messages are of great public interest, most could be easily fashioned to create that appearance.³² Citing *Bigelow*, the Court declared that an “individual ad-

also for those with a general curiosity about, or general interest in the subject matter or the law of another state and its development, and to readers seeking reform in Virginia.

Id.

27. *Id.*

28. 425 U.S. 748 (1976).

29. *Id.* at 762 (quoting *Pittsburgh Press*, 413 U.S. at 385; see also 425 U.S. at 775 (Stewart, J., concurring)).

The Court’s determination that commercial advertising of the kind at issue here is not “wholly outside the protection of” the First Amendment indicates by its very phrasing that there are important differences between commercial price and product advertising, on the one hand, and ideological communication on the other. Ideological expression, be it oral, literary, pictorial, or theatrical, is integrally related to the exposition of thought—thought that may shape out concepts of the whole universe of man. Although such expression may convey factual information relevant to social and individual decisionmaking, it is protected by the Constitution, whether or not it contains factual representations and even if it includes inaccurate assertions of fact. . . .

Commercial price and product advertising differs markedly from ideological expression because it is confined to the promotion of specific goods or services. The First Amendment protects the advertisement of the “information of potential interest and value” conveyed, rather than because of any direct contribution to the interchange of ideas.

425 U.S. at 779-80 (citations omitted).

30. *Id.* at 765.

31. *Id.* at 770-73.

32. *Id.* at 764. The Court noted, as an example, that the pharmacist could transform price quotations into a matter of public interest by “cast[ing] himself as a commentator on store-to-store disparities in drug prices, giving his own and those of his competitor as proof.”

vertisement, though entirely 'commercial,' may be of general public interest."³³ The Court suggested that there are common sense differences between commercial speech and other speech forms.³⁴ The Court, however, failed to explain the common sense differences, although it did note the verifiability and durability of commercial speech.³⁵

B. *Intermediate Stage*

One year later in *Bates*,³⁶ the Court attempted to clarify the "no more than propose a commercial transaction," language of *Virginia Pharmacy*. It reiterated the proposition that a profit motive is not determinative of the issue of limited versus full protection and asserted that speech must be distinguished by its content.³⁷ It is unclear, however, whether *Bates* added a new dimension to the commercial speech definition.

Bates involved two attorneys charged with violating the Arizona Supreme Court's disciplinary rule prohibiting advertisements for legal services in newspapers or other media. The charge was based on a legal clinic's newspaper advertisement offering legal services at "very reasonable fees" and listing fees for certain services.³⁸ Observing that some ad-

33. *Id.*

34. *Id.* at 771 n.24. See *infra* note 98.

35. 427 U.S. at 771.

36. 433 U.S. 350 (1977).

37. *Id.* at 363. See also Barnes, *Unlawful Commercial Speech*, *supra* note 5, at 477.

38. *Bates*, 433 U.S. at 385.

DO YOU NEED
A LAWYER?
LEGAL SERVICES
AT VERY REASONABLE FEES

Divorce or legal separation—uncontested [both spouses sign papers] \$175.00 plus \$20.00 court filing fee

Preparation of all court papers and instructions on how to do your own simple uncontested divorce
\$100.00

Adoption—uncontested severance proceeding \$225.00 plus approximately \$10.00 publication cost

Bankruptcy—non-business, no contested proceedings

Individual

\$250.00 plus \$55.00 court filing fee

Wife and Husband

\$300.00 plus \$110.00 court filing fee

Change of Name

\$95.00 plus \$20.00 court filing fee

Information regarding other types of cases furnished on request

Legal Clinic of Bates & O'Steen

617 North 3rd Street

vertising would reach uninformed consumers not adequately served by the legal profession,³⁹ the Court held that the state may not prevent the publication of truthful advertisements concerning the availability and terms of routine legal services.⁴⁰

Despite the broad language of *Bates*, the Court's analysis in *In re Primus*⁴¹ and *Ohralik*⁴² suggests that it adhered to the vague *Virginia Pharmacy* test. *Primus*, a South Carolina lawyer, was paid a retainer as a legal consultant for a nonprofit public interest organization, and also worked for the ACLU without compensation.⁴³ She spoke to a group of mothers about their right to challenge the requirement of sterilization as a precondition to their continued public assistance. She discussed the possibility of a class action suit to end the practice and to seek damages for past sterilizations.⁴⁴ Later, after receiving ACLU support, she wrote to one of the mothers offering to file a suit on her behalf.⁴⁵ The South Carolina State Bar charged *Primus* with attempting to solicit a client in violation of the Canon of Ethics.⁴⁶ In reversing the disciplinary action, the Supreme Court emphasized that the solicitation was not for pecuniary gain and that the letter was within the first amendment's protection of association. The letter was intended to further the ACLU's social and political aims rather than any financial interest.⁴⁷ The Court addressed associational and free expression rights almost interchangeably, but did not discuss why profit-motivated activities cannot be a legitimate reason for promoting expression among those persons with similar interests.⁴⁸

The attorney in *Ohralik* was similarly disciplined for having solicited two young women injured in an automobile accident.⁴⁹ In contrast to *Primus*, however, the Supreme Court upheld the disciplinary action taken against *Ohralik*.⁵⁰ The two cases are very difficult to distinguish

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Id.

39. *Id.* at 376.

40. *Id.* at 384.

41. 436 U.S. 412 (1978).

42. 436 U.S. 442 (1978).

43. 436 U.S. at 414.

44. *Id.* at 415-16.

45. *Id.* at 416.

46. *Id.* at 422, 431-32.

47. *Id.* at 430-31.

48. *Id.*

49. See *Ohralik*, 436 U.S. 447, 457-59 (1978).

50. *Id.* at 467-68. In his concurring opinion, Justice Marshall observed that reliance on the

except on the basis that greater public interest existed in the information offered and suit prepared by Primus. The Court, therefore, seems to have returned to the *Bigelow* public interest analysis.

Four years later, citing *Virginia Pharmacy* and *Bates*, the Court restated the test of commercial speech in *Central Hudson Gas and Electric v. Public Service Commission*.⁵¹ In that case, the Court invalidated a New York Public Service Commission order prohibiting utilities from promoting energy consumption.⁵² The Court adopted a four-part analysis to determine when commercial speech, defined as "expression related solely to the economic interests of the speaker and its audience,"⁵³ is to be protected: (1) whether the speech concerns lawful activity and does not mislead; (2) whether the asserted governmental interest is substantial; (3) if the first two parts yield positive answers, whether the regulation directly advances the asserted governmental interest; and (4) whether the regulation is not more extensive than is necessary to serve that interest.⁵⁴ The Court ultimately invalidated the ban because the regulation did not directly advance the state's interest in energy conservation and the state failed to show that the regulation was not more extensive than necessary to serve the state's interest.⁵⁵ The Court did little to clarify what speech would be subject to this four-part analysis other than to define it as "expression[s] related solely to the economic interests of the speaker and audience."

C. *Mature Stage*

*Metromedia Inc. v. San Diego*⁵⁶ marked the beginning of the more reflective stage of the doctrine's development and was an appropriate vehicle for the Court to explain the differences between commercial and noncommercial speech. San Diego had enacted an ordinance prohibiting "outdoor advertising display signs."⁵⁷ The city's stated purpose was "to

distinction of profit motive to justify the different results was most undesirable and unsupported by earlier cases that had offered protection to speech despite a pecuniary motive. *Id.* at 471-74 (Marshall, J., concurring).

51. 447 U.S. 557 (1980).

52. *Id.* at 571-72.

53. *Id.* at 561.

54. *Id.* at 566.

55. *Id.* at 569-71.

56. 453 U.S. 490 (1981).

57. San Diego Ordinance No. 10795 (New Series, enacted March 14, 1972). The general prohibition of the ordinance reads as follows:

OFF PREMISE OUTDOOR ADVERTISING DISPLAY SIGNS PROHIBITED

eliminate hazards to pedestrians and motorists brought about by distracting sign displays” and “to preserve and improve the appearance of the city.”⁵⁸ The ordinance included a broad exception for on-site commercial billboards but did not have a similar exception for noncommercial messages.⁵⁹ While the Court applied the *Central Hudson* analysis and decided that the city could differentiate between on-site and off-site commercial messages,⁶⁰ the ordinance was held to be invalid because

Only those outdoor advertising display signs, hereinafter referred to as signs in this Division, which are either signs designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which signs are placed shall be permitted. The following signs shall be prohibited:

1. Any sign identifying a use, facility or service which is not located on the premises.
2. Any sign identifying a product which is not produced, sold or manufactured on the premises.
3. Any sign which advertises or otherwise directs attention to a product, service or activity, event, person, institution or business which may or may not be identified by a brand name and which occurs or is generally conducted, sold, manufactured, produced or offered elsewhere than on the premises where such sign is located.

58. See 453 U.S. at 493.

59. Section 101.0700(F) provides as follows:

The following types of signs shall be exempt from the provisions of these regulations:

1. Any sign erected and maintained pursuant to and in discharge of any governmental function or required by any law, ordinance or governmental regulation.
2. Bench signs located at designated public transit bus stops; provided, however, that such signs shall have any necessary permits required by Sections 62.0501 and 62.0502 of this Code.
3. Signs being manufactured, transported and/or stored within the City limits of the City of San Diego shall be exempt; provided, however, that such signs are not used, in any manner or form, for purposes of advertising at the place or places of manufacture or storage.
4. Commemorative plaques of recognized historical societies and organizations.
5. Religious symbols, legal holiday decorations and identification emblems of religious orders or historical societies.
6. Signs located within malls, courts, arcades, porches, patios and similar areas where such signs are not visible from any point on the boundary of the premises.
7. Signs designating the premises for sale, rent or lease; provided, however, that any such sign shall conform to all regulations of the particular zone in which it is located.
8. Public service signs limited to the depiction of time, temperature or news; provided, however, that any such sign shall conform to all regulations of the particular zone in which it is located.
9. Signs on vehicles regulated by the City that provide public transportation including, but not limited to, buses and taxicabs.
10. Signs on licensed commercial vehicles, including trailers; provided, however, that such vehicles shall not be utilized as parked or stationary outdoor display signs.
11. Temporary off-premises subdivision directional signs if permitted by a conditional use permit granted by the Zoning Administrator.
12. Temporary political campaign signs, including their supporting structures, which are erected or maintained for no longer than 90 days and which are removed within 10 days after election to which they pertain.

60. See 453 U.S. at 507-12.

there was an exception for on-site commercial messages and no similar provision for noncommercial messages.⁶¹

Although the Court did not discuss the actual differences between commercial and noncommercial speech, it cited Justice Stewart's concurrence in *Virginia Pharmacy*.⁶² In that concurrence Justice Stewart differentiated commercial from noncommercial speech on the basis of ideological content,⁶³ defining ideological expression as "thought that may shape our concepts of the whole universe of man."⁶⁴ Justice Stewart concluded that there is no "ideological expression" in commercial speech because the speech is confined only to the promotion of goods and services.⁶⁵

Justice Brennan's concurrence in *Metromedia* signals the beginning of the maturation process of the commercial speech doctrine. He expressed concern with the majority opinion that permitted the ban on commercial billboards. He was particularly displeased that governmental officials would be permitted to decide what constitutes commercial speech.⁶⁶ Together, the citation to Justice Stewart's earlier thoughts and Justice Brennan's concurrence provide some substance for inquiry into the reasons for classifying some speech as commercial.

*Bolger v. Youngs Drugs Product Corp.*⁶⁷ is one of the Court's most recent attempts to differentiate commercial from noncommercial speech. *Bolger* involved a wholesaler's challenge to a federal statute prohibiting

61. *Id.* at 513-21.

62. *Id.* at 505. See *supra* note 15.

63. *Id.* See also *Virginia Pharmacy*, 425 U.S. at 779 (Stewart, J., concurring).

64. *Id.*

65. *Id.*

66. 453 U.S. at 538 (Brennan, J., concurring). Justice Brennan 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 products; they mean lower prices for you at his Shoppe."

Id.

Justice Brennan suggested other troublesome examples in determining what is commercial speech: a billboard by San Diego Padre fans not connected 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.

67. 463 U.S. 60 (1983).

unsolicited mailing of contraceptive advertisements.⁶⁸ The manufacturer sought to mail three types of materials on an unsolicited basis:

- (1) multipage, multi-item flyers promoting a large variety of products available at a drug store, including prophylactics;
- (2) flyers exclusively or substantially devoted to promoting prophylactics; and
- (3) informational pamphlets discussing the desirability and availability of prophylactics in general or of Youngs' products in particular.

The Postal Service had warned the wholesaler that these mailings would violate the statute. The Supreme Court ultimately held that the statute was unconstitutional.⁶⁹

While the Court concluded that most of the mailings fell within the "core notion" of commercial speech—speech that does no more than propose a commercial transaction—the Court conceded that the informational pamphlets also discussed important public issues.⁷⁰ Thus, the Court had to determine how the pamphlets should be characterized. In determining whether the pamphlets were commercial, the Court focused on the "core notion" and three additional factors:⁷¹ (1) whether the material was advertising; (2) whether there were references to specific products; and (3) whether there was an economic motivation.⁷²

Justice Stevens in his concurrence voiced concern about the Court's reliance on these factors to characterize the speech because of the diffi-

68. 39 U.S.C. § 3001(e)(2) provides:

Any unsolicited advertisement of matter which is designed, adapted, or intended for preventing conception is nonmailable matter, shall not be carried or delivered by mail, and shall be disposed of as the Postal Service directs unless the advertisement—

(A) is mailed to a manufacturer of such matter, a dealer therein, a licensed physician or surgeon, or a nurse, pharmacist, druggist, hospital, or clinic; or

(B) accompanies in the same parcel any unsolicited sample excepted by paragraph (1) of this subsection.

