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## COMMERCIAL SPEECH AND THE PERILS OF PARITY

Frederick Schauer\*

Existing First Amendment doctrine has for forty years evaluated regulations of commercial advertising under a so-called intermediate standard of review.<sup>1</sup> Unlike in earlier times,<sup>2</sup> much commercial advertising is now treated as speech subject to some protection under the First Amendment,<sup>3</sup> but the degree of protection is less than that given to the political, ideological, and literary speech long understood to lie at the core of the First Amendment.

Although some commentators (including this one<sup>4</sup>) lament the inclusion of commercial advertising within the ambit of the First Amendment at all,<sup>5</sup> it is too late in the day to expect a reversal of a doctrinal trend of increasing vintage. More interesting, perhaps, is the argument from the other direction, with some Supreme Court Justices and some commentators maintaining that there is no good reason to give now-covered commercial advertising a lesser degree of protection than that long available to core First Amendment communication.<sup>6</sup> The goal of this Article is to address that claim, not so much by objecting to it, but by examining the implications

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<sup>1</sup> See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553–54 (2001); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980).

<sup>2</sup> See generally *Breard v. Alexandria*, 341 U.S. 622, 642–43 (1951) (holding that commercial advertising is subject to normal police power regulation); *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (holding the Constitution “imposed no restraint on government as respects to purely commercial advertising”).

<sup>3</sup> See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) (“[T]he speech whose content deprives it of [First Amendment] protection cannot simply be speech on a commercial subject.”).

<sup>4</sup> See Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1199 (1988).

<sup>5</sup> See, e.g., ARCHIBALD COX, *FREEDOM OF EXPRESSION* 32–33, 40–41 (1980); C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981, 981 (2009); C. Edwin Baker, *Paternalism, Politics, and Citizen Freedom: The Commercial Speech Quandary in Nike*, 54 CASE W. RES. L. REV. 1161, 1162–64 (2004); Reza R. Dibadj, *The Political Economy of Commercial Speech*, 58 S.C. L. REV. 913, 915 (2007); Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 5–6 (1979); Tamara R. Piety, “A Necessary Cost of Freedom”? *The Incoherence of Sorrell v. IMS*, 64 ALA. L. REV. 1, 6 (2012).

<sup>6</sup> See *infra* notes 88–93 and accompanying text.

of *parity*—the consequences of granting to commercial advertising a degree of protection that is commensurate with (or at least close to) the strict (and thus not intermediate) scrutiny available to much of the speech covered by the First Amendment.

### I. HOW WE GOT HERE

It is doubtful that any likely readers of this Article will be unaware of the recent and not-so-recent history of commercial advertising<sup>7</sup> and the First Amendment. Accordingly, little point would be served by still another recounting of that history. Nevertheless, a very brief summary will ensure that we all are on the same page and will set the stage for what is to come.

The prehistory of the commercial speech doctrine starts in 1942, with *Valentine v. Chrestensen*,<sup>8</sup> the case in which a commercial (but not corporate, it should be noted<sup>9</sup>) distributor of advertising handbills claimed that the First Amendment protected his business advertising practices against regulation.<sup>10</sup> In briefly rejecting his claim, the Supreme Court made it clear that not only were his handbills not protected by the First Amendment, but also that the First Amendment was not even relevant to the question.<sup>11</sup> In my preferred and more modern terminology, commercial

<sup>7</sup> The phrase “commercial speech” is the common label for the commercial advertising—“speech that does ‘no more than propose a commercial transaction,’” *Friedman v. Rogers*, 440 U.S. 1, 10 n.9 (1979) (quoting *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973))—that was at the center of *Virginia Pharmacy*, 425 U.S. at 762, and is at the center of most of the subsequent doctrine and commentary. But “commercial speech” is just a label, and in the literal sense the phrase encompasses a wide range of communicative activity, much of which is well removed from the kind of speech at issue in *Virginia Pharmacy* and its progeny. See Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1213–15 (1984). Thus, when I use the phrase “commercial speech” in this Article, I mean that phrase in the technical sense of the kind of commercial advertising that *Virginia Pharmacy* was all about. See *Virginia Pharmacy*, 425 U.S. at 762.

<sup>8</sup> 316 U.S. 52 (1942).

<sup>9</sup> In the wake of *Citizens United v. FEC*, 558 U.S. 310 (2010), there have been ubiquitous claims that corporations do not (or should not) have First Amendment free speech rights, or at least not the same kind of free speech rights as natural persons. See, e.g., ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* 69 (2014). And, earlier, see C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 2–3 (1976). Although there is obviously some overlap between commercial advertising and corporate speech, the two topics are different. Some commercial advertising, as in *Valentine*, 316 U.S. at 53, is not corporate, and much corporate speech is not commercial advertising. See, e.g., *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776–77 (1978) (holding that corporations have free speech rights to engage in political speech); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding that the profit motive of the publisher did not diminish its First Amendment rights).

<sup>10</sup> *Valentine*, 316 U.S. at 53–54.

