2002

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LAWYER ADVERTISING AND THE PHILOSOPHICAL ORIGINS OF THE COMMERCIAL SPEECH DOCTRINE

Ronald D. Rotunda*

I. INTRODUCTION

The topic of lawyers advertising for clients seems prosaic enough, but it is really a subset of a much larger, more theoretical question. What Americans think about the Constitutional right of lawyers to advertise and market their services both reflects and molds what we think about the right to be left alone. In 1928, Justice Brandeis, in his famous dissent in *Olmstead v. United States*, wrote that our Constitution "conferring, as against the Government, the right to be left alone—the most comprehensive of rights and the right most valued by civilized men." Justice Brandeis did not speak in a vacuum; he was building on the philosophical arguments that originated in the debates between Aristotle and Socrates.

Brandeis first turned to this topic nearly forty years earlier, in his seminal article on the subject. The passage of time gave him no solace but only reinforced his dread that the future would bring new assaults on the right to be left alone. His contemporaries shared his fears. Only a few years after Brandeis’ death, George Orwell published his own chilling vision of the future, *1984*.

* The Albert E. Jenner, Jr. Professor of Law, The University of Illinois College of Law. The author is indebted to Professor Thomas Ulen of the University of Illinois and Roger Pilon and Bob Levy, both of the Cato Institute, for their helpful comments.

2. *Id.* at 478 (Brandeis, J., dissenting).
It was no coincidence that Brandeis, the proponent of the right to be left alone, was also a strong proponent of free speech. The right to have the government leave its citizens alone implies that it should not be able to influence or manipulate what its citizens do or think by denying them access to truthful information. For Brandeis, unless there was an emergency requiring immediate action—in other words, if there was time to avert any perceived evil by the processes of education—the only permissible government remedy was “more speech, not enforced silence.”

To give the government the power to prevent us from hearing the truth “for our own good” is to treat adults like children.

A half-century later, Justice William O. Douglas, like Brandeis before him, connected the right to be left alone with the right of free speech. Justice Douglas, in *Schneider v. Smith,* held that “[t]he purpose of the Constitution and Bill of Rights, unlike more recent models promoting a welfare state, was to take the government off the backs of people.”

Four years later, Justice Douglas elaborated that:

One’s hair style, like one’s taste for food, or one’s liking for certain kinds of music, art, reading, recreation, is certainly fundamental in our constitutional scheme—a scheme designed to keep government off the backs of people. That is not to say that the police power of the state is powerless to deal with known evils. An epidemic of lice might conceivably authorize a shearing of locks. Other like crises might be imagined.

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Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.

*Id.* (emphasis added) (footnote omitted).


7. *Id.* at 25.

Others believe that the right of free speech should prohibit the government from restricting truthful speech (e.g., advertising) in order to influence or modify an individual's right to decide for herself whether to use a lawful product or service. But this view is hardly an axiom of modern government. Justice Brandeis’ preferred remedy—“more speech, not enforced silence”—is the subject of much controversy. Hence the question: To what extent should the government be able to restrict truthful advertising in order to manipulate behavior, or does our right to be left alone limit such power?

For example, if the government wants to encourage people to use less electricity, it might decide on an educational campaign against wasteful energy use. Or, the government might require products to disclose how fuel-efficient they are. Or it might increase the tax on electricity, thus lowering demand because that is the result of a price increase.

None of these tools restrict truthful speech. Some of the tools have budgetary consequences (like raising taxes), which is why the government may not prefer them. When the government uses any of these tools, what it does is out in the open, for all to see so that they may evaluate the costs and benefits. But, as Justice Blackmun pointed out, when the legislature restricts speech, “the State’s policy choices are insulated from the visibility and scrutiny that direct regulation would entail and the conduct of citi-

9. See, e.g., MARTIN H. REDISH, MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY (2001); William Van Alstyne, Quo Vadis, Posadas?, 25 N. KY. L. REV. 505 (1998); Alan Howard, The Constitutionality of Deceptive Speech Regulations: Replacing the Commercial Speech Doctrine with a Tort-Based Relations Framework, 41 CASE W. RES. L. REV. 1093 (1991) (arguing that the Commercial Speech doctrine should be abandoned because it justifies certain governmental restrictions that cut against the policy of content neutrality that lies at the heart of the First Amendment); Alex Kozinski & Stuart Banner, Who's Afraid of Commercial Speech?, 76 VA. L. REV. 627 (1990); Rodney A. Smolla, Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech, 71 TEx. L. Rev. 777, 780–81 (1993) (“In classic First Amendment terms . . . the one thing the government may not do is regulate speech because it ‘sells’ a lifestyle, fantasy, ethos, identity, or attitude that happens to be regarded by most as socially corrosive.”).
12. See id. at 565 (noting that the Court, in a previous case, “did not foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required in promotional materials.” (quoting Bates v. State Bar of Ariz., 433 U.S. 350, 384 (1977))).
zens is molded by the information that government chooses to give them.”13 Thus, Justice Blackmun argued that it was wrong for the state to engage in “a covert attempt . . . to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice.”14

Given the tools that the government already has at its disposal, should it also be empowered to prohibit truthful advertising that promotes the use of electricity?15 Modern government has an arsenal of weapons at its disposal to control, regulate, or modify the behavior of its citizens. May the government add to this arsenal a new weapon—the power to restrict truthful speech that promotes the use of lawful goods and services?16

If the First Amendment allows the government to restrict truthful speech that may affect an individual’s right to decide whether to use more electricity, the government should not be expected to limit the application of this new power to electrical energy and voltage alone. The government would have a similar power to restrict truthful advertising of other legally available goods and services, such as advertising affecting an individual’s right to decide whether to hire a lawyer or which lawyer to hire; or advertising promoting a risky activity, such as high diving or motorcycling; or advertising that promotes legally available but unhealthy products, such as high-calorie foods, drinks containing a lot of sugar or caffeine, or beer containing more alcohol than regular beer.17

13. Id. at 574–75 (Blackmun, J., concurring) (citing Ronald D. Rotunda, The Commercial Speech Doctrine in the Supreme Court, 1976 U. ILL. L.F. 1080, 1080–83 (1976)).
14. Id.
15. The decision in Central Hudson invalidated such a state restriction on First Amendment grounds. In his concurring opinion, Justice Blackmun wrote:
   I seriously doubt whether suppression of information concerning the availability and price of a legally offered product is ever a permissible way for the State to “dampen” demand for or use of the product. Even though “commercial” speech is involved, such a regulatory measure strikes at the heart of the First Amendment.
   Id. at 574 (Blackmun, J., concurring). Note that the majority in Central Hudson did not adopt this blanket principle.
16. See Paul D. Carrington, Our Imperial First Amendment, 34 U. RICH. L. REV. 1167, 1188 (2001) (arguing that the Supreme Court’s commercial advertising cases are “mis-guided”).
17. See, e.g., Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (involving a federal law that prohibited beer labels—but not wine or hard liquor labels—from truthfully displaying
Before we turn to these questions, we should realize that, in seeking their answers, almost all of us are prisoners of our culture. It is difficult for us to think outside of the box. What today we regard as normal, our predecessors regarded as revolutionary. All ideas seem to follow a path that starts with a road sign that says, "This is obviously wrong," and ends with another sign that says, "This is obviously correct." If we see farther than our ancestors it is not because we are smarter than they were but because we live in a different era; we have had more time to think about the problem and to learn from their mistakes.

For example, today we would like to think that if we had been judges or political leaders during the 1950s, we would have resisted efforts to prosecute people because of their political speech, speech now protected by the First Amendment. But would most of us really be any different if we lived during that time? We would like to think so, but we cannot really know. In 1951, no less a Justice than Felix Frankfurter piously criticized *Gitlow v. New York* as insufficiently protective of free speech, while simultaneously supporting the similar restriction on free speech upheld in *Dennis v. United States*.

In *Gitlow*, the Supreme Court had affirmed the felony conviction of defendants who had published a radical manifesto urging "mass political strikes and 'revolutionary mass action' for the purpose of conquering and destroying the parliamentary state." In Frankfurter's concurring opinion in *Dennis*, he concluded that the ascendancy of the Communist threat in the 1950s was important enough to justify restrictions on free speech, while the earlier restrictions on free speech in the 1920s were not. "In contrast" to *Gitlow*, Frankfurter stated, "there is ample justification

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18. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam) (striking down a state statute prohibiting the advocacy of crime or violence as a means of accomplishing industrial or political reform).
22. *Dennis*, 341 U.S. at 541–42 (Frankfurter, J., concurring). Justice Frankfurter stated that the appropriate test to apply to political speech was not the "clear and present danger" test, but rather a "candid and informed weighing of the competing interests," and that this balancing test should be performed by Congress, not the judiciary. *Id.* at 525 (Frankfurter, J., concurring).
for a legislative judgment that the conspiracy now before us is a substantial threat to national order and security.\footnote{Id. at 524. Justice Frankfurter elaborated that [i]t requires excessive tolerance of the legislative judgment to suppose that the \textit{Gitlow} publication in the circumstances could justify serious concern. In contrast, there is ample justification for a legislative judgment that the conspiracy now before us is a substantial threat to national order and security. If the Smith Act is justified at all, it is justified precisely because it may serve to prohibit the type of conspiracy for which these defendants were convicted.}{Id. at 541–42 (Frankfurter, J., concurring).}

The previous generation believed that the threat in \textit{Gitlow} was serious enough, just as Frankfurter's generation believed that the Communist threat was serious enough. In the name of free speech, every generation thinks that the villains it faces and the dragons it must slay are real and the threats are substantial, even if the prior generation overreacted to the same villains and dragons. The genuine heroes were people like Justices Brandeis or Holmes who dissented in \textit{Gitlow}.\footnote{\textit{Gitlow}, 268 U.S. at 672 (Brandeis & Holmes, JJ., dissenting).}{24} They escaped the prison of their culture, and they saw much further than their contemporaries. Like Columbus, they saw the horizon and realized that it did not mark the end of the world, only the farthest that one could see from the present vantage point.

Judges, like every other individual, face the challenge of thinking outside the box when they confront rules that restrict speech for reasons that—at the time—are popular and appear to be of unquestionable validity.

The challenge to think outside the prison of our present culture is more difficult when judges rule on speech that relates to lawyers or judges. When this occurs, judges face two prisons: the prison of our culture and the prison of lawyer culture. Restrictions on other professions or businesses may be appropriate, but lawyers believe that lawyers and the law are different. When lawyers become judges they still think like lawyers.