An advertisement shall not be deemed to be unsolicited for the purpose of this paragraph if it is contained in a publication for which the addressee has paid or promised to pay a consideration or which he has otherwise indicated he desires to receive.

Section 3001(e)(a) provides as follows:

Any matter which is unsolicited by the addressee and which is designed, adapted, or intended for preventing conception (except unsolicited samples thereof mailed to a manufacturer thereof, a dealer therein, a licensed physician or surgeon, or a nurse, pharmacist, druggist, hospital, or clinic) is nonmailable matter, shall not be carried or delivered by mail, and shall be disposed of as the Postal Service directs.

69. 463 U.S. at 67.

70. *Id.*

71. *Id.*

72. *Id.*

culty in differentiating commercial from noncommercial speech.⁷³ He concluded that “[b]ecause significant speech so often comprises both commercial and noncommercial elements it may be more fruitful to focus on the nature of the challenged regulation rather than the proper label for the communication.”⁷⁴

It is apparent that even in the Court’s later stage of exploration of the limits of the commercial speech doctrine, there is very little substance other than the establishment of the doctrine. The question then is what normative concerns underlie the doctrine applied in these commercial speech cases.

II. NORMATIVE VALUES: SMALL HINTS AND LARGE INFERENCES

Chrestensen’s casual treatment of speech containing noncommercial as well as commercial ideas seems to suggest that first amendment protection of commercial speech is meritless. This is apparent in *Chrestensen’s* rather short-order treatment of the issue despite the fact that it had never before been decided. Also, there is no indication in the opinion that commercial speech had any constitutional dignity, much less any protection.

Although the Supreme Court has modified its approach to the issue, such scholars as Professor Bork⁷⁵ and Professors Jackson and Jeffries⁷⁶ have suggested that commercial speech is valueless. Professor Bork argues that some rights are derived rather than explicit.⁷⁷ These derivative rights are no less fundamental or important by virtue of their origin than express rights, but because they are derived, they are limited in scope.⁷⁸ Thus the freedoms of speech and press, while express, are not explicit and their scope is derived from the Constitution as a whole.⁷⁹ Thus, to Professor Bork, freedom of expression only protects speech necessary to the political process as the constitutional republican form of government established.⁸⁰ Professor Bork’s approach, therefore, leaves unprotected speech in the areas of science, literature, and the arts, and, by inference,

73. *Id.* at 81.

74. *Id.* at 82.

75. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971).

76. Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 *V.A. L. REV.* 1 (1979).

77. Bork, *supra* note 75, at 20.

78. *Id.* at 21-35.

79. *Id.* at 23.

80. *Id.* at 20.

commercial speech.⁸¹

Professors Jackson and Jeffries have also suggested that the first amendment does not protect commercial speech.⁸² They argue that free speech embodies two values rather than one. Free speech furthers the democratic process of self-government by providing information needed to make political decisions. It also contributes to greater individual self-fulfillment, which makes citizens more capable of deciding issues of self-government.⁸³ They conclude that commercial speech provides no information relevant to political matters.⁸⁴ They would reject *Virginia Pharmacy's* implicit holding that advertising provides information useful in making enlightened decisions on policy and policy-makers.⁸⁵ They rely, however, on *Virginia Pharmacy* as conclusive authority for the proposition that commercial speech does not promote self-realization.⁸⁶ Their thesis is that the commercial speech doctrine is a judicial reinstatement of economic regulation in the guise of enforcement of first amendment values. Although their reasons for excluding commercial speech from protection are arguable, there is merit in their ultimate conclusion.

Two pairs of cases illustrate how the lack of articulated normative values can lead Professors Jackson and Jeffries to conclude that the commercial speech doctrine represents an illegitimate reintroduction of ideas of economic regulation. The first couplet is *Bigelow v. Virginia*⁸⁷ compared with *Bolger v. Youngs Drug Products Corp.*⁸⁸ In *Bigelow*, the defendant was charged with violating Virginia law by publishing an advertisement of a New York abortion referral service.⁸⁹ The subject of

81. *Id.* at 20, 27.

82. Jackson & Jeffries, *supra* note 76, at 6.

83. *Id.* at 5.

84. *Id.*

85. See *Virginia Pharmacy*, 428 U.S. at 765.

86. See Jackson & Jeffries, *supra* note 76, at 5.

87. 421 U.S. 809 (1975).

88. 463 U.S. 60 (1983).

89. The advertisement read as follows:

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

the advertisement was undeniably controversial and a matter of great public concern.⁹⁰ Nonetheless, it cannot be argued that it was anything more than an advertisement of a service for a price.⁹¹ None of the advertisement's space was allocated to explaining New York's laws or to criticism of Virginia's laws prohibiting abortion.⁹² 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 the agency could draw prospective customers from those states. Had abortions been more available, it is likely that there would have been little need for the agency's commercial service.

If the Court's reasoning was that a 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 that the federal government played in ensuring that the corporation continued in business. It is more likely, as Professor Schiro suggests, that the Court wished to emphasize the importance of the right to abortions.⁹³ If this is so, the Court should have set forth its reasoning that the subject matter made the advertisement less subject to restrictive regulations. The Court may have been concerned that upholding the conviction would undermine its recent decision making access to abortions a fundamental right.⁹⁴ The Court, however, 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.⁹⁵ The articulated reason should have been that Virginia had no legitimate interest sufficient to prevent dissemination of information about the exercise of a fundamental right. The Court did not need to declare unconstitutional Virginia's attempt to limit discussion about the availability of the service. The Court should have fo-

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.

Bigelow, 421 U.S. at 812.

90. See Comment, *supra* note 4, at 1029.

91. *But see id.*

92. See *Bigelow*, 421 U.S. at 811-12.

93. Schiro, *Commercial Speech: The Demise of a Chimera*, 1976 SUP. CT. REV. 45, 78 (1976).

94. *See id.*

95. *Bigelow*, 421 U.S. at 827-29.

cused on the restricted subject matter, rather than the illegitimacy of restricting information about services available elsewhere. The opinion thus ignores the state's legitimate interest in prohibiting commercial speech concerning unlawful activity, an interest that the Court has elsewhere recognized.⁹⁶ More consideration should have been given to the basis for invalidating the law before simply concluding that the speech was of fundamental importance, protected, and not commercial.⁹⁷

*Youngs*⁹⁸ makes the decision in *Bigelow* appear even less founded on consistent normative values of the first amendment. The pamphlets in *Youngs* were not all within the Court's "core notion" of commercial speech because they did more than merely "propose a commercial transaction."⁹⁹ Both pamphlets provided information about condoms, one with and one without specific reference to the brands manufactured by *Youngs*, and described the advantages of each.¹⁰⁰ Both flyers discussed the important social issues of venereal disease and birth control.¹⁰¹ Thus, the pamphlets cannot be characterized as mere proposals to enter into a commercial transaction.¹⁰² The Court held that the combination of advertising, specific product references, and the economic motivation for mailing the pamphlets supported the district court's conclusion of commerciality.¹⁰³ Notwithstanding the fact that the pamphlets discussed important social issues, the Court concluded the mailings were commercial speech.¹⁰⁴

Applying all three of these factors to the speech in *Bigelow*, the Court should have reached the same conclusion. In fact the *Bigelow* ad did not discuss the underlying issues of abortion and birth control; it merely proposed that readers take advantage of the service if they wished. The referral agency was mentioned by name and the agency had an economic interest in responses to the ad.¹⁰⁵

A significant issue is what effect the importance of the issues has on the

96. *Central Hudson*, 447 U.S. at 564; *Bates*, 433 U.S. at 384; *Pittsburgh Press Co.*, 413 U.S. at 388.

97. *Bigelow*, 421 U.S. at 822.

98. 463 U.S. at 66-67.

99. *Id.*

100. *Id.* at 66 n.13; *Central Hudson*, 447 U.S. at 563.

101. 463 U.S. at 66-68.

102. *Id.* These ads were not within the "core notion" of commercial speech, which is advertisement of commercial services or goods.

103. *Id.*

104. *Id.*

105. See *supra* note 89.

Court's determination of commerciality. In *Youngs* hints exist in the portion of the opinion devoted to a better explanation of its commerciality test.¹⁰⁶ The Court, however, makes no attempt to distinguish *Bigelow* from *Youngs*, because it was able to strike the regulations as impermissible restrictions without reaching the commerciality issue. The Court, however, could have applied the line of reasoning to *Youngs* to conclude that the pamphlets did not constitute commercial speech. The opinion leaves the question of what force and effect the rhetoric of commerciality in *Youngs* will have. The effect of *Youngs* has to be that the commercial speech doctrine is a substantial and viable tool in providing varied levels of protection to speech on the basis of some unarticulated normative value.

The second couplet of cases is *In re Primus*¹⁰⁷ and *Ohralik v. Ohio Bar Association*.¹⁰⁸ Despite the Court's general statement that profit motive alone is not determinative of protection, these cases suggest that profit motive is important in determining the relative value of the communication.

In *Primus* the Supreme Court emphasized that the solicitation was not for pecuniary gain and the letter was within the first amendment's protection of association, and was intended to further the social and political aims of the ACLU rather than any financial interest.¹⁰⁹ The Court addressed associational and free expression rights interchangeable without any distinction of why profit motivated activities cannot be a legitimate reason for promoting expression among those persons with similar interests.¹¹⁰

In *Ohralik*, the Court relied on the pecuniary interest of Ohralik to justify upholding the disciplinary action taken against him for having solicited two young women injured in an automobile accident.¹¹¹ Justice Marshall, in his concurrence, pointed out that reliance on the profit motive distinction to justify the different results was dangerous and unjustified.¹¹² It seems inappropriate and inconsistent for the Court to focus on the profit motive of the speaker to justify regulation in this situation when all previous cases stated that this factor alone would not be deter-

106. See *Bolger*, 463 U.S. at 67 n.14.

107. 436 U.S. 412 (1978).

108. 436 U.S. 447 (1978).

109. 436 U.S. at 422, 431-32.

110. *Id.* at 431-34.

111. 436 U.S. at 457-59.

112. *Id.* at 471-74 (Marshall, J., concurring).

minative of protection. It can be argued that this was a different way of articulating the Court's acceptance of the compelling state interest in preventing the evils of overreaching, undue influence and invasion of privacy.¹¹³ This, however, ignores the question of why the Court so readily views these evils in a solicitation prompted by profit but not where the motive is altruistic. The possibility exists that a politically motivated and highly committed lawyer would overreach, exert undue influence, and invade the privacy of a potential client to further the desired political or social goal.

Ohralik and *Primus* suggest that contrary to the language of the cases the Courts' evaluation of the speech in question does assign a primary role to profit motive. Again, this is neither unsupportable nor bad. The Court itself has provided support and justification for this position. In *Virginia Pharmacy* the Court stated that commercial speech is distinguishable from other types of speech, and recognized commonsense differences between speech that does no more than propose a commercial transaction and other varieties.¹¹⁴ Most importantly commercial speech while not provably false may be misleading. The state can regulate commercial speech to ensure that commerce "flow[s] cleanly as well as freely."¹¹⁵ Power to regulate commercial speech was said to be a function of the greater ability to ascertain the truthfulness of commercial speech as opposed to political commentary on news reporting.¹¹⁶ This claim, however, seems unsupportable as a general proposition.

Consider the ability to determine the truth of these two statements. "Our facial cream is good for your skin." "The MX missile is a waste of taxpayers dollars and I have voted against it every time." The second statement is more readily verifiable as true than the puffing of a manufacturer in this specific instance. Not all commercial speech, however, is less readily verifiable than political statements. Verifiability will depend more on the type of statement made and its circumstances than on its subject matter.

The early test of commerciality indicates the Court's intention, although it was quickly obscured. Had the test of a speech's commerciality remained whether the speech did "no more than propose a commer-

113. *Id.* at 461-62.

114. *Virginia Pharmacy*, 425 U.S. at 771 n.24.

115. *Id.* at 771-72.

116. *Id.* at 771-72 n.24.

cial transaction"¹¹⁷ it might have been possible to draw the "line of commerciality" by analogy to what constitutes an offer for purposes of contract law. The Court might then have accepted analyses such as Professor Farber's that regulation of commercial speech be justified as an adjunct to regulation of the "act" of contract formation.¹¹⁸

The court instead has not explicitly asserted a contract formation analysis and thus from the beginning has fostered confusion in its ambiguous rationale for greater regulation. In *Virginia Pharmacy*, the Court also suggested that commercial speech is more durable and not likely to be chilled because it is virtually indispensable to profits in our commercial world.¹¹⁹ This seems to be a very different proposition from the "objectivity" of mere proposals for commercial transactions and suggests that a broader range of speech could be regulated.

As previously indicated the demonstrability of truth or falsity is not necessarily greater in political speech than in commercial speech. The same is true as to indicia of hardiness. More important than the category of speech in question is the specific setting of the speech. In *Primus*,¹²⁰ the defendant did nothing more than solicit the representation of clients.¹²¹ Although there was no expectation of profit, in that setting there were indicia of durability and hardiness of the speech that rivaled those in commercial speech. There is a likelihood of strong commitment to purpose that would increase the likelihood of attempts to communicate the message despite regulation. Furthermore, while no direct reward could be received from the clients it must have been apparent that funds, either government or private, for the legal aid office would not be available absent some tangible benefit to society. The opportunity to demonstrate the need for low cost or free legal aid in a situation that begs for remedy, both from an individual and societal stand-point, could be a strong influence on the speaker, the possibility of regulation would not easily chill.