<sup>11</sup> *Id.* at 54 (holding “the Constitution imposes no . . . restraint on government as respects purely commercial advertising”).

advertising was treated as entirely outside the *coverage* of the First Amendment,<sup>12</sup> and thus regulable under non-First Amendment-influenced rational basis standards.<sup>13</sup>

Some years later, commentators began to bridle at this approach to commercial advertising,<sup>14</sup> with Martin Redish's 1971 article in the *George Washington Law Review*<sup>15</sup> properly considered a major landmark in this trend. Redish, following and followed by others,<sup>16</sup> insisted that there was no good reason to treat commercial advertising as a lesser form of speech under the First Amendment and that the time had come to reconsider *Valentine*.<sup>17</sup> Shortly thereafter, Justice Stewart, dissenting in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,<sup>18</sup> argued on freedom of the press grounds that regulation of the advertising section of the newspaper was protected against what might otherwise be permissible antidiscrimination legislation.<sup>19</sup> And two years later, the Court held in *Bigelow v. Virginia*<sup>20</sup> that a state restriction on advertising for abortion services was impermissible under the Constitution.<sup>21</sup> The Court announced in clear terms that the presence of speech in a commercial advertisement was not sufficient to deprive it of First Amendment protection,<sup>22</sup> but it was unclear whether this was a pervasive holding about the First Amendment or whether the Court's conclusion

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<sup>12</sup> See FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 103 (1982); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1776 (2004) [hereinafter Schauer, *Boundaries*]; Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 268–69 (1981); Frederick Schauer, *Codifying the First Amendment*: New York v. Ferber, 1982 SUP. CT. REV. 285, 306.

<sup>13</sup> On rational basis review, see *Ferguson v. Skrupa*, 372 U.S. 726, 728–32 (1963); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88, 491 (1955). On the application of rationality review to uncovered communicative behavior, see *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57–69 (1973).

<sup>14</sup> See Ira M. Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439, 463–64 (1964); Elliott L. Richardson, *Freedom of Expression and the Function of Courts*, 65 HARV. L. REV. 1, 5 n.16 (1951) (describing *Valentine*'s distinction between commercial and non-commercial speech as "dubious"); Developments in the Law, *Deceptive Advertising*, 80 HARV. L. REV. 1005, 1027–37 (1967); Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191, 1194–96 (1965); see also *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring).

<sup>15</sup> Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971).

<sup>16</sup> See, e.g., David A. Anderson & Jonathan Winer, Comment, *Corrective Advertising: The FTC's New Formula for Effective Relief*, 50 TEX. L. REV. 312, 318 & n.32 (1972); Fred T. Magaziner, Note, *Corporate Defamation and Product Disparagement: Narrowing the Analogy to Personal Defamation*, 75 COLUM. L. REV. 963, 972–77 (1975).

<sup>17</sup> See Redish, *supra* note 15, at 429–30, 450–52.

<sup>18</sup> 413 U.S. 376, 400–04 (1973) (Stewart, J., dissenting).

<sup>19</sup> *Id.* at 403–04.

<sup>20</sup> 421 U.S. 809 (1975).

<sup>21</sup> *Id.* at 812–13, 829.

<sup>22</sup> *Id.* at 818–25.

and language were heavily influenced by the abortion context, the latter being a reasonable inference in light of the fact that *Bigelow* came only two years after *Roe v. Wade*.<sup>23</sup>

The intersection of scholarly commentary and increasingly relevant case law thus set the stage for a more frontal assault on commercial speech's First Amendment exile, an assault that reached fruition in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>24</sup> in which the Court, now relying entirely and even more clearly on the Free Speech Clause of the First Amendment, held that the interests of the public in obtaining truthful commercial information was an interest with First Amendment footing,<sup>25</sup> and thus that excluding commercial advertising entirely from the ambit of First Amendment coverage was no longer acceptable.<sup>26</sup>

As is so often the case, a breakthrough decision leaves many questions unanswered, including in this instance the question of the standard of review. Some of those questions were answered in 1976 in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,<sup>27</sup> which established, depending on how you count, either a three-part or a four-part test for evaluating the constitutionality of the regulation of commercial advertising.<sup>28</sup> The *Central Hudson* test was restated and reaffirmed some years later in *Lorillard Tobacco Co. v. Reilly*,<sup>29</sup> and the test is now understood to represent an intermediate level of scrutiny,<sup>30</sup> not nearly as strict as that which *Brandenburg v. Ohio*<sup>31</sup> applies to political and ideological advocacy,<sup>32</sup> but far stricter than the rational basis scrutiny that was the implication of the Court's decision in *Valentine*.<sup>33</sup>

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<sup>23</sup> 410 U.S. 113 (1973).

<sup>24</sup> 425 U.S. 748 (1976).

<sup>25</sup> *Id.* at 763–65.

<sup>26</sup> *Id.* at 762.

<sup>27</sup> 447 U.S. 557 (1980).

<sup>28</sup> *Id.* at 564–66. At one point the Court says that its test applies only “[i]f the communication is neither misleading nor related to unlawful activity,” *id.* at 564, suggesting that the speech being truthful and not related to unlawful activity is the threshold requirement for commercial speech to be considered for First Amendment protection at all. But, two pages later, the Court refers to its “four-part analysis.” *Id.* at 566. In some sense this may make no difference, but, as I suggest below, *infra* notes 71–76, which of these is correct may be consequential for issues of the burden of proof and the necessity of independent appellate review.

