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COMMERCIAL SPEECH: ECONOMIC DUE PROCESS AND THE FIRST AMENDMENT

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UNTIL very recently, the Supreme Court refused to apply the first amendment to "commercial speech."[1] Although the Court never has defined that concept with precision, its meaning is reasonably settled. "Commercial speech" refers to business advertising that does no more than solicit a commercial transaction or state information relevant thereto. Both content and context are critical to this classification. Editorial advertising is not commercial speech,[2] and neither is a discussion of goods or services in a news account or consumer guide.[3] Ordinary business advertising, how-

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[1] *See, e.g.*, Breard v. City of Alexandria, 341 U.S. 622 (1951); Valentine v. Chrestensen, 316 U.S. 52 (1942); Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 205 (1976). *Cf.* Bigelow v. Virginia, 421 U.S. 809, 822 (1975) (emphasizing that advertisement held protected "did more than simply propose a commercial transaction"); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973) (noting that advertisements held not protected were "classic examples of commercial speech"); New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (stating that the editorial advertising involved "was not a 'commercial' advertisement in the sense in which that word was used in *Chrestensen*").

[2] *See* Bigelow v. Virginia, 421 U.S. 809, 818-22 (1975); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rolations, 413 U.S. 376, 384-85 (1973); New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964). In a related context, the Court has said: "[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment." Buckley v. Valeo, 424 U.S. 1, 16 (1976) (per curiam) (citations omitted).

[3] *See, e.g.*, United Medical Laboratories, Inc. v. CBS, 404 F.2d 706 (9th Cir. 1968) (first amendment protection for television reports on practices of certain medical testing laboratories), *cert. denied*, 394 U.S. 921 (1969); Bon Air Hotel, Inc. v. Time, Inc., 295 F. Supp. 704 (S.D. Ga. 1969) (first amendment protection for magazine comments on resort hotel accommodations and services), *aff'd*, 426 F.2d 858 (5th Cir. 1970); Farnsworth v. Tribune Co., 43 Ill. 2d 286, 253 N.E.2d 408 (1969) (first amendment protection for newspaper report on

ever, is commercial speech, and as such it has long been thought to fall outside the guaranteed freedom of speech and press.[4]

At bottom, the doctrine of commercial speech rests on a clean distinction between the market for ideas and the market for goods and services. In the realm of ideas, the first amendment erects stringent safeguards against governmental restraint. In the economic sphere, by contrast, the majoritarian political process controls. Under the doctrine of commercial speech, ordinary business advertising is part and parcel of the economic marketplace and therefore is excluded from the protections of the first amendment.

As a result, commercial speech has been subject to numerous restrictions that would be unconstitutional if applied to "speech" of a different sort. For example, advertisements may be banned as offensive, even though they are manifestly not obscene,[5] and they

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practices of an osteopathic physician); All Diet Foods Distribs., Inc. v. Time, Inc., 56 Misc. 2d 821, 290 N.Y.S.2d 445 (Sup. Ct. 1967) (first amendment protection for derogatory implications of photograph in book on nutrition).

[4] For an elaborate attempt to define commercial speech, see Comment, *supra* note 1, at 222-36. While the attempt to mark the precise boundaries of commercial speech may be difficult, perceiving its general contours is not; such an understanding is sufficient for the purposes of this article.

[5] *But see* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977). The Court stated:

> Appellants contend that advertisements of contraceptive products would be offensive and embarrassing to those exposed to them, and that permitting them would legitimize sexual activity of young people. But these are classically not justifications validating the suppression of expression protected by the First Amendment. At least where obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression.

Id. at 701. *Carey* dealt with advertisements of products—contraceptives—that citizens have an independent constitutional right to use. *See also* Bigelow v. Virginia, 421 U.S. 809 (1975). The Court in *Carey*, however, further suggested that offensive, purely commercial advertising might be treated differently:

> Appellants suggest no distinction between commercial and noncommercial speech that would render these discredited arguments meritorious when offered to justify prohibitions on commercial speech. On the contrary, such arguments are clearly directed not at any commercial aspect of the prohibited advertising but at the ideas conveyed and form of expression—the core of First Amendment values.

431 U.S. at 701 n.28.

Mr. Justice Stevens joined in that part of the opinion on the understanding that it does not foreclose "any regulation on the content of contraceptive advertising in order to minimize its offensive character . . . simply because an advertisement is within the zone protected by the First Amendment." *Id.* at 716 (Stevens, J., concurring). He continued,

> The fact that a type of communication is entitled to some constitutional protection does not require the conclusion that it is totally immune from regulation. *Cf. Young v. American Mini Theatres*, 427 U.S. 50, 75-71 [1976] . . . .
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> In the area of commercial speech—as in the business of exhibiting motion pictures for profit—the offensive character of the communication is a factor which may affect the time, place, or manner in which it may be expressed. *Cf. Young v. American Mini*

may be condemned as misleading, even though they contain no false statement of fact.[6] In some cases, the federal authorities have actually required corrective advertising to undo the supposed misconceptions engendered by past efforts.[7] Government commonly may demand that advertisements include certain information,[8] display specific warnings,[9] or use approved product descriptions,[10] even

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> *Theatres, supra.* The fact that the advertising of a particular subject matter is *sometimes* offensive does not deprive all such advertising of First Amendment protection; but it is equally clear to me that the existence of such protection does not deprive the State of all power to regulate such advertising in order to minimize its offensiveness.

Id. at 716-17 (emphasis in original). *See also* FCC v. Pacifica Foundation, 98 S. Ct. 3026 (1978).

[6] Federal Trade Commission Act §§ 5, 12, 15, 15 U.S.C. §§ 45, 52, 55 (1976) (as amended). *See, e.g.,* FTC v. Mary Carter Paint Co., 382 U.S. 46, 48 (1965) (two-for-the-price-of-one advertising found to he deceptive, even though "respondent was not permitted to show that the quality of its paint matches those paints which usually and customarily sell in the $6.98 range"); FTC v. Colgate-Palmolive Co., 380 U.S. 374, 384-92 (1965) (demonstration of shaving cream's ability to soften sandpaper so it could be shaved found deceptive where a plexiglass "mock-up" was used for visual clarity).

[7] *E.g.,* Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied,* 435 U.S. 950 (1978).

[8] *E.g.,* J.B. Williams Co. v. FTC, 381 F.2d 884 (6th Cir. 1967) (makers of "Geritol," an iron supplement, who represented, directly or indirectly, that people with a tired feeling would find relief must also state that this is true only for people suffering from iron deficiency anemia and that the vast majority of people experiencing tiredness do not have such a deficiency); 15 U.S.C. § 206 (1976), *as implemented by* Environmental Protection Agency Regulations on Fuel Economy of Motor Vehicles, 40 C.F.R. § 600 (1977) (detailed regulations governing dissemination of fuel-consumption/mileage information by auto manufacturers); 21 *id.* § 343(e) (1976) (food deemed misbranded if in package form unless "it bears a label containing (1) the name and place of business of the manufacturer, packer, or distributor; and (2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count"); *id.* § 343(f) (food misbranded if "any word, statement, or other information required by or under authority of this chapter to appear on the label or labeling is not prominently placed thereon"). *Cf.* 15 U.S.C. § 1232 (1976) (label requirements on new car "sticker").

[9] Cigarettes are, of course, the most common example. *See* 15 U.S.C. § 1333 (1976) ("It shall be unlawful for any person to manufacture, import, or package for sale or distribution within the United States any cigarettes the package of which fails to bear the following statement: 'Warning: The Surgeon General Has Determined That Cigarette Smoking is Dangerous to Your Health' "). *See also* Capital Broadcasting Co. v. Acting Attorney Gen., 405 U.S. 1600 (1972), *aff'g* 333 F. Supp. 582 (D.D.C. 1971) (upholding constitutionality of 15 U.S.C. § 1335, which prohibits broadcast advertising of cigarettes).

In 1964, the Federal Trade Commission issued a trade regulation rule declaring the advertisement of cigarettes without disclosing, clearly and prominently, that cigarette smoking is dangerous to one's health to be an unfair and deceptive practice within 15 U.S.C. § 45. *See* 29 Fed. Reg. 8325 (1964). The effective date of this rule was postponed, but in 1972, a consent decree was entered obliging cigarette manufacturers to add the warning to their advertisements. American Brands, Inc., [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶¶ 19,902 (provisional consent order), 19,965 (final consent order).

[10] The Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-392 (1976) empowers the Secretary

where these requirements are not necessary to avoid inaccuracy or deception.[11] The federal government also may suppress advertising of illegal products and all broadcast advertising of some legitimate products, most notably cigarettes.[12] These illustrations suffice to suggest the pervasive legal regulation of business advertising. That such restraints have long been assumed constitutional is tribute to the prevalence of the notion that commercial speech is something apart from the freedom of speech and press guaranteed by the first amendment.

In its 1976 decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[13] the Supreme Court rejected that notion. Earlier decisions had presaged the demise of the commercial speech exception, but all were explicable on other grounds.[14]

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of Health, Education, and Welfare to promulgate "a reasonable definition and standard of identity" for food "under its common or usual name." *Id.* § 341. Food may then be deemed misbranded

> [i]f it purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulations as provided by section 341 of this title, unless (1) it conforms to such definition and standard, and (2) its label bears the name of the food specified in the definition and standard . . . .

Id. § 343(g). *See also id.* § 343(c) (misbranded "[i]f it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word 'imitation' and, immediately thereafter, the name of the food imitated"). These provisions are best remembered in the context of the definitional battle over what constitutes "peanut butter." *See* J. GOULDEN, THE SUPERLAWYERS 185-88 (1972).

[11] The EPA automobile mileage requirements, *see* note 8 *supra,* are required even though nothing may have been said about the vehicle's mileage capacity in the first place. The same may be true of the cigarette labeling requirements, *see* note 9 *supra.* These requirements could be said to counter "tacit" deception engendered by the advertising itself, but they demonstrate that the government's leeway in deciding which commercial messages are desirable is qualitatively different from the government's power over speech traditionally thought to lie at the core of the first amendment. *See* FTC v. Mary Carter Paint Co., 382 U.S. 46 (1965). The Court stated:

> It is true that respondent was not permitted to show that the quality of its paint matched those paints which usually and customarily sell in the $6.98 range, or that purchasers of paint estimate quality by the price they are charged. If both claims were established, it is arguable that any deception was limited to a representation that Mary Carter has a usual and customary price for single cans of paint, when it has no such price. However, it is not for courts to say whether this violates the Act.

Id. at 48. *See also* sources cited note 6 *supra.*

[12] *See* Bates v. State Bar, 433 U.S. 350, 384 (1977); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1973); 15 U.S.C. § 1335 (1976) ("[A]fter January 1, 1971, it shall be unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission"). *See also* 18 *id.* § 1304; 47 C.F.R. § 73.1211 (1977) (prohibition of broadcasting of lottery advertisements).

[13] 425 U.S. 748 (1976).

[14] *See* sources cited note 1 *supra.* In Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973), Mr. Justice Douglas, in dissent, expressed the view that

As the Court itself recognized, however, *Virginia Board of Pharmacy* was a paradigm case of commercial speech,[15] and the invalidation of the restrictive statute therefore was all the more telling. Virginia law prohibited any licensed pharmacist from advertising prescription drug prices.[16] Consumers challenged this provision by asserting that it interfered with their first amendment right to receive and with pharmacists' first amendment right to convey such price information. In holding that price advertising was not outside the first amendment, the Court rejected the central premise of the commercial speech doctrine—namely, that business advertising that does no more than solicit a commercial transaction may be regulated by government on the same terms as any other aspect of the marketplace. Instead, the Court equated ordinary business advertising with constitutionally protected speech. Although noting that commercial speech may be restricted in some ways in which noncommercial speech may not be, the Court withdrew the regulation of commercial advertising from the arena of political choice and reserved it to review by the judiciary under the aegis of the first amendment.[17]

We believe that *Virginia Board of Pharmacy* was decided wrongly. In our view, the first amendment guarantee of freedom of speech and press protects only certain identifiable values. Chief among them is effective self-government. Additionally, the first amendment may protect the opportunity for individual self-fulfillment through free expression. Neither value is implicated by

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Valentine v. Chrestensen, 316 U.S. 52 (1942), was no longer correct and that commercial speech should be afforded genuine first amendment protection. *See id.* at 398 (Douglas, J., dissenting). His dissent reflected a position he first enunciated in Cammarano v. United States, 358 U.S. 498, 514 (1959) (Douglas, J., concurring) ("The [*Chrestensen*] ruling was casual, almost offhand. . . . It has not survived reflection").

[15] "[T]he question whether there is a First Amendment exception for 'commercial speech' is squarely before us." 425 U.S. at 760-61.