Act exempting labor and similar organizations from antitrust laws did not exempt multi-employer units with respect to concerted action in reducing compensation.\textsuperscript{27} Cordova involved securities representatives who charged their employers (approximately forty-two leading stock exchange brokerage firms and the New York Stock Exchange) with conspiracy to reduce commissions paid to representatives in violation of the antitrust laws.\textsuperscript{28} The principle that one may engage in free speech but one may not conspire to set prices is well-grounded in precedent.\textsuperscript{29} This decision is a logical elaboration of prior case law.

Interestingly, in the course of this opinion, Judge Mansfield issued what might be called “factual dictum.”\textsuperscript{30} First, the judge concluded:

There can be little doubt about the fact that if a group of employers, as the complaint here alleges, were allowed, not as part of a collective bargaining agreement, to agree together to reduce the commissions paid to their respective employees, they would have the same power to restrain competition as is inherent in a price-fixing agreement. In a market where the demand for employees with particular skills exceeded the supply, employers could serve their mutual interests by jointly establishing a “going rate” which none would violate, thereby eliminating wage competition between them.\textsuperscript{31}

At the end of the last sentence, Judge Mansfield added an important footnote that announced a factual distinction:

This, of course, is to be distinguished from a “going rate” resulting from competition between employers, such as the initial salaries paid by large law firms to law school graduates hired by them.\textsuperscript{32}

The judge declared that the facts that create an antitrust violation do not apply if the participants are engaged in the practice of law because those rates “result from competition.”\textsuperscript{33} Thus, under this view of the law, there are no antitrust violations if a group of

\textsuperscript{27} Cordova, 321 F. Supp. at 608.
\textsuperscript{28} Id. at 603.
\textsuperscript{29} See, e.g., Standard Oil Co. v. United States, 221 U.S. 1 (1911) (involving methods of competition, such as local pricefixing at points where necessary to suppress competition); see also WILLIAM R. ANDERSON & C. PAUL ROGERS III, ANTITRUST LAW: POLICY AND PRACTICE 47 (1985).
\textsuperscript{30} Cordova, 321 F. Supp. at 606-07.
\textsuperscript{31} Id. at 606.
\textsuperscript{32} Id. at 607 n.2 (second emphasis added).
\textsuperscript{33} Id. at 607.
New York law firms meet and decide to set the going rate for new associates. Why is this practice different from other employers fixing commissions paid to brokers? Because this factual situation "of course, is to be distinguished."34

I have discovered over the years that the use of the words "of course" or "obviously" in a court decision often signals a statement for which the judge authoring the statement has no support. By calling it "obvious," the judge perhaps hopes that the reader will be too embarrassed to challenge the bald assertion. You should understand that my point is "obviously" correct.

Why should law firms have the right to set the prices paid to their employees? This question was answered only a few years later when the United States Supreme Court made it clear that price-fixing by law firms does violate antitrust laws.35

Judge Mansfield, like many other judges and commentators, assumed that the practice of law is different from other commercial activities, and should therefore be subject to different rules.36 It would be difficult for professionals other than lawyers to understand why medical doctors or certified public accountants enjoy a First Amendment right to advertise and engage in face-to-face solicitation of business that extends further than the right of lawyers. In the past, the Court explained that CPAs have such a right because the practice of law is "different"37 from other profes-

34. Id. (emphasis added).
35. See Goldfarb v. Va. State Bar, 421 U.S. 773, 781–82 (1975) (holding that it is illegal price-fixing for law firms to agree to minimum-fee schedules for services offered to clients). Law firms have objected to paying young associates such high salaries, but if the law firms agreed to lower starting salaries, would they take the money that they save and give it to their corporate clients as refunds? See Ronald D. Rotunda, Professionals, Pragmatists or Predators, 75 ILL. BAR J. pt. I at 420 (1987); id. pt. II at 482, 540.
37. See Edenfield v. Fane, 507 U.S. 761, 774 (1993). In Fane, the issue was Florida's regulation of the personal solicitation of business clients by CPAs. The plaintiff sued for the right to make unsolicited calls to clients and to arrange appointments to explain his expertise and lower fees. Id. at 764. The State argued that the rule against such contacts was designed to protect consumers of accounting services against overreaching and also to assure the independence of financial audits. Id. at 768. Writing for the majority, Justice Kennedy found that the State's interests were "substantial in the abstract," but that business clients should have the ability to protect themselves against overreaching. Id. at 770, 775–76. Moreover, to the extent that one is concerned about a lack of audit independence, the Court felt that such concern is likely to be greater when businesses cannot turn to newcomers like Fane, because then the incumbent CPA firms could get too close to management. Id. at 772–73. The State relied on Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), which upheld
sions. However, if CPAs rather than lawyers sat on the United States Supreme Court, decisions governing the free speech of CPAs might well be different.

The distinctions previously drawn by the Court raise numerous questions regarding the regulatory powers of the government. For example, to what extent should it able to control or manipulate our behavior by keeping us from listening to, and being persuaded by, truthful speech? How much power does the government have to regulate and limit what we can read and hear? Does the First Amendment, which applies to the federal government directly and to the states via the Fourteenth Amendment, limit the power of government to regulate truthful advertising about lawful products or services? These questions reflect an age-old controversy that predates our Constitution. Indeed, as discussed below, this debate goes back at least as far as the philosophical disputations between Aristotle and Socrates.

To better understand the decades-long controversy over lawyer advertising, it is important to revisit the origins of the modern commercial speech doctrine.

II. THE ROAD TO THE PRESENT COMMERCIAL SPEECH DOCTRINE

The Supreme Court originally granted no protection for what it calls “commercial speech.” The Court, in Valentine v. Chrestensen, announced that “commercial speech” is not “speech” within

the power of the state to prohibit lawyers from engaging in face-to-face solicitation. Fane expressly distinguished Ohralik as a case where the “holding was narrow and depended upon certain ‘unique features of in-person solicitation by lawyers’ that were present in the circumstances of that case.” Fane, 507 U.S. at 774 (emphasis added) (citations omitted). CPAs, the Court observed, are not “trained in the art of persuasion.” Id. at 775 (quoting Ohralik, 436 U.S. at 465). Moreover, the clients being solicited “are sophisticated and experienced business executives who understand well the services that a CPA offers.” Id.

Yes, lawyers are different. Of course, some CPAs are also lawyers and are as trained as other lawyers in the “art of persuasion.” Law professors know that not all lawyers are trained in the art of persuasion. But that is not important because lawyers are different.

38. See, e.g., PA. CONST. art. 1, § 6; VA. CONST. art. 1, § 12.
39. See Stone, infra note 115; see also Aristotle, Politics (Benjamin Jowett trans., The Modern Library 1943).
41. 316 U.S. 52 (1942).
the meaning of the First Amendment. Thus, the birth of commercial speech may be compared to an immaculate conception: there was no father—the Court simply announced the new rule.

Valentine upheld the conviction of an entrepreneur for violating a sanitary code provision that forbade distributing leaflets in the streets. One side of the leaflet contained an advertisement for a commercial exhibition of a former Navy submarine. The other side contained a protest against the City's denial of wharf facilities for the exhibition. The Court, with little discussion and no dissents, announced that the First Amendment imposed "no restraint on government as respects purely commercial advertising." Commercial speech was effectively excluded from the protection of the First Amendment.

The Court did not question this pronouncement until Bigelow v. Virginia, decided three decades later. The managing editor of a weekly Virginia newspaper published a New York City organization's advertisement offering to arrange low-cost placements for women with unwanted pregnancies in accredited hospitals and clinics in New York. He appealed his conviction for violating a law that outlawed advertisements designed to "encourage or prompt the procuring of abortion" on the grounds that the profit-making abortion organization truthfully advertised a lawful service offered in another state. The Court held that, although the advertisement was "commercial" in nature (i.e., it was not an editorial), the free speech guarantee contained in the First Amendment nevertheless embraced it and, therefore, granted some protection. Consequently, the Court overturned the conviction.

The protections recognized in Bigelow were initially interpreted by some to be limited to abortion cases. The fact that

42. Id. at 54.
43. Id. at 55.
44. Id. at 53.
45. Id.
46. Id. at 54.
47. See id.
49. Id. at 811–12.
50. Id. at 812–13.
51. Id. at 818.
52. Id. at 829.
53. See Jeffrey Brandt, Attorney In-Person Solicitation: Hope for a New Direction and
Justice Blackmun authored the *Bigelow* opinion two years after he wrote the landmark opinion in *Roe v. Wade* \(^{54}\) supported this view. However, *Bigelow* was not expressly limited to cases involving abortion rights. Furthermore, the Court later clarified that protections of free speech would include all forms of commercial speech. \(^{55}\)

### III. Defining Commercial Speech

Since its tentative beginnings in *Bigelow*, the Court has explained that commercial speech is afforded some First Amendment protection; however, this protection has not reached the same level of protection afforded "political" speech. \(^{56}\) The distinction between "commercial" and "noncommercial" speech has not been demarcated with any great precision, nor defined by the Court with any rigor. \(^{57}\) Instead, the Court repeatedly claims there is a "commonsense" \(^{58}\) distinction between speech that merely proposes a commercial transaction and other guaranteed forms of expression. \(^{59}\)

The Court’s assumption that "commercial" speech is really different in kind from "political" speech and deserving of lessened protection is hardly self-evident. One wonders why there is more protection for someone who sells himself as "Presidential timber".

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*Supreme Court Protection After Edenfield v. Fane, 25 U. Tol. L. Rev. 783, 786 n.27 (1994).*


57. See id.

58. Id. at 771–72 n.24. In *Virginia State Board of Pharmacy*, the Court stated:

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


("Jones has the right stuff and cares about the voter") than for one who sells timber ("The XYZ Timber Co. cares about the environment"). Why is there less protection for Pepsi when it claims, "It's the right one baby," than when the Democratic Party claims that it is "the party of the people?" When the New York Times calls itself "the paper of record," is it exercising the right of the press, i.e., the sale of a daily newspaper by a profit-making, publicly traded corporation? Or is it proposing a commercial transaction? What about an advertisement for a political book, or a billboard promoting a political event, or the sale of campaign buttons advancing a political cause?

Statements such as "It's the right one baby" intend to create a certain mood or feeling that may be difficult to verify: what exactly is the "the right one baby" or the candidate with "the right stuff?" Unlike statements such as "Attend this political event," they do not urge people to take specific action, although they may expect certain action to follow—buying the soft drink, voting for the candidate, buying the newspaper or the political book, or attending the political event. In both sets of cases (one commercial, the other political), the speaker may be equally motivated by profit.