<sup>29</sup> 533 U.S. 525, 553–54 (2001).

<sup>30</sup> Thus, the Court refers in *Central Hudson* to “lesser protection,” 447 U.S. at 563, a characterization repeated in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422 (1993).

<sup>31</sup> 395 U.S. 444 (1969) (per curiam).

<sup>32</sup> *Id.* at 477. “Political and ideological advocacy” is an egregious oversimplification, but nothing in this Article turns on delineating the range of factual and prescriptive utterances to which the *Brandenburg* test applies.

<sup>33</sup> See *Valentine v. Chrestensen*, 316 U.S. 52, 54–55 (1942) (“The question is not whether the legislative body may interfere with the harmless pursuit of a lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of or interference with, the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated. If the respondent was attempting to use the streets of New York by

## II. THE ARGUMENT FOR PARITY

Almost from the beginning, many of those who endorsed the inclusion of commercial advertising within the coverage of the First Amendment expressed concern at what they saw as the lower level of protection for commercial speech. They applauded the fact that the *Central Hudson* test was far more rigorous than no protection at all, but lamented the way in which that test granted commercial speech less protection than political and ideological advocacy;<sup>34</sup> less protection than nonobscene books, magazines, and films;<sup>35</sup> less protection than factually false defamation of public officials and public figures;<sup>36</sup> and in general less protection than was available to most of the speech encompassed by the First Amendment.

Some of the earliest laments came from academic commentators, with Franklyn Haiman<sup>37</sup> and Daniel Farber,<sup>38</sup> for example, arguing that, with few or no exceptions,<sup>39</sup> commercial advertising should be treated in more or less the same way as most of the other speech protected by the First Amendment.<sup>40</sup> And thus if we put aside defamation and obscenity, each of which has generated an elaborate doctrinal structure of its own,<sup>41</sup> the claim was that there was a normal or baseline level of First Amendment protection for covered speech—perhaps represented by the test in *Brandenburg v. Ohio*,<sup>42</sup> although that puts it a bit too crudely—that ought to apply to commercial speech as well.

Starting in the 1990s, the same claim, even if not so starkly put, started to come from Supreme Court Justices themselves.<sup>43</sup> In *City of Cincinnati v. Discovery*

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distributing commercial advertising, the prohibition of the code provision was lawfully invoked against his conduct.”).

<sup>34</sup> See *Brandenburg*, 395 U.S. at 449.

<sup>35</sup> Obscenity is defined in *Miller v. California*, 413 U.S. 15, 23–24 (1973), and the not-quite-explicit implication of *Miller* and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 (1973), is that nonobscene material is simply protected. *Miller*, 413 U.S. at 34.

<sup>36</sup> *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 134, 155 (1967) (holding that public figures would be treated in the same manner as public officials for defamation purposes); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>37</sup> FRANKLYN S. HAIMAN, *SPEECH AND LAW IN A FREE SOCIETY* 201–02 (1981) (arguing against a “double standard for commercial and noncommercial speech”).

<sup>38</sup> See Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 *N.W. U. L. REV.* 372, 399 (1979). Farber has since announced that he believes that he was mistaken in making this claim. Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 *HARV. L. REV.* 554, 566 n.51 (1991) (book review).

<sup>39</sup> Haiman, for example, allowed an exception for common law deceit, but only for that. HAIMAN, *supra* note 37, at 201–02.

<sup>40</sup> See Martin H. Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech*, 43 *VAND. L. REV.* 1433, 1444–46 (1990).

<sup>41</sup> See *supra* notes 35–36 and accompanying text.

<sup>42</sup> 395 U.S. 444, 447–48 (1969) (per curiam).

<sup>43</sup> And also, notably, from Judge Alex Kozinski, who with co-author Stuart Banner, argued that the commercial/non-commercial distinction “makes no sense.” Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech?*, 76 *VA. L. REV.* 627, 628 (1990); see also Alex

*Network, Inc.*,<sup>44</sup> for example, Justice Stevens worried about the absence of a “bright line[.]” between commercial speech and other forms of speech,<sup>45</sup> and worried as well about the implications of such “lesser protection” for commercial speech.<sup>46</sup> In the same case, Justice Blackmun argued that truthful, noncoercive commercial speech should receive more protection than it received under the *Central Hudson* standard,<sup>47</sup> and Justice Stevens has since, and similarly, urged that nonmisleading, nondeceptive, and noncoercive commercial speech ought to receive full First Amendment protection.<sup>48</sup>

At the risk of oversimplifying, we might call the position just described the claim of *parity*, and the cudgels of the cause of parity have been more recently taken up, most prominently, by Justice Thomas. In *44 Liquormart, Inc. v. Rhode Island*,<sup>49</sup> for example, he argued that the *Central Hudson* standard should not apply to truthful speech,<sup>50</sup> and that there was, in general, no “philosophical or historical” basis for treating commercial speech as entitled to lesser First Amendment protection.<sup>51</sup> Justice Thomas, joined by Justice Scalia, reiterated that view in *Greater New Orleans Broadcasting Ass’n v. United States*,<sup>52</sup> and it is plausible to assume that Justice Thomas’s more recent seeming objection to almost all forms of category-based distinctions in terms of degrees of protection, the position he took in *Reed v. Town of Gilbert*,<sup>53</sup> would apply to the commercial/non-commercial distinction as well.