Bates added two additional "common sense differences" between non-

117. *Id.*

118. See Farber, *Commercial Speech and First Amendment Theory*, 74 Nw. U.L. REV. 372 (1979). Cf. *Bolger*, 463 U.S. at 81 (Stevens, J., concurring) (at least one member of the Court suggests a search for first amendment values and further proposes that the Court focus on the nature of the regulation and not whether speech is or is not commercial).

119. 425 U.S. at 772 n.24.

120. 436 U.S. 412 (1978).

121. *Id.* See also *supra* note 15.

commercial and commercial speech.¹²² The Court suggested that any concern for great accuracy inhibiting spontaneity is lessened by the calculated nature of most commercial speech. Again, this is an observation which is equally true of noncommercial speech not offered in the heat of an argument or without reflection. If calculation offsets protection, then reduced protection should be afforded all types of speech that are "calculated." An additional distinction between all commercial advertising and noncommercial speech that the *Bates* Court offered is that the benefits of commercial speech, particularly information, are dependent on the speech being truthful and not misleading.¹²³

This is the first step of a return to *Chrestensen*.¹²⁴ For the Court to assert that commercial speech has as its primary benefit the provision of truthful and nonmisleading information assumes that the act of communication or the receipt of information, even false information, is not of value, although it is in the "marketplace" of political or social ideas where truth competes with falsehood. This reasoning implies commercial speech is inherently lacking and of lesser constitutional dignity. These cases, and the commonsense differences are grounded on no articulated value that sets commercial speech apart from noncommercial speech. Although there are hints of underlying values, these implicit values are often inconsistent and directly conflicting. The Court should not assert that commercial speech is valuable primarily because it provides information, but reject the same argument in support of decreased protection for noncommercial speech unless commercial matters are inherently less valuable or constitutionally less dignified. In rejecting this characterization the Court in *Virginia Pharmacy* correctly indicated the vast importance of commercial information in our everyday lives.¹²⁵

Our society attaches substantial importance to diet, health, and lifes-

122. 433 U.S. at 380-83. See also *infra* notes 245-49 and accompanying text.

123. 433 U.S. at 380-83. The third distinction that *Bates* added applies peculiarly to advertising of legal services. The Court stated:

because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising. For example, advertising claims as to the quality of services . . . are not susceptible of measurement or verification . . . similar objections might justify restraints on in-person solicitation.

Id. at 383-84.

124. 316 U.S. 52 (1942).

125. 425 U.S. at 765.

type while fewer than 55 percent¹²⁶ of the eligible adults participate in important political decisions. It may well be that to highly educated adults it is easy to say political decisions and information about those decisions are more significant. Although individually insignificant, more time is spent with mundane decisions that are largely based on commercial messages. There is substantial room for differing opinions as to the relative importance of information. Absent an explicit hierarchical ranking of subject matters in the Constitution, the Court will impose one where necessary to decide questions presented to it. These decisions should be made with concern and deference for individuality and should be made on the basis of articulated values which then can be used to structure future transactions and exercises of freedom.

What then are the values which may be inferred from the opinions in existence. The Court seems to lack consensus as to the normative value underlying continuation of the commercial speech doctrine. The cases indicate shifting and situational justifications for the commercial speech category, which stem, at least in part, from an inadequately articulated prejudice against commercial speech. The Court believes that commercial speech is hardy, and unlikely to suffer from the chilling affect of statutory restrictions.¹²⁷ It is also more mundane, of lesser constitutional dignity than noncommercial or ideological speech.¹²⁸ This undercurrent of prejudice however, is not monolithic.¹²⁹

The Court's holdings, tests and dicta are subject to many different in-

126. Instead of 100 million voters participating in the presidential election, as the Democrats had hoped, unofficial vote totals indicated that about 90 million people voted. That figure is expected to increase to 92 or 93 million when absentee ballots and third-party and write-in voters are tabulated. That vote total would be large enough to end the 20-year decline in the presidential-year voter turnout rate, which slumped to 52.6 percent of the voting age population in 1980.

Elections '84: Decisive Vote, Divided Outcome, Congressional Quarterly Guide to Current American Government (Spring 1985).

127. See *Bates v. State Bar of Arizona*, 433 U.S. 350, 381-83 (1977); *Central Hudson*, 447 U.S. at 564 n.6; *Virginia Pharmacy*, 425 U.S. at 771 n.24.

128. See *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 506 (1981) (quoting *Ohralik*); *Central Hudson*, 447 U.S. at 562-63 n.5.

129. Consider the following almost lyrical praise offered in *Virginia Pharmacy*:

Focusing first on the individual parties to the transaction that is proposed in the commercial advertisement, we assume that the advertiser's interest is a purely economic one. This hardly disqualifies him from protection under the First Amendment. The interests of the contestants in a labor dispute are primarily economic, but it has long been settled that both the employee and the employer are protected by the First Amendment when they express themselves on the merits of the dispute in order to influence its outcome. . . . A single factory may have economic repercussions upon a whole region and affect wide spread systems of marketing. Since the facts of such a 'single factory' could as well turn on

terpretations, and support a variety of normative values. These values range from Judge Bork's¹³⁰ assertion that nonpolitical speech should not be protected to Professor Redish's belief that it must be fully protected because there are salutary values present in the communication and receipt of even commercial speech.¹³¹ Beginning with the premise that there are a number of valid, yet competing normative values this article proposes that the Court should begin to explore the underlying norma-

its ability to advertise its product as on the resolution of its labor difficulties, we see no satisfactory distinction between the two kinds of speech.

As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. . . those whom the suppression of prescription drug information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent. When drug prices vary as strikingly as they do, information as to whom is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.

425 U.S. at 762-64.

130. Bork, *supra* note 75, at 28.

131. Professor Redish defines the "freedom of self-realization" as the "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." After review of Mr. Meiklejohn's theory of self-government that only protects political and nonprivate speech, Professor Redish concludes that the underlying values of private and public speech are the same. He reasons that,

[t]o acknowledge the importance of political self-government is effectively to concede the value of private self-government as well. If society holds as valuable the ability of the individuals as members of society to attain their collective goals, the same principle would seem to place a similar value on the ability of the individual as an individual to determine and achieve his personal goals for a satisfactory life-style as long as those goals do not significantly and unduly interfere with the interests of others First Amendment theory has long recognized that the way for individuals to reach the best possible decisions in the public sphere is by encouraging free and open discussion and a competitive exchange of ideas Thus the optimum course can be decided upon only after all alternatives are considered and the final judgment tested by exposure to opposing facts or opinions. This mode of analysis which dictates the importance of the first amendment in the political sphere applies in an intensified state to decisions which affect the individual alone or as a member of a family. . . .

Redish, *The First Amendment in the Market Place: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 442 (1971).

The task of setting out the competing normative values has been done elsewhere. Rather than repeat a discussion with which most readers in this area will be familiar, it is suggested to those interested in greater detail that they begin with the sources discussed in these prior works. See Barnes, *Unlawful Commercial Speech*, *supra* note 5, at 458-64; Barnes, *Regulations of Speech Intended to Affect Behavior*, 63 DEN. L.J. 1 (1985). From these scholars' works we can develop a range of values against which to test the Court's opinions. There is no need to redo what others such as Professors Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976), Redish, *supra* note 131, at 429, Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 73 NW. U.L. REV. 1212 (1984) and Baker have done.

tive values supporting the commercial speech doctrine before attempting to define commercial speech. This is necessary because enunciation of the values can help shape the test of commerciality so that it reflects these values rather than the particular fact situation.

Three possible values have so far emerged. If there is a genuine distinction between commercial and noncommercial on the basis that commercial matters are less valuable to society and constitutionally less dignified than ideological speech, then an objective test such as product or brand identification is best suited to establishing commerciality. If a choice is made from the other end of the value scale and commercial speech is to be fully protected then no test is necessary. Case law indicates, however, that the Court will focus on neither extreme and the value of commercial speech will be found somewhere in the middle. If, as Professor Farber has suggested, regulation is related to the contract formation function of commercial speech, then a test which focuses on this factor would be appropriate.¹³² This middle range leaves open other possibilities. Suppose the Court rejects Professor Farber's analysis because it fails to explain why contract formation makes speech less protected. Should the Court still wish to permit regulation of commerce because it falls within the traditional state realm,¹³³ the Court could return to the value of commercial speech being inherent in its mere proposal of a commercial transaction.¹³⁴

132. Farber, *supra* note 118, at 386-98. See also *Youngs*, 463 U.S. at 83 (Stevens, J., concurring).

133. Farber, *supra* note 118, at 387.

134. In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are commonsense differences between speech that does "no more than propose a commercial transaction," *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S., [sic] at 385, and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired. The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely.

Attributes such as these, the greater objectivity and hardness of commercial speech may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker. Compare *New York Times Co. v. Sullivan* 376 U.S. 254 (1964) with *Dun & Bradstreet, Inc. v. Grove* 404 U.S. 898 (1971). They may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive. Compare *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), with *Banzhaf v. FCC*, 132 U.S. App. D.C.

This Article focuses on the intermediate range of values leading the Court to offer limited, but not complete protection. It also addresses the objective test appropriate to the value dictating no protection. Despite the Court's rejection of this objective in *Virginia Pharmacy* it continues to be a theme with those who would argue that there is no need to protect commercial speech. With this premise comes the concomitant need to differentiate between commercial and noncommercial speech.

III. WHY NORMATIVE VALUES SHOULD DICTATE THE TEST OF COMMERCIALITY

Early case law defined commercial speech as that which "does no more than propose a commercial transaction" definition.¹³⁵ In *Youngs* the Court described this definition as "the core notion of commercial speech" and went on to list the three factors—profit motive, mention of product or brand by name and the advertising nature of the speech—which support the conclusion of commerciality.¹³⁶ Because the mailings in *Youngs* did more than merely propose a commercial transaction, they were not within the core notion of commercial speech.¹³⁷ Had they been within this core notion, the Court would not have looked at other factors. These three factors thus give some indication of when commercial speech exceeds mere contractual offers or solicitations for a commercial transaction. In essence the category includes speech which contains discussions of public issues and links the product to current public debate, because this additional material is insufficient to raise the speech to the level of noncommercial, ideological speech.¹³⁸ The *Youngs* definition

14, 405 F.2d 1082 (1968), cert. denied sub nom. Tobacco Institute, Inc. v. FCC, 396 U.S. 842 (1969). Cf. *United States v. 95 Barrels of Vinegar*, 265 U.S. 438, 443 (1924) ("It is not difficult to choose statements, designs and devices which will not deceive"). They may also make inapplicable the prohibition against prior restraints. Compare *New York Times Co. v. United States*, 403 U.S. 713 (1971), with *Donaldson v. Read Magazine*, 333 U.S. 178, 189-191 (1948); *FTC v. Standard Education Society*, 302 U.S. 112 (1937); *E.F. Drew & Co. v. FTC*, 235 F.2d 735, 739-740 (CA2 1956), cert. denied, 352 U.S. 969 (1957).

Virginia Pharmacy, 425 U.S. at 771-72 n.24.

This proposal could come from third parties who would not be parties to the actual contract and would necessitate a subjective test of whether the speaker intended to promote a commercial transaction. The difference between this approach and Professor Farber's approach would be to treat some third party speech as commercial when the third parties who promoted the transaction were not parties to the contract itself. See Farber, *supra* note 118, at 388-89.

135. See *supra* notes 15-87 & 134 and accompanying text.

136. *Youngs*, 463 U.S. at 66.

137. *Id.*

138. *Id.* at 66-67.

seemingly implicates no new value, but is an extension of the earlier definition. This is apparent from the Court's discussion of why the extension was necessary. Advertisers would be able to immunize false or misleading product information from regulation by including references to issues of public concern or controversy.¹³⁹ Absent the relation to an activity protected from governmental regulation, the pamphlets discussing contraceptives were valuable only because of the substantial societal and individual interest in information about the commercial product.¹⁴⁰ This is the same interest and value the Court identified in *Virginia Pharmacy* as the reason for granting some protection to commercial speech. Society and the individual want to assure the availability of information about commercial activities which the state seeks to regulate.¹⁴¹ When the information concerns unlawful transactions, or is untruthful or misleading, then it has no constitutional value.¹⁴²

If the purpose of the commercial speech doctrine is to protect the exchange of commercial information, speech essentially devoid of this valuable information will not be protected. In other words, when it is untruthful or misleading, there is neither societal nor individual interest in its communication. As a complementary concept, regulation is permitted when it is designed to ensure the truthfulness, legality and other factors which generate the value of the speech.¹⁴³ The unarticulated complementary value seems to permit the exchange of even mundane price quotations as in *Virginia Pharmacy* and *Bates* because that information is helpful to consumers. The Court thus seems to have substituted its judgment for that of the state legislature. The Court has decided when to strike the balance between information and paternalistic protection in order to achieve better quality goods and services and to prevent deception in commercial transactions.

In *Bates* the Court spent considerable time destroying each rationale the state offered to support the ban on lawyer advertising. In large part the Court's argument rested on its own judgment that the benefits of advertising outweigh the harms of advertising. The Court did not declare the state's concerns unfounded;¹⁴⁴ rather it found that a ban on

139. *Id.* at 67.

140. *Id.*

141. *Virginia Pharmacy*, 425 U.S. at 763-64.

142. *Id.* at 770-73. *Bates*, 433 U.S. at 383-84.