[16] VA. CODE ANN. § 54-524.35 (Repl. Vol. 1978) ("[A]ny pharmacist shall be guilty of unprofessional conduct who . . . (3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by prescription") (held unconstitutional in *Virginia Board of Pharmacy*). *See id.* § 54-524.22:1 (providing that "[t]he Board of Pharmacy may refuse to issue, revoke, suspend, or refuse to renew any license, permit, or registration and/or impose a civil monetary penalty . . . or deny any application if it finds that . . . [the person] has been guilty of unprofessional conduct as prescribed in § 54-524.35").

[17] The Court in *Virginia Board of Pharmacy* explicitly noted that commercial advertising is not to be afforded the same degree of protection as other "speech." *See* 425 U.S. at 771 n.24. *See also* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 454-55 (1978) (holding that state constitutionally may discipline a lawyer for soliciting clients in person for pecuniary gain).

governmental regulation of commercial speech. Thus the justifications supporting judicial abrogation of political choice to uphold the guarantees of the first amendment do not extend to commercial speech. Although disallowing state interference with commercial advertising serves other values that merit careful legislative consideration—aggregate economic efficiency and consumer opportunity to maximize utility in a free market—these values are not appropriate for judicial vindication under the first amendment. We therefore suggest that the line of development[18] begun by *Virginia Board of Pharmacy* should be cut short.

I. Principles for Protecting the Freedom of Speech

Our argument proceeds from certain premises concerning the role of judicial review and the principles for protecting the freedom of speech. At the outset we find persuasive the need to distinguish legislative from constitutional decisionmaking. Legislative action implements popular sovereiguty; judicial review contradicts that ideal. Every judicial invalidation of a statute overrides the judgment of elected officials and substitutes the decision of persons removed from the institutional constraint of voter approval and schooled in the wisdom of an antidemocratic tradition.[19] It does not

[18] *See, e.g., In re* Primus, 436 U.S. 412 (1978) (nonprofit organization that engages in litigation as a form of political expression permitted to solicit clients); Bates v. State Bar, 433 U.S. 350 (1977) (permitting advertising for routine legal services in newspaper); Louisiana Consumers League, Inc. v. Louisiana State Bd. of Optometry Examiners, 557 F.2d 473 (5th Cir. 1977) (advertising of prescription eyeglasses protected by first amendment); Beneficial Corp. v. FTC, 542 F.2d 611, 619-20 (3d Cir. 1976) (relying on *Virginia Board of Pharmacy* in finding the FTC's cease-and-desist order against Beneficial's "instant tax refund" slogan impermissibly broad), *cert. denied*, 430 U.S. 983 (1977); Nickens v. White, 536 F.2d 802, 804 (8th Cir. 1976) (holding that inmate in prison may have first amendment right to receive office supply catalogue); Rogers v. Friedman, 438 F. Supp. 428, 429 (E.D. Tex. 1977) (provision of Texas Optometry Act prohibiting price advertising by optometrists was violative of first amendment), *prob. juris. noted*, 435 U.S. 967 (1978); Health Sys. Agency v. Virginia State Bd. of Medicine, 424 F. Supp. 267 (E.D. Va. 1976) (statutory ban on physician advertising contravenes consumers' right to receive price information; physician cannot be held liable under the statute for furnishing such information to consumer group publishing guide to medical costs); Terry v. California State Bd. of Pharmacy, 395 F. Supp. 94 (N.D. Cal. 1975), *aff'd mem.*, 426 U.S. 913 (1976) (affirming district court decision invalidating California's version of the statute invalidated in *Virginia Board of Pharmacy);* Board of Medical Examiners v. Terminal-Hudson Elecs., Inc., 73 Cal. App. 3d 376, 140 Cal. Rptr. 757 (1977) (sections of Cal. Bus. & Prof. Code unconstitutional insofar as they prohibit advertising of prices for eyeglasses); People v. Remeny, 40 N.Y.2d 527, 355 N.E.2d 375, 387 N.Y.S.2d 415 (1976) (New York City ordinance prohibiting distribution of commercial leaflets in all public places, at all times, and under all circumstances—the same ordinance held valid in Valentine v. Chrestensen, 316 U.S. 52 (1942)—held invalid regulation of protected speech).

[19] Professor Bickel has observed that "[t]he root difficulty is that judicial review is a

follow that the exercise of judicial review necessarily is undesirable nor that judicial intervention in particular disputes is not fully warranted. The point is more limited: the Constitution does not assign to judges unrestricted authority to resolve all problems according to their own perceptions of public policy. Normally, majoritarian decisionmaking prevails. Because judicial review displaces majoritarian choice, respect for the processes of representative democracy requires that judicial overruling of political decisions be justified on grounds other than immediate results.[20] The appropriate inquiry, therefore, is not simply whether a given judicial decision is desirable. One should look in the first instance for some reason to regard the question at hand as appropriately committed to antimajoritarian resolution. In this case, the question is whether some basis in principle justifies judicial abrogation of legislative control over commercial advertising.

The ostensible basis for this result is the first amendment. It declares that "Congress shall make no law . . . abridging the freedom of speech."[21] Plainly, this provision states a limitation on legislative authority. The content of that prohibition, however, is not self-evident. After all, the amendment does not purport to condemn every governmental restraint of speech; it refers instead to the more indeterminate concept of an abridgment of the freedom of speech.[22]

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counter-majoritarian force in our system." A. BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962). *See also id.* at 19; Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

[20] The courts have both the title and the duty when a case is properly before them to review the actions of the other branches in the light of constitutional provision. . . . In doing so, however, they are bound to function otherwise than as a naked power organ; they participate as courts of law. This calls for facing how determinations of this kind can be asserted to have any legal quality. The answer, I suggest, inheres primarily in that they are—or are obliged to be—entirely principled. A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved. When no sufficient reasons of this kind can be assigned for overturning value choices of the other branches of the Government or of a state, those choices must, of course, survive. Otherwise, as Holmes said in his first opinion for the Court, "a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economic opinions . . . ."

Weschler, *supra* note 19, at 19 (quoting Otis v. Parker, 187 U.S. 606, 609 (1903)).

[21] U.S. CONST. amend I.

[22] *See* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 19 (1948) (the first amendment *"does not forbid the abridging of speech,"* but *"it does forbid the abridging of the freedom of speech"*; emphasis in original); Bork, *supra* note 19, at 21 (" 'Freedom of

Nothing in the constitutional text or history yields any very precise notion of what the "freedom of speech" means.[23]

A recurring but ultimately uninformative idea is that the content of the first amendment should derive from an entirely nonfunctional identification of something called "speech." Under this literalistic view, the meaning of the constitutional guarantee would be sought in the definition of the phenomenon of speech rather than through an inquiry into the rationale and purpose of the amendment.[24] This approach would regard every use of words as presumptively protected against governmental interference or restraint. As noted above, neither text nor history compels this conclusion, but the real problem with definitional literalism is that it would lead quickly to absurdity. It would, for example, spy a constitutional issue in every punishment of criminal conspiracy or solicitation and in many cases of espionage.[25] It would also lead to the assertion of a first amend-

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speech' may very well be a term referring to a defined or assumed scope of liberty, and it may be this area of liberty that is not to be 'abridged' ").

[23] *See* BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle,* 30 STAN. L. REV. 299, 307-08 (1978). Professor BeVier notes that "[t]he only firm conclusion solidly based on historical scholarship is that the framers 'had no coherent theory of freedom of speech.' " *Id.* at 307 (quoting Bork, *supra* note 19, at 22).

[24] Mr. Justice Black was the most famous proponent of a "literal" approach to the first amendment. In one sentence, he expressed this thesis as follows: "I read 'no law . . . abridging' to mean *no law abridging.*" Smith v. California, 361 U.S. 147, 157 (1959) (Black, J., concurring) (emphasis in original). *See also* Konigsberg v. State Bar, 366 U.S. 36, 61 (1961) (Black, J., dissenting); Black, *The Bill of Rights,* 35 N.Y.U.L. REV. 865, 874 (1960). Mr. Justice Black couched this "literalism" with several exceptions that bely a truly literal approach. First, he agreed that there could be time, place, and manner restrictions. *See* Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 517 (1969) (Black, J., dissenting); Adderley v. Florida, 385 U.S. 39, 47-48 (1969) (Black, J., dissenting); Cox v. Louisiana (Cox I), 379 U.S. 536, 575 (1965), Cox v. Louisiana (Cox II), 379 U.S. 559, 575 (1965) (Black, J., concurring in *Cox I* and dissenting in *Cox II*). Second, he repeatedly noted that communicative conduct that did not qualify as "speech" was not protected. *See, e.g.*, Street v. New York, 394 U.S. 576, 610 (1969) (Black, J., dissenting) (flag burning as protest is conduct, not speech); Cox v. Louisiana (Cox I), Cox v. Louisiana (Cox II), 379 U.S. at 578 (Black, J., concurring and dissenting) ("Picketing, though it may be utilized to communicate ideas, is not speech, and therefore is not of itself protected by the First Amendment").

Significantly, Mr. Justice Black apparently agreed that the first amendment did not protect commercial speech. He joined the Court in Valentine v. Chrestensen, 316 U.S. 52 (1942), and, in Breard v. City of Alexandria, 341 U.S. 622 (1951), he noted in dissent that the protections of the first amendment do not apply to a " 'merchant' who goes from door to door 'selling pots.' " *Id.* at 650 n.* (Black, J., dissenting).

[25] In the words of Mr. Justice Holmes, "[w]e venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech." Frohwerk v. United States, 249 U.S. 204, 206 (1919). *See* Konigsberg v. State Bar, 366 U.S. 36, 49 n.10 (1961) (Harlan, J.) ("[A literal reading of the first amendment] cannot be reconciled with the law relating to libel, slander, misrepresen-

ment difficulty in laws against perjury and fraudulent misrepresentation. These examples seem ridiculous, but in terms of an *a priori* definition of "speech," none is farfetched. A knowing lie made under oath in an official proceeding is more clearly "speech" than is picketing[26] or wearing an armband[27] or burning a draft card.[28] The latter activities receive some protection, but no one, least of all the Supreme Court, finds a first amendment problem in punishment for perjury. The reason that perjury, fraudulent misrepresentation, and the like are not thought to pose first amendment difficulties lies not in any sort of balancing but rather in the intuition that guaranteeing a right to lie, for example, has nothing to do with the purposes of protecting freedom of speech.[29] In other words, the inquiry is not a matter of classification but of reasoning. It does not turn on the abstract properties of something called "speech" but on the rationale for protecting the "freedom of speech" against majoritarian regulation. Derivation of general principles for protecting the freedom of speech far exceeds the ambition of this piece. It is appropriate, however, even for the limited proposition that the first amendment should not protect commercial speech, to summarize the principles that we take to inform judicial implementation of the guarantee of freedom of speech. Two ideas seem to dominate both cases and commentaries.

The first sees the freedom of speech as an essential corollary of representative democracy as established by the Constitution. Through that structure, the sovereignty of the nation is lodged ulti-

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tation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, and the like").

[26] Cox v. Louisiana (Cox I), 379 U.S. 536 (1965), Cox v. Louisiana (Cox II), 379 U.S. 559 (1965); Thornhill v. Alabama, 310 U.S. 88 (1940).

[27] Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969).

[28] United States v. O'Brien, 391 U.S. 367 (1968).

[29] Although his example is somewhat dated, Mr. Justice Frankfurter made this point while writing for the majority in Beauharnais v. Illinois, 343 U.S. 250 (1952). He stated:

> Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase "clear and present danger." Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class.

Id. at 266. *See also* Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963):

> Proponents of the "absolute" or "literal" interpretation of the first amendment have failed to define the bounds of their position or to account for such apparent exceptions to the absolute test as the law of libel, the application of child labor laws to the distribution of literature, and the regulation of election campaigns.

Id. at 877.

mately in the people.[30] This constitutional structure of popular self-government would be meaningless without the freedom to discuss issues relevant to self-government.[31] Thus, at a minimum, the first amendment "protects the process of forming and expressing the will of the majority according to which our representatives must govern."[32] Put more crudely, the amendment protects "political" speech.

Of course, that concept need not be limited to debate of governmental policy. Political speech may also encompass a wider exchange of ideas and information antecedent to the formation of political opinion.[33] For example, information concerning the degree of concentration in a particular industry and the costs and benefits of reducing (or increasing) that concentration may be considered relevant for informed decisionmaking on antitrust policy, even if that information is not acquired in the course of a debate over governmental action.

Proponents of the political speech rationale do not agree on the question of its scope. Professor Bork would limit political speech to "speech concerned with governmental behavior, policy or personnel . . . , [including] a wide range of evaluation, criticism, electioneering and propaganda,"[34] but others assert that this rationale should

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[30] The democratic aspect of this structure has been reinforced by various amendments, such as that calling for the direct election of senators, U.S. CONST. amend. XVII, and those enfranchising blacks, *id.* amend. XV, and women, *id.* amend. XIX. *Cf. id.* art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . .").