Most of the arguments for parity appear to assume, without ever actually saying so, that the burden of persuasion is on those who would make the case for nonparity. That is, many of the arguments for parity seem to presuppose that the default rule for all covered speech is full protection, and that any argument for granting lesser protection to some category of covered speech must meet the burden of establishing that a particular category is deserving of lesser protection.<sup>54</sup> But even putting aside the question of just how heavy that burden is—must it be shown beyond a reasonable

Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 755 (1993).

<sup>44</sup> 507 U.S. 410 (1993).

<sup>45</sup> *Id.* at 419–20.

<sup>46</sup> *Id.* at 422.

<sup>47</sup> *Id.* at 431 (Blackmun, J., concurring).

<sup>48</sup> *44 Liquormart, Inc., v. Rhode Island*, 517 U.S. 484, 501 (1996) (plurality opinion of Stevens, J.).

<sup>49</sup> 517 U.S. 484 (1996).

<sup>50</sup> *Id.* at 518 (Thomas, J., concurring).

<sup>51</sup> *Id.* at 522.

<sup>52</sup> 527 U.S. 173, 197 (1999) (Thomas, J., concurring).

<sup>53</sup> 135 S. Ct. 2218, 2224 (2015).

<sup>54</sup> *Cf. Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 799–800 (2011) (placing burden on the state to justify excluding violent video games from First Amendment coverage); *United States v. Stevens*, 559 U.S. 460, 468 (2010) (placing the burden of justification on those who would argue for new categories of First Amendment noncoverage). For my own commentary on these cases, including commentary on the coverage question, see Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81, 84–87, 91–93, 97–100, 108–10.

doubt, or by clear and convincing evidence, or by the equivalent of a preponderance of the evidence, or something else?—it is clear that this issue requires, as Justice Thomas indicated, a full exploration, first, of what *kind* of sources and arguments would support the claim.<sup>55</sup> Should it be a question of original intent, as “older” originalists would have had it?<sup>56</sup> Or is it a question of the original public meaning of “the freedom of speech,” as contemporary originalism prefers?<sup>57</sup> Or is it a philosophical question, requiring examination of the goals that the very idea of freedom of speech is best understood to serve?<sup>58</sup> Or is it perhaps a more pragmatic and political inquiry, as we might get from a “living constitution” approach to constitutional meaning?<sup>59</sup>

Even within an area of agreement about the appropriate sources of constitutional interpretation, there then follows the question about the outcomes to which those sources point. This too is, to put it mildly, no easy task, and thus it is plain that the question of whether First Amendment doctrine should distinguish commercial from non-commercial speech is a question whose answer implicates not only the vast universe of free speech theory, but the even vaster one of constitutional interpretive theory more generally.

To say that this Article in this Symposium is not the place to take on these two huge topics is to engage in extravagant understatement. Instead of even attempting to do so, therefore, I wish, more modestly, to pursue a much narrower line of inquiry, albeit one that is relevant to the larger question. And that narrower line of inquiry is the examination of the implications of the argument from parity. In other words, I want to explore what would flow from treating commercial and non-commercial speech as being roughly (even if not exactly) equivalent, as some Justices and some

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<sup>55</sup> *44 Liquormart*, 517 U.S. at 521–22 (Thomas, J., concurring) (noting the lack of a “philosophical or historical” basis for treating commercial speech as of lower value than other speech).

<sup>56</sup> Examples of the older original intent originalism include Raoul Berger, *Original Intent: The Rage of Hans Baade*, 71 N.C. L. REV. 1151, 1159 n.48 (1993); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3–4 (1971); Edwin Meese III, *Reagan’s Legal Revolutionary*, 3 GREEN BAG 2d 193, 193 (2000). See generally Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713 (2011); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989).

<sup>57</sup> On the more recent turn to original public meaning originalism, see, for example, ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 47 (Amy Gutmann ed., 1997); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105 (2001); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 930 (2009).

<sup>58</sup> For just a few of the vast number of non-originalist arguments based on the purpose (and not on anyone’s intent or motive) of the idea of freedom of speech, see, for example, William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 12, 39 (1995); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 596 (1982); Susan H. Williams, *Democracy, Freedom of Speech, and Feminist Theory: A Response to Post and Weinstein*, 97 VA. L. REV. 603, 614–15 (2011).

<sup>59</sup> See DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 2–3 (2010); *The Brennan Center Jorde Symposium: The Living Constitution: A Symposium on the Legacy of Justice William Brennan, Jr.*, 95 CALIF. L. REV. 2217, 2219 (2007).



commentators seem to have preferred. Once we have a handle on the answer to this question, we will then become somewhat better positioned to determine whether the argument from parity succeeds, and whether we are prepared to accept the implications that would flow from the success of that argument.