143. See *Virginia Pharmacy*, 425 U.S. at 771-72.

144. The possible exception is rejection of the justification that there will be undesirable eco-

advertising was not the best response to state concerns.¹⁴⁵ In summary, despite a rational connection between the regulation and at least some compelling regulatory goals, advertising is protected speech. The Court, however, does permit the regulation of some advertising. The regulation is more complex than the imposition of judicial values as to the relative merits of various forms of advertising. All advertising of the classic solicitation type receives this limited protection; it is lost only when it confronts a substantial state interest. To lose this protection, the state regulation must directly advance the state interest and be no more extensive than necessary to achieve its goals.¹⁴⁶ Commercial speech is protected not for values inherent in the message or communication of the message, but for its informational function. The informational function can be as broad as informing the listener about the market place or as narrow as providing price information.¹⁴⁷ When the information is removed, the speech should no longer be protected.¹⁴⁸

As a result of the Court's common sense differences between commercial and noncommercial speech, most cases requiring a definition of commercial speech have been cases by or against advertisers of goods or services. *Metromedia Inc. v. San Diego*¹⁴⁹ appears to be the only case decided to date in which the Court did not consider a specific advertisement or solicitation. *Metromedia* presented the Court with an ideal opportunity to define commercial speech more precisely. Instead, the Court found the ordinance unconstitutional because of impermissible restrictions on noncommercial speech.¹⁵⁰ It is not coincidental, then, that when faced with the abstract concept of commerciality and with no concrete speech in question, the Court struggled with the definition of commerciality.¹⁵¹ The lack of specificity in factual pattern raised concerns as

conomic results. Even here the Court has declared that the consideration is "unpersuasive." *Bates*, 433 U.S. at 378.

145. *Id.* at 379.

146. *Youngs*, 463 U.S. at 74-75; *Central Hudson*, 447 U.S. at 566.

147. Inherent in this argument is an unfortunate rejection of Professor Redish's suggestion of a self-realization value in communication of all speech. The Court apparently believes that the commercial speaker has only an economic interest. See *Virginia Pharmacy*, 425 U.S. at 762. See also *supra* note 132 and accompanying text.

148. See *Virginia Pharmacy*, 425 U.S. at 771-72.

149. 453 U.S. 490 (1981).

150. *Id.*

151. *Id.* at 536-37 (Brennan, J., concurring). Justice Brennan did not specifically state that judicial attempts at a definition are futile, but he did write that he was uncomfortable with the Court's majority opinion, which would allow a banning of commercial billboards. He noted that his discomfort arose in part because governmental officials would be permitted to decide what consti-

to when the commercial speech doctrine would apply.¹⁵² Should the Court face a more direct test of its values than it avoided in *Metromedia*, it would likely rely on the values announced in other commercial speech cases. These elements are inferentially the protection of information and the permissible regulation of commercial speech that rests on commercial speech's dual value of information about a commercial transaction and the concern for deference toward traditional state regulation. A proper test might be an inquiry into whether the speaker reasonably expects the speech to be regulated as an economic transaction as well as communication.

The preliminary formulation of a test combines two values: economic regulation of commerce and protection of the limited informational function about commerce. Perhaps economic due process requires protection of commercial speech simply for its informational aspects.¹⁵³ By offering this limited protection, the Court has not announced a first amendment value based on normative concerns present in commercial speech that is absent in other types of speech. The test would merely restate the conclusion that the interest in economic regulation of the commercial speech is insufficient to override the economic interest in communicating the offer. The Court, therefore, would have substituted one economic value for another.

Professors Jackson and Jeffries have reached this conclusion.¹⁵⁴ They begin with a definition of commercial speech limited to business advertising.¹⁵⁵ To be protected, business advertising should advance one of the recognized values supporting first amendment protection for speech. When it neither provides information useful in the political process nor effects individual self-realization,¹⁵⁶ it falls outside the protection of the

tuted commercial speech. See also *supra* note 66 for Justice Brennan's examples of troublesome billboards.

152. 453 U.S. at 536-37.

153. See Jackson & Jeffries, *supra* note 76, at 30-33.

154. *Id.*

155. *Id.* at 1.

156. *Id.* at 14-20. Professors Jackson and Jeffries are not willing to expand first amendment protection to commercial speech to ensure full protection for speech that fostered these values but that could conceivably be characterized as commercial. Linedrawing difficulty would not suffice as a strategic reason for protection. One basis for an exception was accepted. "Conceivably, a difficulty in linedrawing could become so intractable and pervasive as to render the distinction itself intractable." *Id.* at 19-20. Perhaps that point has been reached in *Dun and Bradstreet v. Greenmoss Builders, Inc.* See *infra* notes 173-211 and accompanying text. The author is also not willing to concede that this is the sole basis for giving up the task of linedrawing. If the normative concern that

first amendment. Once the two liberty interests are absent, it is easy to conclude that economic concerns dictated protection. Professors Jackson and Jeffries concede that the advertising ban in *Virginia Pharmacy* was a classic example of special interest legislation. It was legislation inconsistent with the common good of Virginia citizens; it forced out competition and caused higher prices for prescription drugs. These disadvantages were not mitigated by any demonstrable contribution to professionalism among pharmacists.¹⁵⁷ The Court is thus criticizing the economic judgment of the Virginia legislature. Criticism of this sort belongs to the political process and should not have been turned into a constitutional challenge on first amendment grounds.¹⁵⁸

The Court's position, however, contains more than pure economic due process. It is possible to rephrase the economic value of communication about the transaction as one that expresses the fundamental speech value. Although the Court has failed to do so, it is possible to start from the premise that all speech is protected, but conduct is not. Regulation of speech thus is permitted in such areas as criminal solicitation, conspiracy, and speech that has the force of action, because it is legitimate regulation in an area of traditional state power which only tangentially infringes freedom of expression.

Ignore the history of the commercial speech doctrine and ask whether regulation of conduct such as misrepresentation, fraud or coercion would be regulable despite the freedom of expression related to these activities. The answer is obviously yes because these are areas within the state's traditional exercise of its police power and which only tangentially infringe on first amendment values. Commercial speech is not partially protected because it concerns economic relations; rather it is fully protected, but subject to regulation when its character is more similar to economic activity than economic speech.

This is similar to Professor Farber's analysis.¹⁵⁹ What is different is

requires linedrawing cannot adequately be articulated to justify the distinction, the task of linedrawing should be set aside until that is accomplished.

157. Jackson & Jeffries, *supra* note 76, at 30.

158. "In terms of constitutional values, price supports, minimum wage laws and advertising bans are utterly indistinguishable." *Id.* at 33. Jackson and Jeffries argue that absent damage to the liberty interest or the self-government interest, regulations of economic speech involve nothing more than the harm found in any state regulation of economic activity in a free market system. To use this "harm" as a basis for substituting the court's judgment on the proper resolution of the economic issue is to review *Lochner v. New York*. *Id.*

159. What Professor Farber proposes is that the function of the language, not its content, be

the route this Article takes to reach this conclusion and what implications it has for future development.¹⁶⁰ As to the route taken, this Article suggests the need to examine whether the commercial speech doctrine is merely economic due process or is based on a fundamental value supportive of full protection for commercial speech. Full protection is withheld only because of the reality of the need to exercise traditional state police powers. The implication for future development is in how the definition of commercial speech might reinforce this fundamental value. Professors Jackson and Jeffries would conclude that no test is necessary because the economic value of protecting commercial speech is an illegitimate reintroduction of economic due process.¹⁶¹ Professor Farber sug-

analyzed. If it is informational, it should be protected, but if it is part of the contracting powers by serving a contractual function, it may be regulated.

Similar to the language of a written contract, the language in advertising can be seen as constituting part of seller's commitment to the buyer. Thus, advertising can function as part of the contractual arrangement between the buyer and seller. Of course, in addition to serving this contractual function, advertisements also serve an informative function to which the first amendment applies. The critical factor seems to be whether a state rule is based on the informative function or the contractual function of the language.

Farber, *supra* note 118, at 387.

160. In his proposed contractual framework, Professor Farber states:

[T]he problem is to determine whether some justification exists for treating commercial speech differently from other forms of speech. In other words, we are looking for some distinctive attribute of commercial speech which explains its special treatment. If such a distinction is found, we must determine what difference in constitutional protection it justifies.

Economic motivation and subject matter have already been eliminated as distinguishing factors. How else does commercial speech differ from noncommercial speech? One obvious distinction is that the commercial speaker not only talks about a product, but also sells it. The sale itself is subject to broad state regulation. May such regulation include the attachment of liability to the use of language in connection with a sales transaction?

To ask this question is very nearly to answer it. Contract law consists almost entirely of rules attaching liability to various uses of language. For example the constitutional status of an advertisement describing a product may be unclear, but the seller is obviously liable for damages for the failure to deliver a product corresponding to the contract description. No first amendment problem exists. . . .

Similar to the language of a written contract, the language in advertising can be seen as constituting part of the seller's commitment to the buyer. Thus, advertising can function as part of the contractual arrangement between the buyer and seller. Of course, in addition to serving this contractual function, advertisements also serve an informational function to which the first amendment applies. The critical factor seems to be whether a state rule is based on the informative function or the contractual function of the language. So long as a regulation relates to the contractual function of the utterance, the regulation should not be subjected to the intensive scrutiny required when a regulation directly implicates the first amendment function of language. Thus, the problem is to devise a test which will distinguish between regulations involving the first amendment, informative aspects of advertising and those involving its non-first amendment, contractual aspect.

Farber, *supra* note 118, at 386-87.

161. See Jackson & Jeffries, *supra* note 76, at 30-33.

gests that it is unnecessary to focus on what is commercial speech at all.¹⁶² Obviously, this is essentially the same question and Professor Farber's analysis has not answered it. The question is where to draw the line between fully protected speech and less protected speech about economic matters, regulable by virtue of its contract formation function.

If the normative value underlying protection of commercial speech is the protection of all speech with informational value, then the category of commercial speech is necessarily broad, encompassing virtually all advertising. If the normative value is protection of speech that does not serve a contractual purpose, the category is less expansive because all speech which is contractual is excluded from the category of fully protected informational speech. Speech having no contractual function, that is, speech which may be economic in nature, but not part of the contractual process, should be protected. This is a negative inference drawn from the police power of *contract regulation*. This appears to be Professor Farber's position. The inference this Article draws from the cases is similar; the Court should eliminate more speech from the category of full protection in deference to the traditional state police power in regulating *commerce*. The value inferred here is broader, encompassing not only contract formation but all aspects of speech that regulation of commerce tangentially affects. Professor Farber limits the category of less protected commercial speech to speech like advertising that is part of the contractual process.¹⁶³ When the inferred value of deference to regulation to prevent economic harm is used, it allows broader regulation, including regulation of third-party speech, that is, speech by someone other than the parties to the contract.

Although this potentially broader regulation would not please those who view the commercial speech doctrine as a good development, it would be viewed as a better focus on the reason why commercial speech is less protected. The reason may not be persuasive, but it is a more normatively sound explanation than the distinction between contractual and noncontractual language. There is not any apparent reason to offer less protection to language of contract than to any other type of speech. Limited protection is offered to commercial speech not because it is contractual, but because protection is circumscribed by the need to accommodate a legitimate competing constitutional principle—the state's

162. See Farber, *supra* note 118, at 386-87.

163. *Id.*

exercise of its police power to protect against harm. Although debatable, this ordering of values is more solidly founded on articulated norms inferred from prior Court opinions.

The Court should articulate norms that justify less protection than that offered by the strict scrutiny test,¹⁶⁴ as has been the case in testing inferences with noncommercial speech.¹⁶⁵ The Court should also justify the lack of protection for commercial speech that is false, misleading or about unlawful transactions when these limits are not imposed on non-commercial speech.¹⁶⁶

The remainder of this Article is designed to aid those who view limited protection as a necessity and who are willing to enunciate a normative value supporting commercial speech which focuses on its informational value and on the competing concern of deference to state regulation of economic matters. The Court's present values protect the informational function without undue hindrance of economic regulation. Rather than suggest that this is a legitimate normative value, this Article simply recognizes that it appears to capsulize what the Court has done to date. The balance of this Article makes clear that what is needed is a systematic exploration of these inferential values to determine whether they are ade-

164. See *Central Hudson*, 447 U.S. at 564. See also *supra* notes 15-87 and accompanying text for development of the need for demonstration of present deficiency.

165. See *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980). There have been applications of the intermediate scrutiny test in contexts other than commercial speech. See, e.g., *Seattle Times v. Rhinehart*, 104 S. Ct. 2199 (1984). In *Seattle Times*, a leader of a religious group brought an action for invasion of privacy and defamation against two Washington newspapers. The newspapers had written numerous articles about the leader, and other members claimed these stories were in part "fictional and untrue." During discovery, the newspapers requested certain membership and financial information that the group refused to provide. The trial court ordered the group to identify all donors who made contributions during the past five years and to divulge enough membership information to substantiate any claims of diminished membership. The court, however, also issued a protective order prohibiting the newspapers from publishing or using the information in any way other than case preparation. The newspapers argued that this offended the first amendment. The Supreme Court applied the two-part substantial interest test of whether the "practice in question [furthers] an important or substantial government interest unrelated to the suppression of expression" and "whether the limitation of First Amendment Freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved." Thus because the protective order regarding discovered information before trial was not a classic prior restraint, it did not require "exacting" first amendment scrutiny. Protection of information made available in the discovery process does not offend the first amendment. *Id.* at 2207-08. See also Post, *The Management of Speech: Discretion and the First Amendment in the Context of Civil Discovery*, 1984 SUP. CT. REV. 169 (1985).

166. See *supra* note 132 and accompanying text.

quate expressions of normative values which justify the commercial speech doctrine.