Exactly when does speech become "commercial?" The economic motive of the speaker cannot be the touchstone, because the New York Times has an economic motive to sell newspapers; it is, after all, a publicly traded corporation. If economic motivation makes speech less deserving of constitutional protection, then authors, playwrights, composers, and other artists who sell their works would be correspondingly disadvantaged. Consequently, some commentators have attacked the political/commercial distinction. However, the Court continues to recognize a difference between commercial and political speech and, for purposes of this analysis, we must accept its existence.

The underlying assumption, therefore, must be that lawyer advertising is "commercial speech" even if the purpose of the speech

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60. See, e.g., Jonathan W. Emord, Contrived Distinctions: The Doctrine of Commercial Speech in First Amendment Jurisprudence, CATO POLICY ANALYSIS No. 161 (Sept. 23, 1991). See generally NICHOLAS WOLFSON, FREE SPEECH, FREE MARKETS, AND FOOLISH INCONSISTENCY (1990) (arguing that because political speech does not necessarily lead to reasoned outcomes, it should not be afforded more protection than commercial speech).
COMMERCIAL SPEECH DOCTRINE

is to enable persons to find lawyers so that they may “petition the Government for a redress of grievances.”

IV. REGULATING COMMERCIAL SPEECH

A. Misleading Commercial Speech

The United States Supreme Court permits the government to regulate commercial speech—for example, a television commercial or a newspaper advertisement—if the regulation is intended to prevent fraudulent or misleading speech or speech that proposes an illegal transaction. The government may prohibit advertisements that solicit murder, or that seek to hire “a white male,” because these are legislatively defined illegal activities.

Under the First Amendment, the government has less power to regulate political speech than it has to regulate commercial speech. Consequently, a state cannot prohibit a misleading political advertisement because it is political speech. The government may, however, regulate speech that is purely commercial if the speech is misleading. The commercial speech must be demonstrably false or misleading to warrant such regulation.

For example, in *Peel v. Attorney Registration and Disciplinary Commission*, the Court held that Illinois violated the First Amendment when it disciplined a lawyer who had truthfully declared on his letterhead that the National Board of Trial Advocacy had certified him as a civil trial specialist. The Board, a bona fide private group, developed a set of objective and demand-

61. U.S. CONST. amend I.
63. Pittsburgh Press, 413 U.S. at 388 (“Discrimination in employment is not only commercial activity, it is illegal commercial activity . . . .”).
64. E.g., Va. State Bd. of Pharmacy, 425 U.S. at 771-72 (discussing the distinction).
65. See id.
67. Id.
68. 496 U.S. 91 (1990).
69. Id. at 111.
ing standards and procedures to certify lawyers with experience and competence in trial work.\textsuperscript{70}

Illinois claimed this lawyer's letterhead was sufficient to "mislead" the public because it implied a higher standard of quality than non-certified lawyers possessed.\textsuperscript{71} However, the implication that one might draw from the letterhead's factual statement may, in fact, be true. The \textit{Peel} case illuminates one conundrum surrounding the regulation of truthful, but potentially misleading commercial speech. For instance, a restaurant may truthfully claim that it has a Michelin four-star rating, or a hotel may truthfully claim that the AAA rates it highly. These statements are no more misleading than a lawyer's factual claim that a bona fide organization has certified a lawyer as meeting special qualifications. The lawyer simply made a statement of an objective, verifiable fact—that a bona fide independent group has rated that lawyer very highly, and this fact "may support an inference of quality."\textsuperscript{72}

Similarly, the lawyer may claim that he or she graduated from the University of Richmond, or is active in the state bar, or used to hold a high position in the Department of Justice. These are all verifiable facts from which people may draw an inference of quality if they choose to do so.

Illinois argued that the lawyer's statement was misleading because it implied that the State recognized or certified specialists.\textsuperscript{73} Since Illinois did not certify any lawyer specialists, the State claimed Mr. Peel was making a false claim.\textsuperscript{74} But Mr. Peel made no claims that the State of Illinois certified him.\textsuperscript{75} Instead, he truthfully stated that the National Board of Trial Advocacy certified him.\textsuperscript{76} Hence, Illinois' argument boiled down to the idea that the word "certified" implied that \textit{only} the government certifies.\textsuperscript{77}

\textsuperscript{70} Id. at 102.
\textsuperscript{71} Id. at 98–99.
\textsuperscript{72} Id. at 101. Hence, any advertising that the government prohibits as misleading must be \textit{truly} misleading.
\textsuperscript{73} Id. at 99.
\textsuperscript{74} Id.
\textsuperscript{75} Id. at 101.
\textsuperscript{76} Id.
\textsuperscript{77} Id. at 103.
The Illinois Supreme Court adopted this position, and—to buttress its point—cited a dictionary to prove what “certificate” means. The court quoted from the dictionary definition of “certificate,” but, first, it “ellipsed out” the words below that have been reprinted in italics. A certificate is a document issued by a school, a state agency, or a professional organization certifying that one has satisfactorily completed a course of studies, has passed a qualifying examination, or has attained professional standing in a given field and may officially practice or hold a position in that field.

What the Illinois Supreme Court did bears repeating. In an effort to find evidence that a lawyer had engaged in misleading speech, the state court turned to the dictionary, and—when the dictionary did not support the conclusion desired—the court “ellipsed out” the inconvenient words. There is an irony in what the state court did. While criticizing this lawyer for misleading by implication, the court was misleading by misquoting.

The full dictionary quotation reflects the common sense fact that private groups issue certificates all the time, and that consumers are aware of this. For example, a golf course may certify a hole in one, or a private school may issue a certificate to commemorate perfect attendance. An auto mechanic may proclaim that he has a “Mercedes certificate as an air conditioning specialist.” It is not inherently misleading or confusing to claim truthfully that one is certified by a bona fide private organization. Nonetheless, some states seek to prohibit speech on the grounds that it is misleading, even when the statements are factually true. Consider, for example, In re R.M.J., in which a lawyer truthfully advertised that he was a member of the United States Supreme Court Bar. Missouri sought to discipline the lawyer on the grounds that, while what he said was technically true, it “could be misleading to the general public unfamiliar with the re-

78. Id.
79. Id. at 104.
80. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 367 (1986 ed.) (emphasis added).
82. See id.
83. See Peel, 496 U.S. at 102–03.
84. 455 U.S. 191 (1982).
85. Id. at 197.
requirements of admission to the Bar of this Court."\textsuperscript{86} In other words, lawyers are aware that the Supreme Court's admission of a lawyer to its Bar implies no special competence, but general consumers might not be aware of this and, therefore, the advertisement might lead them to draw an incorrect conclusion.

Notwithstanding this argument, the Court held that Missouri's absolute prohibition of this advertisement violated the First Amendment because there was no finding in the record specifically identifying the information as misleading.\textsuperscript{87} Moreover, restrictions short of absolute prohibitions—for example, requiring a statement explaining the meaning of admission to the Supreme Court Bar—may have sufficed to cure any possible deception.\textsuperscript{88} The Court explained that the protection of free speech ensures that government regulation of commercial speech is not more extensive than necessary to serve the asserted governmental interest.\textsuperscript{89}

The Court's decision also discussed the state supreme court's reprimand of the attorney (identified as "R.M.J") for deviating from the precise listing of areas of practice.\textsuperscript{90} For example, his advertisement listed his areas of practice as including "real estate," but the state rule required the use of the term of "property."\textsuperscript{91} He also used the term "contracts," but the state rule did not allow that term at all.\textsuperscript{92} Hence, the advertisement was deemed "misleading" by the Missouri court.\textsuperscript{93}

The United States Supreme Court required Missouri to demonstrate that R.M.J.'s listings were deceptive.\textsuperscript{94} The Court stated that the state's mere assertion that the advertisements were misleading was insufficient to justify the prohibition.\textsuperscript{95} Because the

\begin{footnotes}
\item[86] Id. at 205.
\item[87] Id. at 205–06.
\item[88] Id. (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980)).
\item[89] Id.
\item[90] Id. at 197.
\item[91] Id.
\item[92] Id.
\item[93] Id. at 205.
\item[94] Id.
\item[95] Id.
\end{footnotes}
burden could not be met, the Court declared the regulation invalid.96

The *R.M.J* Court did not hold that the rule was unconstitutional as applied to *R.M.J*.97 Rather, the Court simply invalidated the rule altogether.98 As a logical matter, the Court held that there is nothing misleading about a lawyer representing that he or she does work in the area of real estate, if, in fact, the lawyer does work in that area.99 The state could not avoid constitutional free speech requirements by announcing that “real estate” was misleading because the lawyer should have used the term “property.”100

Some countries do not embrace the same free speech protections found in America and make the same mistake as the Missouri and Illinois Supreme Courts: they announce that a form of communication is “misleading” and therefore should be banned. For example, in *Irwin Toy Ltd. v. Quebec (Attorney-General)*,101 the Canadian Supreme Court concluded that television advertising directed at children is “*per se* manipulative” because children are young and impressionable.102

If a statement is “*per se* manipulative” because children are young and impressionable, it is difficult to understand its logic. First, anyone who is a parent knows that children generally are not that easily influenced or impressionable. If they were, it would be simple to train them to say “please” and “thank you.” Moreover, if children are so easy to convince and manipulate, should not *Irwin Toy* equally presume that they will believe their parents (the real purchasers of the advertised toys), when their

96. *Id.* at 207.
97. *Id.* at 206–07.
98. *Id.*
99. *Id.* at 204.
100. *Id.*
102. *Id.* at 988. Oddly enough, in *Irwin Toy*, the Canadian court relied on a report of the Federal Trade Commission stating: “The report [of the FTC of the United States] thus provides a sound basis on which to conclude that television advertising directed at children is *per se* manipulative. Such advertising aims to promote products by convincing those who will always believe.” *Id.* American courts, however, do not accept that report as justifying a similar restriction in the United States.
parents tell them that the toys are too expensive, or are not appropriate for their age, and so forth?

Why is it that the *Irwin Toy* court concluded that children—as a matter of law—are easily impressed by what they see and hear on television but not by what they hear from their parents? If children are so impressed with what is on television, the government could easily control them by putting its own advertisements on television urging children to obey their parents and to never be peevish. The cure for the speech we do not like should be “more speech, not enforced silence.”

