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Lowe v. SEC: Investment Advisors Act of 1940 Clashes with First Amendment Guarantees of Free Speech and Press

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LOWE V. SEC: INVESTMENT ADVISERS ACT OF 1940 CLASHES WITH FIRST AMENDMENT GUARANTEES OF FREE SPEECH AND PRESS

In the wake of mounting controversy over whether federal securities laws can withstand first amendment scrutiny,[1] the United States Supreme Court granted certiorari in *Lowe v. SEC*[2] to consider whether the first amendment prohibits an injunction[3] against publication and distribution of an investment advisory newsletter by an unregistered investment advisor. However, the Court bypassed this constitutional question, and instead adopted a statutory construction of the Investment Advisers Act of 1940 (the "Act")[4] that excluded Lowe's newsletters as "bonafide financial publications" of general circulation under section 80(b)-2(a)(11)(D).[5] The majority ruled that the petitioners were not investment advisers, and therefore did not need to be registered with the Securities and Exchange Commission (SEC).[6] Consequently, there was no justification for restraining future publication of Lowe's newsletters.[7]

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1. In pertinent part, the first amendment states: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. The Court's initial judicial standard for addressing first amendment challenges was the "clear and present danger" doctrine developed during World War I. *See* Schenck v. United States, 249 U.S. 47 (1919) (conviction under Espionage Act of 1917 for encouraging defiance in young people through distribution of leaflets criticizing the draft upheld). For a more thorough discussion of the "clear and present danger" doctrine, see Mendelson, *Clear and Present Danger—From* Schenck *to* Dennis, 52 COLUM. L. REV. 313 (1952). The guarantee of free speech became one of the nation's most protected rights in ensuing years. *See, e.g.*, Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 381-82 (1973); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940). *See generally* J. BARRON & C. DIENES, HANDBOOK OF FREE SPEECH AND FREE PRESS (1979) [hereinafter BARRON & DIENES]; J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 857-1027 (2d ed. 1983) [hereinafter NOWAK, ROTUNDA & YOUNG].

2. 556 F. Supp. 1359 (E.D.N.Y. 1983), *rev'd*, 725 F.2d 892 (2d Cir.), *cert. granted*, 469 U.S. 815 (1984). For an excellent discussion of the Second Circuit's decision, see Comment, SEC v. Lowe: *The Constitutionality of Prohibiting Publication of Investment Newsletters Under the Investment Advisers Act*, 69 MINN. L. REV. 937 (1985).

3. *See generally* Steinberg, *SEC and Other Permanent Injunctions—Standards for Their Imposition, Modification, and Dissolution*, 13 SEC. L. REV. 263 (1981). A single securities law violation is insufficient to obtain an injunction. Most federal courts issue an injunction only if there is a reasonable likelihood that the wrongdoer will commit the violative act again if not enjoined. *Id.* at 268-69 (citing SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 99 (2d Cir. 1978)).

4. 15 U.S.C. §§ 80(b)-1 to -22 (1982) (original version at ch. 686, § 220, 54 Stat. 789 (1940)). For a discussion of the Act, see *infra* notes 15-41 and accompanying text.

5. Lowe v. SEC, 472 U.S. 181, 211 (1985).

6. *Id.* For a discussion of registration requirements under the Investment Advisers Act, see *infra* note 21.

7. *Lowe*, 472 U.S. at 211. For a discussion of the majority's opinion, see *infra* text accompanying notes 70-75.

Justice White, in his concurring opinion, disagreed with the majority's construction of the Act. He found that Lowe was "an investment adviser subject to regulation and sanction under the Act."[8] However, unlike the majority, Justice White addressed whether the SEC's attempt to bar Lowe from publishing an investment newsletter violates the first amendment guarantees of free speech and press. In his judgment, any action preventing unregistered persons from offering impersonal investment advice[9] through publications would violate the first amendment.[10]

Lowe v. SEC[11] demonstrates the tension between the federal government's power via the SEC to license and regulate a profession, and the rights of free speech and press protected by the first amendment.[12] Although a majority of the Court avoided the constitutional question, three concurring Justices sent the SEC "a clear warning . . . that it cannot use the securities laws to restrict publication of financial news."[13] The concurring opinion likely will impact on federal cases in which the SEC has pursued or secured injunctions against publishers of financial newsletters.[14]

This comment will scrutinize the Act's purposes and scope and will discuss the first amendment law pertinent to the regulation of professions, prior restraints and commercial speech. Next it will extensively examine the Supreme Court's decision. This comment also will analyze the Act's general applicability to investment newsletters, and will discuss whether the first amendment effectively prohibits the SEC from barring publication of "Lowe-type" investment newsletters. Finally, it will conclude that

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8. *Lowe*, 472 U.S. at 211. (White, Rehnquist, J.J., and Burger, C.J., concurring). For a discussion of the concurring opinion, see *infra* text accompanying notes 76-94.

9. For a more extensive definition of investment advice, see 1 T. FRANKEL, THE REGULATION OF MONEY MANAGERS, 156-62 (1978); Note, *The Regulation of Investment Advisers*, 14 STAN. L. REV. 827 (1962); *see also* Comment, *Current Problems in Securities Regulation*, 62 MICH. L. REV. 680, 716 (1964) (general discussion on parties qualified to give investment advice).

10. *Lowe*, 472 U.S. at 211; *see infra* notes 85-94 and accompanying text.

11. *Lowe*, 472 U.S. 181.

12. The tension between federal securities law and the first amendment has been summarized as follows:

> The securities laws protect the integrity of securities markets by requiring full disclosure of information about securities issues and by prohibiting the dissemination of false or misleading information about securities. They regulate the flow of information in the marketplace. The first amendment, on the other hand, prohibits the government from unreasonably interfering with people's ability to communicate . . . through speech. It limits the power of the government to regulate the flow of information among individuals.

Miller, *The SEC as Censor: Is Banning an Investment Newsletter a Prior Restraint of the Press?* 11 Preview of U.S. Supreme Court 243 (1985).

13. 17 SEC. REG. & L. REP. (BNA) 1029, 1030 (June 14, 1985) (quoting a comment by the Reporters' Committee for Freedom of the Press).

14. *Id.*

financial newsletters, such as Lowe's, are outside the commercial speech boundaries and therefore entitled to full first amendment protection against prior restraint.

I. BACKGROUND

A. *The Investment Advisers Act of 1940*

1. Introduction

The Investment Advisers Act of 1940 regulates investment advisers.[15] It was the last in a series of federal acts designed to eliminate the securities market abuses that precipitated the 1929 stock market crash and the depression of the 1930's.[16] "[T]he general objective of the [Act] . . . is to protect the public and investors against malpractices by persons paid for advising others about securities."[17] The Act originally served as a census of United States investment advisers.[18] However, amendments to the Act in 1960, 1970, and 1975 substantially strengthened its regulatory and enforcement powers.[19]

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15. 15 U.S.C. §§ 80(b)-1 to -22 (1982). For discussions of the Investment Advisers Act of 1940, see 2 L. LOSS, SECURITIES REGULATION 1392-1417 (2d ed. 1961); 1 T. FRANKEL, *supra* note 9, at 149-83; T. HAZEN, THE LAW OF SECURITIES REGULATION § 18.1-.3 (law. ed 1985); Harroch, *The Applicability of the Investment Advisers Act of 1940 to Financial and Investment Related Publications*, 5 J. CORP. L. 55 (1979); Loomis, *The Securities and Exchange Act of 1934 and the Investment Advisers Act of 1940*, 28 GEO. WASH. L. REV. 214, 244-49 (1959); Lovitch, *The Investment Advisers Act of 1940—Who Is an "Investment Adviser?"*, 24 U. KAN. L. REV. 67 (1975). *See generally* 45 AM. JUR. 2d *Investment Companies and Advisers* §§ 16-18 (1969).

16. SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963). Regulation of investment advisers began with the enactment of the Public Utility Holding Company Act of 1935. 15 U.S.C. § 79 (1982). Section 30 of this Act directed the SEC to conduct a survey of investment trusts and companies. The SEC's report was published in five parts. *See* SEC REPORT ON THE STUDY OF INVESTMENT TRUSTS AND INVESTMENT COMPANIES, H.R. Doc. No. 246, 77th Cong., 1st Sess. (1941); H.R. Doc. No. 136, 77th Cong., 1st Sess. (1941); H.R. Doc. No. 279, 76th Cong., 1st Sess. (1939-1940); H.R. Doc. No. 70, 76th Cong., 1st Sess. (1939); H.R. Doc. No. 707, 75th Cong., 3d Sess. (1938). The SEC also studied investment advisers during this survey, and found that "activities of investment advisers [inherently] present various problems which usually accompany the handling of large liquid funds of the public." H.R. Doc. No. 477, 76th Cong., 2d Sess. 28 (1939). The Investment Advisers Act of 1940 was enacted largely as a result of this study. *See* Lovitch, *supra* note 15, at 67.

Other statutes enacted to regulate the securities industry include the Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1982), the Securities Exchange Act of 1934, 15 U.S.C. §§ 78-78kk (1982), and the Commodity Exchange Act of 1974, 7 U.S.C. §§ 1-24 (1982).

17. Lovitch, *supra* note 15, at 67 (quoting S. REP. No. 1760, 86th Cong., 2d Sess. 1 (1960) (Senate Report on 1960 amendments to Act)).

18. 2 L. Loss, *supra* note 15, at 734.

19. Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97; Investment Company Amendments Act of 1970, Pub. L. No. 91-547, 84 Stat. 1432; Act of September 13, 1960, Pub. L. No. 86-750, 74 Stat. 885 (all amendments codified at 15 U.S.C. §§ 80(b)-1 to 80(b)-22 (1982)). These amendments provided additional grounds for denial of a registration

2. Registration Requirements

Generally, investment advisers doing business through the mails or interstate commerce must register with the SEC.[20] Registration entails an extensive disclosure of pertinent business information.[21] The Act specifies the grounds for denial, revocation, or suspension of a registration.[22]

3. Sanctions

The Act prohibits an unregistered investment adviser or a party whose registration has been denied or revoked from carrying on his profession.[23] The Act forbids registered and unregistered advisers from participating in fraudulent, deceptive or manipulative practices.[24] An adviser violating the Act's provisions may be subject to criminal penalties,[25] an injunction,[26] or

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application, gave the SEC the power to adopt record-keeping rules and regulations defining fraudulent practices, and allowed the SEC to examine investment advisers' records. The amendments also made certain terms of the Act applicable to all registered or unregistered investment advisers, and eliminated exemptions for advisers whose clients were all insurance companies or investment companies. *See* Lovitch, *supra* note 15, at 68. *See generally* Ahart, *Suggested Amendments to the Investment Advisers Act*, 6 SEC. REG. L.J. 226 (1978).

20. 15 U.S.C. § 80(b)-3 (1982).

21. *See id.* § 80(b)-3(c). Upon filing for registration as an investment adviser on Form ADV, the applicant must disclose: name and location of business; names and addresses of partners, officers and directors; educational background; prior and present business affiliations of partners; nature of business as an investment adviser, including the manner of giving advice and rendering reports; a balance sheet and other financial statements certified by a C.P.A.; nature and scope of authority over clients' funds; basis of compensation; whether any disqualification exists that would be grounds for denial, suspension, or revocation of a registration, e.g., a criminal conviction; and a statement of whether a substantial part of the business will consist of acting as an investment adviser. *Id.* Investment advisers are required to file Form ADV-5 annually to update information in the SEC's files. They also must submit a new balance sheet each year. 17 C.F.R. § 275.204-2 (1979). *See generally* T. HAZEN, *supra* note 15, at 631-32.

22. 15 U.S.C. § 80(b)-3(e), (f). The SEC can censure, revoke, or suspend the registration of advisers who have committed crimes or associated with criminals, including false SEC filings, perjury, and crimes involving larceny, felony, embezzlement, extortion, forgery, counterfeiting, mail fraud, fraud, and fraudulent funds or securities misrepresentation. *Id.* § 80(b)-3(e)(2).

23. *Id.* § 80(b)-3(a) (1982).

24. *Id.* § 80(b)-6. In SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963), the Supreme Court suggested that the Act's antifraud provisions should be given broad effect. *Id.* at 194-95. The defendant, a registered investment adviser and investment newsletter publisher, recommended stocks for purchase and sale. On several occasions it purchased stock for its own account, just before recommending a long-term investment to clients. When the market price went up after the recommendation, the defendant sold its shares at a profit, "a practice known as 'scalping.'" *Id.* at 181. After substantial investigation, the SEC moved to enjoin the defendant's practices. The Court held that the defendant must disclose its "scalping" practice to its clients. *Id.* at 196.

25. 15 U.S.C. § 80(b)-17 (conviction of a willful violation of the Act results in a fine up to $10,000, or imprisonment up to five years, or both).

26. *Id.* § 80(b)-9(e) (a permanent or temporary injunction or restraining order will be

a limited private action by investors.[27]

4. The Definition of an "Investment Adviser"

The Act defines an investment adviser as

> any person who, for compensation, engages in the business of advising others, either directly or through publications . . . as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities; but does not include . . . the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation.[28]

This broad definition potentially includes anyone who gives securities advice for compensation, from the highest caliber investment counselor who gives his clients personalized advice to the publisher of a "tipster" sheet.[29]

5. The "Bona Fide Publications" Exclusion

Generally, the SEC has recognized two types of investment advisers: those publishing advisory services and market reports[30] and those offering

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granted when a person has engaged in violative act). For a general discussion on SEC injunctions see Steinberg, *supra* note 3.

27. In TransAmerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979), the Court held the Act does not authorize a private right of action by investors. However, the Court recognized an investor's limited right to cancel investment adviser contracts and to obtain reimbursement for fees paid and expenses incurred under § 80(b)-15. *Lewis*, 444 U.S. at 24 n.14.

28. 15 U.S.C. § 80(b)-2(a)(11) (1982). This section also excludes banks, lawyers, accountants, engineers, or teachers whose adviser services are solely incidental to the practice of their profession; brokers and dealers whose services are solely incidental to the conduct of their business and who receive no special compensation; and any person whose advice relates wholly to securities issued by the United States. *Id.* § 80(b)-2(a)(11)(A) to -2(a)(11)(F). For a discussion of the judicial and SEC definitions of an investment adviser, and the bona fide publications exclusion, see *infra* notes 29-41 and accompanying text.

29. *See* Lowe v. SEC, 472 U.S. 181, 219 (1985) (quoting David Schenker, Chief Counsel to SEC Investment Trust Study and one of the primary drafters of the proposed legislation); *see also Investment Trust and Investment Companies: Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 76th Cong., 3d Sess. 47 (1940).