The legitimate purpose of permitting state regulation of commercial speech must be related to the prevention of substantive evils such as coercion, fraud and deceit.¹⁶⁷ If the regulation was not directed at misbehavior and was directed more at a general distaste for commercial matters, the Court could have left commercial speech unprotected. Because the Court has accepted an informational value in commercial speech, it must now establish at which point that informational value is subordinated to prevent abuses from untruthful, misleading or unlawful information. As a result, not all commercial speech needs to be subjected to regulation. It is only that speech which presents these evils. These evils are not just abstract evils; they are economic harms. They come about when the speech results in the allocation of economic resources in a way the state has determined to be inappropriate. An example is the sale of a car which the seller fraudulently represented as having an engine. Harm will result to the purchaser, who should not pay the same under the fraudulent misrepresentation as he would pay with full knowledge of the defect.

States should regulate speech not to curb its expression, but to prevent the harm which may result from its communication. For regulation to be proper, there should be a finding that its communicative value is impaired to the point of permitting regulation. The factors that determine the point at which regulation will be permitted should indicate whether the Court should adopt an objective or subjective test of commerciality. Assume that the Supreme Court is primarily concerned with protecting commercial speech only when it has informative value and the interest of the state in economic regulation does not override that value. Unlike noncommercial speech, commercial speech is unprotected when false, misleading or unlawful.¹⁶⁸ The state's interest in ensuring a clean stream of commerce apparently dictates this limitation. Thus unprotected commercial speech should be speech which raises the likelihood of one of the evils that is unprotected. Conversely, commercial speech which does not present a danger should be fully protected. To distinguish between fully protected speech and speech subject to regulation or prohibition, the Court should use a test of commerciality designed to determine whether

167. *Bates*, 433 U.S. at 383; *Virginia Pharmacy*, 425 U.S. at 771.

168. *Bates*, 433 U.S. at 383; *Virginia Pharmacy*, 425 U.S. at 771.

the speech may result in a commercial transaction affected by one of the evils.

An example of false commercial speech that should not be regulated and an example of false commercial speech that should be regulated might be useful. Suppose the Druid News Network broadcasts a news segment criticizing a new vaccine that allegedly cures the flu. As it turns out, the vaccine is effective. Although the broadcast concerns a commercial product, the speech appears unlikely to result in any of the evils with which the Court is concerned. This is because no transaction in reliance on the speech is likely to occur. The speech was calculated to discourage rather than encourage transactions. Now suppose Silicon Life Incorporated criticizes the same product as ineffective and suggests consumers purchase its own remedy that turns out to be wholly ineffective. This expression raises the possibility of economic harm that the Court wants to prevent through state regulation.

The Court should focus on the interest of the speaker to bring about a transaction that may result in harm, which the state would seek to prevent by exercising its traditional police power. A modification of the first hypothetical can show how this test should be focused on intent and is therefore subjective. Druid News Service, instead of criticizing the new vaccine, praises it as a major medical breakthrough. Sales of the vaccine shoot up dramatically. If the vaccine proves worthless, is the commercial speech subject to regulation? It would appear not. It appears to do more than propose a commercial transaction. *Youngs* demonstrated that speech can be commercial while doing more than proposing a commercial transaction. One must ask why this is not commercial speech.¹⁶⁹ Applying the *Youngs* factors, it is apparent that the broadcast mentioned the product name, but it was not a traditional advertisement and there was no direct economic motive in the report. It could be argued that ratings, popularity and advertising appeal are dependent on how much "newsworthiness" a show has and that by falsifying the report, Druid created a sensational story from which it benefited.

The Court, however, must draw a line with the intent of the speaker

169. See *Youngs*, 463 U.S. at 66-67. In *Youngs*, the Court first acknowledged that "most" of the manufacturer's mailings fell within the "core notion" of commercial speech. The Court, however, was still faced with categorizing the manufacturer's information pamphlets that the Court conceded "contain discussion of important public issues such as venereal disease and family planning." Three additional characteristics of commercial speech were noted and used to determine the pamphlets were commercial speech: the pamphlets were "advertisements," they referred to a "specific product," and there was an "economic motivation" behind the mailings.

because in any profit motivated publication, there is a motive to generate interest and thereby increase profit. Profit motive alone has not been sufficient for the Court to categorize speech as commercial speech.¹⁷⁰ If the speaker's interest would be equally served if no transaction is entered into, then the speech should be termed noncommercial despite the fact that its subject matter is a product mentioned by name. Any other result would categorize news reports and product evaluations by consumer advocates as commercial. If the focus is on the subjective element of intent, the state would be allowed to attack speech which is promotional and intended to induce economic behavior that may result in harm. If the state seeks to regulate economic speech on the basis of its concern for economic or commercial matters rather than concern for substantive harms, the Court should analyze the action as impermissible subject matter regulation.

Although explained in greater detail elsewhere,¹⁷¹ it is worthwhile to discuss this possible subjective formulation of the commercial speech test. To be useful and lasting, the values underlying the commercial speech doctrine should dictate this test rather than being an ad hoc response to precedent.

The test, based on prior Court cases, may be phrased this way: When the purpose of the speech would not be equally served if the audience failed to enter into a commercial transaction, then the speech is commercial. In summation, the speech is commercial when made to promote a

170. See *New York Times*, 376 U.S. at 266. In responding to the argument that there was no first amendment protection because the allegedly libelous statements were published as part of a paid, "commercial" advertisement, the Court stated that if this fact alone were determinative, it would discourage newspapers from carrying 'editorial advertisements' . . . and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech. . . . [Otherwise] the effect would be to shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.'

Id.

171. See Barnes, *Unlawful Commercial Speech*, *supra* note 5, at 480-85. The test was first proposed in my previous article and, together with the objective tests discussed at *infra* notes 243-56 and accompanying text, formed the basis for an argument that commercial speech once defined might more easily fit with the general first amendment doctrine. Unlawful commercial speech can be viewed as a clear and present danger. See Barnes, *Unlawful Commercial Speech*, *supra* note 5, at 498-506. While that analysis prompted the broader thoughts that culminated in this Article, they were more tentative and less than fully developed. Although I hope they are no more deficient than the present analysis, they are only a sidelight to the central issue of that article. The greater development here is in large part an attempt to make the choice of a test easier and more logical, consistent and sensitive to normative concerns, a problem that was not treated in the earlier article.

commercial transaction. Applied to the above hypotheticals, Silicon's statement is commercial because its purpose is to induce sales of its product despite the additional informational value of criticizing the competitor's product. Silicon's speech serves this informational value as well as did the story by Druid News Service which criticized the product. The purpose of Druid's speech, however, was served without the listeners turning to a competing product and is, therefore, noncommercial speech. The result is fully consistent with the test of commerciality in *Youngs*. Because the underlying values are better articulated, it provides more direction and aid to those concerned with the limits of regulation.

This test can be represented by intersecting four categories of purpose with four categories describing the subject of the message. The following chart illustrates this purpose and subject intersection to indicate how messages should be categorized if a subjective test is chosen. To reemphasize, this is only one application of the subjective test. Other possible applications exist and results will vary according to the normative values brought to the task. Any possible application will necessarily involve the same dangers of over- or under-inclusiveness that exist whenever the Court examines subjective intent. This Article will discuss the dangers in greater detail following the chart.

- A. Positive Promotion
- B. Positive Critique
- C. Commercial
- D. Negative Critique

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
1 A Commercial	2 A Commercial	3 A Commercial	4 A Commercial
1 B Noncommercial	2 B Noncommercial	3 B Noncommercial	4 B Noncommercial
1 C Commercial	2 C Commercial	3 C Commercial	4 C Commercial
1 D Noncommercial	2 D Noncommercial	3 D Noncommercial	4 D Noncommercial

Subjective Test-Content and purpose are evaluated

By classifying the message to be tested according to its purpose and the tactic used, the speech may be categorized as commercial or noncommercial. Thus, all offers, as that term is used in contract terminology, are commercial. Positive statements about a good are also commercial when the purpose is served only if the consumer is encouraged to enter a transaction to purchase the good, although it is unnecessary that the transaction be for the particular good or involve the marketer mentioned. Negative statements about a good are also commercial when the purpose of the statement is served only if the advertisement induces the consumer to turn to another good in competition with the criticized commodity.

Commercial speech, under this subjective test, would not include criticisms of a product, service or marketer when the purpose is informational and is not to encourage a transaction for a competing good. Turning to a competitor, however, may be the natural consequence of the speech, but so long as the purpose of the speech is equally well served if no transaction is consummated, then the speech is noncommercial. Similarly, a message that praises a good can be noncommercial even though the result may be an increase in the number of transactions. This occurs so long as the purpose of the message would be equally well served if the audience had chosen not to enter any transactions.

This test is not offered as a schematic definition to answer all questions of categorization. Each situation requires application of the critical element of purpose, or intent, in determining whether the speech is commercial. If the speech's purpose is to encourage a particular transaction or the creation of a market for future transactions, then the message is commercial. The test treats purely informational messages as noncommercial. Those messages which have a purpose that is equally well served when no transaction is entered fail to implicate the second value, deference to traditional police power control of economic transactions. This is one of the two apparent normative values underlying the commercial speech doctrine. Examples of purely informational speech of which the purpose is equally well served if no transaction occurs include news reports and consumer testing and evaluation services.

Mixed messages, which consist both of commercial and noncommercial parts, should be treated as commercial. An example of a mixed message is: "Support the fight against whaling. Buy Zenith Automobiles. For every car bought, we donate \$100." These messages are necessarily treated as commercial to prevent abuse. When a speaker wishes the full protection of the first amendment, he must now include

commercial concerns and confuse the issue. Necessity dictates this portion of the test rather than a normative determination that mixed messages are no more valuable than commercial messages.¹⁷² To characterize mixed messages as noncommercial would invite evasion of regulation through the addition of gratuitous noncommercial statements in the speech.

The subjective test should be useful if the normative value underlying the commercial speech doctrine is protection of commercial speech for its informational function with the concomitant circumscription of protection to allow state regulation in the exercise of police powers. The connection to commerce comes from the promotional aspect of the message. If the message is intended to prompt a commercial transaction, it is likely to raise concerns with which the state's police power deals. The evils of substantive commercial harm are present when there is a direct connection between the speech and the harm regulated. With this differentiation between promotional and nonpromotional messages, the danger of overinclusiveness is inextricably linked. Presumably it will be left to state and local governments and their administrative agencies to distinguish "promotion" from "critique." This Article will explore the difficulties in making the distinction and the uneasiness that this delegation should generate.

A. *Dun and Bradstreet v. Greenmoss Builders, Inc.*¹⁷³

Greenmoss illustrates the need for better articulation of the commercial speech doctrine. In *Greenmoss* the Court did address the issue of whether a credit report is commercial speech.¹⁷⁴ Rather than determine

172. See *Metromedia*, 453 U.S. at 538-39 (Brennan, J., concurring) (citing examples where the speaker might escape application of the commercial speech doctrine); *Virginia Pharmacy*, 425 U.S. at 764-65 (suggesting that a pharmacist could pose as a social commentator); *Valentine v. Christensen*, 316 U.S. at 53 (Christensen attempted to evade the statute by printing a protest on the back of the commercial handbill).

173. 105 S. Ct. 2939 (1985).

174. There was a last-minute entry ordering separate briefs and argument on the issue of whether the nature of speech as economic or commercial should offset the standard of care required of the speaker. 53 U.S.L.W. 3183 (1984). See also 53 U.S.L.W. 3165 (1984) (hearings). Yet the Court virtually ignored this issue in favor of a basis of decision that left the Court divided with a three-judge plurality and four dissenters. See *Dun and Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2944-48 (1985). Justice Brennan addressed the question of commerciality and suggested that credit reports are not commercial speech. His test of commerciality, though, is that described in *Youngs* as the core notion and there appears to be no indication of whether he would command a majority of the Court to limit the characterization to advertising of goods and services. *Id.* at 2962 (Brennan, J., dissenting).

whether economic or commercial speech should be granted protection in defamation actions when the publication is a false credit report, the Court decided the case on the applicability of *Gertz v. Robert Welch, Inc.*¹⁷⁵

Dun and Bradstreet prepared a credit report on Greenmoss and distributed it to subscribers of its services.¹⁷⁶ This report inaccurately stated that Greenmoss had filed a petition in bankruptcy.¹⁷⁷ Dun and Bradstreet's "reporter" on Vermont bankruptcies submitted the inaccurate information. This reporter was a high school student paid two hundred dollars per year for his services, who mistakenly read a former Greenmoss employee's filing as being Greenmoss's filing.¹⁷⁸ The parties did not address the commercial speech doctrine in the initial briefs and only did so in supplemental briefs the Court ordered after the first round of oral arguments.¹⁷⁹ *Greenmoss* is pertinent because of the Court's call for arguments on the applicability of the commercial speech doctrine and its subsequent failure to address the issue. As a first amendment case and particularly a defamation decision, *Greenmoss* is a significant opinion because it established that the *Gertz* limitations did not apply to speech on matters of purely private concern.¹⁸⁰

The opinion does not affect *Gertz*'s limitations on presumed and punitive damages in actions for speech of public concern, the need to prove fault, and the requirement of actual malice for recovery in cases brought by public figures and public officials.¹⁸¹

While not directly reaching the issue of whether speech of a commercial nature should also be given less protection in defamation actions, *Greenmoss* offers an adumbration of the Court's apparent value judgment that commercial speech which defames deserves less protection. The Court does little to define private speech. Justice Powell for the plurality wrote:

In a related context, we have held that "[w]hether . . . speech addresses a matter of public concern must be determined by [the expression's] content,

175. 418 U.S. 323 (1974).