### III. THE IMPLICATIONS OF PARITY

#### *A. The Question of Coverage*

An initial question is whether accepting the argument from parity would require rethinking the various areas in which communications—“speech” in the literal sense—remain uncovered by the First Amendment.<sup>60</sup> And although not all noncovered communications are commercial—think about garden variety (not murder for hire, for example) solicitations to crime,<sup>61</sup> for example, or the speech involved in writing a will<sup>62</sup>—many of them are. The entire regulatory apparatuses of the Securities and Exchange Commission, the Federal Trade Commission, and the Food and Drug Administration, for example, are largely schemes of regulation of commercial speech. Some aspects of those regulatory schemes are based on the false or misleading nature of the regulated speech,<sup>63</sup> and thus part of *Central Hudson*’s threshold test (about which more presently),<sup>64</sup> but not all of them are. Consider, for example, the countless timing restrictions in the Securities Act of 1933 and the Securities Exchange Act of 1934, all of which impose restrictions on the timing and nature of truthful commercial communications.<sup>65</sup> Or think about the operation of the anti-conspiracy provisions of the Sherman Antitrust Act. As it is now, if the CEO of Company A calls the CEO of Company B, Company A’s competitor, and truthfully informs her about Company A’s proposed price schedule, and if in response the CEO of Company B shares similar truthful information with the CEO of Company A, they both run a serious risk of prison time for unlawful price-fixing, even though nothing has happened other than the exchange of truthful information.<sup>66</sup> Under what appears to be the current approach, a First Amendment argument against this application of the antitrust laws would be treated as laughable, and thus one question at the outset is whether the argument

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<sup>60</sup> See Schauer, *Boundaries*, *supra* note 12, at 1771.

<sup>61</sup> See generally KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* (1989).

<sup>62</sup> I know of no case in which it has ever been claimed that the words in a will can trigger First Amendment concerns, even though the law of wills is a scheme for the regulation of words, and thus speech. But the very fact that no such claim has made its way to an appellate court is exactly the point.

<sup>63</sup> See, e.g., Securities Act of 1933, §§ 11, 12(2), 15 U.S.C. §§ 77k, 77l(2) (2012).

<sup>64</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

<sup>65</sup> A useful overview of many of the (regulated) timing aspects of the sale of securities under the Securities Act of 1933 is Natalie L. Regoli, *U.S. Regulation of Public Securities Offerings and Development of Standards for Internet Offerings*, 7 J. TECH. L. & POL’Y 3 (2002).

<sup>66</sup> On horizontal price-fixing as a per se violation of section 1 of the Sherman Act (15 U.S.C. § 1 (2012)), see *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940).

from parity incorporates an argument for substantially expanded First Amendment coverage—coverage that would take in the vast swaths of regulatory activity that now, with nary a First Amendment objection, lie well outside the boundaries of the First Amendment.<sup>67</sup> If it does, then does the argument from parity place much of antitrust law, much of securities regulation, and even much of contract law at risk?<sup>68</sup>

In what follows, I want to assume that this is an uncharitably expansive reading of the argument from parity. That is, although we occasionally see arguments for First Amendment coverage of some of the areas I have just mentioned,<sup>69</sup> most of the arguments from parity presuppose that there is a distinction between coverage and protection, and thus these tend to be arguments for increased protection within the area of coverage, and are not, or are not necessarily, arguments for expanded coverage.

### B. Practices of Review

As noted above,<sup>70</sup> the status of the first part of the *Central Hudson* test is a source of some confusion. Is *Central Hudson* a four-part test, in which the first part

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<sup>67</sup> Schauer, *Boundaries*, *supra* note 12, at 1773.

<sup>68</sup> At the Symposium at which this Article was presented, Professor Redish opined that some (all?) of my examples are easily disposed of by recognizing that the regulation of the words involved in things like contract and antitrust is a regulation of words because of their performative (my word) or operative (my word, again) effect. But even apart from the fact that this does not help with the regulation of the substance and timing of informational speech, as pervades much of securities regulation, it is also not clear what distinguishes speech whose utterance (or writing) has a causal effect on subsequent human action from speech that creates legal consequences. The commercial speech with which we are concerned, after all, is speech that “proposes a commercial transaction,” but that characterization also applies to speech soliciting a murder for hire, or to speech proposing an act of unlawful price-fixing. And if the response to these examples is to note, as the *Virginia Pharmacy* Court itself noted, that in these latter examples the underlying conduct is illegal, then it is not clear why that matters for commercial speech when it does not with respect to encouragements for unlawful activity, as in *Brandenburg*, does not with respect to speech arising from illegal activity, as in, for example, *Bartnicki v. Vopper*, 532 U.S. 514, 517–18 (2001), and does not with respect to speech that is itself part of an otherwise unlawful act, as in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907–08 (1982). In other words, even the argument from illegality fails to explain much of existing doctrine, which appears to cover a substantial amount of communication no less closely related to illegality than are the examples that Redish and others think are easily excluded from First Amendment coverage.

<sup>69</sup> With respect to securities regulation, see Aleta G. Estreicher, *Securities Regulation and the First Amendment*, 24 GA. L. REV. 223 (1990); Antony Page, *Taking Stock of the First Amendment’s Application to Securities Regulation*, 58 S.C. L. REV. 789 (2007). On the FDA, where the recent controversy about off-label advertising is interesting in part because it is not about false or misleading advertising, see Coleen Klasmeier & Martin H. Redish, *Off-Label Prescription Advertising, the FDA and the First Amendment: A Study in the Values of Commercial Speech Protection*, 37 AM. J.L. & MED. 315 (2011). On the FTC, see Ivan L. Preston, *The Federal Trade Commission’s Identification of Implications as Constituting Deceptive Advertising*, 57 U. CIN. L. REV. 1243 (1989).