30. *See, e.g.*, George A. Burnett, SEC No-Action Letter (July 11, 1977) (LEXIS, Fedsec library, Noact file) (stock market trends adviser is an investment adviser); Orient Enterprises, Ltd., SEC No-Action Letter (Jan. 2, 1976) (LEXIS, Fedsec library, Noact file) (Japanese company which published newsletter on Japanese market is an investment adviser).

Publishers who distribute mainly historical or statistical compilations have been considered investment advisers. *See, e.g.*, James H. Ogburn, SEC No-Action Letter (Mar. 18, 1977) (LEXIS, Fedsec library, Noact file) (monthly computerized analysis of financial data or stock is an investment advisory activity); Ruth Slaton Fowler Estate Trust, SEC No-Action Letter (Dec. 10, 1975) (LEXIS, Fedsec library, Noact file) (publisher of a stock market cal-

personal investment advice to individual clients.[31]

The Act's definition of an investment adviser excludes "the publisher of any bona fide newspaper, news magazine, or business or financial publication of general and regular circulation."[32] Consequently, these publishers are insulated from the SEC's regulatory powers. The Court of Appeals for the Second Circuit addressed the imprecise scope of the "bona fide publications" exclusion in *SEC v. Wall Street Transcript Corp.*[33] In that case, the court held that the first amendment was not violated merely by the enforcement of a subpoena which required the publishers of a bi-weekly securities tabloid to disclose certain commercial information.[34] The court determined that the "bona fide publications" exclusion encompassed only "those publications which do not deviate from customary newspaper activities to such an extent that there is a likelihood that the wrongdoing which the Act was designed to prevent has occurred."[35]

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endar containing Dow Jones Industrial Average and Price Earnings Ratio is an investment adviser); Municipal Advisory Council of Texas, SEC No-Action Letter, [1975-1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) 80,410, at 86,086 (Nov. 20, 1975) (statistical reporting service concerning municipal securities is an investment advisory activity).

Newsletters focusing on the general economy or the financial environment may result in a publisher being classified by the SEC as an investment adviser. *See, e.g.*, Sorg Printing Co., SEC No-Action Letter (Jan. 20, 1979) (LEXIS, Fedsec library, Noact file); John Exter, SEC No-Action Letter (May 12, 1976) (LEXIS, Fedsec library, Noact file); Clifford L. Temes, SEC No-Action Letter (Mar. 13, 1976) (LEXIS, Fedsec library, Noact file). For a discussion of the SEC's interpretation, see generally Harroch, *supra* note 15, at 69-70, 73-80.

31. *See* SECURITIES AND EXCHANGE COMMISSION, REPORT ON SPECIAL STUDY OF SECURITIES MARKET, H.R. DOC. NO. 95, 88th Cong., 1st Sess. pt. 1, at 146 (1963) [hereinafter *Special Study*]; *see, e.g.*, PM, Inc., SEC No-Action Letter, [1984-1985 Transfer Binder] Fed. Sec. L. Rep. (CCH) 77,839, at 79,225 (Oct. 4, 1984) (SEC informed the publisher that it would look to the content, advertising and readership to determine if a health industry newsletter was a report concerning securities for Investment Act definitional purposes); Frost & Sullivan, Inc., SEC No-Action Letter, [1974 Transfer Binder] Fed. Sec. L. Rep. (CCH) 82,142 (July 5, 1978) (SEC informed a marketing-research firm selling investment research reports which were prepared by investment-banking firms and brokerage firms, that the marketing-research firm would have to register as an investment adviser); G. Tsai & Co., SEC Ruling, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) 81,686 (May 16, 1978) (SEC informed publisher of construction industry report that, if report was aimed primarily at investors who are customers of a broker-dealer, the publisher would be deemed an investment adviser. SEC examines material contained in the newsletters, the manner in which it is promoted, and the report's audience); Media General Financial Daily [1972-1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) 78,961 (Aug. 16, 1971) (involved proposed daily general business newspaper similar to the Wall Street Journal; SEC refused to give a no-action letter, because it had neither a general nor regular circulation and its purpose was to assist subscribers in making investment decisions). *But see* FINANCE MAGAZINE [1971-1972 Transfer Binder] Fed. Sec. L. Rep. (CCH) 78,536 (Oct. 6, 1971) (SEC came to opposite conclusion with a different magazine).

32. 15 U.S.C. § 80(b)-2(a)(11)(D).

33. 422 F.2d 1371 (2d Cir.), *cert. denied*, 398 U.S. 958 (1970).

34. *Id.* at 1381.

35. *Id.* at 1377 (footnote omitted).

Furthermore, the court stated "whether or not a given publication fits within this exclusion must depend upon the nature of its practice rather than upon the purely formal 'indicia of a newspaper' which it exhibits on its face and in the size and nature of its subscription list."[36] Consequently, the SEC was empowered to continue investigation of the defendants' commercial operations. The investigation concluded upon the SEC's commencement of an action for an injunction compelling defendants' SEC registration and halting publication of the tabloid. Upon review, the district court refused to grant the injunction, finding instead that the Act excluded the *Transcript* as a "bona fide publication."[37] Although the *Transcript* may have been engaged in investment advice distribution, it was not an "investment adviser" since the published material came entirely from reprinted brokerage house reports, and the *Transcript* received no compensation for publication from these brokerage houses.[38]

Alternatively, in *SEC v. Wall Street Publishing Institute, Inc.*,[39] the United States District Court for the District of Columbia held that the publisher of *Stockmarket Magazine* was not excluded from the Act.[40] The magazine received compensation from subscribers, gave advice concerning the value of securities or the desirability of purchasing or selling specific securities, and issued reports and analyses.[41]

B. *History of First Amendment Issues Presented in* Lowe

Three first amendment issues were presented in *Lowe*. First, whether the SEC's action pursuant to the Act was a permissible regulation of a profession, even though such action might incidentally curtail certain types of speech. Second, whether an injunction against further publication of Lowe's newsletters was an unconstitutional prior restraint upon

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36. *Id.* (footnote omitted). Most of the *Wall Street Transcript's* published materials consisted of reprinted reports assessing specific securities. "This . . . at least raises doubt about whether the [publication] is outside the exclusion . . . ." *Id.* at 1377-78. Thus, the SEC was allowed to investigate the *Transcript's* commercial practices without violating the first amendment. *Id.* at 1380. After the investigation, the SEC sought an injunction against the *Transcript* for operating as an unregistered investment adviser. SEC v. Wall St. Transcript Corp., 454 F. Supp. 559 (S.D.N.Y. 1978).

37. *Id.* at 565-67.

38. *Id.* The SEC has reinforced the views expressed in the *Wall Street Transcript*. It has followed a long standing policy of interpreting the "bona fide publications" exclusion as excluding an investment newsletter from regulation only if, based on "content, advertising material, readership, and the relevant factors, a [newsletter] is not primarily a vehicle for distributing investment advice." Applicability of Investment Advisers Act to Certain Publications, 42 Fed. Reg. 2953 n.1 (1977) (to be codified at 17 C.F.R. § 276 (1984)).

39. 591 F. Supp. 1070 (D.D.C. 1984).

40. *Id.* at 1072.

41. *Id.* at 1077-78. Lowe's newsletters are quite similar in content to the *Stockmarket Magazine* in the *Wall Street Publishing* case. Part III of this article will examine whether Lowe's publishing activities fall within the "bona fide publications" exclusion.

fully protected speech. Finally, whether Lowe's newsletters were within the scope of the commercial speech doctrine and, if so, whether the SEC's regulations could survive the reduced level of scrutiny used to analyze commercial speech restrictions.