176. See *Greenhouse Builders, Inc.*, 143 Vt. at 70-71, 461 A.2d at 416, *aff'd*, 105 S. Ct. 2939 (1985).

177. 143 Vt. at 70-71, 461 A.2d at 416.

178. *Id.*

179. See *Greenmoss Builders, Inc.*, 53 U.S.L.W. 3183 (1985) (order requesting briefs and arguments).

180. See *Greenmoss Builders, Inc.*, 105 S. Ct. at 2946.

181. *Id.* at 2946-47, 2955 (Brennan, J., dissenting).

form, and context . . . as revealed by the whole record.' These factors indicate that petitioner's credit report concerns no public issue. It was speech solely in the individual interest of the speaker and its specific business audience. . . . Moreover, since the credit report was made available to only five subscribers, who, under the terms of the subscription agreement, could not disseminate it further, it cannot be said that the report involves any 'strong interest in the free flow of commercial information.'¹⁸²

The use of the word "business" to "modify" audience appears to be a salutary narrowing of an otherwise unuseful phrase. The most effective speech in terms of its results and economic cost will typically be useful only to the audience. This is true for both ideological and commercial speech. The Court's use of the word "business" in this context must inferentially connote a lowered public interest in such matters; the Court's opinion, however, does not support such a proposition. The language thus appears to be another example of an unarticulated bias in favor of ideological concerns. The Court's underlying bias seems to be that business concerns are by nature narrower and of less public interest.

The Court discusses the commercial speech doctrine only in the section of the opinion in which it determines that the speech is private speech. Because of this limited increase to the commercial speech doctrine, there is limited damage to public debate flowing from the decision not to apply the *Gertz* restrictions on defamation actions to private speech. Justice Powell stated that credit reports, like advertising, are a hardy form of speech unlikely to be deterred by incidental regulation.¹⁸³ More significantly, the Court did not hold credit reports to be commercial speech.¹⁸⁴

Justice Brennan's dissent did not address the issue of whether the commercial nature of the speech should lower the standard of care *Gertz* required, but he did attack the conclusion that the economic nature of the speech narrowed the audience and made it of less public concern.¹⁸⁵ Justice Brennan and three other Justices appear to believe that the nature of the speech alone, whether it is economic or commercial, should not dictate the level of protection in defamation actions.¹⁸⁶ Beyond this propo-

182. *Id.* at 2947.

183. *See id.* Justice Brennan in dissent rejected characterization of credit reports as commercial speech. *Id.* at 2962 (Brennan, J., dissenting). He went on to rely on the "core notion" of commercial speech, classic advertising of a good or service, as the hallmark of commerciality. *Id.*

184. *See supra* note 174.

185. 105 S. Ct. at 2962 (Brennan, J., dissenting). *See also supra* note 174.

186. *See supra* note 183.

sition the Court seems scarcely to have considered the values supporting the commercial speech doctrine itself. Lingering signs of the unarticulated prejudice against commercial speech are even present in the dissent.¹⁸⁷

The absence of a complete enunciation of the normative basis for the commercial speech doctrine justified the Court's request for reargument on whether the doctrine should be applicable to credit reports. Because the Court ultimately did not address the issue, *Greenmoss's* significance to this Article lies in why the issue was raised and how the litigants treated it. The litigants' responses were varied and generally lacked normative development. The "tests" the litigants developed to explain why credit reports are or are not commercial speech lacked sensitivity to this issue of normative values.¹⁸⁸

Dun and Bradstreet took the position that its credit reports did not fall within the Supreme Court's definition of commercial speech.¹⁸⁹ Dun and Bradstreet observed that with the possible exception of *Metromedia Inc. v. San Diego*, the Supreme Court cases involved actual instances of commercial advertisement or solicitation for goods or services.¹⁹⁰ Dun and Bradstreet then pointed to the expressed value of permitting state regulation of conduct in commercial transactions and suggested that regulation of credit report statements concerning parties other than the seller of the good or service should be noncommercial. Because such statements are not promotional, they do not raise the predicate of deference to state regulation of commercial transaction.

Dun and Bradstreet also argued that even if the speech involved in credit reports were commercial speech, regulation through defamation liability would not comport with the *Central Hudson* demand for a substantial interest.¹⁹¹ In *Gertz* the Supreme Court stated that there is no

187. Justice Brennan wrote: "As *Thornhill* suggests, the choices we make when we step into the voting booth may well be the products of what we have learned from the myriad of daily economic and social phenomemon that surround us." 105 S. Ct. at 2961.

188. This is not a criticism of counsel, some of whom did an admirable job of setting up the possible normative basis for the Court's ruling. It is not even a criticism of the Court. It is too easy in the relative leisure of academic life with months or even years to devote to consideration of a problem to find fault in decisions that should be timely resolutions of the disputes between litigants as well as thoughtful interpretation of the Constitution. It is offered as a constructive suggestion.

189. Petitioner's Supplemental Brief on Reargument at 40-44, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985).

190. Petitioner's Supplemental Brief at 40-41.

191. 447 U.S. at 564.

substantial state interest in compensating for other than actual injury.¹⁹² The decision, however, left open the questions of why commercial speech is less protected than other types of speech, and whether less protection is based on more than a desire to continue state economic regulation of commercial transactions. The Court fails to answer why the test is not a compelling state interest test as in the direct regulation of noncommercial speech.¹⁹³

Finally, Dun and Bradstreet argued that it is difficult to distinguish between commercial speech and noncommercial speech which is of a commercial or economic nature.¹⁹⁴ Implicit in this argument is a willingness to accept a dividing line between proposals for commercial transactions in the form of advertising and solicitations which would be commercial speech under prior cases.¹⁹⁵

Dun and Bradstreet emphasized the importance of commerce and economic concerns and the Court's dicta about the need to receive information to make informed economic choices.¹⁹⁶ They also stated that speech of an economic or commercial nature has been fully protected when it was not promotional or advertising in nature.¹⁹⁷ Other than with promotional or advertising speech, the informational value is not diminished by deference to state regulation of economic transactions. In summary, Dun and Bradstreet did an admirable job of tying its arguments into the two competing values deducible from prior Court opinions. The arguments lacked cohesion based on the normative concerns; that weakness, however, is probably attributable to insufficient emphasis on normative concerns in prior Court opinions.

Respondent Greenmoss's argument illustrates with even greater clarity the result of the Court's inattention to normative values. Its argument proceeded from the premise that it would win by convincing the Court that past opinions had not foreclosed application of the commercial speech doctrine to credit reports. This would be sufficient to explain why credit reports should be included within the category of commercial speech if, in addition, any "harm" would result from lack of regula-

192. 418 U.S. at 349 (1974).

193. See *supra* note 165 and accompanying text.

194. Petitioner's Supplemental Brief on Rearguments at 44-45, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985).

195. *Id.* at 40-41.

196. *Id.* at 35-38.

197. *Id.* at 39.

tion.¹⁹⁸ Not surprisingly Greenmoss emphasized the need for the states to regulate this kind of speech.¹⁹⁹

To support its conclusion, Greenmoss offered a definition of commercial speech which included credit reports: "combination of a particular profit motive and of content and subject matter triggers the categorization of commercial speech."²⁰⁰ Dun and Bradstreet had argued that speech about someone else's product should not be classified as commercial speech because the state's interest in regulating the speech disappeared when the transaction involved other parties. Greenmoss countered this and advanced *Pittsburgh Press*²⁰¹ as an example of speech held to be commercial despite the lack of direct link between the sex differentiated categories in the employment contracts.²⁰²

This argument, however, fails for two reasons. The Court decided *Pittsburgh Press* prior to the commercial speech cases and did not address the relevant issues. More importantly the regulation is best viewed as a regulation of the contract to place advertisements in sex differentiated columns.²⁰³ It is this contract that constitutes a commercial transaction subject to regulation. The promotion or offer of unlawful services raised the need for regulation.

Greenmoss devoted a substantial portion of its argument to justifying the inclusion of credit reports in the category of commercial speech as the Court had defined it.²⁰⁴ The Court had incorporated two factors into the definition: hardiness and verifiability. Without normative values, the tests of hardiness and verifiability are reduced to vague and unprincipled indicia of whatever the person advancing them chooses to establish. Here Greenmoss and the amicus curiae for Greenmoss argued that information in credit reports is primarily factual, available from public sources and not subject to hasty evaluation to meet "deadlines."²⁰⁵ Ver-

198. See Supplemental Brief of Respondent on Reargument at 36-39, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985).

199. *Id.* at 39.

200. *Id.* at 42.

201. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, *reh'd denied*, 414 U.S. 881 (1973).

202. See Supplemental Brief of Respondent on Reargument at 43, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985).

203. See *supra* note 201 and accompanying text.

204. See Supplemental Brief of Respondent on Reargument at 44-47, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985).

205. *Id.*; Brief Amicus Curiae in Support of Respondent *Greenmoss Builders, Inc.*, at 12-15, 19-20, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985).

ifiability as it had previously been used by the Court referred to the advertiser's knowledge of the product or service, which allowed careful scrutiny of the advertisement. It was then a product of the inherent nature of the knowledge that would allow the advertiser to choose between nonmisleading and truthful statements to advertise the product.²⁰⁶

With reference to the hardiness factor, Greenmoss argued that the decision to print the information is a business decision in which risk is weighed against profit. With credit reports, profit outweighs risk if the service is properly performed which results in hardy speech.²⁰⁷ The obvious response is that a similar analysis can be applied to most newspapers and electronic media networks. They are engaged in profit-making activities and can weigh the risks. If the risk is worth taking, they should be subject to the same liability and regulation.

Without deciding that the credit report was commercial speech, the Court relied on the concepts of hardiness and verifiability to conclude that the protection of *Gertz* did not apply.²⁰⁸ The role of these factors in establishing the parameters of private speech is unclear. The Court seems to have resorted to them simply to mollify those who might argue that deterrence of private speech could damage first amendment interests. The Court's classification of this speech as private, however, would not damage first amendment interests because only false speech is subject to defamation actions. Commercial speech is valuable only when it is true. It is profitable speech at least "arguably"²⁰⁹ more objectively verifiable and thus unlikely to be deterred by the absence of the *Gertz*'s protections.

Reliance on these factors seems misplaced because of their applicability to other traditionally favored speech. As the dissenting justices argued, profit motive has never served as a basis for establishing the level of protection accorded expression.²¹⁰ The following example illustrates this line of reasoning: a public interest group places advertisements in various newspapers attacking both a proposed utility increase and the public utilities commission which favors the increase. The advertisement also

206. See *supra* note 135. See also *Central Hudson*, 447 U.S. at 564 n.6.

207. Supplemental Brief of Respondent on Reargument at 45, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985).

208. See *Greenmoss*, 105 S. Ct. at 2947.

209. It is curious that the plurality chose to add this modifier. If it is merely arguable rather than obvious or intuitive to most readers, is it a legitimate basis for the Justices' conclusion? I do not believe so. As previously discussed, the lack of greater objectivity in economic speech can be demonstrated by comparing examples of economic and ideological speech.

210. See *Greenmoss*, 105 S. Ct. at 2960 (Brennan, J., dissenting).

criticizes the commission's record of generally supporting such increases during a period of decreasing energy costs. This speech is clearly "hardy;" the consumers want to save money and have demonstrated a high level of motivation and commitment to their cause. It is preposterous to suggest that the Constitution provides any less protection for any false statements the consumer group may make. Yet because the Court fails to delineate the normative basis for the categories of commercial and private speech, there can be no legal distinction. To this point there has been no articulation of this type of distinction.

The *Greenmoss* case foreshadows the value which compels categorization. Some speech is less valuable because it does not command public attention.²¹¹ The state's interest in preventing defamatory speech offsets the interest in nonpublic speech. The Court has yet to announce the link in the commercial speech category between the lower interest and state power to regulate commerce. The *Greenmoss* decision offered the Court the opportunity to synthesize the newly created private speech category with the commercial speech doctrine by focusing on the elements of limited interest and the desirability of state regulation of harmful speech. An effective synthesis must narrow the commercial speech doctrine and articulate why some commercial speech is of limited value. If the Court's objective is to prevent economic harm flowing from untruthful commercial speech, it should limit the category to the kind of speech likely to produce this harm. The parameters of the doctrine should not be based merely on the *sotto voce* elitism apparent in the Court ascribing values to all members of society. The Court should be sensitive to the diversity of interests as well as to the diversity of opinion on "public" issues.

B. Securities Exchange Commission v. Lowe

In a brief amicus curiae for *Greenmoss*, Sunward Corporation argued that limitation of the commercial speech category would damage the state's ability to regulate certain commercial activity. Citing *Securities Exchange Commission v. Lowe*,²¹² Sunward suggested that such a limitation would hamper the state's interest in regulating commercial activity such as investment advising.²¹³ In *Lowe* a divided Second Circuit panel reversed the district court's denial of an S.E.C. request to enjoin publica-

211. *Id.* at 2946.

212. 725 F.2d 892 (2d Cir.), *rev'd*, 105 S. Ct. 2557 (1985).

213. Brief of Amicus Curiae in Support of *Greenmoss Builders, Inc.*, at 20, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985).

tion of investment newsletters and revoke Lowe's investment advisor's registration.²¹⁴ The S.E.C. had revoked Lowe's registration because of his prior criminal convictions.²¹⁵ The Investment Advisers Act (the "Act") requires individuals to register prior to using the mails or any means of interstate commerce in connection with the business of investment advisement.²¹⁶ The Act broadly defines "investment adviser" to include any person who for compensation advises others, either directly or through publication, as to the value of securities or the advisability of investing in or selling securities, or who for compensation publicizes securities reports.²¹⁷ Lowe's publication of two subscription investment newsletters brought him within the scope of the Act.²¹⁸

The Second Circuit held that the S.E.C. could properly revoke his registration. In dissent, Judge Brieant argued that the majority failed to give due deference to first amendment protection.²¹⁹ The majority held that the publication of the newsletters was commercial speech and that the state's regulatory function dominated any speech interest in this

214. See *Securities Exchange Commission v. Lowe*, 725 F.2d 892, 895-96, 901-02 (2d Cir. 1984), *rev'd*, 105 S. Ct. 2557 (1985).