[31] Bork, *supra* note 19, at 23. Professor Meiklejohn made the same point more elaborately:

> It makes no difference whether a man is advocating conscription or opposing it, speaking in favor of a war or against it, defending democracy or attacking it, planning a communist reconstruction of our economy or criticising it. So long as his active words are those of participation in public discussion and public decision of matters of public policy, the freedom of those words may not be abridged. That freedom is the basic postulate of a society which is governed by the votes of its citizens.

A. MEIKLEJOHN, *supra* note 22, at 46.

[32] BeVier, *supra* note 23, at 309. *See* A. MEIKLEJOHN, POLITICAL FREEDOM 79 (1960) (first amendment deals with "speech which bears, directly or indirectly, upon issues with which voters have to deal").

[33] A. MEIKLEJOHN, *supra* note 22; Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 256-57.

[34] Bork, *supra* note 19, at 27-28. Professor Bork argues that "freedom of speech" should be limited to debate of governmental policy because that is the only form of speech that may be distinguished from all other forms of speech and activity on a trnly principled basis. Thus "[c]onstitutional protection should be accorded only to speech that is explicitly political." *Id.* at 20. For him, no reasoned basis exists to single out literary expressions, for example, for first amendment protection from any other human activity related to self-fulfillment. Thus explicitly political speech "does not cover scientific, educational, commercial or literary expressions as such." *Id.* at 28.

protect as well the "forms of thought and expression . . . from which the voter derives . . . the capacity for sane and objective judgment which, so far as possible, a ballot should express."[35] Whatever its precise parameters, however, this rationale does not include "speech" irrelevant to the processes of political decisionmaking, or so tenuously connected as to be no more useful in the formation and reformation of political opinions than the experience of life itself.[36] In other words, the political speech rationale does not protect a right of individual expression for its own sake but rather seeks to preserve the systemic integrity of our constitutional scheme of self-government.

The political speech principle first received extended elaboration in the work of Alexander Meiklejohn.[37] Subsequent commentators have criticized aspects of Meiklejohn's argument,[38] but few would question "his basic conclusion that the constitutional process of self-government provides an indispensable clue to the meaning of the first amendment."[39] Indeed, the fighting issue is not the validity of Meiklejohn's insight but rather its exclusivity. Some theorists insist that the political speech principle is the only legitimate premise for construing the first amendment.[40] Others contend that the

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[35] Meiklejohn, *supra* note 33, at 256-57. Thus, although Professor Meiklejohn derived "freedom of speech" from a constitutional theory of public power rather than a private right, he believed that the sound exercise of the ballot right would shelter within the protective scope of the first amendment: "1. Education, in all its phases . . . . 2. The achievements of philosophy and the sciences . . . . 3. Literature and the arts . . . . 4. Public discussion of public issues . . . ." *Id. See also* Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221.

[36] *See, e.g.*, Bork, *supra* note 19, at 28.

[37] *See* A. MEIKLEJOHN, *supra* note 22, at 94; A. MEIKLEJOHN, *supra* note 32, at 79, 95-96; Meiklejohn, *First Amendment and Evils that Congress Has a Right to Prevent*, 26 IND. L.J. 477, 488 (1951); Meiklejohn, *supra* note 33, at 255; Meiklejohn, *What Does the First Amendment Mean?,"* 20 U.CHI. L. REV. 461, 479 (1952). *See generally* Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41 (1974).

[38] *See, e.g.*, BeVier, *supra* note 23; Bork, *supra* note 19; Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 434-58 (1971).

[39] BeVier, *supra* note 23, at 309. *See* Mills v. Alabama, 384 U.S. 214, 218 (1966) ("there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs"). *Cf.* Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) ("speech concerning public affairs is more than self-expression; it is the essence of self-government"); H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT 6 (1965) ("free speech is so close to the heart of democratic organization that if we do not have an appropriate theory for our law here, we feel we really do not understand the society in which we live").

[40] Professor Bickel has written:

> Yet the First Amendment does not operate solely or even chiefly to foster the quest

freedom of speech encompasses values in addition to those necessary for effective self-government. Chief among them is the idea of individual self-fulfillment through free expression,[41] a view most notably expounded by Professor Emerson.

Emerson finds in the first amendment something akin to a statement of natural law. He starts with "the widely accepted premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being."[42] For Emerson, self-realization begins with the development of the mind, a process that is necessarily individual in character. Thus Emerson reasons that "every man—in the development of his own personality—has the right to form his own beliefs and opinions."[43] He must also have the right to express those beliefs and opinions because "expression is an integral part of the development of ideas, of mental exploration and of the affirmation of self."[44] "Hence," Emerson concludes, "suppression of belief, opinion and expression is an affront to the dignity of man, a negation of man's essential nature."[45]

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for truth, unless we take the view that truth is entirely a product of the marketplace and is definable as the perceptions of the majority of men, and not otherwise. The social interest that the First Amendment vindicates is rather, as Alexander Meiklejohn and Rohert Bork have emphasized, the interest in the successful operation of the political process, so that the country may better be able to adopt the course of action that conforms to the wishes of the greatest numher, whether or not it is wise or is founded in truth.

Discussion, the exchange of views, the ventilation of desires and demands—these are crucial to our politics. And so, for much the same reasons, is the effectiveness of the decisions reached by the political process . . . . It would follow, then, that the First Amendment should protect and indeed encourage speech so long as it serves to make the political process work, seeking to achieve objectives through the political process by persuading a majority of voters; but *not* when it amounts to an effort to supplant, disrupt, or coerce the process . . . ; and also *not* when it constitutes a breach of an otherwise valid law, a violation of majority decisions embodied in law.

A. BICKEL, THE MORALITY OF CONSENT 62-63 (1975) (emphasis in original). *See also* BeVier, *supra* note 23, at 300-01; Bork, *supra* note 19, at 26-31.

[41] *See* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 33 (1954); T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970); T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1966); Emerson, *supra* note 29. *Cf.* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence believed that the final end of the State was to make men free to develop their faculties"). *See also* First Nat'l Bank v. Bellotti, 435 U.S. 765, 804-05 (1978) (White, J., dissenting).

[42] Emerson, *supra* note 29, at 879. *But cf.* Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 U. PA. L. REV. 737, 744 (1977) ("[t]he colonists were not thinking as intently as we do now in terms of protecting the individual against the manifold pressures of the collective").

[43] Emerson, *supra* note 29, at 879.

[44] *Id.*

[45] *Id.* Professor Emerson lists four "values" that freedom of expression protects:

Maintenance of a system of free expression is necessary (1) as assuring individual self-

Although we are not entirely comfortable with Emerson's thesis,[46] for present purposes we are willing to accept both political speech and individual self-fulfillment as legitimate premises for protecting the freedom of speech. While these two principles may not exhaust the catalogue of values attributed to the first amendment,[47] they do capture in reliable summary the dominant conceptions of the meaning of freedom of speech. Most interpretations of that guarantee emphasize the protection either of political speech or of individual

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fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making, and (4) as maintaining the balance between stability and change in the society.

Id. at 878-79. It is the first of these values that is associated most widely with Professor Emerson's name. *See, e.g.*, First Nat'l Bank v. Bellotti, 435 U.S. 765, 804-05 (1978) (White, J., dissenting); BeVier, *supra* note 23, at 321-22.

[46] Professor Emerson's thesis is troubling in at least two respects. First, his thesis depends on the assumption of an acceptable distinction between speech and conduct. *See* Emerson, *supra* note 29, at 880-81. Without this distinction the right of individual self-fulfillment would exceed tolerable limits. *See, e.g.*, Cox v. Louisiana (Cox I), 379 U.S. 536, 554 (1965). Emerson provides no principled basis, however, for understanding why self-fulfillment and the "realization of [one's] character and potentialities as a human being" depend more on freedom of expression than freedom of action. *See, e.g.*, Bork, *supra* note 19, at 25. Anyone other than an academic might find this hierarchy curious. A consideration of the practical problems in maintaining the distinction clarifies this theoretical weakness. Virtually all expression involves some action, and many kinds of conduct have communicative potential. *See* A. BICKEL, *supra* note 40, at 63; A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 78-79 (1970). Thus, in any particular case involving mixed speech and conduct, resolution of the limit of governmental competence will be derived from a judicial weighing of the competing interests. *See* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION, *supra* note 41, at 87 (uses "the nature of the government's interest" to differentiate "the burning or turning in of draft cards from a refusal to have them in one's possession"). Limits on the right to self-fulfillment then are prudential rather than principled; they must be gleaned from practical, competing concerns rather than from an inherent, comprehensible notion of freedom of speech. The political speech theory, by comparison, while arguably no easier to apply to particular facts, *see* notes 69-80 *infra* and accompanying text, contains its own limiting principle: it does not protect expression irrelevant to the operation of representative democracy established by the Constitution. *See* notes 30-40 *supra* and accompanying text.

Second, the right to individual self-fulfillment and the political speech principle can have only an ironic relationship with each other. Under Meiklejohn's thesis, the first amendment functions to protect the self-governing process. A first amendment right of individual self-fulfillment, by contrast, disallows legislative choice on grounds unrelated to the integrity of the political process, thus limiting the power of the the political system that the guarantee of freedom of speech, at least in part, is designed to nuture. *See* BeVier, *supra* note 23, at 322. A first amendment encompassing both theories would contain the same conflict between majoritarian and antimajoritarian decisionmaking that pervades the constitutional scheme as a whole.

[47] *See* Emerson, *supra* note 29, at 878-79. *Cf.* Bork, *supra* note 19, at 25 (listing four values that arguably may be derived from the first amendment: "[t]he development of the faculties of the individual; . . . [t]he happiness to be derived from engaging in the activity; . . . [t]he provision of a safety val[v]e for society; and . . . [t]he discovery and spread of political truth").

autonomy in matters of opinion, belief, and expression.[48] Also, we are unable to discover—in the opinion of the Court, in the secondary literature, or in our own reflections—any other principle that would bring the protection of commercial speech within the scope of the first amendment. Thus these two principles provide useful vantage points for examination of the constitutional status of commercial speech.

II. First Amendment Principles and Commercial Speech

Measured in terms of traditional first amendment principles, commercial speech is remarkable for its insignificance. It neither contributes to self-government nor nurtures the realization of the individual personality. Thus, although business advertising may play an important role in ordering the marketplace, it falls outside the accepted reasons for protecting the freedom of speech.

In the first place, commercial speech has no apparent connection with the idea of individual self-fulfillment. Whatever else it may mean, the concept of a first amendment right of personal autonomy in matters of belief and expression stops short of a seller hawking his wares. Professor Emerson himself asserts that commercial soliciting and similar activities "fall within the system of commercial enterprise and are outside the system of freedom of expression."[49] Also, the Court in *Virginia Board of Pharmacy,* despite an exhaus-

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[48] *See, e.g.,* First Nat'l Bank v. Bellotti, 435 U.S. 765, 781-83, 791 n.31 (1978); *id.* at 804-05 (White, J., dissenting).

[49] T. Emerson, The System of Freedom of Expression, *supra* note 41, at 311. *See also* Emerson, *supra* note 29, at 948 n.93 ("Communications in connection with commercial transactions generally relate to a separate sector of social activity involving the system of property rights rather than free expression"). Professor Baker who believes, as does Professor Emerson, that the central meaning of the first amendment may be found in individual self-expression, also was unable to fit the protection of commercial speech within that rationale:

> The individual uses speech to order and create the world in a desired way and as a tool for understanding and communicating about that world in ways which he or she finds important. In fact, the values supported or functions performed by protected speech result from that speech being a manifestation of individual freedom and choice. However, in our present historical setting, commercial speech is not a manifestation of individual freedom or choice; unlike the broad categories of protected speech, commercial speech does not represent an attempt to create or affect the world in a way which can be expected to represent anyone's private or personal wishes. Therefore, profit-motivated or commercial speech lacks the crucial connections with individual liberty and self-realization which exist for speech generally, and which are central to justifications for the constitutional protection of speech, justifications which in turn define the proper scope of protection under the first amendment.

Baker, *Commercial Speech: A Problem in the Theory of Freedom,* 62 Iowa L. Rev. 1, 3 (1976) (citations omitted).

tive canvas of the reasons for its decision, did not identify drug price advertising as a form of protected self-expression by the pharmacist. In fact, the Court contradicted any such rationale by correctly "assuming" that "the advertiser's interest is a purely economic one."[50] Thus, whatever its other effects, governmental regulation of commercial speech does not invade the concept of a first amendment right of a personal fulfillment through self-expression. Judicial abrogation of legislative control over commercial speech cannot be justified on this ground.

Governmental regulation of commercial advertising also does no violence to the protection of political speech. Conceptually, the irrelevance of commercial speech to the political speech principle is a mere truism, at least from the speaker's standpoint, because "commercial speech" is defined in part by the absence of political significance.[51] "[S]peech which does 'no more than propose a commercial transaction' "[52] omits, by definition, any expression essential to self-government. For this kind of communication, the structure of representative democracy yields no inference of inviolability because commercial speech concerns economic rather than political decisionmaking. Furthermore, in this case, at least, experience confirms reason. The typical newspaper advertisement or television commercial makes no comment on governmental personnel or policy. It does not marshall information relevant to political action, nor does it focus public attention on questions of political significance. Indeed, ordinary commercial advertising is generally so bland as to be irrelevant even to those antecedent questions of value or attitude that may underlie political opinion.[53]

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[50] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 762.