1. Regulation of a Profession and the First Amendment

State regulation of a profession which incidentally curtails freedom of speech is permissible.[42] States typically regulate professionals through the use of licensing schemes and disbarment procedures.[43] For example, in *Ohralik v. Ohio State Bar Association*,[44] the United States Supreme Court denied relief to a lawyer disbarred because of illegal solicitation of clients. While the attorney's right to solicit clients merited some first amendment protection, the Court nevertheless concluded that "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity."[45]

This decision establishes that where a fiduciary relationship exists between a professional and his client, the state has a compelling interest in protecting the client from fraud. This interest can be upheld by the regulation of commercial transactions within the profession and by the institution of rules and regulations which promote high standards of professional behavior.[46] However, "the principle that the government may restrict entry into professions and vocations through licensing schemes has never been extended to encompass the licensing of speech per se . . . . At some point, a measure is no longer a regulation of a profession but a regulation of speech" which as a prior restraint must survive a heightened level of judicial scrutiny.[47]

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42. *See, e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).

43. Watson v. Maryland, 218 U.S. 173, 177-78 (1910) (doctors); Dent v. West Virginia, 129 U.S. 114, 121-23 (1889) (doctors).

44. 436 U.S. 447 (1978).

45. *Id.* at 456; *see also* Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1967) (regulations on entry into a profession are constitutional if rationally related to applicants' fitness to practice profession). *But see* Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (truthful advertising by lawyer of "routine" legal services is protected by the first amendment). *See generally* Andrews, *Lawyer Advertising and the First Amendment*, 1981 AM. B. FOUND. RESEARCH J. 967.

46. *Ohralik*, 436 U.S. at 460, 465-67.

47. Lowe v. SEC, 472 U.S. 181, 229-30 (1985) (citing Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980)); Thomas v. Collins, 323 U.S. 516 (1945); Jamison v. Texas, 318 U.S. 413 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. State, 308 U.S. 147 (1939); Lovell v. City of Griffin, 303 U.S. 444 (1938); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931).

2. Prior Restraints

This raises the second significant first amendment issue in *Lowe*: would an injunction against further publication of Lowe's newsletters be an unconstitutional prior restraint?[48] In *New York Times Co. v. United States*,[49] the Supreme Court recognized the general rule that a complete prohibition or prior restraint of fully protected speech is presumptively unconstitutional and may be sustained "only in exceptional cases such as when there is a threat of grave and immediate danger to the security of the United States."[50]

3. Commercial Speech

The most significant first amendment issue involved is whether Lowe's newsletters fall within the scope of the commercial speech doctrine.[51] If the newsletters are commercial speech, the SEC's prohibition of further publication will be reviewed under a lesser degree of first amendment scrutiny.[52]

Recently the Court has given first amendment protection to speech

48. A "prior restraint" is a suppression of the right to publish, as opposed to a punishment imposed after publication. *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 556-62 (1976); Organization for a Better Austin v. Keefe, 402 U.S. 415, 418-19 (1971); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 714 (1931). *See generally* BARRON & DIENES, *supra* note 1, at 33-61; Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648 (1955); Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53 (1984); Jeffries, *Rethinking Prior Restraint*, 92 YALE L.J. 409 (1983).

49. 403 U.S. 713 (1971) (per curiam).

50. *Id.* at 740 (held that government could not restrain publication of the Pentagon Papers; threat to national security insufficient to uphold injunction).

51. The first case to extend commercial speech first amendment protection was Bigelow v. Virginia, 421 U.S. 809 (1975) (held government could not prohibit dissemination of abortion advertisement). Prior to *Bigelow*, purely commercial advertising received no first amendment protection. *See* Valentine v. Chrestensen, 316 U.S. 52 (1942) (upheld ordinance prohibiting distribution of advertisements in the streets).

In Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), the Court explicitly stated that the first amendment protected commercial speech. The Court invalidated a Virginia statute that prohibited pharmacists from publishing prescription drug prices. *Id.* at 761-73. The Court stated that society's interest in the free flow of commercial information must be protected to ensure intelligent and informed decisions. *Id.* at 762-65. *See generally* BARRON & DIENES, *supra* note 1, at 155-88; NOWAK, ROTUNDA & YOUNG, *supra* note 1, at 767-79; Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971); Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U. ILL. L. REV. 1080; Note, *Constitutional Protection of Commercial Speech*, 82 COLUM. L. REV. 720 (1982); Note, *The Federal Securities Laws, The First Amendment, and Commercial Speech: A Call for Consistency*, 59 ST. JOHN'S L. REV. 57 (1984) [hereinafter Note, *The Federal Securities Laws*].

52. *See infra* text accompanying note 58.

which "does no more than 'propose a purely commercial transaction.' "[53] Thus far, the Court only has extended the doctrine to give expressions in advertisements first amendment protection.[54] The Court stated its rationale for extending this protection to advertisements in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[55] holding that in a free market economy "the free flow of commercial information" to consumers should not be restricted.[56] Accordingly, a Virginia statute prohibiting pharmacists from publishing prescription drug prices was invalidated.

The test for determining the constitutionality of a regulation which restricts commercial speech was formulated by the Court in *Central Hudson & Electric Corp. v. Public Service Commission of New York*.[57] The four-part test states that:

> For commercial speech to come within [first amendment protection], it at least must concern lawful activity and must not be misleading. Next we must ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[58]

Thus, if Lowe's newsletters constitute commercial speech, then the *Central Hudson* four-part test will determine whether the SEC's prohibition

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53. Bigelow v. Virginia, 421 U.S. 809, 820-21 (1975); *see also* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 73-75 (1983) (striking down federal law prohibiting mailing of unsolicited contraceptive advertisements) upon the grounds that society's interest in free flow of truthful commercial information outweighs state's interest in regulating offensive advertisements). For a discussion of the case, see Note, *Constitutional Law—First Amendment-Protection of Commercial Speech*—Bolger v. Youngs Drug Products Corp., 32 U. KAN. L. REV. 679 (1984); *see also Virginia Pharmacy*, 425 U.S. at 762 (advertisements of drug prices); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973) (held constitutional a city ordinance designed to forbid newspapers from carrying sex-designated advertising for nonexempt job opportunities).

54. *See, e.g., Bolger*, 463 U.S. at 60 (advertisements of contraceptives); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980) (advertisements by utility company for use of electricity); Friedman v. Rogers, 440 U.S. 1 (1979) (optometrist advertising through use of trade names); Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85 (1977) (sign posting by real estate agencies); *Virginia Pharmacy*, 425 U.S. 748 (advertising by pharmacists). In Ad World, Inc. v. Township of Doylestown, 672 F.2d 1136, 1140 (3d Cir.), *cert. denied*, 456 U.S. 975 (1982), the court stated that "[t]he Supreme Court has confined . . . 'commercial speech' to cases involving 'purely commercial advertising' " (citing *Pittsburgh Press*, 413 U.S. at 384).

55. 425 U.S. 748.

56. *Id.* at 762-65.

57. 447 U.S. 557 (1980) (held unconstitutional a state public service commission's regulation banning advertisements promoting use of electricity). The Court found that despite the state's substantial interest in energy conservation, a blanket prohibition on advertising was too drastic to survive commercial speech scrutiny. *Id.* at 568-71. *See generally* Note, *Time, Place or Manner Restrictions on Commercial Speech*, 52 GEO. WASH. L. REV. 127 (1983).