215. 725 F.2d at 895.

216. 15 U.S.C. § 80b-3(a). "Except as provided in subsection (b) of this section, it shall be unlawful for any investment adviser, unless registered under this section, to make use of the mails or any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser."

217. 15 U.S.C. § 80b-2(a)(11):

'Investment adviser' means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities; but does not include (A) a bank, or any bank holding company as defined in the Bank Holding Company Act of 1956 [12 U.S.C. 1841 *et seq.*] which is not an investment company; (B) any lawyer, accountant, engineer, or teacher whose performance of such services is solely incidental to the practice of his profession; (C) any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefore; (D) the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation; (E) any person whose advice, analysis or reports relate to no securities other than securities which are direct obligations of or obligations guaranteed as to principal or interest by the United States, or securities issued or guaranteed by corporations in which the United States has a direct or indirect interest which shall have been designated by the Secretary of the Treasury, pursuant to section 3(a)(12) of the Securities Exchange Act of 1934 [15 U.S.C. 78c(a)(12)], as exempted securities for the purposes of that Act [15 U.S.C. 78a *et seq.*]; or (F) such other persons not within the intent of this paragraph, as the Commission may designate by rules and regulations or order.

218. *Lowe*, 725 F.2d at 898.

219. *Id.* at 903-10 (Brieant, J., dissenting).

situation.²²⁰

The Supreme Court decided *Lowe*²²¹ before *Greenmoss*.²²² The Court avoided the constitutional issue and instead focused on the statute's construction.²²³ The Court determined that Congress intended the statute to exclude nonpersonalized investment publications.²²⁴ The concurring Justices, who would have decided the case on the constitutional issue, did not address the question of the commercial nature of the speech. Justice White's concurrence was written in the alternative, assuming that *Lowe's* publications were first commercial and then noncommercial. In either case the injunction against publication was said to be an invalid restriction not narrowly drawn. Justice White concluded that regardless of which assumption was valid, the statute was too broadly drawn to satisfy the state interest without unduly interfering with expression, and thus, the injunction was an invalid restriction.²²⁵

The significance of *Lowe* is in the Second Circuit's treatment of the speech as commercial speech. The Second Circuit could point to at least two arguments in favor of applying the commercial speech doctrine to the facts of *Lowe*. First, the Supreme Court had not previously limited the doctrine to advertising.²²⁶ The fact that the Court did not define the limits of the doctrine's applicability, however, is insufficient to serve as a

220. *Id.* at 898-901. In reaching this conclusion the Second Circuit looked to *Ohralik* for authority. Citing *Ohralik* for the broad proposition that government "does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity," they further listed specific examples of communications that are presently regulated and do not offend the First Amendment. *Id.* at 899. The examples provided were exchange of information about securities, corporate proxy statements, exchange of price and product information among competitors and employers' threats of retaliation for the labor activities of employees. *Id.*

221. *Lowe v. Securities Exchange Commission*, 105 S. Ct. 2557 (1985).

222. The Court decided *Lowe* on June 10, 1985. *Greenmoss* was decided June 26, 1985.

223. The majority frustrated three justices as well, who concurred on the basis that the action to enjoin publication was unconstitutional. These justices felt that the statutory construction was incorrect because it might well go further toward frustrating congressional goals than declaring the specific provision in the statute for injunctions to be unconstitutional. See *Lowe*, 105 S. Ct. at 2578-82 (White, J., concurring).

224. *Id.* at 2570.

225. *Id.* at 2585-86 (White, J., concurring).

226. 725 F.2d at 900. The Second Circuit, while first acknowledging that the Third Circuit in *Ad World, Inc. v. Township of Doylestown*, 672 F.2d 1136 (3d Cir.), *cert. denied*, 456 U.S. 975 (1982), held that commercial speech is limited solely to product of service advertising, looked to *Bates* as standing for the proposition that the Supreme Court had not limited commercial speech to advertising. *Id.* The specific language in *Bates* on which the Court relied was "[i]f commercial speech is to be distinguished, it must be distinguished by its content not its form." *Id.* (citation omitted). The Second Circuit then distinguished *Central Hudson*, which stated: "[t]he First Amendment's concern for commercial speech is bed on the information function of advertising," on

means of extending these limits to advertisements. Second, the need for regulation to protect investors also favored the application of the doctrine.²²⁷ The Court, however, failed to distinguish Lowe's newsletters from the *Wall Street Journal*, *Barron's*, *Forbes*, or a host of other investment advice publications. The Court relied on the statutory definition which excluded "publishers of any bona fide newspaper, newsmagazine or business or financial publications of general or regular circulation" from the registration requirements.²²⁸ The opinion thus leaves unanswered the question whether Congress could properly address the problem by making that distinction. According to the Second Circuit, when the S.E.C. sought passage of the Act, it "emphasized the potential for abuse if persons in the business of publishing investment advice were willing to 'lend themselves to the use of stock market promoters and manipulators.'"²²⁹ The S.E.C. was also concerned with the failure to disclose that the publication, or a third party, had compensated the adviser for his advice or that the adviser had an interest in the promoted security.²³⁰

With these concerns in mind, it is easy to see why Congress wanted registered advisers. The statute, however, was passed in 1940, before heightened sensitivity to the value of speech about economic concerns, and the statute in effect permitted a prior restraint on the basis of a perceived predilection to dishonesty demonstrated by prior convictions. This predilection was not perceived to exist if the speaker published or wrote for a "bona fide" newspaper. Congress, or the S.E.C. using the power granted it by Congress, could punish or regulate publication of false or misleading information which does not disclose the financial adviser's interest. The state thus seems to have a compelling interest for regulation, which would be carried out in the least restrictive manner if the sanctions were based on the misleading publication.²³¹ What stands out as unsupportable is the judgment of Congress and the S.E.C. that certain types of publications are subject to a greater potential for abuse than the same type of material published by a "bona fide" newspaper.²³²

the ground that the Court actually defined commercial speech as "expression related solely to the economic interest of the speaker and its audience." *Id.* (citations omitted).

227. 725 F.2d at 901-02.

228. *Id.* at 897. See also *supra* note 216 and accompanying text.

229. 725 F.2d at 897.

230. *Id.*

231. See *supra* note 193.

232. See *Lowe*, 725 F.2d at 900.

The recent scandal involving the *Wall Street Journal's* "Heard on the Street" column illustrates that even "bona fide" publications are not immune from the abuse with which Congress was concerned. More importantly, it is possible to distinguish *Lowe*-type advisers as publishing commercial speech, while excluding "bona fide" type adviser's columns from that category. Yet had the Court permitted regulation of this type of speech as necessary to prevent the potential for abuse, it could also permit the licensing and regulation of "bona fide" newspapers.²³³ This, seems patently unacceptable.

As the concurring Justices suggested, there appears to be an implicit judgment that the regulation was invalid as applied and that the majority construed the exception to cover nontraditional journals and newsletters to avoid invalidation of the regulatory scheme.²³⁴ Assuming this inference is correct, then all nine Justices believed that it would be unconstitutional for the S.E.C. to enjoin publications by persons it had decided were untrustworthy. To allow the S.E.C. to enjoin publications when harm to investors had not been shown would prevent the publication of honest and nonfraudulent information.²³⁵ Even under the lower level of scrutiny applied to commercial speech, this regulatory scheme is broader than necessary to achieve the state's goal of preventing self-dealing and dishonesty on the part of investment advisers.²³⁶ It swept too broadly by permitting injunctions.

The Court thus adds very little to the normative development of the commercial speech doctrine. By failing to distinguish between commercial and noncommercial speech both in *Lowe* and *Greenmoss*, the Court has left the determination of commerciality to lower courts, which may be tempted to accentuate the underlying and unarticulated prejudice against commercial matters by subordinating the issue to the state's interest in regulating these publications. The Second Circuit opinion leaves one with the impression that the finding of a legitimate purpose was sufficient to regulate the commercial speech. The court did not test the scope of the regulation because commercial speech was involved and not likely to be deterred.²³⁷ One should ask whether the lack of guidance from the

233. *Id.* at 907-08 (Briant, J., dissenting).

234. *See Lowe*, 105 S. Ct. at 2581-82 (White, J., concurring).

235. *Id.*

236. *See Central Hudson*, 447 U.S. at 566. *See also Lowe*, 105 S. Ct. at 2586 (White, J., concurring).

237. *See Lowe*, 725 F.2d at 901.

Supreme Court contributed to the Second Circuit's rather ambivalent attitude toward the value of commercial and economic speech.

C. *Return to Dun & Bradstreet v. Greenmoss*

Lowe v. S.E.C. and the arguments of *Greenmoss* should have held great significance for the Court. The conclusion that commercial speech can be expanded to include credit reports and investment advice illustrates a lack of recognition of the Court's apparent values. *Greenmoss's* test focusing on speech having value only in providing information is simply too vague as an enunciation of normative values. When combined with the value of deference to state regulation, it is more useful in establishing the balance of concerns by focusing on the predicate of the regulation.²³⁸ If these two values were enunciated as a normative basis for the limited protection of commercial speech, the test of commerciality should focus on the promotional aspect.

A subjective test from the pattern proposed in this Article should be selected to provide this focus. This promotion test would give the result Congress and the S.E.C. sought without the need to distinguish among "bona fide" newspapers and other investment advisers. Had the advice been offered to induce a commercial transaction, it should be classified as commercial no matter who was the speaker. Thus advice offered with an underlying profit motive or undisclosed interest in the security would be commercial and regulable whether it appeared in the *Wall Street Journal* or in one of Lowe's publications. *Greenmoss's* argument that an advertising or promotional link would eliminate speech about a transaction by third parties from regulation is incorrect.²³⁹ So long as the third party speaker's interest is equally served if no transaction is entered into, speech is commercial and regulable.

Only the dissent considered the arguments on this issue. The four dissenting Justices concluded that credit reports are not commercial speech. While prior cases did not make the category of commercial speech coextensive with advertising, the distinguishing factor seemed to be the lack of informational value.²⁴⁰ This alone would be enough to

238. Farber, *supra* note 118, at 386-93; *Youngs*, 463 U.S. at 80 (Stevens, J., concurring).

239. See Supplemental Brief of Respondent on Reargument at 41-42, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985); Brief Amicus Curiae in support of Respondent *Greenmoss Builders, Inc.* at 17-19, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985).

240. *Virginia Pharmacy*, 425 U.S. at 765. The Court first assumes two premises regarding "ad-

encompass credit reports and investment newsletters because there is no advertising of the speaker, service or product. The purpose is to provide information about the contemplated transactions, whether an extension of credit by, or the purchase of securities from, a third party. This takes into account, however, only one part of the dichotomized values which appear to be the basis of the commercial speech doctrine. Of equal concern is the need to ensure continued state regulation of commerce.²⁴¹ This regulation serves a second function of distinguishing commercial speech by its hardness and verifiability, and reduces the risk of a chilling effect, even for speech that is only valuable for the information it conveys.²⁴²

Without a link to promotional purpose whether it is called advertising or merely intent to promote a commercial transaction, dilution of protection for noncommercial speech, the fear of which has prevented equal treatment for the categories, is invited. Because of the asserted need to police commerce, the Court would tolerate state interference as to non-commercial and commercial speech. The level of equality would be sought on a lower plane than what is acceptable.²⁴³ The concern again should be to focus on the need to regulate commercial transactions, and not to regulate communications that simply concern economic or commercial matters.

When courts do not inquire into the speaker's subjective purpose, they

vertisements" role in our free enterprise system. The first premise is that "[a]ny advertising, however, tasteless and excessive," assists the private purchaser in making an informed and intelligent economic decision because the purchaser is informed as to whom is producing and selling what product, for what reason, and at what price. The second premise is that private economic decisions are in the public interest. From this the Court concludes that the "free flow" of commercial information is "indispensable" to the free enterprise system. The Court further concludes that this information "is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered" and therefore serves the goal of "public decision making in a democracy." See also *Bates*, 433 U.S. at 364.

241. See *Youngs*, 463 U.S. at 68-69; *Metromedia*, 453 U.S. at 506; *Central Hudson*, 447 U.S. at 562-65; *Ohralik*, 436 U.S. at 455-56; *Bates*, 433 U.S. at 381; *Virginia Pharmacy*, 425 U.S. at 771 n.24, 772-73.

242. See *Virginia Pharmacy*, 425 U.S. at 771 n.24. The Court, reflecting on the common differences between commercial speech and other varieties, stated that

[t]he truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more than anyone else. Also, commercial speech may be more durable than other kinds.