<sup>70</sup> See *supra* note 28 and accompanying text.

is the determination whether the speech is false or misleading? Or is it a three-part test, applicable only to those forms of government regulation that are not based on assuring the accuracy of commercial speech?

The distinction is important, because it plainly implicates the question of appellate review. Under existing First Amendment doctrine, factual findings leading to non-protection, or answers to mixed questions of law and fact leading to the same conclusion, are subject to independent appellate review.<sup>71</sup> In obscenity law, appellate courts must determine the factual correctness of a lower court determination that certain material actually does appeal to the prurient interest, or actually does offend contemporary community standards, or is actually devoid of literary, artistic, political, or scientific value.<sup>72</sup> In constitutionalized defamation law, lower court findings that some statement was in fact “of and concerning” the plaintiff, or was made with awareness of falsity, are subject to the same standard.<sup>73</sup> And the same is true, even if less obviously so, with other areas of First Amendment doctrine. Presumably an administrative or lower court determination under *Brandenburg* that some act of advocacy will “likely” cause unlawful action is subject to independent appellate review, as now appears to be the case with application of *Brandenburg*’s “imminence” standards,<sup>74</sup> at least after *Hess v. Indiana*.<sup>75</sup> And much the same, we suspect, applies to the determination that some invasion of privacy was “newsworthy,” at least on the (hardly obvious) assumption that the newsworthiness standard in the Restatement of Torts standard has found its way into First Amendment doctrine.<sup>76</sup>

Consider, then, application of this standard to commercial speech. If the first “prong” of *Central Hudson* is considered as a threshold test for coverage, then it might be possible to conclude, even consistent with accepting the parity argument vis-à-vis covered speech, that regulatory schemes that are aimed at false or misleading speech do not trigger First Amendment standards. If this is so, then perhaps that determination is not subject to the requirement of independent appellate review. But if instead the test in *Central Hudson* is a genuine four-part test, and if the argument

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<sup>71</sup> See *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499–503 (1984); *Jacobellis v. Ohio*, 378 U.S. 184, 187–90 (1964) (plurality opinion of Brennan, J.); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 284–85 (1964).

<sup>72</sup> See *Jenkins v. Georgia*, 418 U.S. 153, 160–61 (1974); see also *Smith v. United States*, 431 U.S. 291, 305–06 (1977) (observing that the third prong of the *Miller* test is particularly susceptible to appellate review).

<sup>73</sup> *Bose*, 466 U.S. at 490–91; *N.Y. Times*, 376 U.S. at 262.

<sup>74</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1964) (per curiam) (“[C]onstitutional guarantees of free speech and press do not permit a state to forbid . . . the use of force or of law violation except where such advocacy is directed to inciting . . . imminent lawless action . . .”).

<sup>75</sup> 414 U.S. 105, 108–09 (1973).

<sup>76</sup> See *Fla. Star v. B.J.F.*, 491 U.S. 524, 536–37 (1989) (using a standard of “public significance,” and seemingly applying independent appellate review to that determination); see also *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 498 n.2 (1975) (Powell, J., concurring). On the newsworthiness standard, which has never been explicitly applied to the First Amendment by the Supreme Court, see RESTATEMENT (SECOND) OF TORTS § 652D (1977).

from parity is aimed at bringing all four parts up to “normal” (that is, non-intermediate) First Amendment strict scrutiny standards, then we can ask, perhaps rhetorically, whether every determination by the SEC that a representation in a registration statement was misleading be subject to judicial review? Similarly, would every trial court determination upholding the SEC’s determination be subject to independent appellate review? And would the same apply to the FTC and the FDA? If the FDA’s determination that some drug has been mislabeled, misdescribed, or misadvertised marks the line between non-protection and protection, then is the application of that line again subject to independent judicial review and independent appellate review, just as is the case with the line between protection and non-protection for obscenity, for defamation, and for incitement?<sup>77</sup>

### C. Truth and Falsity

Justice Stevens,<sup>78</sup> Justice Blackmun,<sup>79</sup> Justice Thomas,<sup>80</sup> and some of the academic proponents of parity<sup>81</sup> have qualified their positions to exclude false or misleading statements, but if the broad claims of parity are to be taken seriously, we at least ought to ask why truth and falsity should be more relevant to commercial speech than they otherwise are in First Amendment doctrine. This is not of course an article about metaethics, so we can put well aside the question whether normative statements of moral, political, or ideological positions can be true or false.<sup>82</sup> And this is even

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<sup>77</sup> Indeed, the Court in *Bose* emphasized that the requirement of independent appellate review arises from the obligation of the judiciary to patrol the boundaries between protection and non-protection, in order to minimize the incidence of cases of erroneous non-protection. See 466 U.S. at 504, 511. Consequently, if whether a statement about a product is true or false marks the line between protection and non-protection, then one might suppose, at least if very high scrutiny is being applied, that the principles of *Bose* would apply to a determination of falsity or misleadingness, whether that determination is made by an administrative agency, by a jury, or even by a trial court.