58. *Central Hudson*, 447 U.S. at 566.

on future publication is constitutional under the first amendment. However, as suggested later in this comment, courts should not necessarily conclude that all advisory publications concerning securities are commercial speech.[59]

II. THE SUPREME COURT DECISION: Lowe v. SEC

A. *Statement of the Case*

Christopher Lowe was the president and principal shareholder of the Lowe Management Corporation which was registered as an investment adviser pursuant to the Act.[60] From 1974 to 1981, Lowe was convicted of several theft-related crimes.[61] In 1979, the SEC instituted an administrative action against Lowe and the Lowe Management Corporation, alleging that Lowe had violated the Act's antifraud provisions since he failed to disclose these convictions.[62] The proceedings resulted in the revocation of the corporation's registration, effectively barring Lowe from associating with any investment advisers.[63]

Thereafter, Lowe stopped giving clients personal advice, but continued publication of two investment newsletters, the *Lowe Investment and Financial Letter* and the *Lowe Stock Advisory*.[64] These newsletters assessed general market trends, reviewed investment strategies, and recom-

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59. *See infra* notes 113-22 and accompanying text.

60. Lowe v. SEC, 472 U.S. 181, 183 (1985).

61. *Id.* (footnote omitted). These convictions included misappropriating an investment client's funds, engaging in business as an unregistered investment adviser, tampering with evidence to cover up fraud of an investment client, and stealing from a bank. *Id.*

62. *Id.*

63. *See In re* Lowe Management Corp., [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) 82,873, at 84,321 (May 11, 1981). The SEC has power to revoke the registration of an investment adviser who commits a crime. 15 U.S.C. § 80(b)-3(e)(2)(c) (1982); *see supra* note 22.

64. Lowe published the *Lowe Investment and Financial Letter* and the *Lowe Stock Advisory*. A third publication, the *Lowe Stock Chart Service*, had solicited subscriptions but was never published. SEC v. Lowe, 725 F.2d 892, 895 (2d Cir. 1984). A typical issue of the *Lowe Letter* contained general comments on the securities and bullion markets, offered advice on desirability of various investments, including stocks, treasury bills, and money market funds. It recommended the purchase or sale of specific securities. The number of subscribers varied from 3,000 to 19,000. Subscriptions cost $39 for one year or $79 for three years. Lowe offered a special telephone hotline for investors to call for updated recommendations. *Id.* at 895.

The *Lowe Stock Advisory* had only a few hundred subscribers. Subscriptions cost the same as the *Lowe Letter*. However, the advice was much more specific, with particular emphasis on the purchase, sale or hold recommendations on lower-priced stocks. *Id.*

At trial, subscribers criticized the publication's lack of regularity. The *Lowe Letter* was advertised as semi-monthly, but only eight issues came out after entry of the 1981 order prohibiting Lowe from associating as an investment adviser. *See infra* note 63. However, there was no evidence that any material Lowe published was misleading or fraudulent. *See Lowe*, 472 U.S. at 185-86.

mended buying and selling of specific securities.[65]

In 1982, the SEC sued Lowe and his corporation to enjoin further newsletter publication, alleging that he was acting as an unregistered investment adviser in violation of section 80(b)-3(a) of the Act.[66] The district court denied the SEC's injunction request, concluding that it would amount to an unconstitutional prior restraint on Lowe's right to publish and disseminate impersonal investment advice to the general public.[67]

The United States Court of Appeals for the Second Circuit reversed, holding that the publishers were not investment advisers. Therefore, the court reasoned that no first amendment rights were violated by revocation of Lowe's registration or the prohibition on the publication of the newsletters.[68]

The United States Supreme Court granted certiorari in October 1984, to consider these important issues concerning securities regulation under the Act and the first amendment guarantees of free speech and press.[69]

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65. *Id.* at 185.

66. SEC v. Lowe, 556 F. Supp. 1359 (E.D.N.Y. 1983).

67. *Id.* at 1365. Although the court did not hold the Act unconstitutional, it did distinguish impersonal advice offered through publications and personal advice, finding that an injunction could be issued only against the latter. *Id.* at 1369. The district court's decision may have been the first to accept the argument that SEC injunctions may violate the free speech guarantee. *See* Note, *The Federal Securities Laws*, *supra* note 51, at 68 n.61.

68. SEC v. Lowe, 725 F.2d 892 (2d Cir. 1984). The court rejected Lowe's constitutional claims, finding instead that the SEC acted pursuant to a legitimate power to regulate a professional commercial activity when it denied Lowe's registration application. *Id.* at 901. The court characterized the newsletters as "potentially deceptive commercial speech" subject to legitimate regulation under the Act. *Id.* Finally, the court noted that Lowe only was prevented from selling personal advice concerning the value of specific securities or the advisability of their purchase or sale, not from publishing a newspaper of general interest, "or from publishing recommendations in someone else's bona fide newspaper as an employer, editor, or writer." *Id.* at 902. The dissent agreed with the district court, ruling that the newsletters were outside the rubric of commercial speech, and therefore were entitled to full first amendment protection. *Id.* at 906. (Brieant, J., dissenting). For a discussion of permissible regulation of a profession under the first amendment, see *supra* note 45; for a discussion on commercial speech, see *supra* notes 51-58 and accompanying text; for a discussion of prior restraints on fully protected speech, see *supra* note 48.

Following its appellate victory in *Lowe*, the SEC instituted actions against several investment newsletter publishers. *See, e.g.*, SEC v. Suter, 732 F.2d 1294 (7th Cir. 1984) (held the first amendment was no defense to an action for an injunction prohibiting publication of newsletters); *In re* Weinberg, SEC Investment Advisers Act of 1940, Release No. 918 (July 31, 1984) (Lexis, Fedsec library, Cases file) (SEC prohibited an unregistered adviser who published a newsletter from associating as an investment adviser); *see supra* notes 39-41 and accompanying text for a discussion of *Wall Street Publishing.*

69. *See Lowe*, 472 U.S. at 188-89.

B. *The Supreme Court Decision*

1. Majority Opinion

In reversing the Second Circuit decision, a majority of the Court avoided the first amendment issues presented by *Lowe*.[70] Rather, the Court found the Act excluded Lowe's newsletters under the "bona fide publications" exception.[71] The Court reasoned that because the newsletters' contents were entirely disinterested and were offered to the public on a regular basis, they fell within the plain language of the exclusion.[72] Consequently, Lowe was not an investment adviser and therefore was not subject to the SEC's regulations or sanctions.[73] The majority concluded that Congress intended to regulate only those advisers offering clients personal advice.[74] By crediting Congress with awareness of the first amendment issues involved when the Act was enacted, the majority inferred that Congress could not have intended to regulate speech through licensing of nonpersonalized investment advice contained in newsletters.[75]

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70. Lowe v. SEC, 472 U.S. 181, 211 (1985). The Court adhered to the principal of "constitutional avoidance," which states that:

> A statute must be construed, *if fairly possible*, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score . . . [but if] the intention of the Congress is revealed too clearly, [you cannot ignore] it because of mere misgivings as to power . . . . The *problem must be faced and answered.*

George Moore Ice Cream Co. v. Rose, 289 U.S. 373, 379 (1933) (emphasis added); *see also* Crowell v. Benson, 285 U.S. 22, 62 (1932).