243. See *Metromedia*, 453 U.S. at 506; *Central Hudson*, 447 U.S. at 563 n.5; *Ohralik*, 436 U.S. at 456.

must impose an objective test which assigns commercial speech to a lower position because of its subject matter. An objective test of commerciality is necessarily more restrictive because it lacks the normative values assigned to the state's regulation of commercial transactions. Greenmoss's supplemental brief seems to suggest an objective test by defining commercial speech to include everything that assists the audience to form "commitments which are partially part of a contract of sale or service."²⁴⁴ What Greenmoss did not consider and the Court did not address is how a limited examination of the intent behind the motive would aid the Court in distinguishing between Dun and Bradstreet credit reports and *New York Times* editorials on the inaccuracy of credit reports.²⁴⁵ Both publications are in business to make a profit and the speech is intended to make their own product more attractive. The only speech about economic or commercial matters meriting protection under Greenmoss's test would be that made by an individual who speaks without payment or by a nonprofit organization that does not even earn operating expenses from the speech.²⁴⁶

Greenmoss's proposed test focusing on economic motive and subject matter would promote a purely objective test of commerciality. Greenmoss would distinguish credit reports (commercial speech) from newsreports about economic matters (noncommercial speech) on the basis of motive. Both reports concern commercial matters so the first portion of the test is not in controversy. Perhaps a traditional newsreport is as a matter of "commonsense" different, but the *Greenmoss* test does not require the differentiation at any particular point. Since both reports deal with commercial matters, the test is essentially one of motive; it is difficult, however, to distinguish the economic motive of Dun and Bradstreet in publicizing credit reports from the economic motive of the *Tucson Guardian* in publishing a business page about stock prices. Lenders can use Dun and Bradstreet's report to decide whether a loan should be made. Investors can use the *Guardian's* report to decide whether to

244. Supplemental Brief of Respondent on Reargument at 41, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985).

245. *Id.* at 42-43.

246. Even Consumer Reports could be said to have a "profit motive" in the sense that its evaluations of products are intended to affect consumer choices. Without the evaluations, no one would likely subscribe and provide the funds needed to operate the magazine. There is a tremendous economic stake in the speech even without a "profit motive." The taxpayer has a similar economic interest in attacking import quotas if she wishes to buy an imported car. The difficulty would be in separating economic motives from more particularized profit motives.

purchase securities. Both papers are published with the expectation that the service will be of sufficient value that customers will purchase the paper.

A distinction based on the inclusion or exclusion of nonbusiness articles is equally difficult to justify. The *Wall Street Journal*, *Barron's*, and *Forbes* all exhibit a strong profit motive in focusing their publications on economic matters. To escape classification as commercial speech, Dun and Bradstreet would need only to include Mike Royko and Ellen Goodman columns or UPI copy.²⁴⁷ At some point the publication becomes sufficiently general in interest to dissipate the profit motive stigma. The weakness of Greenmoss's position stems from the fact that most attempts to make the distinction are subject to this criticism, a fact the Court has already acknowledged.²⁴⁸ Without clarification of the relevant underlying principles or its normative value, an objective test of commerciality will never escape this criticism.

Even when combined with the factor of economic or commercial subject matter, the motivation of profit does not indicate why commercial speech should be less protected. As previously noted, profit motive is easily manipulable and is not linked to a value that can be enunciated to protect traditional economic or commercial commentators and differentiate them from limited interest commentators. Commercial or economic subject matter was the phrase the Court used in its order requesting supplemental briefs on reargument.²⁴⁹ The Court's implicit judgment is that speech about commercial or economic matters is more mundane and of lesser constitutional dignity.²⁵⁰ Unlike the position Professors Bork, Jackson and Jeffries take, the Court seems to accept that this speech deserves some, albeit less, protection than noncommercial or ideological expression.²⁵¹

To establish a normative position that commercial speech lacks value, the test of commerciality must be objective. If speech concerning economic or commercial matters is less valuable, then there should be a test to determine the worth of its content. If the content of the speech promotes goods or services or is simply concerned with economic or com-

247. See *Lowe*, 725 F.2d at 908 (Briant, J., dissenting).

248. See *Metromedia*, 453 U.S. at 521 (Brennan, J., concurring).

249. See *supra* notes 173-74 and accompanying text.

250. See *Metromedia*, 453 U.S. at 506-07; *Central Hudson*, 447 U.S. at 557; *Ohralik*, 436 U.S. at 456.

251. See *Metromedia*, 453 U.S. at 506-07; *Central Hudson*, 447 U.S. at 557; *Ohralik*, 436 U.S. at 456.

mercial matters, then it is commercial and less valuable. This test, however, is too simplistic; it would include Dow Jones quotations, prime and federal reserve board discount interest rates, announcements of import quotas and numerous other governmental indicators. This test fails to indicate where mundane commercial advertisement ends and valuable economic data begins.

Dun and Bradstreet v. Greenmoss presented the Court with an opportunity to consider a normative basis for commercial speech. The Court's failure to use this opportunity may indicate a disagreement more fundamental than the one which divided the Court in the application of *Gertz* to private profit-motivated speech.²⁵² In earlier opinions factors were present that would have been helpful in the search for values. The Court's use of the hardiness and verifiability factor²⁵³ inadequately distinguished promotional from general economic and commercial matters, yet carries an interesting implication. In addition, *Youngs* recognition that advertising is the "core notion" of commercial speech is a further indication of the primary factor in circumscribing protection.²⁵⁴ This primary factor is the desire to permit state regulation of commerce as embodied in promotional, economic and commercial speech.

This Article rejects the premise that commercial speech is less valuable than noncommercial speech and suggests that if the goal is to permit states to regulate commerce through the regulation of promotional and commercial speech, an objective test of commerciality is indispensable. An objective test, however, cannot coexist with the "of or concerning commercial or economic matters" language. This test focuses instead on the limiting principle of the state's regulation of commerce to make the value acceptable. When the speech's content promotes a good or service, the speech is commercial even if the speaker's purpose is altruistic. Thus whether a consumer service gives a product a high rating, or whether Silicon Life praises its own product in an advertisement, both constitute commercial speech. The following chart illustrates one formulation of an objective test.

252. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2947 (1985). The balancing of the state interest in protection of individual reputations and the constitutional protection of expression is better developed because the values on both sides are readily apparent.

253. *Virginia Pharmacy*, 425 U.S. at 772 n.24. See also *supra* note 242 and accompanying text.

254. 463 U.S. at 66.

1.	2.	3.	4.
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
1 X Commercial	2 X Commercial	3 X Commercial	4 X Commercial
1 Y Noncommercial	2 Y Noncommercial	3 Y Noncommercial	4 Y Noncommercial

X. Positive Statement

Y. Negative Statement

Object Test - Content only is evaluated

Characteristic - Only such factors as a buyer would consider where he is concerned only with how the good or service satisfies its intended purpose. These include such factors as safety, efficiency and cost.

Because the key factor of commercial regulation is promotion, this objective test would treat negative statements about a product or competitor as noncommercial. The chart provides distinct categories for criticism and praise directed at the good, service or marketer and also for criticism and praise with reference to characteristics apart from the good, service or marketer. This differentiation between speech that does no more than propose a commercial transaction and speech with broader implications is critical to any objective test of commercial speech. To categorize as noncommercial speech which goes beyond mere reference to the suitability or desirability of a good or service would permit skillful advertisers to disguise commercial speech by insertions of positive statements. The following example illustrates this point: "Silicon Life Inc. is cleaning up Silicon Valley. Our new air scrubber has made life better for everyone living in the South Bay Basin. Buy Silicon products." Silicon's speech may have a salutary effect of encouraging debate on issues beyond the usual promotional factors of quality and price. Treatment of this type of statement as noncommercial, however, would allow marketers to escape regulation. An imaginative advertising department will easily find ways to promote its product while avoiding regulation. The proposed test attempts to avoid evasion of the regulation by treating any positive statement about a product, service or marketer²⁵⁵ as commercial speech, whether it concerns characteristics²⁵⁶ of the good or service or it is

255. Marketer here is used as a shorthand description of producer, manufacturer, wholesaler, retailer or anyone else in the distributional chain with an interest in the sale of the good or service.

256. Characteristics here is used as a shorthand description of all matters that would be relevant to a buyer who is concerned only with how the good will satisfy its intended purpose and includes such matters as quality, safety, efficiency, and cost. This is a very artificial distinction and points out one of several weaknesses in this type of objective test. Why wouldn't statements about something other than characteristics of the good be treated as commercial? Under this formulation they are treated as commercial, but would one distinguish between these two types if one is uncomfortable with the result? After all, the announced values of the court have included protection for speech that does no more than propose the mundane commercial transaction. Here, this speech clearly does more. The evasion problem should be considered dispositive of any attempt to declare positive statements about issues wider than commercial suitability as anything other than commercial speech. There remains, however, the possibility of negative statements about goods or services on the basis of wider issues other than commercial suitability of the product or service as being considered noncommercial speech. Positive statements concern wider matters, yet are treated as mundane commercial speech and lacking in full constitutional importance. Negative statements on wider issues do not involve the risk of erosion because they would not be used as a promotional tool. Any link to positive statements, even the mention of a competitor's product, should result in their treatment as commercial speech. They would therefore not promote, and lesser regulation would encourage, a broadening of the issues discussed. Now one must distinguish between "commercial suitability" characteristics and other wider issues. In actual life, the country of origin of a car may be a very real

wholly unrelated to the suitability of the good or service.

Unlike the subjective test, the objective test does not require an inquiry into the speaker's intent. An intent inquiry introduces an unnecessary element of uncertainty into a determination of commerciality. It also creates the possibility that the agency making the determination will have a chilling effect on noncommercial speech. The agency would necessarily have to distinguish between "promotional" speech and "critical" speech. A speaker wanting to comment on economic issues going beyond mere commentary on particular goods or services would have to contend with the possibility that the agency might discern a promotional intent when the good or service is mentioned. Any portion of the speech which might be misleading could subject the speaker to sanctions. This would discourage speech about topics of greater scope which include eco-

selling point because some may view certain countries of origin more favorably. It is a matter of taste and does not affect the suitability of the product for its intended purpose. Only such factors as are objectively determinative of suitability should be considered to be within this group of suitability characteristics. When the use of the good or service is a function of the personal taste of the consumer, the subject of values should be included within the suitability characteristic category.

Examples are hair styling or a work of art. The value of these services or goods is dependent on the personal taste of the consumer or whim. How would one then classify the importance of a manufacturer's pollution record or civil rights record? Presumably not being directly related to suitability and not being the primary criterion in selection as with the whim involved in hair styling or art works, the matter is of wider importance and speech concerning it should be treated as non-commercial. Thus the following alternative chart remains objective yet permits the categorization of some negative statements that focus on wider issues as noncommercial while capturing as commercial statements which are negative but do no more than attack commercial suitability.

	1. Good or Service	2. Good or Service for Other Than Characteristic of Good or Service	3. Marketer for Characteristic of Good or Service	4. Marketer for Other Than Characteristic of Good or Service
X. Positive Statement	1 X Commercial	2 X Commercial	3 X Commercial	4 X Commercial
Y. Negative Statement	1 Y Commercial	2 Y Noncommercial	3 Y Commercial	4 Y Noncommercial

Modified Objective Test

The test may better address the underlying value by requiring a closer relationship between so-called mundane subject matter and the categorization of the speech as commercial. It seems, however, to introduce an anomaly by classifying negative statements about wider issues as noncommercial while classifying positive statements about the same wider issues as commercial. The sole justification for this is the need to prevent evasion, a danger raised by the classification of positive statements about wider issues as noncommercial.

conomic or commercial ideas. The subjective approach thus seems to threaten first amendment values.²⁵⁷ An objective test would avoid this necessarily ad hoc determination by treating news reports, consumer ratings, and other nonpromotional information as commercial. The objective test thus recognizes the inherent weakness of an inquiry into the speaker's intent and focuses solely on subject matter. Promotional motivation is irrelevant. Moreover, the test eliminates the Court's need to inquire into the state's regulatory interest.²⁵⁸ What emerges is the disquieting conclusion that commercial speech is less valuable because it concerns something less important to those who decide what is important.

While such a value system is suspect as a normative basis for the commercial speech doctrine, if accepted it would militate in favor of an objective test. Because of the inability to differentiate meaningfully Dun and Bradstreet credit reports from *The Wall Street Journal* articles, an objective test would classify nonpromotional speech about economic matters as commercial speech. The logic or philosophy behind the limited value approach to commercial speech does not dictate this result. Rather it would be the unfortunate consequence of the Court's acceptance of commercial speech as being of lesser importance and dignity. As a result, it would classify most articles in the business sections of newspapers and similar publications as commercial speech.²⁵⁹ Unless the Supreme Court articulates a different normative basis for the commercial speech doctrine, this result is the only one capable of producing consistent results. For example, the *Greenmoss* test would use the elements of economic or commercial subject matter combined with the profit motive to determine the commerciality of the speech. It appears impossible to chart this test, as was done with the proposed tests, to remain consistent with the expressed values and to differentiate between credit reports and the business sections of newspapers. *Greenmoss's* proposed test, therefore, fails because it does not correctly identify those factors which should be tested by objective means and those factors which should be tested by subjective

257. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Justice Holmes argued that

[w]hen men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market That at any rate is the theory of our Constitution.

258. See *supra* note 164 and accompanying text.

259. The Court has continually refused to accept that commercial speech is of equal dignity or importance to that of noncommercial speech.

means and then generate results which are the result of logic and consistent values. Without adequate enunciation of the underlying normative value, it is unlikely that the Court will consistently and logically apply the value.

IV. CONCLUSION

The *Greenmoss* test, similar to any test a litigant may offer, was result oriented. In contrast, the Court's consideration of any commerciality test should be normative with results being used only to test its consistency and practicability to achieve the ends the articulated value dictates. Once the Court develops the normative basis for the commercial speech doctrine, the test of commerciality should logically flow from it. In the search for normative values, the Court should consider how a test would be formulated to implement the value. An inquiry into appropriate tests should focus on the inquiry into normative values. A meaningful test should only be a tool to clarify and implement the chosen normative value.