[51] *See* notes 1-4 *supra* and accompanying text.

[52] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (citing Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)).

[53] One could argue, however, that consumer experience with a scheme of unrestricted price advertising might influence political opinion toward the desirability of legal regulation. According to this argument, price advertising is politically significant because it enables consumers to make more informed political judgments on whether such advertising should be allowed. Of course a ban on such advertising is politically siguificant in exactly the same sense. Indeed, taking the argument one step further, any kind of experience may affect the formation of political opinions, but it scarcely follows that all such activity is protected by the first amendment. The link is too tenuous. For example, the activity of purchasing drugs under different regimes of economic regulation would be relevant to issues of political choice in the same highly limited way as would a scheme of unrestricted price advertising, but no one would contend that the consumer has a right to lower drug prices if the legislature mandates fixed, and higher, prices. At least no such right would be found in the first amend-

The point seems plain enough and would require no belaboring were it not for some rather curious pronouncements by the Court in *Virginia Board of Pharmacy*. As a starting proposition, the Court accurately noted what was not in issue:

> Our pharmacist does not wish to editoralize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price."[54]

On first glance, the statement could not be more clear. The Court is saying that price advertising has nothing to do with political speech or even with the exposition of cultural or philosophical ideas, and most of the Court's analysis proceeds on that basis. Had the case involved political commentary or the publication of newsworthy information, the result would have been commonplace, and there would have been no occasion for the groundbreaking assertion of first amendment protection for speech of purely commercial import.[55]

Having initially assessed the problem correctly, the Court then muddies the waters. The Court rightly avoids any effort to force price information into the concept of political expression by the speaker. With respect to the listener, however, the Court apparently could not resist trying to associate price advertising with the protection of political speech. That attempt begins with the familiar observation that the ready availability of commercial information fosters the efficient allocation of resources in a free market economy. The opinion then continues as follows:

> And if it [the free flow of commercial information] is indispensable to the proper allocation of the resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to

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ment. *See* Meiklejohn, *supra* note 33. Professor Meiklejohn does not include commercial speech within his expansive interpretation of the range of political speech protected by the first amendment. *See, e.g.*, A. MEIKLEJOHN, *supra* note 32, at 79, 83. Professor Redish, although strongly wishing to protect commercial speech under the first amendment, was likewise unable to fit it within Meiklejohn's political speech principle. Redish, *supra* note 38, at 436 ("Since pure commercial speech seems to have no direct relation to the political process, the conclusion is inescapable that Dr. Meiklejohn would relegate it to the lesser protection of the fifth amendment").

[54] 425 U.S. at 761.

[55] *See* Buckley v. Valeo, 424 U.S. 1, 16 (1976); New York Times Co. v. Sullivan, 376 U.S. 254, 265-66 (1964); Smith v. California, 361 U.S. 147, 150 (1959). *See also* First Nat'l Bank v. Bellotti, 435 U.S. 765, 786 n.23 (1978).

> how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.[56]

The striking indirection of phrasing suggests that the Court may be a little doubtful of this argument, as well it should be. While an unrestrained flow of commercial advertising may be essential to the efficient functioning of a free market economy, neither commercial advertising nor a free market economy is essential to informed political decisionmaking.[57]

Simply put, the Court's argument, if its cautiously negative approach may be called that, is a non sequitur. It apparently rests on the assertion that because regulation of the free enterprise system

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[56] 425 U.S. at 765 (footnotes omitted).

[57] Professor Redish sees advertising as serving "a legitimate educational function in that it is 'an immensely powerful instrument for the elimination of ignorance' " and that the results of this education "is the economy in time and effort the individual consumer realizes, as well as the increased sophistication he enjoys as to products with which he would otherwise remain unfamiliar." Redish, *supra* note 38, at 433. He therefore concludes that "[i]f the individual is to achieve the maximum degree of material satisfaction permitted by his resources, he must be presented with as much information as possible concerning the relative merits of competing products." *Id. See also id.* at 439. This position, however, fails to take account of the lack of an underlying constitutional entitlement to enjoy that diversity *ab initio*. The government is free, in innumerable ways, to limit the "maximum degree of material satisfaction permitted by [a consumer's] resources." *See* notes 110-25 *infra* and accompanying text. Once that is realized, the structure of Professor Redish's argnment collapses. *Cf.* Bork, *supra* note 19, at 27 ("Other human activities and experiences also form personality, teach and create attitudes just as much as does the novel, but no one would on that account, I take it, suggest that the first amendment strikes down regulation of economic activity, control of entry into a trade, laws about sexual behavior, marriage and the like").

Several other authors, in trying to establish a link between the constitutional protection of commercial speech and the traditional principles underlying the first amendment, likewise have proposed tbat because commercial speech may be as "important" as political speech, it therefore should be protected under the Meiklejohn "political speech" rationale. *See, e.g.*, Note, *Yes, FTC, There is a* Virginia: *The Impact of* Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. *on the Federal Trade Commission's Regulation of Misleading Advertising*, 57 B.U.L. REV. 833, 847-48 (1977); Comment, *The First Amendment and Consumer Protection: Commercial Advertising as Protected Speech*, 50 ORE. L. REV. 177, 188-89 (1971). The basis of Professor Meiklejohn's "political speech" theory, however, was protection of speech essential to a representative form of government. *See* notes 30-40 *supra* and accompanying text. It was not based on the importance of such speech in other aspects of our lives. The first amendment, Professor Meiklejohn insisted, "is concerned, not with a private right, but with a public power, a governmental responsibility." Meiklejohn, *supra* note 33, at 255. Thus "the First Amendment . . . forbids Congress to abridge the freedom of a citizen's speech . . . *whenever [that speech is] utilized for the governing of the nation.*" *Id.* at 256 (emphasis added). *See also id.* at 258 ("there are many forms of communication which, since they are not being used as activities of governing, are wholly outside the scope of the First Amendment").

is a matter of political choice, commercial advertising that plays a part in the functioning of the free enterprise system is *for that reason* politically significant speech. But in terms of relevance to political decisionmaking, advertising is neither more nor less significant than a host of other market activities that legislatures concededly may regulate.[58] Political decisionmaking does not depend any more on knowing that "I will sell you the X prescription drug at the Y price" than it does on the ability of pharmacists to charge different prices for the same product in the first place. The decisive point is the absence of any principled distinction between commercial soliciting and other aspects of economic activity. This identity of interests belies the Court's cautious attempt to support the constitutionalization of commercial speech not as a matter of economic right but as a manifestation of political speech. The correct conclusion is the one with which the decision began: The role of price advertising in ordering the marketplace does not bring it within the political speech principle of the first amendment.[59]

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[58] *See* Bork, *supra* note 19, at 25, 27. The Court apparently has backed off a bit from its roundabout assertion that commercial speech can be identified with the Meiklejohn "political speech" principle. In Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), the Court was concerned with the effect of parity between commercial speech and political speech, and concluded: "Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, *commensurate with its subordinate position in the scale of First Amendment values* . . . . " *Id.* at 456 (emphasis added). *Ohralik* suggests, then, that the Court did not take seriously its assertion in *Virginia Board of Pharmacy* that "even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 765.

[59] The Court appears to be uneasy with the entire commercial speech development, but unwilling to state the reasons for its unease. The problem seems to be that pure commercial speech does not fit readily into the Court's recent analysis which emphasizes the first amendment's contribution to political dialogue and the operation of democratic institutions.

The Supreme Court, 1976 Term, 91 HARV. L. REV. 70, 207 (1977). The piece suggests that the Court should "articulate a view which explains . . . the role of commercial speech in light of traditional first amendment values," and, failing at that, "the Court should admit that different values inform its interpretation of the amendment in the areas of commercial and political speech." *Id.* While we agree that the Court has failed to justify the inclusion of commercial speech within the scope of the first amendment, we do not agree that the Court should simply cast around for a new reason instead of rejecting the incorporation. Only if the new reason bore some principled relation to an acceptable theory of the first amendment would adherence to *Virginia Board of Pharmacy* be justified. *See also* Comment, *supra* note 1, at 216 n.75 (acknowledging that the "Court's ruling that the microeconomic functions performed by commercial speech constitute interests protected by the first amendment" is an unjustified "novel addition" to first amendment analysis and favors the approach advocated by Professor Redish, *see* note 57 *supra*).

A related line of argument posits a purely strategic rationale for protecting commercial speech. The thrust of this view is not that commercial speech, as such, is politically siguificant but rather that constitutional protection for commercial advertising is necessary to make effective the guarantee of free political debate. In other words, this argument concerns the practical administration of the distinction between commercial and political speech and not the theoretical scope of the political speech principle itself.

The starting point is the accepted proposition that constitutionally protected speech does not lose that status merely "because money is spent to protect it."[60] The distinction between protected and unprotected communication does not depend solely on conveyance for payment but rests on a mixed question of context and content:[61] Does the advertisement discuss an issue relevant to self-government, or does it merely solicit a commercial transaction? The Court in *Virginia Board of Pharmacy* apparently believed that this inquiry would prove difficult, if not debilitating. "[N]o line," the Court suggested, "between publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn."[62]

Certainly, the Court is right in perceiving that there is no self-executing rule for determining the limits of the political speech principle in the context of business advertising. The specter of line-drawing, however, is seldom sufficient reason to abandon the inquiry entirely.[63] As Mr. Justice Rehnquist pointed out in dissent,[64] it is one thing to speculate that some future case may require a refined and subtle judgment in applying the commercial speech doctrine. It is quite another thing to take this observation as a springboard for the wholesale displacement of legislative authority

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[60] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 761. *See* sources cited note 55 *supra*. Thus a paid advertisement conveying political debate or commentary is protected as political speech.

[61] *See* notes 1-4 *supra* and accompanying text.

[62] 425 U.S. at 765. *See* Baker, *supra* note 49, at 42 n.146; Kaufman, *The Medium, the Message, and the First Amendment*, 45 N.Y.U.L. REV. 761, 769 (1970).

[63] As Professor Bork has noted:

> Any theory of the first amendment that does not accord absolute protection for all verbal expression, which is to say any theory worth discussing, will require that a spectrum be cut and the location of the cut will always be, arguably, arbitrary. The question is whether the general location of the cut is justified. The existence of close cases is not a reason to refuse to draw a line and so deny majorities the power to govern in areas where their power is legitimate.

Bork, *supra* note 19, at 28.

[64] 425 U.S. at 787-88 (Rehnquist, J., dissenting).

even where no such ambiguity exists.[65] To withdraw an entire field from legislative competence simply because doing so obviates the need for some more careful inquiry in the future puts the constitutional cart before the horse and contradicts all the usual arguments for restraint in the exercise of judicial review. Generally speaking, at least, respect for the concept of a representative democracy demands that intrusion into the legislative process on grounds of judicial expedience be sparingly used.[66]

Of course, there may be exceptions. Conceivably, a difficulty in linedrawing could become so intractable and pervasive as to render the distinction itself untenable. To protect the constitutional rights in those cases, the sensible solution would be to abandon the inquiry or restructure the rule of decision. As the Supreme Court itself has observed in another context, it may sometimes be necessary to protect constitutionally irrelevant communication "in order to protect speech that matters."[67] While there may be situations in which this kind of rule is ultimately justified, respect for the majoritarian political process requires that a purely strategic abrogation of legislative choice not be undertaken in advance of necessity.

That necessity was entirely absent in *Virginia Board of Pharmacy*. The case concerned the purported desire of the pharmacist

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[65] *See* Chrestensen v. Valentine, 122 F.2d 511, 520-21 (2d Cir. 1941) (Frank, J., dissenting), *rev'd*, 316 U.S. 52 (1942). The Court, for example, has not protected all the speech of participants in a labor dispute, simply because some of it may be protected. *See, e.g.*, NLRB v. Gissell Packing Co., 395 U.S. 575, 618 (1969). Nor has it subjected all economic legislation to strict review under the equal protection clause simply because legislation may have a racially disproportionate impact. *See, e.g.*, Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 264-68 (1977); Washington v. Davis, 426 U.S. 229, 242 (1976).

[66] Professor Bickel has argued that "expediency" sometimes demands that a Court avoid deciding an issue. *See* A. BICKEL, *supra* note 19, at 64-72. For Bickel, however, expediency was justified only when coupled with avoidance, because "[w]hen it strikes down legislative policy, the Court must act rigorously on principle, else it undermines the justification for its power." *Id* at 69.

[67] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). The Court noted:

> Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. . . . And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. . . . The First Amendment requires that we protect some falsehood in order to protect speech that matters.