In short, a state may regulate and punish “misleading” commercial speech, but only if the speech is truly misleading. It should not be enough for the government to claim that people might be misled, or that children might not understand.

B. Speech Soliciting a Crime

A state may forbid speech that advertises unlawful activity. Because the act is declared unlawful, the government may also prohibit solicitation to commit an illegal act. Otherwise, contract murderers would be able to freely advertise their services. Thus, the Court has held that speech that promotes an illegal activity—such as advertising for burglary tools, or for “men only” jobs in violation of sex discrimination laws when sex is not a bona fide occupational qualification—is not protected speech. There is no danger that the legislature is prohibiting the speech in order to regulate otherwise lawful behavior because the speech itself is soliciting a response that is unlawful.

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103. See id.
108. Id. at 388.
109. Id. at 376.
110. See id. at 388–89.
The mirror image to this proposition would be a rule that a state may not forbid truthful advertising promoting legal activities. For example, during Prohibition, a state could forbid advertising that promoted speakeasies because it was illegal to offer or sell intoxicating liquor. After Prohibition, nightclubs serving liquor were able to freely engage in non-misleading advertisements that disclosed that they were offering or selling intoxicating liquor.

Oddly enough, the United States Supreme Court has never specifically held that the state may not forbid truthful speech about lawful activities. Furthermore, the Irwin Toy case in Canada has its admirers in this country. Devotees of government regulation of commercial speech would like to control what others do by regulating what they can see, read, and hear. If the commercial speech does not solicit a crime and is not truly misleading, should the government still be able to prohibit it? An analysis of this issue brings us back to Aristotle and Socrates.

V. MANIPULATING BEHAVIOR BY CONTROLLING ADVERTISING

A basic assumption of democracy is that adults are mature enough to vote and determine the rules by which they will be governed. The general public is entrusted with the power to decide who the next President should be with access to the nuclear button. Do we trust the people enough to let them be exposed to non-misleading speech about lawful activities? Or is the power to ban truthful advertising a useful weapon that has a rightful place in the government arsenal?

We are not talking of the situation where the government counteracts advertisements with more advertisements, such as when the government uses advertising such as "[f]riends don't let friends drive drunk" to persuade people. Instead, we are talking about the situation where the government counteracts advertisements by banning them. The normal remedy for speech we do

111. See U.S. CONST. amend. XVIII, §§ 1–2 (repealed 1933).
112. See U.S. CONST. amend. XXI.
113. See, e.g., KENT GREENAWALT, FREEDOM TO OFFEND FIGHTING WORDS: INDIVIDUAL'S COMMUNITIES, AND LIBERTIES OF SPEECH (1995).
114. See, e.g., id.
not like is more speech. However, the question here is whether the First Amendment allows the government to enforce silence.

A. The Socratic Approach

Should the government be able to dampen interest in a lawful product or service by making it a crime to truthfully advertise that product or service? Do such restrictions on so-called commercial speech violate basic principles of freedom of expression and imply a lack of faith in the ability of individuals to reason, make choices, and accept their consequences?

Socrates would not have trouble answering these questions because he rejected democracy. He did not trust the people, believing instead that the people are not fit to rule themselves. In Socrates' view, it is "the business of the ruler to give orders and of the ruled to obey." The governed are the "herd." The "expert" ruler treats his subjects (i.e., us) like a herd of cattle. Of course, the cattle-tender in this metaphor is not the "Good Shepherd" of the New Testament who cares for his innocent sheep like a father and mother care for their innocent children. Rather, this rancher views his cattle as steak and hamburger. Christians and Jews speak of humans as the children of God; Socrates' metaphor would treat humans as the pets of the gods.

For Socrates, government exists not by the consent of the governed but by the submission of the governed. In his ideal world, the expert is the "one who knows," and, therefore should rule his subjects. Just as patients should obey the orders of the doctor,

116. See id. at 12, 71-73, 116.
117. See id. at 12-13.
118. Id. at 15 (concluding that "in the Timaeus and its sequel, the Critias, Plato pictured the Golden Age of man as a time when gods tended their human herds as men later tended their cattle").
119. See id.
120. See id. at 17.
121. See Xenophon Memorabilia and Oeconomicus 229-31 (E. Capps et al. eds., E.C. Marchant trans., 1918).
122. See id. at 229.
123. See id. at 17-18.
and athletes should obey their coach, similarly, the multitude should obey “experts,” that is, “those who know how to rule.”

B. The Aristotelian Approach

Though he spoke about a century later, Aristotle’s rebuttal of Socrates was directly on point. His book, *Politics*, written over 2300 years ago, is full of contemporary insights. It is in this famous work that we find Aristotle’s eternal epithet that man is a “political animal.”

Our word “political” comes from *polis*, the ancient Greek word for “city.” The ancient Greek city was not merely an urban area; it was a sovereign city-state. When Aristotle said that man is a political animal, he meant that humans, unlike other animals, are endowed with logos—the ability to speak, reason, make decisions, distinguish right from wrong, and live together and participate in a community. We are not political animals because we are avid viewers of Cable News Network and are obsessed with the next election; we are “political animals” because we live with each other in groups, in communities, and have the ability to reason with each other.

In contrast to Socrates, Aristotle believed that people should have the freedom to obtain information and exercise free speech. People can use this information and speech to reason with each other and make decisions by majority rule. Aristotle believed people are fit to rule and decide for themselves. It is very likely that Aristotle was the harbinger of Chief Justice Stone’s famous footnote in *United States v. Carolene Products Co.* It is in this footnote that Chief Justice Stone explained that

129. *See id.* at 10.
130. *See id.*
131. *See id.* at 92–93.
132. *See id.*
133. *See id.*
laws restricting speech should be subject to “more exacting judicial scrutiny” because such legislation “restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation.”

Plato played Boswell to Socrates. In the Platonic dialogue, Gorgias, Plato recounts how Socrates attacked the practice of oratory and rhetoric as mere flattery of the common mob. I.F. Stone’s book, The Trial of Socrates, explains that the unspoken premise of the Socratic assault on oratory was disdain for the common people of Athens, the so-called “mob.” Socrates believed that the rulers neither could nor should try to reason with “the herd.”

In contrast to Socrates’ world view, Aristotle’s Rhetoric argues that leaders can influence people through reasoned argument because mankind possesses intelligence—the ability to reason. Indeed, at the very heart of democracy lies the faith in the people—the vox populi. Aristotle believed that “free government has no future where men can be treated as a mindless herd. Thus, from the very opening lines of the Rhetoric, we are in a different universe from that of the Socratic and the Platonic, and breathe a different air.”

Antiphon, like Aristotle, was a critic of Socrates and Plato. Antiphon spoke of the equality of man. He placed great importance on the idea that the laws governing mankind should be created with the consent of the governed. This intellectual ancestor of Jefferson anticipated our Declaration of Independence by over two thousand years.

135. Id. at 152 n.4; see Nowak & Rotunda, supra note 55, §§ 15.4, 15.7, 18.3, 20.7(a), 23.5.
136. Stone, supra note 115, at 91.
137. Id.
138. Id. at 16, 91.
140. See Stone, supra note 115, at 92.
141. See id.
142. See id. at 43.
143. Kathleen Freeman, Ancilla to the Pre-Socratic Philosophers 147–48 (1948).
144. Stone, supra note 115, at 43–44.
C. The Framers and the Rejection of Philosopher-Kings

The Framers of the United States Constitution were well aware of the debate between the followers of Plato and Socrates and the followers of Aristotle. The Framers took an Aristotelian view of the world. In The Federalist Papers, James Madison wrote that the foundation of our government is based on the assumption that man has the ability to reason, and that a democracy is a better form of government because it relies on the reasoning of all the people. Madison explicitly rejected rule by philosopher-kings. He wrote that

\[\text{[the reason of man, like man himself, is timid and cautious, when left alone; and acquires firmness and confidence, in proportion to the number with which it is associated. . . . In a nation of philosophers, this consideration ought to be disregarded. A reverence for the laws, would be sufficiently inculcated by the voice of an enlightened reason. But a nation of philosophers, is as little to be expected as the philosophical race of kings wished for by Plato.}\]

In the often-cited civil liberties decision of *Meyer v. Nebraska* the Supreme Court acknowledged that life would be quite different in America if our government was like Plato’s ideal commonwealth, or the city-state of Sparta (a military state that Plato and Socrates admired). In both of these places, the *Meyer* Court noted, the government sought “to submerge the individual and develop ideal citizens.” *Meyer* categorically rejected this aim because such “ideas touching the relation between individual and State were wholly different from those upon which our institu-

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148. 262 U.S. 390 (1923).
149. *See id.* at 401–02. *Meyer* invalidated a Nebraska law that prohibited the teaching of any subject in a language other than English to pupils who had not passed the eighth grade. *Id.* at 390–91. The law applied to every “private, denominational, parochial or public school.” *Id.* at 390.
150. *Id.* at 402.
tions rest..."151 Other judicial precedent repeats this refrain.152 Therefore, under decisions of the Supreme Court, Athens, not Sparta, should be the American model.

VI. THE LEGISLATIVE APPLICATION OF ARISTOTLE

Often, but not invariably, America's legislative efforts have reflected the inherent worth of the common man and woman. When federal legislation concerns subjects about which citizens can form their own legitimate judgments, Congress has often rejected a paternalistic approach. However, one must continue to recognize that the philosophical triumph of Athens over Sparta will never be complete, and debate on the issue is never-ending.