71. *Lowe*, 472 U.S. at 211. The court stated "[t]he Act was designed to apply to those persons . . . who provide personalized advice attuned to a client's concerns . . . . The mere fact that a publication [gives] advice . . . about specific securities does not give it the personalized character [of an investment adviser]." *Id.* at 207-08. *But see* SEC v. Myers, 285 F. Supp. 743 (D.C. Md. 1968) (held publisher of newsletter was investment adviser where publication gave advice on specific securities and offered reports on securities business); Harroch, *supra* note 15, at 76 (clearest example of when the SEC staff would classify publication as giving investment advice is upon the recommendations of particular securities).

72. *Lowe*, 472 U.S. at 206. The Court concluded a publication would be "bonafide" if it contained disinterested information and was offered to the general public on a regular schedule. *Id.* The Court's conclusion that Lowe's newsletters were regular publications may be erroneous. *See id.* at 185 (testimony at trial indicated not regular).

73. *Id.* at 210-11. The majority held that "[a]s long as [Lowe's] communications [to] . . . subscribers remain entirely impersonal and do not develop into the kind of fiduciary, person-to-person relationships that were [described by] the legislative history of the Act . . . the publications [will be] . . . presumptively, within the exclusion." *Id.* at 210.

74. *Id.* at 204; *see supra* note 71.

75. *Lowe*, 472 U.S. at 204. Justice White criticized the majority's conclusion, stating that Congress should not be credited with "the ability to predict [the Court's] constitutional holdings 45 years in advance of [the Court's] declining to reach them." *Id.* at 227. However, the majority stated that Congress must have been aware of the holding in Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931) (established right of liberty of speech and press to be free of prior restraints), and Lovell v. City of Griffin, 303 U.S. 444 (1938) (struck down ordinance prohibiting distribution of literature). *Lowe*, 472 U.S. at 204-05. The Court concluded the mention of *Lovell* in the legislative history "supports a broad reading of the

2. Concurring Opinion

Justice White vigorously disagreed with the majority's "improvident construction" of the statute in his concurring opinion.[76] He found that Lowe was clearly "an investment adviser subject to regulation and sanction under the Act."[77] However, he concurred with the majority's result because he felt that "to prevent [Lowe] from publishing at all" would violate the first amendment.[78]

Further, he agreed "that constitutional adjudication should be avoided where it is fairly possible to do so without negating the intent of Congress."[79] Nevertheless, he found that to exclude "publishers of investment advisory newsletters from the definition of 'investment adviser' [would] not only [run] counter to the [Act's] language,[80] legislative history,[81] and administrative construction,"[82] but also would prevent legitimate statutory application of the statute to publishers of investment advisory newsletters to protect the public against potentially serious types of fraud.[83]

Unlike the majority, Justice White addressed whether the first amendment permits the federal government to prohibit Lowe's publication of investment advice newsletters circulated to the general public.[84] He rejected the government's argument that the SEC's use of a registration scheme is permissible regulation of entry into a profession[85] and instead

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exclusion for publishers." *Id.* at 205.

76. Lowe v. SEC, 472 U.S. 181, 211 (1985).

77. *Id.* Justice White found that Lowe undeniably engaged in the business of giving advice as to the desirability of purchasing or selling specific securities. *Id.* at 214; *see infra* notes 80-83 and accompanying text.

78. *Id.* at 211.

79. *Id.* at 212; *see, e.g.*, United States v. Clark, 445 U.S. 23, 31 (1980) (construction of statute fair and reasonable in light of language, purpose, history of enactment); Yu Cong Eng v. Trinidad, 271 U.S. 500, 518 (1926) ("amendment may not be substituted for construction, and . . . a court may not exercise legislative [role] to save the law [from conflict with the Constitution]"); *see also supra* note 70.

80. *Lowe*, 472 U.S. at 224. Effect should be given to all statutory language; since the definition of an investment adviser specifically includes those who give investment advice "through publications" and who "issue . . . analyses or reports concerning securities," Lowe's activities are covered. *Id. See generally* Harroch, *supra* note 15, at 80.

81. *Lowe*, 472 U.S. at 224; *see* S. REP. No. 184, 91st Cong., 1st Sess. 43, *reprinted in* 1970 U.S. CODE CONG. AND AD. NEWS 4897, 4939 (stating the Act regulates "those who receive compensation for advising others [about securities] *or who are in the business of issuing . . . reports concerning securities*") (emphasis added); *see also Special Study*, *supra* note 31, at 146 (publishers of periodic market reports are investment advisers).

82. *Lowe*, 472 U.S. at 224. For a discussion on the SEC's interpretation of the applicability of the Act to investment newsletters, see *supra* note 31. *See generally* Lovitch, *supra* note 15, at 79-104.

83. *Lowe*, 472 U.S. at 224; *see infra* note 109 and accompanying text.

84. *Lowe*, 472 U.S. at 228.

85. For a discussion on permissible regulation of entry into a profession, see *supra* notes 42-47 and accompanying text.

reasoned that the Act's provisions preventing unregistered persons from giving advice have more than a merely incidental effect on speech.[86] He found that such provisions impermissibly restrict speech per se and therefore are direct restraints on the constitutional guarantees of free speech and press.[87] Consequently, these regulations would be subject to strict scrutiny under the first amendment.[88]

Justice White did not decide whether the newsletters contained fully protected speech or commercial speech. Regardless of classification, he was firmly persuaded that the SEC's "flat prohibition or prior restraint on [legitimate as well as fraudulent advice], as applied to fully protected speech, [was] presumptively invalid and [could] be sustained only under the most extraordinary circumstances."[89] The government did not demonstrate any extraordinary circumstances warranting a decision to uphold the ban.[90] Alternatively, the SEC's restrictions on Lowe's right to publish could not survive even if scrutinized under commercial speech standards, since the restrictions were more extensive than necessary to meet the government's interest in protecting investors from unscrupulous advisers.[91] Justice White also found that Lowe's past misconduct could

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86. *Lowe*, 472 U.S. at 228-33. Justice White reasoned:

> Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of [his client] . . . government regulation ceases to function as a legitimate regulation of professional practice with only incidental impact on speech; *it becomes regulation of speaking or publishing as such*, subject to the First Amendment's command that 'Congress shall make no law . . . abridging the freedom of speech, or of the press.'

Id. at 232 (emphasis added); *see also* Bates v. State Bar of Arizona, 433 U.S. 350 (1977). *But see* Schneider v. State, 308 U.S. 147 (1939) (holding municipality validly can forbid individuals from passing leaflets out in the middle of the street).

87. *Lowe*, 472 U.S. at 233 (the Act prevented unregistered persons from publishing information for the public; it did not merely regulate entry in to the profession).

88. *Id.*

89. *Id.* at 234. For a discussion on the resolution of whether the newsletters should be classified as commercial speech, see *infra* text accompanying notes 113-22. *See generally* Note, *The Federal Securities Laws*, *supra* note 51.

90. *Lowe*, 472 U.S. at 234 (citing New York Times Co. v. United States, 403 U.S. 713 (1971) (finding a prior restraint invalid even where publication of Pentagon Papers would endanger national security)); *see also* Schneider v. State, 308 U.S. 147 (1939); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931).