Id. at 340-41. *See also* BeVier, *supra* note 23, at 322-31. She has observed that

> [a] . . . concern that the rules will *in fact* shield protected speech arises from the perception that the legal system is often incapable of making fine discriminations that would be necessary if rules of constitutional privilege simply mirrored the requirements of the principle itself. The pervasive phenomenon of the "mixed utterance" has demonstrated stubborn resistance to adequate treatment in terms of abstract principle alone.

Id. at 326-27 (emphasis in original). *But see* Bork, *supra* note 19, at 27-28.

to make a purely commercial statement to a prospective buyer.[68] Because that statement does not remotely suggest an intractable linedrawing problem, the Court resorted to a hypothetical to suggest that the difficulty might nevertheless arise. "Our pharmacist," said the Court, "could cast himself as a commentator on store-to-store disparities in drug prices, giving his own and those of a competitor as proof."[69] That hypothetical is as close as the Court comes to explaining why the lack of a bright line at the boundary of commercial speech justifes withdrawal of the entire field from legislative competence.[70] The implication is that a legislative policy of restricting commercial speech would be impossible to administer and hence ineffectual. The Court apparently fears that advertisers could evade the legislative restraint by garnishing their advertisements with political commentary. If this proved correct, overruling the doctrine of commercial speech would be largely a formality. There would be no real curtailment of legislative power but only a facilitation for advertisers to do directly that which the Constitution guarantees them the right to do by subterfuge and indirection.

This argument founders on at least two grounds. First and fore-

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[68] 425 U.S. at 761.

[69] *Id.* at 764-65.

[70] The Court, in leading to this hypothetical, also provided some examples—taken from decided cases—to buttress its point:

> Even an individual advertisement, though entirely "commercial," may be of general public interest. The facts of decided cases furnish illustrations: advertisements stating that referral services for legal abortions are available, *Bigelow v. Virginia, supra;* that a manufacturer of artificial furs promotes his product as an alternative to the extinction by his competitors of fur-bearing mammals, see *Fur Information & Fashion Council, Inc. v. E.F. Timme & Son,* 364 F. Supp. 16 (SDNY 1973); and that a domestic producer advertises his product as an alternative to imports that tend to deprive American residents of their johs, cf. *Chicago Joint Board v. Chicago Tribune Co.,* 435 F.2d 470 (CA7 1970); cert. denied., 402 U.S. 973 (1971).

Id. at 764. Bigelow v. Virginia, 421 U.S. 809 (1975), rested, at least in part, on the impermissible interference such an advertising ban imposed on the underlying right that the Constitution protects. *See id.* at 822. That decision does not question, however, the power of a state to regulate advertising where there exists "a clear relationship between the advertising in question and an activity that the government was legitimately regulating." *Id.* at 825 n.10. This divergence also arose in the recent lawyer solicitation cases. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); *In re* Primus, 436 U.S. 412 (1978). In the other two examples, the subjects of the advertisements, artificial furs and domestic producers, presumably can be legislatively regulated or banned. Should a product be deemed illegal, the maker or seller could be prevented from advertising it. *See, e.g.,* Pittshurgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973); notes 110-29 *infra* and accompanying text. The problem with the examples used in *Virginia Board of Pharmacy,* therefore, is that it is "difficult to justify protection of a means to an end primarily on the ground of its ability to achieve that end, when the end itself may be freely dispensed with." *The Supreme Court, 1975 Term,* 90 HARV. L. REV. 56, 145 n.23 (1976).

most, it is belied by experience. The record in this case, for example, does not indicate that any pharmacist in fact had tried to avoid the legislative restriction by posing as a commentator on store-to-store disparities in drug prices. The Court points to no evidence of an unsolvable problem; indeed, the Courts' example is pure speculation. The absence of any previous problem of this sort is highly significant. After all, a rule distinguishing commercial from political speech is not an untried possibility. Quite to the contrary, the exclusion of commercial speech from the protections of the first amendment has been an established feature of constitutional doctrine for more than thirty years. During that era legislatures imposed a wide variety of restraints on commercial advertising.[71] Presumably, the parties adversely affected by such regulation have had ample incentive to evade its impact, and their efforts to do so should have presented to the courts exactly the kinds of linedrawing problems discussed above.

The remarkable fact, of course, is the absence of historical experience of this sort.[72] *Valentine v. Chrestensen* itself involved an attempted subterfuge, but the Court did not find any particular difficulty in making the distinction required by that case.[73] Subsequent decisions have touched on one or another aspect of the commercial speech doctrine,[74] but neither the volume nor character of past litigation reveals any inordinate judicial difficulty in applying the traditional rule.[75] Even Professor Emerson has acknowledged that "the

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[71] For examples of these kinds of restrictions, see notes 5-12 *supra* and accompanying text. For examples of cases involving similarly restrictive legislation, see Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 424 (1963); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949); Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608 (1935). *Cf.* Packer Corp. v. Utah, 285 U.S. 105 (1932) (prohibition of cigarette advertising on billboards); Delamater v. South Dakota, 205 U.S. 93, 104 (1907) (upholding authority of states to prohibit nonresident liquor dealers from soliciting within state for liquor transactions that citizens otherwise "would not have thought of making").

[72] One might expect, for example, to find a tradition of instability in the definition of "commercial speech"—a series of cases wrestling with the question and perhaps a variety of tests proposed to resolve the inquiry. Or one might anticipate some record of complaint as, for example, in the field of obscenity where the linedrawing efforts arguably have been unsuccessful. *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 78-113 (1973) (Brennan, J., dissenting).

[73] 316 U.S. 52, 58 (1942).

[74] *See* cases cited notes 1-2 *supra*. A surprisingly small number of lower court decisions are collected in Comment, *The Right to Receive and the Commercial Speech Doctrine: New Constitutional Considerations*, 63 GEO. L.J. 775, 797-99 nn. 132-43 (1975).

[75] Judge Frank observed:

> We should not be disturbed because, in the future, cases may arise where there will be some difficulty in ascertaining the primary purpose in distributing a handbill, and,

problem of differentiating between commercial and other communication has not in practice proved to be a serious one."[76] The impression derived from study of prior experience is that of a rule widely understood, though not everywhere accepted—a rule attacked not for instability or unintelligibility but for reaching results thought by some to be undesirable.

One reason for this rather quiet history is a purely practical consideration of the sort often overlooked in theoretical debate. It concerns the assumed propensity of affected parties to try to evade legal restraints on commercial speech by clothing their business messages in political commentary or social debate. Good reason exists to regard this as an unreal picture. After all, the businessman's first purpose is to make money, and advertising costs money. Ordinarily, the businessman will advertise or not according to his estimate of the expected return on that investment.[77] When the law restricts his ability to advertise, he will try to avoid that constraint if he thinks it would be profitable to do so. The kinds of disguises and stratagems that would be necessary to portray commercial advertising as political speech, however, are very likely to render the advertising itself less effective. Economic self-interest would often counsel

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> because, when such cases arise, the courts may not be able to stop at locating merely the north and south poles of the subject matter, but may be required to do a more precise job of legal map-making and to fix a definite equatorial line. Where to draw such lines "is the question in pretty much everything worth arguing in the law," Mr. Justice Holmes often noted.

Chrestensen v. Valentine, 122 F.2d 511, 520 (2d Cir. 1941) (Frank, J., dissenting) (quoting Irwin v. Gavit, 268 U.S. 161, 168 (1925) (Holmes, J.)), *rev'd*, 316 U.S. 52 (1942). One author asserts that the various discussions of the *Chrestensen* doctrine by the Supreme Court "resulted primarily in confusion about the extent of the doctrine." Comment, *supra* note 74, at 795. The cases cited for support of that statement, *id.* at 795 n.124, however, suggest only that the Court was applying a twin context and content approach, *see* text accompanying notes 1-4 *supra*, not that it was having great trouble in doing so, or in articulating what it was doing. The discussion of lower court decisions by the author (and an examination of the dates of those decisions), *see* Comment, *supra* note 74, at 797-99, suggest not so much a difficulty in applying the *Chrestensen* doctrine, as a growing "[d]issatisfaction with the commercial speech doctrine," with "[a] number of lower courts . . . iguor[ing] it completely." *Id.* at 798. *See also* BeVier, *supra* note 23, at 354; Kaufman, *supra* note 62, at 769.

[76] T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT, *supra* note 41, at 105 n.46.

[77] On the role of advertising in economic competition, see generally J. BACKMAN, ADVERTISING AND COMPETITION (1967); F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 324-45 (1970). *Cf.* Chrestensen v. Valentine, 122 F.2d 511, 519 (2d Cir. 1941) (Frank, J., dissenting) ("we should not confess that we are so cloistered that we do not know that the dominant purpose of most men, *when engaged in business*, is to seek customers and make profits"; emphasis in original), *rev'd*, 316 U.S. 52 (1942). *See also* A. ALCHIAN & W. ALLEN, EXCHANGE AND PRODUCTION: COMPETITION, COORDINATION AND CONTROL 310-13 (2d ed. 1977); Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1, 8-13 (1977).

against any elaborate ruse to convey a forbidden commercial message. As a result, the legislative policy underlying a limitation on commercial speech is not likely to be defeated in practice by the subtle problems that abstract speculation may suggest.[78]

Second, one must recognize that *Virginia Board of Pharmacy* in fact does not resolve whatever difficulties do inhere in the need to distinguish "commercial speech" from speech protected by the first amendment. The Court in that case explicitly stated that commercial speech, although now assimilated to the protections of the first amendment, is not entitled to the same *level* of protection accorded other kinds of "speech."[79] Even after *Virginia Board of Pharmacy* then, commercial speech must be distingnished from traditionally protected speech to determine the level of first amendment protection a particular communication will receive. Whatever linedrawing problems may have been encountered under the old doctrine thus are simply carried forward in a different context.[80]

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[78] Problems in accurately distinguishing between political and commercial speech, moreover, should not create an intolerable "chilling effect" on protected speech. Any political commentator can frame his message to avoid valid advertising regulation. *See* BeVier, *supra* note 23, at 354. In addition, the Court effectively has protected political messages even when in the form of advertisements. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

[79] 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" . . . 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.

425 U.S. at 771 n.24 (citations omitted). Since that time, the Court expressly has relied on this difference when deciding a case. In holding that a state constitutionally could regulate a lawyer's solicitation of an accident victim, the Court stated:

> Expression concerning purely commercial transactions has come within the ambit of the Amendment's protection only recently. In rejecting the notion that such speech "is wholly outside the protection of the First Amendment," *Virginia Pharmacy*, [425 U.S. at 761], we were careful not to hold "that it is wholly undifferentiable from other forms" of speech. [*Id.*] at 771 n.24. We have not discarded the "commonsense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. *Ibid.* To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values . . . .

Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978) (footnotes omitted).

[80] *See The Supreme Court, 1975 Term, supra* note 70, at 149-50.

In summary, *Virginia Board of Pharmacy* is inexplicable under traditional first amendment principles. Ordinary business advertising does not advance the goal of individual self-fulfillment through free expression, nor does it contribute to political decisionmaking in a representative democracy. Commercial advertising simply is not relevant to either of these commonly accepted bases for construing the first amendment. Moreover, there is no evidence of a strategic necessity to protect constitutionally irrelevant speech "in order to protect speech that matters." Both reason and experience suggest that the distinction between commercial speech and protected speech is relatively easy to maintain. Finally, we are at a loss to identify any other comprehensible understanding of the first amendment that would require protection of commercial speech. That is not to say, of course, that *Virginia Board of Pharmacy* is unsupported by any intelligible perception of public policy but only that the decision is responsive to values far removed from those that plausibly might be associated with a constitutional guarantee of the freedom of speech.

III. Commercial Speech and Economic Liberty

In light of the irrelevance of traditional first amendment concerns to commercial advertising, it is not surprising that the Court in *Virginia Board of Pharmacy* spent relatively little effort trying to explain its decision in those terms. Instead, the opinion emphasized the adverse economic effects of Virginia's ban against drug price advertising.[81] The Court saw this restriction as an invasion of two basic values of economic liberty. The first is the opportunity of the individual producer or consumer to maximize his own economic utility. The second is the aggregate economic efficiency of a free market economy. The Court correctly perceived that the suppression of drug price advertising is likely to impair both of these values.

In discussing maximization of individual utility, the Court began with the "assumption" that the advertiser's interest "is a purely economic one."[82] While, as the Court noted, this factor does not disqualify the advertiser's claim to first amendment protection,[83] neither does it provide a reason for giving such advertisements constitutional protection. A more potent consideration was the interest of the individual consumer. As the Court pointed out, a "consumer's

[81] *See, e.g., id.* at 145 n.23; Comment, *supra* note 1, at 216-17.
[82] 425 U.S. at 762.
[83] *See id. But see* Baker, *supra* note 49, at 3-4.

interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate."[84] The Court went on to describe with feeling and eloquence the impact of a price advertising ban on individual consumers:

> Those whom the suppression of prescription drug price 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 who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.[85]

By voiding the legislative restriction on drug price advertising the Court hoped to enable individual consumers to spend their "scarce dollars" more effectively.[86]

The Court's economic analysis is surely correct. In the competitive economic model, a seller advertises only if he believes it to be more efficient than an alternative expenditure of similar resources.[87] A ban against price advertising increases the costs of obtaining price information and makes it less likely that the consumer's choices will be well informed.[88] Because the marginal cost of acquiring more information at some point exceeds the marginal benefits of obtaining such information, the reduction of less costly sources of informa-

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[84] 425 U.S. at 763.