A. Using Children as a Justification for Regulating Adults

When the persons to be protected from undue coercion are not able to make reasoned choices, the government has a greater duty to regulate. Laws protecting children fall into this category because children do not possess the same level of reasoning ability as adults. Thus, if it is illegal to sell a product (such as "adult" magazines) to children, it should be constitutional to enact a statute designed to prohibit store advertisement proclaiming that it will sell children a product that is illegal for them to purchase.153

However, a state may not "burn the house to roast the pig."154 The state law must be narrowly tailored and serve compelling

151. Id.
153. See e.g., Ginsberg v. New York, 390 U.S. 629 (1968) (upholding a statute that defined illegal "obscenity" in terms of an appeal to the prurient interest of minors). The Court emphasized that the statute could not be overbroad; that is, it could not seek to prevent the general public from reading or having access to materials on the grounds that the materials would be objectionable if read or seen by children. Id. at 634 n.6. In addition, the statute could not be vague. Id. at 643.
154. Butler v. Michigan, 352 U.S. 380, 383 (1957) (overturning a statute that made it illegal to sell books which contained obscene language tending to corrupt the morals of children). Even in the case of children, it would be one thing for a state to ban advertising that is genuinely misleading to children; it is quite another to ban advertising because of generalized concerns about children and their reasoning ability. See Irwin Toy, Ltd. v. Quebec (Attorney-General) [1989] 1 S.C.R. 927, 1005–09 (Can.) (Beetz & McIntyre, J.J., dissenting).
governmental interests.\textsuperscript{155} A state, under the guise of child protection, may not constitutionally forbid the public from having access to materials on the grounds that the materials would be objectionable if children read or saw them.\textsuperscript{156}

In \textit{Butler v. Michigan},\textsuperscript{157} the Court, without dissent, overturned the conviction of a defendant accused of violating Michigan's obscene literature statute. The statute made it an offense to distribute or offer for sale a book, drawing, photograph, etc., "tending to the corruption of the morals of youth."\textsuperscript{158} The Court believed that this statute restricted freedom of speech in violation of the due process clause by reducing the "adult population . . . to reading only what is fit for children."\textsuperscript{159} Under the First Amendment, the fact that ubiquitous children may see an "adult" book or magazine is insufficient justification for severe restrictions on its distribution.\textsuperscript{160} This type of ban could also have perverse effects. Remember the old adage: if you want to create a crowd to watch a movie, first try to ban it.

Following the tradition of \textit{Butler} is \textit{Sable Communications of California, Inc. v. FCC},\textsuperscript{161} in which the Supreme Court held that Congress may constitutionally impose an outright ban on "obscene" pre-recorded interstate commercial telephone messages ("dial-a-porn") because the protection of the First Amendment does not extend to obscene speech.\textsuperscript{162} However, the Court invalidated the portion of the statute that imposed an outright ban, regardless of age, on "indecent," i.e., "adult," dial-a-porn messages.\textsuperscript{163} Thus, the government could ban such messages from reaching children but not adults.\textsuperscript{164} The Court found that the means used in the statute were improper because they were a to-

\textsuperscript{155} See NOWAK & ROTUNDA, supra note 55, § 18.3 (explaining the standards of review under the equal protection guarantees).
\textsuperscript{156} See Butler, 352 U.S. at 383–84.
\textsuperscript{157} 352 U.S. 380 (1957).
\textsuperscript{159} Butler, 352 U.S. at 384.
\textsuperscript{160} See id.
\textsuperscript{161} 492 U.S. 115 (1989).
\textsuperscript{162} Id. at 128.
\textsuperscript{163} Id. at 116.
\textsuperscript{164} Id. at 128.
Instead, the means should have been narrowly tailored to serve the purported interest in protecting children. A more narrowly tailored solution to prevent indecent dial-a-porn from reaching minors might include the requirement of access codes, scrambling rules, and credit card regulations. None of these techniques would directly regulate what someone says, hears, reads or writes.

United States v. Playboy Entertainment Group, Inc. is another example of a congressional attempt to prevent "obscene" material from reaching minors by regulating speech about such material. This case declared section 505 of the Telecommunications Act of 1996 unconstitutional. Section 505 provided that cable television operators providing channels primarily dedicated to sexually oriented programming must fully scramble or block those channels. If they were unable to do so, television operators were supposed to limit their transmission to hours when children were unlikely to be viewing.

Because scrambling can be imprecise, audio or visual portions (or both) of the scrambled programs might be heard or seen—a phenomenon called "signal bleed." The purpose of section 505 was to shield children from hearing or seeing images resulting from signal bleed, but the law at issue in Playboy was not narrowly tailored. To comply with section 505, the majority of cable operators adopted the time channeling approach. Under this approach, for two-thirds of the day no household in those service areas could receive the programming, even if the household or the

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165. *Id.*
166. *Id.* at 130.
167. *Id.* at 128.
169. *Id.* at 827.
171. *Id.* § 561(b). Later, administrative regulation set these hours to between 10 p.m. and 6 a.m. FCC Broadcast Radio Services, 47 C.F.R. § 76.227 (2001). *Playboy*, 529 U.S. at 803.
173. *Id.*
174. *Id.*
viewer wanted to do so.175 Playboy sued, challenging section 505’s constitutionality.176

The Court held that section 505’s content-based restriction on speech violated the First Amendment because the government could further its interests in less restrictive ways.177 One plausible, less restrictive alternative could be found in section 504 of the Act.178 This section requires a cable operator, “[u]pon request by a cable service subscriber . . . without charge, [to] fully scramble or otherwise fully block” any channel that the subscriber does not wish to receive on a household-by-household basis.179 As long as subscribers knew about this opportunity (targeted blocking), section 504 would provide as much protection against unwanted programming as would section 505.180 Thus, parents had the final decision-making authority, not federal bureaucrats.

Because of the availability of targeted blocking, the government failed to prove that section 505 was the least restrictive means for addressing a real problem.181 The Court acknowledged that many adults would find the Playboy material highly offensive.182 It also agreed that the government had legitimate reasons for the regulation of the material because the programs came into homes where children might see or hear them against parental wishes or consent.183

The Court determined, however, that the First Amendment protected Playboy’s programming because the material was not constitutionally obscene to adults.184 In addition, section 505 was a content-based regulation (even though it did not impose a complete prohibition), and therefore it had to satisfy strict scrutiny.185 Under strict scrutiny, a restriction must be narrowly tailored to promote a compelling government interest, and the government

175. Id.
176. Id.
177. Id. at 813–15.
179. Id.
180. Playboy, 529 U.S. at 810.
181. See id. at 810–11.
182. Id. at 811.
183. Id.
184. See id.
185. Id. at 813.
must use the least restrictive means to serve that interest. The Court determined that targeted blocking would be less restrictive than banning, and was therefore feasible and the most effective means of furthering the government's compelling interest.

Recently, the Federal Trade Commission ("FTC") claimed that Hollywood is "deceptive" because it "markets" R-rated films to children. But what does it mean to "market" to juveniles, anyway? For example, MetLife markets its insurance products using Snoopy and other characters from the comic strip "Peanuts." These characters can be seen on billboards, commercials and the MetLife homepage selling life insurance, advising about wills, and explaining the need for long-term care insurance. Perhaps the FTC should investigate MetLife to determine if the company is trying to scare young children by talking about death and nursing homes. Maybe Hollywood and MetLife are conspiring to get children accustomed to death so that they will be less reluctant to attend scary movies.

The Court has made clear that the government lacks power to ban or restrict material that is not constitutionally "obscene"; the government's power does not increase simply because minors will be part of the audience. The protection of minors is an important government goal, but the protection of the First Amendment is also important. Following this idea, the Third Circuit Court of Appeals recently declared unconstitutional the Child Online Protection Act of 1998.

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186. Id.
187. Id. at 810–11. Justice Breyer argued in his dissenting opinion that section 504's targeted blocking was not a similarly effective alternative because some parents might not know of their section 504 opt-out rights. Id. at 842 (Breyer, J., dissenting). This argument is interesting in that it is based on a presumption that adult parents are ignorant. Even if one thinks parents are ignorant, a narrowly tailored rule would simply require the cable operators to inform cable subscribers of their rights.
188. FED. TRADE COMM’N, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A REVIEW OF SELF-REGULATION AND INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDINGS & ELECTRONIC GAME INDUSTRIES (2000), available at http://www.ftc.gov/reports/violence/vioreport.pdf; see Ronald D. Rotunda, Don’t Blame Movies, supra note 158, at A35 (discussing the problems that occur when "politicians and bureaucrats start toying with the First Amendment").
190. See Playboy, 529 U.S. at 811.
B. Paternalism and Government Regulation: Some Examples From Our History

1. Food, Drugs, and FDA Approval

When factors going into a decision are unusually complex, we may choose to rely on the government for protection and guidance. Congress created the Food and Drug Administration ("FDA") to regulate the safety and effectiveness of new drugs because it believed that the factors going into decisions about the safety of drugs require extensive experimentation and scientific expertise.\(^192\) Congress concluded that the ability to evaluate such drugs may be outside the ken of the ordinary layperson; it therefore authorized the FDA to prevent the marketing of unsafe drugs, or the marketing of drugs in a misleading manner.\(^193\)

The FDA does not, however, make the paternalistic decision to deprive consumers of the ability to choose to buy foods high in fat, cholesterol, sugar, or nicotine.\(^194\) The law requires that food labels truthfully list a product's ingredients so that consumers will be able to make informed and reasoned decisions about what foods to eat.\(^195\) Various organizations and individuals can educate consumers about the dangers involved with these foods, but there is no paternalistic, governmental banning of them. More importantly, given that these products are legal, there should be no effort to ban nondeceptive advertising about them,\(^196\) even though

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193. Id.
194. See FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 131–32 (2000) (holding that the FDA does not have the authority to regulate tobacco products as customarily marketed).
196. Over the years, various politicians have sponsored bills that would, in substance, ban tobacco advertisements that use colors or pictures, thus permitting text-only advertisements. Joanne Lipman, France Heartens Anti-Tobacco Advocates, WALL ST. J., Mar. 30, 1990, at B6 (discussing the effects that foreign restrictions on tobacco advertising will have on the United States). However, the Supreme Court has held that a state may not prohibit nondeceptive advertisements that use illustrations. See Zauderer v. Office of Disciplinary Counsel, 471 U.S. 629, 647 (1985) ("The use of illustrations or pictures in advertisements serves important communicative functions: it attracts the attention of the audience to the advertiser's message, and it may also serve to impart information directly. Accordingly, commercial illustrations are entitled to First Amendment protections af-
many people say that they cannot stop eating potato chips, or
that commercials about ice cream make them crave fatty foods.
As a result, some of these people will suffer the ill effects of heart
disease, high blood pressure, obesity, and so forth.

2. The Federal Securities Laws

The securities laws of the United States offer another example
where our government has chosen to follow the democratic model
of Aristotle rather than the Platonic guardian/dictator model of
Socrates. Federal Securities laws mandate full disclosure of all
material information so that an investor can make an informed
judgment about whether to buy an offered investment. The
government requires the disclosure of risks to assure that infor-
mation is true and complete. Because of these disclosures, in-
vestors, using the free marketplace, can decide for themselves
whether to purchase stock.

The government does not engage in “merit” review of invest-
ments. It mandates disclosure and does not govern substance. Investors decide for themselves whether to invest in tulips or
technology. Like most of the rest of the world, the United
States does not determine whether a proposed offering of stock
presents “excessive investment risk,” or is based “upon unsound
business principles.”