Professor Samaha observed, at the live symposium, that independent appellate review may now be more rare in practice than one might glean from the major cases alone. This is surely true, but that may be a function of the almost complete disappearance of obscenity law in light of the Internet and changing social mores, and the substantial evaporation of defamation law as a result of the stringency of the *New York Times Co. v. Sullivan* test. Given normal litigation incentives, things might well change were independent appellate review to be applied to determinations about the falsity or misleadingness of commercial advertising, especially given the resources available to many of the entities whose activities would be constrained by such determinations.

<sup>78</sup> 44 *Liquormart, Inc., v. Rhode Island*, 517 U.S. 494, 501 (1996) (plurality opinion); see also *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 492–93 (1995) (Stevens, J., concurring).

<sup>79</sup> *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 431 (1993) (Blackmun, J., concurring).

<sup>80</sup> 44 *Liquormart*, 517 U.S. at 518 (Thomas, J., concurring).

<sup>81</sup> See HAIMAN, *supra* note 37, at 201.

<sup>82</sup> Indeed, Professor Blasi seems to me to be on sound footing in interpreting Holmes’s “best test of truth” claim in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J.,

more certainly not an article about theology, so we can also put aside questions of the truth or falsity of religious doctrine. But if we are focusing only on statements of raw and non-evaluative fact, then it is clear that pure factual falsity is protected by existing First Amendment doctrine, at least within the areas of the First Amendment's more central application. For example, plainly false factual statements about public officials and public figures are protected unless it can be shown that they were made with actual knowledge or actual suspicion of falsity.<sup>83</sup> More recently, *United States v. Alvarez*<sup>84</sup> has established that demonstrable factual falsity, and even intentional factual falsity outside of the defamation context, normally constitutes no barrier to full First Amendment protection.<sup>85</sup>

The question thus arises why, under the standard arguments for parity, things should be different for commercial advertising. If Mr. Alvarez is free to claim he was awarded the Congressional Medal of Honor even if he was not,<sup>86</sup> and if the *Ocala Star-Banner* is free to say, falsely, that a town's mayor has been indicted for perjury as long as the *Star-Banner* was not aware of the falsity at the time of publication,<sup>87</sup> then we should ask why, under a regime of parity, that same conclusion would not apply to those who make factual statements about the products they are attempting to sell?

For an originalist, this may not be a difficult question. The common law of fraud, which requires knowledge for the statement to be actionable,<sup>88</sup> long predates the First Amendment,<sup>89</sup> and so an originalist such as Justice Thomas can easily conclude that sanctioning intentional falsity is consistent with the original public meaning of the phrase, "the freedom of speech." But for a non-originalist proponent of parity, the question becomes more difficult, and invites (or demands) an inquiry into why factually false commercial speech should be treated differently from factually false non-commercial speech.

One answer to this question comes from *Virginia Pharmacy* itself, which notes the "commonsense differences" between commercial and non-commercial speech.<sup>90</sup>

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dissenting), as a reference to the value of democratic decision-making for moral, political, or other evaluative propositions, and not especially relevant to pure factual propositions. Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 4–5.

<sup>83</sup> On the protection of plainly false and plainly defamatory factual statements if not made with knowledge of falsity, see *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 300 (1971). On the "reckless disregard" facet of the actual malice doctrine, and on its requirement of actual suspicion of falsity, see *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

<sup>84</sup> 132 S. Ct. 2537 (2012) (plurality opinion).

<sup>85</sup> *Id.* at 2545.

<sup>86</sup> *Id.* at 2542, 2551.

<sup>87</sup> *Ocala Star-Banner*, 401 U.S. at 295–300.

<sup>88</sup> See *Rosen v. Bd. of Med. Exam'rs of Iowa*, 539 N.W.2d 345, 349 (Iowa 1995).

<sup>89</sup> See MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 209 (Charles Runnigton ed., London 1820).

<sup>90</sup> *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976).

But in talking about the comparative “hardiness” of commercial speech, the Supreme Court likely got things backwards. Yes, ordinary people are afraid of going to jail and afraid of fines, but profit-based actors are likely to be even more sanction-sensitive than natural persons, or at least that is what the Court itself thought in *New York Times Co. v. Sullivan*.<sup>91</sup> And if the “commonsense differences” cannot do the work that the *Virginia Pharmacy* Court thought they could, we are left with the question about why it would be, under a regime of parity, that factual falsity should be less protected in the context of commercial than it is in the context of non-commercial but still plainly self-interested factual falsity, of which *Alvarez* provides an excellent example.