91. *Lowe*, 472 U.S. at 235. Justice White stated, "It cannot be plausibly maintained that investment advice from a person whose background indicates that he is unreliable is *inherently* misleading or deceptive, nor am I convinced that less drastic remedies than outright suppression . . . are not available to achieve the government's . . . purpose." *Id. But see* SEC v. Suter, 732 F.2d 1294, 1299 (7th Cir. 1984) (court held false and misleading investment newsletters were commercial speech; newsletters were unprotected under the test established in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980) (because they were misleading); Savage v. Commodity Futures Trading Comm'n, 548 F.2d 192, 196 (7th Cir. 1977) (*Commodity Exchange Bulletin* treated as commercial speech). The *Suter* injunction was no broader than necessary because the publisher's deceptive newsletters had to be stopped to protect investors. *Suter*, 732 F.2d at 1299. However, in *Lowe* the

not restrict him from publishing in the future.[92] He supported this contention with the Court's "commercial speech cases [which] have consistently rejected the [idea] that . . . drastic prohibitions on speech, [such as flat-out bans], may be justified by a *mere possibility* that [future] speech will be fraudulent."[93]

Finally, Justice White emphasized the narrow scope of his decision, to "hold only that the Act may not constitutionally be applied to prevent [unregistered] persons . . . (including [those] whose registration [was] denied . . . revoked [or suspended]) from offering impersonal investment advice through publications" such as Lowe's newsletters.[94]

III. Analysis of *Lowe* Decision: Improper Constitutional Avoidance

A. *Applicability of Investment Advisers Act of 1940 to Investment Newsletters*

Justice White's definition of an investment adviser is preferable to the majority's definition. His view is supported by the SEC's administrative interpretation of the Act, the Act's plain language, legislative history and purpose. Arguably, the majority overextended the constitutional avoidance doctrine[95] when they interpreted the Act to exclude Lowe from the definition of an investment adviser.

1. SEC Administrative Interpretation of the Act

The SEC's consistent application of the Act to publishers of investment newsletters, such as the type published by Lowe, supports the conclusion that Lowe is an investment adviser under the Act.[96] The SEC routinely has interpreted "investment adviser" to include parties whose activities are limited to publication of investment advisory newsletters.[97] The "bona fide publications" exclusion has been construed to exclude a newsletter publisher from federal regulation under the Act "only where, based on the content, advertising material, [and] readership, . . . [the] publica-

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newsletters were not misleading, and thus a complete ban would be too restrictive to be upheld under *Central Hudson*.

92. *Lowe*, 472 U.S. at 235.

93. *Id.* (emphasis added) (citing Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985)); *In re* R.M.J., 455 U.S. 191, 203 (1982); Bates v. State Bar of Arizona, 433 U.S. 350 (1977). In *Zauderer*, a lawyer's advertisements containing statements regarding the legal rights of persons injured by the Dalkon Shield constituted commercial speech. *Zauderer*, 471 U.S. at 638.

94. *Lowe*, 472 U.S. at 236.

95. *See supra note* 70.

96. *See supra* note 37. *See generally* Harroch, *supra* note 15, at 73-80. An agency's construction of a statute should be given substantial weight. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

97. *See supra* notes 30, 37.

tion is not primarily a vehicle for distributing investment advice [to individuals]."[98] Generally, the courts have followed this rationale.[99]

Lowe's investment newsletters not only contained general comments about the securities and bullion markets but also made specific recommendations for purchasing, selling or holding stocks.[100] Additionally, the newsletter offered subscribers a telephone hotline to obtain current financial information.[101] Although Lowe did not offer investment advice "specifically tailored to [his individual subscribers'] needs, . . . he undeniably engaged 'in the business of advising others . . . through publications . . . as to the value of securities' and he issued . . . analyses or reports concerning securities."[102] Therefore, the court should have found Lowe within the definition of an "investment adviser" under section 80(b)-2(11)(D) of the Act.

2. Plain Language of the Act

The majority's broad interpretation of "investment adviser" disregards language in the Act specifying that an "investment adviser" includes one who gives investment advice through publications or who issues reports on securities.[103] If Congress had intended for all bona fide publications to be excluded from regulation under the Act, it would be difficult to imagine why this language including publishers would have been written into the definition of an investment adviser at all.[104]

3. Legislative History of the Act

In the legislative history, representatives of the SEC and investment advisers sought application of the Act to investment newsletter publishers.[105] The Senate Report did not emphatically state that a personal relationship between an adviser and a client would be a necessary prerequi-

98. Lowe v. SEC, 472 U.S. 181, 216 (1985).

99. *See supra* notes 33-41 and accompanying text.

100. *Lowe*, 472 U.S. at 185.

101. *Id.*

102. *Id.* at 214.

103. 15 U.S.C. § 80b-2(a)(11) (1982). The definition specifically states that individuals rendering investment advice through publications are within the Act's definition. Cases have interpreted this to include publishers of investment newsletters. *See, e.g.*, SEC v. Suter, 732 F.2d 1294 (7th Cir. 1984).

104. Lowe v. SEC, 472 U.S. 181, 218 (1985) (White, J., concurring). Justice White pointed out that "if the [bona fide publications] exception is expanded to [encompass] more than just publications that are not primarily vehicles for distributing investment advice, it [would be] difficult to imagine any workable definition that does not sweep in all publications that are not personally tailored to individual clients." *Id.* at 216. However, the court adopted this type of expansive definition. *Id.* at 217 n.3.

105. *See supra* note 29. *See generally* Butowsky, *Counselling the Investment Adviser*, 1975 PRACTISING L. INST. 19-27.

site for classification as an investment adviser under the Act.[106] The Act's definition of an investment adviser includes those who give advice through publications.[107] This expressly discounts the majority's assertion that Congress intended the Act to apply only to those advisers who give personal investment advice.[108]

4. Purpose of the Act

The purpose of the Act is to prevent fraud. Thus, a publication such as Lowe's, which is primarily a vehicle for offering investment advice, is clearly a target for regulation. A newsletter which recommends specific securities and investments can be abused to perpetrate fraud on individuals more so than a general publication which does not recommend specific securities. Accordingly, the majority's exclusion of Lowe from regulation under the Act will impede prevention of fraudulent acts by newsletter publishers.[109] Lowe's newsletters do not entail "customary newspaper activities."[110] Rather, their content and readership deal with the very activities the Act was designed to regulate, such as recommending the buying and selling of specific securities.

B. *Determining the Proper Level of First Amendment Protection for Investment Newsletters*

The SEC's injunction against further publication of Lowe's newsletters is not a legitimate regulation of a profession. The theory of professional licensing should not be expanded to regulate the press.[111] Lowe's criminal conviction indeed may be condemnable; however, past impropriety has not been a legitimate reason for denial of a license that results in free speech curtailment.[112]

Furthermore, the Court has not expanded the commercial speech doctrine to include this communication medium. Although the Court has not clearly defined commercial speech, it appears limited to advertisements

106. *See* S. REP. No. 1775, 76th Cong., 3d Sess. 22 (1940).

107. 15 U.S.C. § 80(b)-2(a)(11) (1982).

108. *See* Lowe v. SEC, 472 U.S. 181, 221 n.7 (1985).

109. *Id.* at 225 n.8 (1985). If the "bona fide publications" exclusion is broadly construed, the publishers of investment newsletters will be beyond the reach of tools used by SEC to uncover and prevent fraudulent activities, such as "scalping." For a definition of scalping, see *supra* note 24.

110. *See supra* notes 33-38 and accompanying text.

111. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-31, at 724 (1978) (discussing historical opposition to press licensing systems).