[85] *Id.* at 763-64. The Court also cited statistics that gave force to its textual statements and concluded: "These figures eloquently suggest the diminished capacity of the aged for the kind of active comparison shopping that a ban on advertising makes necessary or desirable." *Id.* at 764 n.18.

[86] *Id.* at 763-65.

[87] "Advertising [his] product . . . inform[s] some potential customers of [his] existence and goods. Information about possible sources of goods is a scarce resource, as anyone knows who enters a strange town and seeks accommodations and restaurants." A. ALCHIAN & W. ALLEN, UNIVERSITY ECONOMICS 347 (1972). *See* A. ALCHIAN & W. ALLEN, *supra* note 77, at 311; Coase, *supra* note 77, at 9 ("Normally, firms incur advertising expenditures because of the additional profit which results from the increased demand to which the information or the change in taste leads"). *Cf.* E. MISHAN, 21 POPULAR ECONOMIC FALLACIES 113-26 (1970) (advertising serves not only an "information" function but also a "persuasion" function; the two are not the same).

[88] *See generally* R. POSNER, ECONOMIC ANALYSIS OF LAW § 4.7 (2d ed. 1977); G. STIGLER, THE ORGANIZATION OF INDUSTRY 171-90 (1968); Barzel, *Some Fallacies in the Interpretation of Information Costs*, 20 J.L. & ECON. 291 (1977); Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1 (1969); Kronman, *Mistake, Disclosure, Information and the Law of Contracts*, 7 J. LEGAL STUD. 1, 12-18 (1978).

tion means that a consumer (now more "uninformed" than would otherwise be the case) will pay more than is "necessary" (in a world of less costly information).[89] On the evidence in this case, the consumer may pay as much as seven times more.[90] The result is an unnecessary reduction in consumer purchasing power, and for the person of limited means, a decrease in the "alleviation of physical pain or the enjoyment of basic necessities."[91] The ban, of course, may increase the welfare of pharmacists as a class but only by effecting a wealth transfer from consumers to pharmacists.[92]

The Court also perceived that this impairment of individual economic opportunity has adverse implications for aggregate efficiency:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed.[93]

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[89] *See* G. STIGLER, *supra* note 88, at 207-08.

[90] Certainly that information may be of value. Drug prices in Virginia, for both prescription and nonprescription items, strikingly vary from outlet to outlet even within the same locality. It is stipulated, for example, that in Richmond "the cost of 40 Achromycin tablets range from $2.59 to $6.00, a difference of 140% [sic]," and that in the Newport News-Hampton area the cost of tetracycline ranges from $1.20 to $9.00, a difference of 650%.

425 U.S. at 754 (footnote omitted). *See also* STAFF OF FEDERAL TRADE COMMISSION, BUREAU OF CONSUMER PROTECTION, PRESCRIPTION DRUG PRICE DISCLOSURES 109-82 (1975) [bereinafter cited as FTC STAFF REPORT].

[91] 425 U.S. at 764.

[92] *See* A. ALCHIAN & W. ALLEN, *supra* note 77, at 336 ("[t]he effect, and often the purpose, of legal barriers to entry is to increase the wealth of those who were already in the market"); R. POSNER, *supra* note 88, at 550 (enforcement of airlines' cartel by the Civil Aeronautics Board exemplifies a "transfer [of] wealth from consumers to shareholders"). *See generally* Calabresi, *Transaction Costs, Resource Allocation and Liability Rules—A Comment*, 11 J.L. & ECON. 67, 68 n.4 (1968); Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); Goetz & Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554, 568 (1977).

A staff report of the Federal Trade Commission concluded that the savings to consumers from an elimination of drug price advertising restrictions would be "of a very substantial magnitude, amounting to many millions of dollars per year." FTC STAFF REPORT, *supra* note 00, at 181. *See* Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J.L. & ECON. 337, 340-45 (1972) (comparison of prices of eyeglasses in states with and without advertising ban shows latter category consistently lower).

[93] 425 U.S. at 765. Information has social value; a lessening in the flow of information increases the probability of a misallocation of resources. *See, e.g.*, Kronman, *supra* note 88, at 12 ("From a social point of view, it is desirable that information which reveals a change in circumstances affecting the relative value of commodities reach the market as quickly as possible. . . . The sooner information of the change reaches the [market], the less likely it

When consumers choose ignorantly, an inefficient allocation of societal resources is likely.[94] While the ultimate results of legislative interference with the competitive market are difficult to predict, it seems plausible to assume that the consequence of a reduced flow of information will lead to some situational monopolies that would not exist if advertising were unrestricted.[95] Most economists are willing to assume that the existence of some monopoly power likely will lead to a lower level of aggregate economic efficiency than would otherwise be the case.[96]

As a matter of public policy, both of these considerations are significant. The opportunity of the individual consumer to maximize his own utility by making well-informed economic choices is important, particularly in the context of medical care. Moreover, the nation plainly has an interest in promoting allocative efficiency in the economy as a whole—that interest lies at the heart of the federal antitrust laws.[97] Generally, one might regret any governmental action that invades these interests without some clearly offsetting benefit to the public good.

Virginia claimed such an offsetting benefit in the maintenance of professionalism among pharmacists. The state argued that unlimited advertising would lead to aggressive price competition in the

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is that social resources will be wasted"). *See generally* Hirshleifer, *The Private and Social Value of Information and the Reward to Inventive Activity*, 61 AM. ECON. REV. 561 (1971); Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1961).

[94] Kronman, *supra* note 88, at 13 ("[a]llocative efficiency is promoted by getting information of changed circumstances to the market as quickly as possible"). *See* sources cited note 88 *supra*.

[95] *See* A. ALCHIAN & W. ALLEN, *supra* note 77, at 325; R. POSNER, *supra* note 88, at 402. *See also* Baxter, *NYSE Fixed Commission Rates: A Private Cartel Goes Public*, 22 STAN. L. REV. 675 (1970); Benham, *supra* note 92; Jordan, *Producer Protection, Prior Market Structure and the Effects of Government Regulation*, 15 J.L. & ECON. 151 (1972). For an interesting attempt to deal with the problems of market informational imperfections, see Schwartz & Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. ____ (1979) (forthcoming).

[96] The doubt about the allocative effect of monopoly power comes from a concept that economists call the "theory of second best." *See* Lipsey & Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956). In simplified terms, it counsels that in a world that is not perfectly competitive—that has a number of monopolies or oligopolies—no general presumption exists that the transformation (by society) of one of these noncompetitive industries into a perfectly competitive industry will move society closer to an efficient allocation of resources. R. LIPSEY & P. STEINER, ECONOMICS 329-30 (4th ed. 1975); F. SCHERER, *supra* note 77, at 22-27. Most economists, however, are willing to assume that a move toward competition is at least *likely* to improve allocative efficiency. R. BORK, THE ANTITRUST PARADOX 114 (1978). *See also* R. MILLER, INTERMEDIATE MICROECONOMICS: THEORY, ISSUES, AND APPLICATIONS 446 (1978).

[97] *See generally* R. BORK, *supra* note 96; R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 8-18 (1976).

preparation and sale of prescription drugs. Such competition, feared the state, would drive the conscientious pharmacist out of business and endanger the survival of the neighborhood pharmacy.[98] Despite these arguments, the Court was not persuaded of the merits of Virginia's law. The Court found no direct or necessary relation between drug prices and professional standards.[99] The pharmacist whom the advertising ban enables to charge more than the competitive price may or may not provide superior service. Moreover, the Court thought it significant that pharmacists in any event were subject to close regulation explicitly addressed to maintaining professional standards.[100]

While the state's arguments are not inherently implausible, one may well agree with the Court that Virginia's ban against drug price advertising contributed less to the professionalism of pharmacists than to their wealth.[101] Certainly, the legislation benefited small, inefficient pharmacies that could not compete effectively with larger concerns if price advertising were allowed. In other words, the advertising ban operated to insulate certain sellers from the competitive marketplace and thus to achieve special advantage for the owners of small pharmacies.[102] Whether this legislation also redounded to the benefit of the public at large seems more doubtful. The Court, at least, seems to have viewed Virginia's law as nothing more or less than a classic case of special interest legislation incon-

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[98] 425 U.S. at 766 (the justifications for the advertising ban "have to do principally with maintaining a high degree of professionalism on the part of licensed pharmacists").

> Price advertising, it is argued, will place in jeopardy the pharmacist's expertise and, with it, the customer's health. It is claimed that the aggressive price competition that will result from unlimited advertising will make it impossible for the pharmacist to supply professional services in the compounding, handling, and dispensing of prescription drugs. . . . It is also claimed that prices might not necessarily fall as a result of advertising. If one pharmacist advertises, others must, and the resulting expense will inflate the cost of drugs. It is further claimed that advertising will lead people to shop for their prescription drugs among the various pharmacists who offer the lowest prices, and the loss of stable pharmacist-customer relationships will make individual attention—and certainly the practice of monitoring—impossible. Finally, it is argued that damage will be done to the professional image of the pharmacist.

Id. at 767-68.

[99] *See id.* at 768-70.

[100] *See id.* at 768-69.

[101] *See* sources cited note 92 *supra*. *Cf.* R. POSNER, *supra* note 88, at 502 ("a state statute that . . . forbids opticians to replace eyeglass frames without a prescription . . . can have no real purpose other than to increase the incomes of optometrists and opthalmologists at the expense of opticians—and consumers").

[102] *See generally* FTC STAFF REPORT, *supra* note 90, at 172-76; A. ALCHIAN & W. ALLEN, *supra* note 77, at 325.

sistent with any disinterested understanding of the public good.[103]

The issue is not free from doubt, but on balance, the *Virginia Board of Pharmacy* opinion seems persuasive in demonstrating the unwisdom of Virginia's law against drug price advertising. No reason exists to doubt the Court's assessment that the advertising ban would inhibit competition and lead to artificially high drug prices, and, although the point is certainly arguable, the Court may also be right to discount the purported contribution of economic inefficiency to high professional standards.[104] These concerns undoubtedly are sufficient grounds to warrant criticism of Virginia's policy and opposition to its continued enforcement.[105] It is surprising to discover, however, that these economic considerations add up to a *constitutional* impediment to legislative control of the marketplace. It is all the more startling to be told, as *Virginia Board of Pharmacy* announces, that the source of that constitutional restraint is the first amendment. One might have thought, as the Court has so often proclaimed, that demanding judicial review of economic legislation was a concern of the past.[106] Even if that tradition were to be revived, one would expect to find the constitutional safeguards of economic liberty to be housed within the flexible contours of due process of law. Instead, economic due process is resurrected, clothed in the ill-fitting garb of the first amendment, and sent forth to battle the kind of special interest legislation that the Court has tolerated for more than forty years.[107] In short, the Supreme Court has recon-

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[103] The example is not unusual. A number of regulatory restraints, similarly justified in the name of "quality," seem designed to serve the welfare of those who are able to enter. *See* A. ALCHIAN & W. ALLEN, *supra* note 77, at 37, 325-36. *Cf.* R. POSNER, *supra* note 88, at 498-500 (real purpose of statute involved in New Stato Ice Co. v. Liebemann, 285 U.S. 262 (1932), "[n]o doubt . . . was to foster cartelization of the Oklahoma ice industry").

[104] *See* sources cited notes 101-03 *supra.*

[105] The Court's analysis seems to support strongly the antitrust attack on drug price advertising restrictions launched by the Federal Trade Commission in 1975. *See* FTC STAFF REPORT, *supra* note 90.

[106] *E.g.*, Whalen v. Roe, 429 U.S. 589, 597 (1977) ("The holding in *Lochner* [v. New York, 198 U.S. 45 (1905)] has been implicitly rejected many times. State legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part"; footnotes omitted); City of New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976) (per curiam) ("in tbe local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment"). *See generally* McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34; Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463 (1967). For an interesting study indicating that many state courts still subject legislative regulation of economic activity to a demanding scrutiny, see Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976).