#### *D. Interests, Compelling and Not So Much*

In equal protection and due process doctrine, strict scrutiny is ordinarily associated with the idea of a “compelling interest,” such that state interests must be “compelling,” and not merely rational or reasonable, if they are to be allowed to overcome equal protection or due process hurdles.<sup>92</sup> And although compelling interest strict scrutiny is not quite as “fatal in fact” as was formerly alleged,<sup>93</sup> it remains clear that there are quite a few entirely legitimate governmental interests that still do not qualify as compelling.<sup>94</sup>

The Supreme Court has occasionally described First Amendment strict scrutiny in “compelling interest” terms,<sup>95</sup> but more commonly *Brandenburg* or its equivalent is the marker for First Amendment strict scrutiny. Yet, however we characterize First Amendment strict scrutiny, it remains plain that the “normal” degree of First Amendment scrutiny is by some margin stricter than the “directly advances” a “substantial” “governmental interest” standard from *Central Hudson*,<sup>96</sup> and that the fit between means and ends must be more than the simple reasonableness criterion applicable to commercial speech under *Board of Trustees of State University of New York v. Fox*<sup>97</sup> and *Edenfield v. Fane*.<sup>98</sup> As a result, justifications for restrictions that might satisfy the existing commercial speech standard may wind up being insufficient

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<sup>91</sup> 376 U.S. 254, 266 (1964).

<sup>92</sup> See, e.g., *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2417 (2013) (equal protection); *Roe v. Wade*, 410 U.S. 113, 154–55 (1973) (due process).

<sup>93</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 326–27 (2003).

<sup>94</sup> For a description of some number of cases in which legitimate or reasonable state interests have been invalidated in the service of various rights and other constitutional considerations, see Frederick Schauer, *The Annoying Constitution: Implications for the Allocation of Interpretive Authority*, 58 WM. & MARY L. REV. (forthcoming 2017).

<sup>95</sup> See, e.g., *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1664–65 (2015); *Sable Comm’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *New York v. Ferber*, 458 U.S. 747, 753, 756–57 (1982).

<sup>96</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

<sup>97</sup> 492 U.S. 469, 480 (1989).

<sup>98</sup> 507 U.S. 761, 767 (1993).

under a regime of parity. And although this might not be troublesome when applied to some paternalistic deprivations of information,<sup>99</sup> things may well appear differently insofar as scrutiny stricter than that which now exists under *Central Hudson* serves to invalidate some number of other health-protective or safety-protective informational restrictions that would generally be considered substantial or important but might still not qualify as compelling.<sup>100</sup>

#### CONCLUSION

Parity means equality, and equality is agnostic about the level at which two items might be equal. If an employer pays all her workers fifteen dollars an hour, she has treated them all equally. All of the employees might be better paid if some were paid twenty dollars an hour and others thirty, but this would still not be an approach characterized by equality.

This simple example illustrates an important aspect of the argument for parity. Parity could be achieved by raising commercial speech protection to that of most of the other forms of speech covered by the First Amendment, but it could also be achieved by lowering what we now think of as the typical high degree of protection available under the First Amendment to that now applicable to commercial speech. In other words, both leveling up and leveling down would achieve parity.

The possibility of achieving parity by leveling down worried Justice Powell, writing for the Court in *Ohralik v. Ohio State Bar Ass'n*.<sup>101</sup> Defending the lower degree of protection for commercial speech, he was concerned that trying to achieve parity—“leveling” was his word—between commercial and other speech would invite “dilution” of the high degree of protection available for traditional First Amendment communication.<sup>102</sup> From his perspective, the risks of leveling down were plainly greater than the prospect of leveling up.

Although it has not been my goal here to argue against the claims of parity as much as to explore their implications, Justice Powell’s concern is worth taking to heart. If it turns out that independent appellate review of administrative determinations of

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<sup>99</sup> See, e.g., *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 330 (1986) (upholding restrictions on advertising of casino gambling).

<sup>100</sup> This characterization might possibly apply to the current controversy about the regulation of off-label pharmaceutical advertising. See *United States v. Caronia*, 703 F.3d 149, 168–69 (2d Cir. 2012) (holding First Amendment prohibits government from punishing pharmaceutical manufacturers for speech promoting off-label uses of FDA approved drugs); Klasmeier & Redish, *supra* note 69, at 316–17 (arguing that it is unconstitutional to limit advertising of off-label uses of FDA approved drugs); David Orentlicher, *Off-Label Drug Marketing, the First Amendment, and Federalism*, 50 WASH. U. J.L. POL’Y 89, 90 (2016) (arguing that although it may not be good for citizens’ health to promote off-label uses of pharmaceuticals, it may nevertheless be unconstitutional to redistrict off-label advertising).

<sup>101</sup> 436 U.S. 447, 455–56 (1978).

<sup>102</sup> *Id.* at 456.

factual falsity would place an unrealistically heavy burden on the courts, the solution under a regime of parity might wind up relaxing the independent appellate review requirement throughout the First Amendment. If it turns out that requiring justifications for commercial speech regulation to be compelling rather than merely substantial would invalidate too many traditionally accepted and reasonable but not compelling regulatory schemes, one possible future outcome would be that speech restrictions throughout the First Amendment would be subjected to a lower standard of importance or urgency. And if it turns out that reluctance to allow official judgments of truth and falsity extended to commercial representations, the unwillingness to allow official determinations of truth and falsity elsewhere in the First Amendment domain might be sacrificed.

From the perspective of those whose chief concern about the First Amendment is increased freedom of unrestricted commercial advertising, none of the foregoing may seem like much of a problem. But from the perspective of those who might be more concerned with the degree of protection for much of the speech covered by the First Amendment, the problem is different, and the claims of parity may entail unintended consequences. Or, to put it somewhat differently, be careful what you wish for.