112. Courts have held past misconduct is not a basis for denial or revocation of license. *See* Cornflower Entertainment, Inc. v. Salt Lake City Corp., 485 F. Supp. 777, 785 (D. Utah 1980) (citing 23 additional cases).

that "propose a commercial transaction."[113] Lowe's newsletters, however, are not advertisements and they do not propose a commercial transaction. Rather, they "contain fact and opinion not about Lowe's *own* services, or products, but about services and products *sold by others*."[114] Accordingly, since Lowe had no economic interest in the material he reported on, his newsletters should not have been defined as commercial speech.

While the Court may have intended to encompass more than just advertisements within the commercial speech doctrine, it certainly did not desire to extend the doctrine into an area of private economic decision-making.[115] This is especially true since the free flow of information in this area is of great importance to investors. "At the very least, it is suggested 'commercial speech' should not include opinions about transactions to which a speaker is not a potential party."[116] Even if Lowe's newletters were characterized as commercial speech, an injunction against Lowe would fail the four-part *Central Hudson* test used by the Court to determine the constitutionality of restrictions on commercial speech.[117]

Lowe's newsletters merit first amendment protection pursuant to the first prong of the test because they contain authorized (lawful) material and are not misleading.[118] "Next we must ask whether the asserted government interest is substantial . . . ."[119] The government clearly has a legitimate interest in regulating investment advisers to prevent unscrupulous advisers from perpetrating frauds upon investors. The court then must determine whether the regulation directly advances the government's interest. Finally, the regulation must not be more extensive than

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113. *See supra* notes 51-57. For an excellent law review article on the definition of commercial speech, see Comment, *Commercial Speech: A Proposed Definition*, 27 How. L.J. 1015 (1984).

114. Comment, *supra* note 2, at 952 (emphasis added).

115. *See* Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 771 n.24 (1976). The Court suggested that commercial speech may be verified more easily by its disseminator than, for example, news reporting or political commentary because the advertiser ordinarily disseminates a product or service that he provides and presumably knows more about than anyone else. *Id.* The Court also said that "[c]ommercial speech may be more durable than other kinds, and since advertising is the sine qua non of . . . profits, there is little likelihood of its being chilled by proper regulation." *Id.* Conversely, it would appear that the great amount of opinion in investment newsletters would make them less verifiable by the publisher and more likely to be "chilled" by regulation.

116. Note, *The Federal Securities Laws*, *supra* note 51, at 75.

117. *See supra* note 58 and accompanying text. A flat-out ban on publication would be too drastic. Lowe had not actually published fraudulent newsletters. There was merely a risk he might do so in the future. For cases holding that drastic prohibition on speech may not be justified by a mere possibility the speech will be fraudulent, see *In re* R.M.J., 455 U.S. 191, 203 (1982), and Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

118. *See* Lowe v. SEC, 472 U.S. 181, 185-86 (1985).

119. *Central Hudson Gas & Elec. Corp.*, 447 U.S. 557, 566 (1980).

necessary to serve that interest.[120] In *Lowe*, the SEC injunction totally bars Lowe from publishing his newsletters. This form of regulation is more extensive than necessary to accomplish the government's interest. For example, the SEC could use the Act's antifraud provisions to punish a fraudulent act *after it has occurred.*[121] Accordingly, regulations imposing a complete ban on the publication of legitimate newsletters, such as Lowe's, cannot survive even the reduced level of first amendment scrutiny applied to review restrictions on commercial speech.[122]

Lowe's newsletters should be entitled to full protection under the first amendment. Therefore, an injunction against further publication of the newsletters clearly places a prior restraint on Lowe's right to disseminate truthful information and commentary.[123] An injunction which prohibits *all* communication, lawful as well as unlawful, is an impermissible prior restraint tolerable only under the most severe conditions.[124] If Lowe publishes fraudulent information, the SEC should be entitled to sanction him. However, the first amendment theory of prior restraints does not allow the SEC to prevent him from offering truthful investment advice to the public in advance of its dissemination.[125]

IV. Conclusion

Lowe v. SEC is important for the future of federal regulation under the Investment Advisers Act of 1940, as well as for determining the proper first amendment protection afforded investment newsletters. Unfortunately, the majority's broad interpretation of the statute, which excludes publishers of investment newsletters such as Lowe from regulation, significantly lessens the SEC's power to monitor and prevent fraudulent acts by such publishers. However, in the final analysis, the Court's result will benefit publishers of newsletters, as well as the investing public. Since

120. *Id.*

121. *See* SEC v. Blavin, 557 F. Supp. 1304 (E.D. Mich. 1983), *aff'd*, 760 F.2d 706 (6th Cir. 1985) (mail fraud statute of Act successfully used by SEC against newsletter publisher). Justice White suggested that *Blavin* would not be applicable to Lowe's situation because to apply the mail fraud statute in order to require disclosure, a fiduciary duty must exist between the publisher and his client. Consequently, the majority's ruling excluding publishers such as Lowe from the purview of the Act deletes the necessary fiduciary requirement. *Lowe*, 472 U.S. at 225 n.8.

122. *See supra* text accompanying note 58.

123. The Supreme Court has warned that it "strikes at the very heart" of the first amendment to require a license from the government as a condition of exercising freedom of speech or press. *See* Schneider v. State, 308 U.S. 147, 164 (1939). The Court held: "To require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of constitutional guarantees." *Id.* Thus, freedom of speech cannot be conditioned upon obtaining a license, even if the government claims it has an interest in preventing fraud. *See id.*

124. *See supra* text accompanying notes 49-50.

125. *See supra* note 48 and accompanying text.

Lowe was not required to register as an investment adviser, the Court effectively prevented the SEC from supressing Lowe's right to disseminate valuable information to the public. Thus, it upheld the first amendment right to free speech without actually addressing the issue.

This comment has suggested that publishers of investment newsletters should be considered investment advisers under the Investment Advisers Act of 1940. This construction would be consistent with the administrative interpretation of the Act by the SEC, the Act's plain language, its legislative history, and its purpose. This comment also has suggested that investment newsletters contain fully protected speech immune from prior restraint. The SEC should heed the warning contained in *Lowe*, and limit encroachment on the fundamental rights of free speech and press. Courts may rely on Justice White's concurring opinion in *Lowe* to strike down federal securities regulations which impose impermissible restrictions on free speech.[126]

Stacy P. Thompson

126. Justice White's guidelines also may be used to analyze first amendment implications of restrictions in speech in other areas of governmental regulation. For example, in Joslin v. Secretary of Dept. of Treasury, 616 F. Supp. 1023 (D. Utah 1985), the district court adopted the first amendment guidelines established by Justice White in *Lowe*. *Id.* at 1026-27. These guidelines were used to determine the line between legitimate regulation of a profession and impermissible prohibitions on speech. *Id.*

In *Joslin*, an attorney brought an action challenging the constitutionality of IRS regulations which governed standards of practice of attorneys and others who gave opinions on tax shelter offerings. The district court held that the IRS regulations were permissible regulations of the legal profession. *Id.* The court utilized Justice White's guidelines and found "a personal nexus exist[ed] between the attorney and the client when his professional judgment [was] sought." *Id.* at 1027. Thus, because there was a fiduciary relationship involved the state could permissibly regulate the profession in order to protect clients from fraud.

Although this case does not deal with federal securities regulations, it does indicate that courts may look to the guidelines established by Justice White in *Lowe* to determine if government regulations impermissibly restrict free speech.

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