198. See, e.g., Reproposal of Comprehensive Revision to System for Registration of Se-
199. See id.
200. See id.
201. See id.
202. But see LEWIS LOSS & EDWARD COWETT, BLUE SKY LAW 18 (1958) (“Only in the
United States and Canada, at the state and provincial level, are there rigorous substan-
tive standards governing the sale of securities.”); see also id. at 17 (stating that “this kind
of paternalistic attitude toward the investor is peculiar to the United States and Canada”).
On the federal level—as opposed to the state level in the United States or the provincial
level in Canada—there is no substantive review of the merits of securities offerings.
203. Report on State Merit Regulation of Securities Offerings, 41 BUS. LAW. 785, 787
(1986).
Some individual states engage in merit review of stock offerings, but academics criticize merit review as a paternalistic and ineffective method of protecting investors. In general, more disclosure, and more speech is thought to be better than imposing merit review, which attempts to weed out seemingly unsound investments.

3. Prohibition and Advertising Alcohol

In some cases, the United States has chosen the Platonic rather than the Aristotelian approach to commercial activities. Probably the most infamous example of the United States rejecting the strong tradition and belief in the democratic process was Prohibition, the “Noble Experiment” of the 1920s. The purposes of Prohibition were certainly noble—to create a healthy, alert, sober citizenry. The means to achieve this end—forced abstinence—were fatally flawed, based on a paternalistic assumption using the model of the Platonic guardian/dictator.

The people enacted the Eighteenth Amendment, which prohibited the “manufacture, sale, or transportation of intoxicating liquors within . . . the United States,” but the experiment was a massive failure because it was based on the assumption that the government should treat adults as if they were children. When

205. See, e.g., James S. Mofsky & Robert D. Tollison, Demerit in Merit Regulation, 60 MARQ. L. REV. 367, 378 (1977) (an empirical study of merit regulation that compared securities denied registration in a state that practiced merit regulation but that were allowed registration in other states that did not engage in merit regulation). These securities were compared with securities that were allowed registration in a state that practiced merit regulation; the authors determined that “on balance, returns on securities denied registration were as high as those for securities registered.” See also BLUEPRINT FOR REFORM: THE REPORT OF THE TASK GROUP ON REGULATION OF FINANCIAL SERVICES 42 (1984). Merit regulation has “often resulted in unnecessary economic barriers to the capital formation process.” 15 Sec. Reg. & L. Rep. (BNA) 1882 (Oct. 7, 1983) (quoting Jack Bailey, executive director of the Iowa Development Commission who stated, “[w]e have lost jobs in Iowa and now we need risk capital to get the state going again. Merit review has flagged those efforts because some companies don’t want to put up with it”); see also Blue Sky Red Tape, FORTUNE, July 1957, at 122.

206. See U.S. CONST. amend. XVIII (repealed 1933).

207. IRVING FISHER, PROHIBITION AT ITS WORST 108 (1926).

208. See STONE, supra note 115, at 15.

209. U.S. CONST. amend. XVIII.
they sobered up, the people enacted the Twenty-first Amendment, which repealed the Eighteenth.\textsuperscript{210}

The end of Prohibition caused fear that the people would turn in massive numbers to "demon rum."\textsuperscript{211} In fact, despite the legalization of liquor and the resulting explosion in liquor advertisements, the number of drinkers increased by only ten percent.\textsuperscript{212} The mammoth enforcement efforts behind Prohibition made hardly a dent in the number of American drinkers.\textsuperscript{213} But it did serve to make criminals out of ordinary citizens and increase the power of organized crime.\textsuperscript{214} Indeed, the main legacy of the "Noble Experiment" was the emergence of organized crime as a major force in American life.\textsuperscript{215} Three-quarters of a century later, we still are left with this unintended bequest.

Prohibition and the banning of liquor advertisements were not the solution to prevent alcoholism. Alcoholics Anonymous ("AA") has been proven to be a very successful method in treating alcoholism.\textsuperscript{216} AA does not blame alcoholism on the manufacturers, vendors, or advertisers of liquor.\textsuperscript{217} AA informs its members that they are adults, and are therefore personally responsible for their own choices.\textsuperscript{218} Any effort to blame third parties, according to AA, is an improper exercise in denial.\textsuperscript{219}

Modern society has chosen to deal with the issue of alcohol consumption by educating people about its dangers—for example, publishing research showing a statistically significant relationship between drinking even a very small amount of alcohol and breast cancer.\textsuperscript{220} This gives individuals the ability to decide for

\begin{itemize}
  \item \textsuperscript{210} U.S. CONST. amend. XXI.
  \item \textsuperscript{211} See \textit{Samuel Elliot Morrison, The Oxford History of the American People} 516 (1965).
  \item \textsuperscript{212} Andrew Kupfer, \textit{What to Do About Drugs}, \textit{FORTUNE}, June 20, 1988, at 39, 40.
  \item \textsuperscript{213} Interestingly, in recent years, the public in the United States has voluntarily turned away from hard liquor—not because of less speech (a ban on liquor advertisements) but because of more speech (greater publication about the health dangers of excessive alcohol).
  \item \textsuperscript{214} See \textit{Morrison, supra} note 211, at 900.
  \item \textsuperscript{215} See id. at 901.
  \item \textsuperscript{216} See A. Lawrence Chickering, \textit{Denial Hardens the Drug Crisis}, \textit{WALL ST. J.}, July 25, 1988, at 6.
  \item \textsuperscript{217} See id.
  \item \textsuperscript{218} See id.
  \item \textsuperscript{219} See id.
  \item \textsuperscript{220} John Noble Wilford, \textit{Moderate Drinking May Increase Risk of Cancer in Breast},
themselves whether the risks are worth the benefits of moderate consumption of alcohol.\textsuperscript{221} Today we seek to educate pregnant women about the dangers of drinking while pregnant, but the government does not ban liquor advertisements simply because they might be viewed by pregnant women.\textsuperscript{222}

However, old habits die hard. Consider the decision in \textit{Rubin v. Coors Brewing Co.}\textsuperscript{223} The \textit{Rubin} Court invalidated a federal law that prohibited beer labels (but not wine and hard liquor) from truthfully displaying the alcohol content.\textsuperscript{224} Why would the government forbid a seller from truthfully disclosing the alcohol content of the beer that it is selling?\textsuperscript{225} The government argued that the ban was necessary to suppress the threat of "strength wars" among brewers, who, without the regulation, would seek to compete in the marketplace based on the potency of their beer.\textsuperscript{226}

However, Aristotle and our Founding Fathers had more faith in the people. Justice Stevens, concurring, stated in \textit{Rubin} that "the Constitution is most skeptical of supposed state interests that seek to keep people in the dark for what the government be-

\textsuperscript{221} The State of California implemented a multi-million dollar anti-smoking advertising campaign. See Seth Mydans, \textit{California Opens All-Out War on Tobacco and Its Marketing,} \textsc{N.Y. Times}, Apr. 11, 1990, at A1. This alternative is consistent with the principle that the best remedy for the speech with which we disagree is more speech, not less.

\textsuperscript{222} Indeed, some suggest that to make it a crime for a pregnant woman to drink may raise questions about a woman's constitutional privacy rights. \textit{Cf.} \textit{Roe v. Wade}, 410 U.S. 113, 152-53 (1973) (discussing the general scope of a constitutional right of privacy).

\textsuperscript{223} 514 U.S. 476 (1995).

\textsuperscript{224} \textit{Id.} at 488-89.

\textsuperscript{225} Justice Stevens stated that

\begin{quote}
[a] truthful statement about the alcohol content of malt beverages would receive full First Amendment protection in any other context; without some justification tailored to the special character of commercial speech, the Government should not be able to suppress the same truthful speech merely because it happens to appear on the label of a product for sale.
\end{quote}

\textsuperscript{226} \textit{Id.} at 492-93 (Stevens, J., concurring).
lieves to be their own good." The Court declared the ban on the truthful display of alcohol content to be unconstitutional.

If the government had that same faith in the people that Aristotle and our Founding Fathers did—the faith that forms the basis of democracy—then it should not bar truthful speech about a lawfully available product. The government would recognize that if people knew that "ice beer" has a higher alcohol content than regular beer, they could decide to drink regular beer if they preferred less alcohol. If people wanted a higher alcohol content, they could turn to wine or distilled spirits. Federal law pursued an opposite, inconsistent policy with regard to those liquors, and permitted (indeed, required) the disclosure of alcohol content, notwithstanding the alleged concern about strength wars.

We should not be surprised to learn that alcoholics already knew that hard liquor has more alcoholic content than beer, notwithstanding the federal label restrictions.

VII. COMMERCIAL SPEECH AND THE DEMOCRATIC IDEAL: WHY POLITICIANS PREFER RESTRICTIONS OF TRUTHFUL SPEECH, OR HOW TO HIDE THE TRUE COSTS OF REGULATION

It is not an exaggeration to suggest that the effort to discourage and dampen the use of a lawfully available product or service by forbidding or restricting an individual or corporation from en-


228. Rubin, 514 U.S. at 491.

229. The lower court in Rubin found, as a factual matter, that in the United States "the vast majority of consumers... value taste and lower calories—both of which are adversely affected by increased alcohol strength." Adolph Coors Co. v. Bentsen, 2 F.3d 355, 359 (10th Cir. 1993).

230. See Bureau of Alcohol, Tobacco, and Firearms, Alcoholic Content, 27 C.F.R. § 4.36 (2001), which provides in part:

(a) Alcoholic content shall be stated in the case of wines containing more than 14 percent of alcohol by volume, and, in the case of wine containing 14 percent or less of alcohol by volume, either the type designation "table" wine ("light" wine) or the alcoholic content shall be stated. Any statement of alcoholic content shall be made as prescribed in paragraph (b) of this section.

Id.

231. In the United States, a corporation is an incorporeal "person" for purposes of the Fourteenth Amendment. Santa Clara County v. S. Pac. Ry., 118 U.S. 394 (1886). Thus, it is unconstitutional for a state to enact a criminal statute that forbids corporations from spending money for the purpose of influencing the vote on referendum proposals. First
gaging in truthful advertising related to that product or service is simply another illustration of the age-old battle between privacy on the one hand, and government intrusion on the other. It can be seen as a struggle between self-determination—the right to make private choices—and personal freedom on the one hand, and George Orwell's Big Brother on the other. It is between embracing the democratic assumption that people are fit to rule themselves and embracing the model of the Platonic guardian/dictator.