[107] *See* cases cited note 71 *supra.*

stituted the values of *Lochner v. New York*[108] as components of freedom of speech. This renovation of discredited doctrine is far more troublesome than commentators have been willing to admit[109]

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[108] 198 U.S. 45 (1905). In *Lochner*, the Court struck down a statute making it a crime for a baker to permit his employees to work more than 60 hours per week as "an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty." *Id.* at 56. *Lochner* has come to he regarded as the symbol of an era when the Court struck down legislation solely because it interfered with economic liberty. *Lochner*, of course, was not unique. *See, e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262 (1932); Adkins v. Children's Hospital, 261 U.S. 525 (1923); Coppage v. Kansas, 236 U.S. 1 (1915); Allgeyer v. Louisiana, 165 U.S. 578 (1897). *Cf.* Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 662-63 (1874) ("[T]here are . . . rights in every free government beyond the control of the State. . . . There are limitations on [governmental] power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist [are among these]"). For a summary of the laws invalidated during this period, see U.S. SEN., THE CONSTITUTION OF THE UNITED STATES OF AMERICA, S. Doc. No. 39, 88th Cong., 1st Sess. 1431-85 (E. Corwin & S. Jayson eds. 1964). The rejection of *Lochner* has been regarded almost universally as correct. *But cf.* R. POSNER, *supra* note 88, §§ 25.1, 28.4 (arguing that the Court should not subject cases involving economic rights to treatment different from those cases involving individual rights).

[109] Most commentary has been supportive, even encouraging. *See, e.g.*, Redish, *supra* note 38, at 432-48; Comment, *supra* note 74, at 799-803; Comment, *Prior Restraints and Restrictions on Advertising after Virginia Pharmacy Board; The Commercial Speech Doctrine Reformulated*, 43 Mo. L. REV. 64, 74-87 (1978); Comment, *supra* note 57, at 187-90; Comment, *supra* note 1, at 216 n.75, 226-27. The few commentators who have recognized the possible inconsistency between *Virginia Board of Pharmacy* and the Court's recent economic legislation cases, have nonetheless apparently believed that *Virginia Board of Pharmacy* was decided correctly. *See, e.g., The Supreme Court, 1976 Term, supra* note 59, at 206-08 (Court has not yet justified *Virginia Board of Pharmacy* within first amendment; should try again); Comment, *supra* note 74, at 801-02 (suggesting that the economic rights-civil liberties distinction not be so sharply drawn); Comment, *supra* note 1, at 216 n.75 (Court's economic analysis unjustified; but traditional first amendment values support *Virginia Board of Pharmacy*).

Professor Baker is hostile to the development in *Virginia Board of Pharmacy*. He is unable to fit the protection of commercial speech within the Emerson theory of the first amendment. *See* Baker, *supra* note 49, at 3. He is also troubled by the link between that case and *Lochner*. *See id.* at n.22. Professor Baker does not discuss *Virginia Board of Pharmacy* in terms of the "political speech" rationale, however, for he apparently does not accept the Meiklejohn theory of the first amendment. He objects, instead, to constitutional protection not only for speech that "does no more than merely propose a commercial transaction," but also for *all* speech that is motivated by the speaker's profit motive, even if overtly political, because he does not believe that this speech "can be attributed to the choice of a free agent." *Id.* at 35. Professor Baker asserts that "[t]he possible motivations structurally attributable to the 'political commercial speech' show that it must be included within the category of commercial speech," *id.*, and concludes that where speech is induced by a profit motive, "allowing for human choice requires that the authority to control this speech be located where choices can be based on substantive values and constitutive concerns—in other words, in the political realm." *Id.* at 36 (footnotes omitted). This approach makes the rejection of *Virginia Board of Pharmacy* easy; commercial advertising becomes merely a subset of unprotected speech because it is motivated by the desire for profit. Such a position rests on a rejection of the theory underlying the Meiklejohn interpretation of the first amendment in that it denies

and warrants thorough reconsideration.

Were it not for the first amendment trappings, this revivification of *Lochner* would no doubt excite substantial opposition. At the very least, it would be recognized as a contradiction of the heretofore settled idea that the Constitution tolerates extensive regnlation of the economy. Various decisions have reiterated that proposition in a host of different contexts. For example, government constitutionally is free to restrict production of a good,[110] to determine the prices and conditions of sale,[111] and even to ban certain items from the marketplace.[112] Government also has the authority to limit access to a profession,[113] to prescribe wages and conditions of employment,[114] and even to outlaw certain lines of work.[115] Additionally, government may distort the free market economy by licensing a monopoly,[116] by creating other barriers to entry,[117] or by subsidizing public competition to private industry.[118] In all of these ways, government

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protection to speech admittedly directed at influencing the political process when the underlying motive for that speech is profitmaking.

[110] *E.g.*, Wickard v. Filburn, 317 U.S. 111 (1942).

[111] *E.g.*, Sunsbine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940); Townsend v. Yeomans, 301 U.S. 441 (1937); Old Dearborn Distrib. Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936); Nehbia v. New York, 291 U.S. 502 (1934); Munn v. Illinois, 94 U.S. 113 (1877).

[112] Nebbia v. New York, 291 U.S. 502, 527-28 (1934) ("The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned"); Beer Co. v. Massachusetts, 97 U.S. 25, 33 (1878) (manufacture, sale, or purcbase of intoxicating liquor).

[113] *E.g.*, City of New Orleans v. Dukes, 427 U.S. 297 (1976) (per curiam); North Dakota Stato Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947).

[114] *E.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (mandatory retirement at age 50); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952) (employees entitled to time off with pay to vote); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (restraint of employers in selecting or discharging employees); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (minimum wages); Erie R.R. v. Williams, 233 U.S. 685 (1914) (employers required to pay employees semi-monthly and in cash); Knoxville Iron Co. v. Harbison, 183 U.S. 13 (1901) (employers required to redeem wages paid to employees, in form of merchandise, for cash).

[115] Ah Sin v. Wittman, 198 U.S. 500 (1905) (legislation suppressing gambling).

[116] This result is common in the licensing of utility companies, for example. *Cf.* Cantor v. Detroit Edison Co., 428 U.S. 579, 595-96 (1976) ("public utility regulation typically assumes that the private firm is a natural monoply").

[117] *E.g.*, Martin v. Walton, 368 U.S. 25 (1961) (per curiam); Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608 (1935); McCloskey v. Tobin, 252 U.S. 107 (1920); Olsen v. Smith, 195 U.S. 332 (1904).

[118] *E.g.*, 47 U.S.C. § 396 (1976) (establishing the Corporation for Public Broadcasting). *Cf.* American Commercial Lines v. Louisville & N.R.R., 392 U.S. 571, 593-94 (1968) (upholding ICC's position that railroads may not set prices below average price to attract business away from barge lines); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 338-39 (1936) (water

may regulate and affect commercial transactions. According to *Virginia Board of Pharmacy*, however, government may not suppress the solicitation of commercial transactions in the form of business advertising. That kind of regulation is supposedly barred by the first amendment, even though it does not implicate the traditionally accepted meanings of freedom of speech. The problem, says the Court, is that the ban against drug price advertising impairs the economic welfare of the individual consumer and contributes to aggregate economic inefficiency. These values are also implicated, however, by every one of the laws mentioned above. Every kind of legislative restraint on the operation of the free market economy may be used to favor one group at the expense of the public at large and thus to further one or another social objective by encouraging an economically inefficient allocation of resources.

Indeed, such results are commonplace. Price supports for farm products raise the price of bread and maintain an inefficient concentration of resources in food production.[119] Minimum wage laws add to unemployment, especially among young and unskilled workers, and distort the aggregate labor market.[120] Exactly the same values that are impaired by Virginia's ban against drug price advertising are also invaded by these and most other instances of governmental regulation of the economy. Of course, countervailing social objectives often may justify governmental displacement of the free market, and we are very far from suggesting that regulation of the market is necessarily, or even presumptively, undesirable. The point is, rather, that such judgments are properly left to popularly elected legislatures. In terms of constitutional values, price supports, minimum wage laws, and advertising bans are utterly indistinguishable. Constitutional objection to such laws stands or falls on precisely the ground asserted in *Lochner v. New York* and repeatedly repudiated in the decades since then.[121]

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power resulting from construction of federally owned dams may be converted to electricity and sold to private parties).

[119] P. SAMUELSON, ECONOMICS 411-13, 415-18 (10th ed. 1976). *Cf.* A. ALCHIAN & W. ALLEN, *supra* note 88, at 331-32 (government's purchases of farm surplus helps maintain artificially high prices).

[120] A. ALCHIAN & W. ALLEN, *supra* note 77, at 406-08; Mincer, *Unemployment Effects of Minimum Wages*, 84 J. POL. ECON. S87, S104 (1976); Moore, *The Effect of Minimum Wages on Teenage Unemployment Rates*, 79 J. POL. ECON. 897, 897 (1971).

[121] *See* notes 108-18 *supra* and accompanying text. Professor Posner has implied that economic regulation should be scrutinized by the judiciary on more or less the same basis as political speech regulation:

> A final question considered here is whether political and economic rights are as neatly separable as the Supreme Court apparently believes. Political dissent requires

Exactly the same point can be made in terms of the familiar notion that the greater power normally includes the lesser. Nothing in the federal Constitution bars a state from legislating prescription drug prices,[122] even if the prices were set significantly higher than those that would prevail in a competitive market. Ancillary to such action, the state might also forbid commercial advertising of prescription drugs at any price other than that authorized by law.[123] Given the authority to set prices in the first place, there is nothing remarkable in the extension of legislative control to price advertising. After all, if it is illegal to sell the X drug at the Y price, then no legitimate reason can be found to advertise such a sale. The typical business advertisement—speech that does "no more than solicit a commercial transaction"[124]—serves no valid purpose when the underlying transaction is forbidden by law. The Supreme Court

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substantial financial resources. In a society in which activity was completely controlled by government—in which paper was rationed, printing was licensed, and the state, directly or indirectly, was the principal employer—it would be extremely difficult to organize and finance political activity in opposition to the government. In the Joseph McCarthy era, people believed to be sympathetic to communism were barred from government employment, even in nonsensitive jobs. These people did not starve. They found jobs in the private sector and today some of them are again active in politics. The cost of dissent would have been greater had the government been the only employer so that the consequence of holding unpopular views might be denial of all opportunity to obtain a livelihood. Although no single economic regulatory measure brings us measurably closer to complete governmental control of economic activity, the Court has been unwilling to tolerate even slight encroachments on First Amendment freedoms.

R. POSNER, *supra* note 88, at 550-51. Professor Coase has also made a similar suggestion: "Support for the First Amendment is dependent on the view that government intervention in a particular market would be bad. Why not, then, be consistent and apply this view of government intervention more widely?" Coase, *supra* note 77, at 4. *See also* Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV., PAPERS AND PROCEEDINGS 384, 389 (1974). These objections would seem to be directed to the Court's interpretations of the due process and equal protection clauses of the Constitution. Although that inconsistency may well be found in the Court's post-*Lochner* interpretations of the Constitution, our point is narrower in focus: given the Court's evident rejection of *Lochner*, its recent treatment of commercial speech under the first amendment is inexplicable especially in light of its willingness to tolerate commercial speech restrictions under the fifth and fourteenth amendments, *see* note 71 *supra* and accompanying text.

[122] *See* note 111 *supra* and accompanying text.

[123] "Discrimination in employment is not only commercial activity, it is *illegal* commercial activity under the Ordinance. We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes." Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1973) (footnote omitted) (emphasis in original).

[124] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 762 (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)).

apparently has accepted this reasoning and has indicated its readiness to uphold legislative regulation of commercial advertising "incidental to a valid limitation on economic activity."[125]

The significance of this analysis lies in its application to the instance in which the legislature has not exercised its "greater power" over the underlying economic activity. Thus, for example, the legislature rationally might conclude that the sale of cigarettes should be allowed but that advertising should be banned to discourage new users.[126] In such a case, according to the reasoning of *Virginia Board of Pharmacy*, governmental control over price advertising would offend the first amendment.[127] This conclusion only makes sense if one assumes a first amendment value in the advertising of cigarettes independent of its role in encouraging or facilitating the sale of cigarettes. The latter transaction the government concededly has the power to forbid or control. If independent first amendment significance did exist in this instance, it would also exist when the state has declared the underlying transaction unlawful. So, for example, some legitimate function would arise for the advertisement, "I will sell you the X drug at the Y price," even where the sale is forbidden by law. That no such independent purpose in fact can be identified confirms the hypothesis that the significance of ordinary business

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[125] Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 389 (1973) ("[a]ny First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity"). *See also* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. at 388. In *Pittsburgh Press*, the Court properly recognized that the ability to ban the commercial advertising did not give the state license to interfere with the discourse by which the substantive decision to ban or not to ban is formulated and affected. *Id.* at 391 ("nothing in our holding allows government at any level to forbid Pittsburgh Press to publish and distribute advertisements commenting on the Ordinance, the enforcement practices of the Commission, or the propriety of sex preferences in employment"). That "political" dialogue is at the core of the Meiklejohn theory of the first amendment. It is interesting to note, in light of *Virginia Board of Pharmacy*'s linedrawing discussion, that the *Pittsburgh Press* majority discussed nothing of that sort.

[126] *See* note 9 *supra*. *See also* note 128 *infra*.

[127] The Court, of course, could avoid this result by giving more weight to the government's interest in suppressing cigarette advertising than they gave to Virginia's interest in banning drug price advertising. The public health justifications for preventing the solicitation of the purchase of a carcinogenic product are quite strong. *See* Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 585-86 (D.D.C. 1971), *aff'd*, 405 U.S. 1000 (1972). Note, however, that such justifications, or any opposition to them, must focus on the wisdom of discouraging the underlying transaction—the sale of cigarettes—rather than on the value of the "speech" standing alone.

advertising lies entirely in its relation to the contemplated economic transaction.[128] It follows that such advertising should be subject to governmental regulation on the same terms as any other aspect of the marketplace.[129]

The point can be put more vividly by comparing *Virginia Board of Pharmacy* with *North Dakota State Board of Pharmacy v. Sny-*

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[128] A number of states, for example, have statutes that regulate or prohibit the use of "loss leaders"—the practice of selling certain products at below cost to "lead" consumers into a store, where they presumably will buy other products as well. The Supreme Court has upheld these regulations. *See* Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n, 360 U.S. 334, 341-42 (1959). If, however, states wished for some reason to ban the advertising of loss leaders but not the selling below cost (because, for example, they were more concerned with the solicitation aspect than the below-cost selling aspect, and thought that this would be easier to police than an "intent" test), application of the decision in *Virginia Board of Pharmacy* would lead to the conclusion that the advertising ban without an underlying product ban runs afoul of the first amendment. This distinction is pointless. The substantive effects of these two approaches are indistinguishable because the purpose of a loss leader, definitionally, is to lead people into the store. We are unable to discern, in effect or in theory, the difference between a regulation that prohibits the use of loss leaders and a regulation that simply prohibits the advertising of loss leaders—except that the latter might be slightly more favorable to consumers and somewhat easier to administer. In prohibiting the latter but not the former, no discernible value appears to be promoted and certainly no first amendment value. A cost is imposed, however: a state is deprived of what might in fact be a sensible tool—banning the solicitation but not the sale below cost—and is driven to an all-or-nothing choice.

[129] Advertising restrictions repeatedly have survived constitutional objections on grounds other than those posed by the first amendment. *See, e.g.*, cases cited note 71 *supra*. The Court in *Virginia Board of Pharmacy* passed by these cases, noting that "[t]he challenge now made, however, is based on the First Amendment. This casts the Board's justifications in a different light, for on close inspection it is seen that the State's protectiveness of the citizens rests in large measure on the advantages of their being kept in ignorance." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 769. While this argument is not based on economics, it employs the same mode of reasoning as the Court's economic justifications—and seems infirm for those same reasons. The Court broadly asserts that the choice between the paternalism of protective regulation of consumers and the free market of opened channels of communication is not a decision left to legislative bodies because "[i]t is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Id.* at 770. The argument does not explain why this rationale applies to first amendment, but not fifth and fourteenth amendment, analysis. The Constitution does not prohibit *substantive* paternalism, as a recent and growing body of consumer protection legislation attests. *See, e.g.*, Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1691 (1976); Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 (1976).

The Court acknowledges as much in *Virginia Board of Pharmacy*. *See* 425 U.S. at 755-56, 769. We thus encounter the same "greater-includes-the-lesser" problem: the first amendment makes that decision for us only if the information is within the ambit of the first amendment protection. If the information is made available to facilitate the economic purchasing decisions of consumers, however, it is hard to articulate a reason to protect that information where more drastic, substantive regulatory powers are available to the governmental regulatory bodies.

der's Drug Stores, Inc.[130] The latter case involved a North Dakota statute requiring that the holder of a permit to operate a pharmacy be a "registered pharmacist in good standing" or "a corporation or association, the majority stock in which is owned by registered pharmacists in good standing."[131] Snyder's Drug Stores, Inc. was denied a permit because no evidence existed that the majority stock of the parent corporation was held by registered pharmacists. A state court held this requirement unconstitutional under the authority of *Liggett Co. v. Baldridge.*[132] In that 1928 decision, the Supreme Court had invalidated a Pennsylvania law requiring 100% ownership of pharmacies by licensed pharmacists.[133] Reconsidering the question in 1974, the Court unanimously overruled *Liggett* and reinstated the North Dakota statute, noting that "oppos[ing] views of public policy are considerations for the legislative choice."[134] Only two terms later, the Court held unconstitutional Virginia's ban against drug price advertising.[135] Of course, the Virginia case involved "speech," but the identity of interests in the two cases reveals the bankruptcy of this reversion to nonfunctional definitionalism.

Both Virginia and North Dakota defended their laws as appropriately designed to maintain high professional standards in the practice of pharmacy. Virginia's announced purpose was to facilitate provision of professional services by inhibiting effective price competition.[136] North Dakota said it was promoting the same goal by prohibiting ownership by cost-cutters who would not share a professional's devotion to duty over profit.[137] In both cases, however, the legislation is more easily understood as benefiting small, inefficient pharmacies against drugstore chains and other would-be competitors. North Dakota approached that problem directly, while Virginia merely made it difficult for large discount houses to realize their competitive advantage. The predictable result of both laws is

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[130] 414 U.S. 156 (1973).

[131] N.D. CENT. CODE § 43-15-35(5) (1977). *See* 414 U.S. at 157-58.

[132] 278 U.S. 105 (1928). The state court decision is Snyder's Drug Stores, Inc. v. North Dakota State Bd. of Pharmacy, 202 N.W.2d 140 (N.D. 1972), *rev'd,* 414 U.S. 156 (1973).

[133] 278 U.S. at 113 (finding the requirement that all stock be owned by pharmacists invalid under the fourteenth amendment because it created "an unreasonable and unnecessary restriction upon private business").

[134] 414 U.S. at 167.

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

[136] *See id.* at 766-70.

[137] *See* Snyder's Drug Stores v. North Dakota State Bd. of Pharmacy, 202 N.W.2d 140, 142-43 (N.D. 1972) (quoting portion of Mr. Justice Sutherland's opinion in Liggett Co. v. Baldridge, 278 U.S. 105, 111 (1928), dealing with police powers), *rev'd,* 414 U.S. 156 (1973).

to make prescription drug prices higher than would otherwise be the case and thus to effect a wealth transfer from consumers to pharmacists.[138] All the economic evils identified by the Court in *Virginia Board of Pharmacy* are present as fully in the North Dakota case, yet not a single justice voted to strike the latter statute. This outcome cannot be attributed to judicial enthusiasm for North Dakota's brand of special interest legislation. Rather, it reflects a profound and hitherto consistent regard for legislative authority over economic affairs. That deference has been shown not only in *North Dakota State Board of Pharmacy* but also in numerous other modern decisions upholding laws that were arguably unwise, unfair, or opposed to the public interest.[139] No deference was found in *Virginia Board of Pharmacy* because that case happened to involve something called "speech." As we have tried to show, that statute had nothing to do with any intelligible understanding of the meaning of the first amendment. Its invalidation under that rubric constitutes an unwarranted, and probably unintended, resurrection of economic due process in the guise of the freedom of speech.

Finally, the Court in *Virginia Board of Pharmacy* carefully noted that the guarantees of the first amendment do not apply to commercial speech with their usual force.[140] Indeed, the Court emphasized

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[138] *See* notes 87-92 *supra* and accompanying text.

[139] *See* cases cited note 71 *supra*. A bare month after the decision in *Virginia Board of Pharmacy*, the Court was confronted with an equal protection claim of a hot dog vendor who was excluded from operating in the French Quarter of New Orleans by a statute that allowed such operation only by " 'vendors who have continuously operated the same business within the Vieux Carre . . . for eight or more years prior to January 1, 1972.' " City of New Orleans v. Dukes, 427 U.S. 297, 298 (1976) (per curiam) (quoting CODE OF CITY OF NEW ORLEANS ch. 46, § 1, 1.1 (amended 1972)). The Court observed:

> States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step by step, *Katzenbach v. Morgan*, 384 U.S. 641 (1966), in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. See, *e.g.*, *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-489 (1955). In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines, see, *e.g.*, *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952); in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment. See, *e.g.*, *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963).

Id. at 303-04. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 316-17 (1976) (upholding statute requiring mandatory retirement at age 50 against constitutional challenges).

[140] The Court noted that

> [o]bviously, much commercial speech is not provably false, or even wholly false but

that not all commercial advertising would receive constitutional protection; only "truthful and legitimate commercial information" would be protected.[141] Government remains free to purge commercial advertising of speech that is deceptive or misleading or perhaps merely unverifiable.[142] This result is entirely sound, for only mischief would flow from constitutional abrogation of the government's ability to prevent commercial fraud. The distinction between "truthful and legitimate" information and other kinds of speech, however, does suggest how far *Virginia Board of Pharmacy* has gone in standing traditional first amendment doctrine on its head. The political speech principle scarcely is limited to empirically verifiable or demonstrably true statements.[143] The rhetoric of any political campaign bears witness to the constitutional tolerance for speech that fairly might be termed deceptive or misleading. The core evil that the first amendment seeks to avoid is official determination of the truth or falsity of political opinion.[144] Nothing could be more hostile

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> only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.

425 U.S. at 771-72 (footnotes omitted). The Court has since expanded the point that there are "commonsense differences" between commercial speech and other forms of speech, *id.* at 771 n.24, by observing that commercial speech has a "subordinate position in the scale of First Amendment values." Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). This statement apparently applies even to truthful commercial speech.

[141] 425 U.S. at 771 n.24.

[142] *See, e.g.*, Warner-Lambert Co. v. FTC, 562 F.2d 749, 758-59, 763 (D.C. Cir. 1977) (first amendment no obstacle to FTC order requiring manufacturer of Listerine to cease and desist representing that Listerine cures colds or sore throats, or lessens their effect, and requiring Listerine to state in future advertisements that "Listerine will not help prevent colds or sore throats or lessen their severity"), *cert. denied*, 435 U.S. 950 (1978). Although the evidence in *Warner-Lambert* was conflicting, the FTC found that "the preponderance of the evidence demonstrates that . . . the use of Listerine, as directed, will not prevent or cure colds or sore throats or ameliorate cold symptoms." Warner-Lambert Co., 86 F.T.C. 1398, 1496-97 (1975) (footnote omitted), *aff'd as modified*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978). This case does not seem to be a clear instance of "provably false, or even wholly false" advertising; the question of Listerine's efficacy against colds or sore throats apparently remains a respectably debatable question, although present indications suggest that Listerine's claims were wrong. In the political speech area, protection of precisely such debate is at the very core of the first amendment. *See* notes 143-45 *infra* and accompanying text. For a discussion of the impact of *Virginia Board of Pharmacy* on the work of the FTC, see Note, *supra* note 57, at 848-52; Note, *First Amendment Restrictions on the FTC's Regulation of Advertising*, 31 VAND. L. REV. 349, 360-63, 369-73 (1978).

[143] *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 347-49 (1974); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

[144] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340-41 (1974); A. BICKEL, *supra* note 40, at 62-63.

to the traditional understanding of the freedom of speech than governmental evaluation of the deceptiveness of political statements. Yet nothing could be more palpably wrongheaded than the extension of this approach to protect deceptive or misleading solicitations of commercial transactions. The Court has recognized the difference and announced its willingness to allow suppression of misleading commercial speech. That seeming contradiction once again shows how far ordinary business advertising is removed from the traditional concerns of the first amendment and how plainly the freedom of speech has been diverted to serve the entirely unrelated values of individual economic liberty and aggregate economic efficiency.[145]

IV. Conclusion

It is possible, of course, to view *Virginia Board of Pharmacy* as based on a rationale much narrower than the revivification of economic due process in the guise of commercial speech. One may take the decision as representing merely that "good" commercial speech should be protected, whereas "bad" commercial speech, as before, should continue to be subject to state regulation. In these terms, *Virginia Board of Pharmacy* is an easy case. The Court's discussions of the free enterprise system and of the adverse impact on "the poor, the sick, and particularly the aged"[146] suggest what is all too apparent. The parties and the cause affected the outcome of the case. The immediate result may not be disturbing: no one is "against" lower prices, the facilitation of consumer choice, and the alleviation of human distress. That, one suspects, is why so many commentators have expressed approval of the decision even while noting some uncertainty as to its rationale.[147] It requires no elaboration, however, to conclude that a constitutional decision justified only on this ground is a misuse of the first amendment and a departure from the principles that should govern the exercise of judicial review in a representative democracy. That is not to say, however, that the

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[145] *Compare* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 765 ("[s]o long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable"), *with id.* at 771 ("[o]bviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem").

[146] *Id.* at 763.

[147] *See* note 109 *supra.*

Supreme Court understood its action in such terms. The *Virginia Board of Pharmacy* opinion gives no evidence of conscious resort to the low road of unprincipled immediacy. Rather, the decision announces and defends a doctrinal innovation of purportedly general applicability. It is because we take the decision in precisely those terms that we explicate so fully our grounds for believing it mistaken.