The purpose of restrictions on the advertising of truthful, non-misleading, noncoercive commercial speech is typically to dampen demand for a lawfully available product or service by forbidding speech promoting or advertising the product or service. This is an example of the government attempting to paternalistically protect people from themselves by withholding information from them. In Rubin, Justice Stevens recognized that one problem with evaluating the justifications for banning commercial speech is that "the Court sometimes takes such paternalistic motives seriously."

A belief in the democratic ideal rejects the view that the people are the Platonic "herd" that the government must manipulate. As

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232. See ORWELL, supra note 4, at 3.

233. It is because of this basic philosophical battle that groups such as the American Civil Liberties Union ("ACLU") have opposed various proposed federal laws designed to restrict alcohol and tobacco advertising. E.g., County Commission OK's Airport Ad Policy, LAS VEGAS REV. J., Jun. 16, 1999, available at 1999 WL 9286375 (reporting that the "Clark County Commission unanimously approved . . . a once-controversial airport advertising policy with amendments that satisfied First Amendment concerns of the ACLU.") For example, the airport "deleted provisions that banned advertising for alcohol and tobacco products."); Ira Glasser, Executive Director of the ACLU, HEALTH LETTER 6, Apr. 1, 1999, available at 1999 WL 13846860 (discussing the ACLU's long opposition to restrictions on commercial speech, including restrictions on tobacco advertising); Franklyn S. Haiman, Is It Capitalism Versus Democracy? (reviewing ROBERT W. MCCHESEY, RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES (1999)), available at 2000 WL 19225170.


Justice Douglas stated nearly a half century ago, "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." That principle applies to truthful advertising about legal services just as it applies to the truthful advertising of other lawful products or services.

Restrictions on commercial speech are inconsistent with the Aristotelian tenets that form the foundation of a democratic state. Moreover, they lend credence to the Socratic belief that the government should manipulate the "herd" by depriving the people of information.

Government regulation of commercial speech imposes hidden costs in addition to the asserted benefits that attend governmental control of commercial activity. The majority of people (the "herd") might reject a ban on advertising if they knew of the disguised economic burdens such a regulation creates. If the legislature does not hide the costs and benefits of a policy decision, but instead fully reveals this information, the people likely will develop faith in the legislature's rational weighing of interests.

If a state, for example, decides to regulate a particular product by taxing it, the people are competent to weigh the advantages with the disadvantages of such a decision. That competence is part of the foundation on which democracy rests. A state legislature has wide discretion under the Constitution to decide to tax a particular product, establish a regulatory body to collect a tax, and then use that tax to subsidize another product. Normally, the costs as well as the benefits of taxes are relatively open and transparent to the people. Thus, the people accept the process and the means by which their representatives reached the decision to tax, even though the people may not agree with it.

In contrast, the public's insight into legislative decisionmaking suffers when legislators regulate truthful speech. The legislative action is much less transparent. Because of the hidden burdens

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236. Griswold v. Connecticut, 381 U.S. 479, 482 (1965); see also Switzman v. Elbing [1957] S.C.R. 285, 306 (Can.) (Rand, J.) (recognizing that freedom of expression is "little less vital to man's mind and spirit than breathing is to his physical existence").

237. See STONE, supra note 115, at 50.

238. See id. at 74–75.


240. See, e.g., Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 42 (1824).
inherent in any regulation of speech, even the regulators may not understand the full consequences of their regulation. At worst, the legislature, by disguising its true objectives, may implement a policy that the majority of people would oppose if they had received adequate information about the true costs of the proposal. The legislature, in short, might impose regulations that a majority of the people would have rejected if they were cognizant of the regulation's true burdens. Restrictions on advertising reflect an anti-democratic means of implementing other policy judgments.

A simple example illustrates the point. A state legislature may wish to assist less efficient pharmacies (or small, one-person law offices) in their efforts to compete effectively with chain store druggists who charge their customers less (or legal clinics, who charge less by routinizing certain simple legal services, like simple divorces, as did the legal clinic involved in Bates v. State Bar of Arizona). The legislature may achieve this goal in two very different ways. First, it could place a special tax on these legal drugs, thus raising their cost and lowering the incidence of their use. To aid the less efficient druggists (or less efficient law firms) the state could then grant outright subsidies to pharmacists who have no affiliation with chain stores and have gross sales below a fixed amount. The combination of a tax on all drugs and a subsidy to the small, inefficient druggists would discourage drug use and aid the small pharmacists.

To decide whether the advantages of discouraging legitimate drug use and aiding certain favored businesses outweigh the disadvantages, the public would need only to compare the perceived benefits of these goals with their costs. The public can measure the costs of this legislative judgment in terms of higher taxes and costs for consumers. The legislature would arrive at its decision openly and, presumably, in a rational manner. Of course, the average voter will wonder why he or she has to pay more in order

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241. After 1966, when the United States banned cigarette advertisements on television, it became more difficult for producers of new low tar and low nicotine cigarette brands to introduce their products. Also, when cigarette advertising left the airways, that departure was accompanied by an exodus of anti-cigarette advertisements broadcast on television. That hurt the anti-tobacco effort. Changing Fashions in Free Speech, WALL ST. J., May 18, 1976, at 20. Proponents of the ban did not anticipate this result, thus illustrating that old adage: be careful what you wish, because it may be granted.

242. 433 U.S. 350 (1977). The Court held that the legal advertisements were constitutionally protected. Id. at 383.
for the state to give money to certain favored businesses. This voter concern may explain why the legislature does not prefer this open and transparent method.

Alternatively, the state could achieve its goal by prohibiting the truthful advertising of drug prices (or prohibiting truthful advertising of less expensive legal services that the legal clinics offer). A prohibition on advertising discourages the workings of a competitive market system and imposes transaction costs in the efficient transfer of information, which should result in price increases. More efficient drug stores would not be able to advertise that the medicine they offer is less expensive. The law might even prohibit the stores from responding to telephone inquiries. Consumers might collect the relevant information by visiting several stores and comparing prices, but this method, of course, is time-consuming and inefficient. In contrast, advertising that informs the consumer of the availability of less expensive alternatives of fungible products should generally lower prices. Indeed, lower prices should result even if the entire cost of advertising is added to the price of the product and therefore passed on to the consumer because increased demand may create economies of scale.

Advertising is not a free good. It costs money. Consequently, people often assume that advertising increases the price of goods in that its cost must be included in the final price of the goods sold. However, advertising is different than the cost of raw materials that go into making a product. Raw materials are a variable cost, but advertising is a fixed cost. To that extent, its effect on the final price of the good will be less, if the advertising increases the firm’s output.


244. See Buchanan, supra note 243, at 556.

245. Id.

246. See id. at 289. In the short run, the total cost equals total fixed costs plus total variable costs. See id. at 289 fig. 7-1.

247. See ROTUNDA, supra note 40, § 1-6.5 (2000).
Let us consider the example of an automobile. If the price of a car drops 10% (perhaps there has been a decrease in the cost of raw materials, such as steel, that go into manufacturing the car), that does not mean that dealers will automatically sell 10% more cars. Similarly, if the retail price of the car increases 10%, that does not mean that the dealers sell 10% fewer cars. If car prices increase significantly, people tend to keep their old cars longer, and may shift to alternative forms of public transportation. The extent to which the price of cars is passed on to the consumer is a function of variable demand. If a product has a very elastic demand, it is difficult for the retailer to pass on the increased costs of manufacturing the item. In such cases the retailer will have to absorb a lot of the cost, resulting in lower profit margins.

Another way of thinking about the issue is to remember this basic principle of economics—price is a function of supply and demand. It is not a function of cost.

Compare the cost of advertising cars (or advertising legal services). The cost of advertising cars and the cost of the steel that goes into the manufacturing of cars do not interact in the same manner. Steel is a variable cost, but advertising is a fixed cost. Each car that is manufactured uses a certain amount of steel. Manufacturing more cars means using more steel. But more cars does not necessarily mean more advertising. Therefore, manufacturing more cars does not automatically increase the cost of advertising.

Economists would assert that an increase in the cost of steel shifts the automobile supply curve upward. Each increase in the price of steel causes an increase in the cost of cars. The extent to which this cost is reflected in the retail price of cars is a function of the elasticity of demand and the degree of competition in the

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248. The technical reasons for these effects are not obscure and may bear mentioning. Two are especially important. First, depending on the degree of competition among sellers, an increase or decrease in input prices might result in no change at all in the prices consumers pay for the final output. Rather, there may be only a change in the profit levels of settlers. Second, if a change in input costs does result in a change in input prices, the extent of the resultant change in the quantity of output demanded will depend on the “elasticity of demand”—e.g., on the responsiveness of consumer demand to changes in that good’s price.


250. See id. at 389 fig. 9-2.

251. See id.

252. See id. at 394 fig. 9-4.
industry. Because advertising is a fixed cost, its effect on the supply curve is quite different, and, therefore, elasticity of demand does not wholly determine how much of the advertising cost can be passed along to consumers. The supply of cars is, in part, a function of the cost of steel, not a function of the cost of advertising.

Once, when the law forbade commercial advertising of prescription drugs, empirical studies of drug prices indicated that there was less competition, and, thus, significantly higher drug prices. For example, an American Medical Association survey in Chicago showed that the price of the same amount of the same drug varied up to 1200%. Price disparities of this magnitude would not exist in a market that permitted price advertisements, because advertising facilitates both comparison-shopping by consumers and competition by druggists. The ban on advertisements, therefore, increased drug prices and concomitantly discouraged legitimate drug purchases. Therefore, the absence of easily obtainable information about drug prices has helped insulate less efficient druggists from price competition.

In a sense, the result of the government restrictions on truthful commercial speech is the same as the result of a tax on all drugs, and a subsidy for certain favored druggists. In both cases, drugs will cost more and certain druggists will receive government aid. However, the impact of the method used to achieve this result is decidedly different. It is comparatively more difficult for voters to measure the true costs of the restriction on speech. It is hard to put a dollar value on the cost of a law that prohibits advertising prescription drug prices. On the other hand, it is comparatively easier to understand the costs of increased taxes. If the legislature imposes a sales tax of 10%, then consumers know that the tax is 10%. When there is a photo-op of a governor or other offi-

253. See id. at 388.
255. Id.
256. Based on studies, a Federal Trade Commission staff study concluded that prohibiting the advertising of drug prices costs consumers millions of dollars. FTC STAFF REP., supra note 243, at 119.
257. Id.
258. All of that 10% will be passed on to the consumer if the demand is completely inelastic. Otherwise, part of the cost is reflected in reduced volume of transactions. The point, however, is that consumers will know that there is a sales tax of ten percent. This cost is
cial giving a check to the favored druggists, the average voter should understand what is happening. That is why the politicians will prefer to restrict commercial speech rather than raise taxes. There is less accountability to the voters.

If the true costs were known, the majority might prefer lower drug prices. Restrictions on commercial speech obstruct the decision-making process, because the public can more easily weigh the costs of subsidies and tax increases than it can weigh the costs of limitations on the exercise of First Amendment rights. This is true even though the ultimate economic results are the same: higher drug prices.

In applying these basic principles to the advertising of legal services, consider *Florida Bar v. Went For It, Inc.* In this case, the Supreme Court upheld Florida regulations that prohibited personal injury plaintiff-lawyers (but not defense-lawyers) from soliciting employment by sending targeted direct mail to accident victims and their relatives prior to the passing of thirty days after the accident. If the state favored insurance companies in the period immediately following an accident by making claimants fair game for insurance lawyers (but not plaintiffs' lawyers) seeking to settle the case quickly, such a rule would strike many people as unfair.

Instead, the Florida Bar argued that it had a “substantial” interest in “maintaining the professionalism of the members of the bar,” and that the “public’s perception of, and confidence in, its system of justice and those who administer it is critical to the stability of a democratic society.” The Supreme Court upheld the Florida rule because it was designed, in the view of the majority, to protect the “flagging reputations of Florida lawyers. The visible. In contrast, in the case of a value-added tax, the cost is not visible.

260. Id. at 635.
263. *Florida Bar,* 515 U.S. at 625. The majority in *Florida Bar* described the regulation
Court stated that "[s]peech by **professionals obviously** has many dimensions." Note, by the way, the Court's use of the word "obviously" to justify its conclusion.

The holding applied only to targeted direct mail within the prohibited time frame—thirty days—and not to other forms of advertising, such as general or group mail advertising. In reaching this conclusion, the majority relied on empirical studies about the image of the legal profession that supposedly justified the Florida rule. This case marked the first time that the Court upheld advertising restrictions based on the need to protect the dignity of lawyers. In fact, the Court had specifically rejected this purported justification in the past.

A broader scope of judicial review should apply where legislative judgments are based on hidden costs than where the costs of the legislative decisions are obvious. A court decision that requires a legislative body (or a court, in issuing rules governing the legal profession) to reveal the true expense of a decision does not infringe on the legislature's (or court's) ability to make that decision. This type of judicial mandate would not be anti-majoritarian because it encourages an open decision-making process. This process facilitates more rational legislative decisions because it reflects the Aristotelian belief in the worth of the common man. In contrast, the Platonic guardian/dictator would have no qualms about manipulating the "herd."

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264. *Id.* at 634 (emphasis added).
265. *See supra* text accompanying notes 32-35.
266. *Florida Bar,* 515 U.S. at 634.
267. *Id.*
268. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 648 (1985). The Zauderer Court stated:

*[W]e are unsure that the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of their First Amendment rights. . . . [T]he mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity.

*Id.* (emphasis added).
In Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., the Court held unconstitutional, as a violation of free speech, a state statute prohibiting pharmacists from advertising prescription drug prices. Similarly, in Bates v. State Bar of Arizona, Arizona gave constitutional protection to lawyers who advertised the prices at which they would perform certain routine services. These decisions are an important example of the democratic quality of judicial review.

They do not impose substantive limitations on the legislature (or court) implementing a policy, but, at the same time, Virginia Pharmacy and Bates require a state to implement its policies within a framework that is more conducive to a democratic decision-making process. As a result of Virginia Pharmacy, for instance, a legislature must implement its commercial regulation within a framework that is more likely to expose the true costs of that regulation.

As the Court in Virginia Pharmacy recognized:

So long as we preserve a predominately 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. [It is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered.]

Thus, the Court stated that the protection for commercial speech serves the important First Amendment goal of "enlighten[ing] public decisionmaking in a democracy." It is the alternative to a "highly paternalistic approach" where the "State's

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270. Id. at 770; see also Ford v. Quebec (Attorney-General), [1988] 2 S.C.R. 712, 755–61 (Can.) (discussing United States Supreme Court decisions that have held that commercial speech is entitled to less protection under the First Amendment).
272. Id. at 383.
273. Advertising restrictions that members of professional organizations agreed to abide by would not violate the First Amendment (because there is no state action), but they would still be illegal because they would violate the antitrust laws as a conspiracy in restraint of trade. Goldfarb v. Va. State Bar, 421 U.S. 773, 778 (1975).
275. Id. (footnote omitted).
protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance.\textsuperscript{276}

Central Hudson Gas & Electric Corp. v. Public Service Commission\textsuperscript{277} followed Virginia Pharmacy. In Central Hudson, the Court invalidated a state regulation that completely banned promotional advertising by electric utilities.\textsuperscript{278} The purpose of the regulation was to promote energy conservation by dampening demand.\textsuperscript{279} Even if the purpose was laudable, the means were unconstitutional.\textsuperscript{280} Though the state could have reduced electrical consumption directly by taxing it, the state did not have the constitutional power to ban advertising that merely promoted electrical use.\textsuperscript{281} It was not valid for the regulators to argue that because they could ban or limit electrical consumption directly, they could exercise the "lesser included" power of banning discussions about increasing electrical usage.\textsuperscript{282}

VIII. CONCLUSION

In Virginia Pharmacy, the Court concluded that the choice "between the dangers of suppressing information, and the dangers of its misuse if it is freely available" is the choice "that the First

\textsuperscript{276} Id.
\textsuperscript{277} 447 U.S. 557 (1980).
\textsuperscript{278} Id. at 571.
\textsuperscript{279} Id. at 569–70.
\textsuperscript{280} Id. at 570–71.
\textsuperscript{281} Id. at 570.
\textsuperscript{282} In Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750 (1988), the Court stated: [The] "greater-includes-lesser" syllogism . . . is blind to the radically different constitutional harms inherent in the "greater" and "lesser" restrictions. Presumably in the case of an ordinance that completely prohibits a particular manner of expression, the law on its face is both content and viewpoint neutral. In analyzing such a hypothetical ordinance, the Court would apply the well-settled time, place, and manner test. The danger giving rise to the First Amendment inquiry is that the government is silencing or restraining a channel of speech.

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Therefore, even if the government may constitutionally impose content-neutral prohibitions on a particular manner of speech, it may not condition that speech on obtaining a license or permit from a government official in that official's boundless discretion.

Id. at 762–64 (footnote and internal citations omitted).
Amendment makes for us.” To advocate the complete suppression of lawfully available products or services in an attempt to dampen interest in such products or services is to reject the basic Aristotelian premise of our democratic society that people have a right to more information, not less, so that they can make well-informed decisions.

Speech no longer sheds its First Amendment protections because of the fact that it is commercial in nature. Although the state and federal governments may still impose reasonable regulations on the time, place, and manner of speech (without regard to the content of the communication), and although the regulations may seek to discourage or prohibit false or misleading advertising, or the advertising of illegal products or services, a legislature should be reluctant to suppress the dissemination of truthful information about an entirely lawful activity. Allowing such speech, rather than restricting it, serves to encourage more rational majority decision-making. A state should not hide behind the commercial speech doctrine.

The First Amendment protection that commercial speech is now afforded by the Court does not forbid the legislature from

284. Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 350 (1986) (Brennan, J., dissenting) (offering authority for the proposition that the state may ban tobacco advertising that is specifically directed towards children or any other group for whom the purchase of tobacco is illegal). A ban on such advertising already exists.

Posadas does not offer, outside the confines of the peculiar facts of that case, authority to ban advertising. This point is discussed in NOWAK & ROTUNDA, supra note 55, § 20.31. During oral argument in Posadas, counsel for Puerto Rico argued that a casino advertising in a Spanish language daily with ninety-nine percent local circulation would be permitted to advertise casino gambling, so long as the advertising “is addressed to tourists and not to residents.” Ronald D. Rotunda, The Constitutional Future of the Bill of Rights: A Closer Look at Commercial Speech and State Aid to Religiously Affiliated Schools, 65 N.C. L. REV. 917, 926 & n.51 (1987) (quoting Transcript of Oral Argument at 26, 478 U.S. 328 (1986) (No. 84-1903)).

Puerto Rican law already prohibited casinos from admitting persons under eighteen or from offering their facilities to the public of Puerto Rico. Id. at 926. If the law in fact prohibited Puerto Ricans from engaging in casino gambling, one should not be too surprised that the Court upheld a ban on advertising that invited Puerto Rican residents to enter the casino in order to gamble in violation of the law.

It is noteworthy that the majority in Posadas frequently cited Central Hudson with approval. Id. at 923. The Posadas Court gave no hint that it was in any way undermining Central Hudson, a precedent only six years old. Justice Powell, who authored Central Hudson, joined the majority opinion in Posadas. Id. at 921–29. Even the Puerto Rican courts agreed that a total ban on advertising of casino gambling would be “capricious” and “arbitrary.” Posadas, 478 U.S. at 334–35.
rewarding what the economists call "rent-seeking" activity—seeking to persuade the government to give you something at the expense of your fellow citizens—although it does make rent-seeking a little more difficult.

In other words, if a state wants to make an activity or product more expensive, or if it wants to aid a particular favored class of people or certain economic interests (e.g., those groups with greater access to the legislators), it may do so, subject of course to other constitutional proscriptions. The state could implement these goals directly and forthrightly, by taxes, subsidies, or by statutorily authorized price-fixing, or other similar devices. However, the state should not seek to accomplish these results by forbidding the discussion of (or the advertising of) information, or through the restriction of advertisers from publishing billboards or commercials designed to attract attention and to be easily understood. The state, in short, should not seek to prevent people "from being convinced by what they hear." In a democracy, that should be an anathema.


286. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 642 (1985) (holding that a state may not constitutionally discipline an attorney who had solicited legal business by running newspaper advertisements that included a drawing of the Dalkon Shield Intrauterine Device). The state prohibited legal advertisements that used illustrations. The lawyer's advertisement contained illustrations, but none of the illustrations were deceptive. The advertisement offered to represent women who had allegedly suffered from using the Dalkon Shield. See NOWAK & ROTUNDA, supra note 55, at 148–49.