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SECURITIES REGULATION AND FREEDOM OF THE PRESS: TOWARD A MARKETPLACE OF IDEAS IN THE MARKETPLACE OF INVESTMENT

Donald E. Lively*

Federal regulation of securities traditionally, and almost unquestioningly, has included regulation of the press.¹ Central to governance of the investment marketplace are systems of prior restraint and mandatory disclosure premised upon investor protection but antithetical to first amendment principles. The constitutionality of those systems largely has been uncontested. Since commercial speech has emerged as a protected form of expression, however, it is fitting to assess the compatibility of securities regulation with the first amendment.

Because securities regulation implicates protected expression, and its specific constitutional perimeters have not been officially charted, it is disappointing that the Supreme Court bypassed a recent first amendment challenge to one layer of the editorial control process.² The Court determined that government could not restrain publication of a particular investment newsletter.³ Its decision, however, was the product of statutory construction rather than constitutional analysis.⁴ The invitation to shape the contours of securities regulation consistent with contemporary constitutional dictates thus was declined. Nonetheless, the controversy provides an occasion for reflection upon a regulatory system constructed before commercial speech was constitutionally protected, but which must comport with modern first amendment realities.

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1. The Supreme Court's recent consideration of whether the Securities and Exchange Commission could suppress an investment newsletter constituted a rare opportunity for a hearing on the claim that securities regulation contravened the first amendment. *See* *Lowe v. SEC*, 105 S. Ct. 2557 (1985). A first amendment challenge to the Securities and Exchange Commission's power to review and restrain distribution of offering materials had never reached the Supreme Court. Somewhat offhandedly, without elaboration and in an unrelated case, the Court has observed that dissemination of information regarding investments may be regulated without first amendment concern. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). However, the *Lowe* court sidestepped the first amendment issue.

2. *Lowe v. SEC*, 105 S. Ct. at 2574.

3. *Id.* at 2574.

4. *Id.* at 2573-74.

In 1931, the Supreme Court observed that the central premise of the first amendment "consist[ed] in laying no previous restraints upon publications."⁵ Despite the Court's affirmation that the constitution abhorred official censorship, two years later Congress created the Securities and Exchange Commission ("SEC").⁶ The agency, guided by a regulatory model originally envisioned by Justice Brandeis and actually constructed by Justice Frankfurter, was charged with administering a system of prior restraint and compelled disclosure.⁷ Pursuant to its mandate, one of the SEC's most elemental functions is to review and approve the content of offering materials⁸ before they may be disseminated to potential investors.⁹ As official editor-in-chief, the agency may insist upon amplification, deletion or other content change.¹⁰ If an issuer of securities refuses to accept the SEC's editorial revisions, the agency may issue an order restraining dissemination to the public.¹¹

5. *Near v. Minnesota*, 283 U.S. 697, 713 (1931) (quoting 4 W. BLACKSTONE, COMMENTARIES *151-52). See *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). Abhorrence of prior restraints is rooted in the notion that "a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle . . . others beforehand. . . . [T]he line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Southeastern Promotions v. Conrad*, 420 U.S. 546, 559 (1975).

6. 15 U.S.C. §§ 77a-77aa (1982).

7. The system of editorial control and suppression, that became the Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1982), was based upon a model constructed by Justice Brandeis prior to his appointment to the Supreme Court. Brandeis' central premise was that "[p]ublicity is justly commended as a remedy for social and industrial diseases . . . [and] must . . . be utilized . . . as a continuous remedial measure." L. BRANDEIS, *OTHER PEOPLE'S MONEY* 92 (1932). See R. KARMEL, *REGULATION BY PROSECUTION* 40-42 (1982). The Brandeis model, adopted by Felix Frankfurter, who drafted the Securities Act of 1933 prior to his appointment to the Supreme Court, was heavily criticized by another future Supreme Court Justice, William O. Douglas, who believed disclosures of the type mandated by the SEC would not be meaningful for a public that lacked specialized training and skills. L. LOSS, *FUNDAMENTALS OF SECURITIES REGULATION* 33 (1983) (quoting Douglas, *Protecting the Investor*, 23 YALE REV. 521 (1934)). As discussed *infra* at note 81 and accompanying text, many investors do not even bother to read disclosure materials. Douglas later would argue generally against systematic prior restraint or editorial control of commercial expression. See *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 397 (1973) (Douglas, J., dissenting); *Cammarano v. United States*, 358 U.S. 498, 513-15 (1959) (Douglas, J., concurring).

8. Prior to offering a security, an issuer must file offering materials with the SEC. See 15 U.S.C. §§ 77e, 77g, 77h, 77j, & 77aa (1982). The offering materials include a registration statement, which must be editorially approved by the agency before a prospectus may be disseminated. See *id.* A prospectus contains essentially the same information as a registration statement. See 15 U.S.C. § 77j(a) (1982). However, it also may include any notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale. 15 U.S.C. § 77b(10) (1982). Absent an effective editorially approved registration statement, dissemination of a prospectus in any such form is barred. 15 U.S.C. § 77(e) (1982).

9. See 15 U.S.C. § 77e (1982).

10. See T. HAZEN, *THE LAW OF SECURITIES REGULATION* 66-72 (1985); R. KARMEL, *supra* note 7, at 257-71.

11. See 15 U.S.C. § 77h(b), (d) (1982).

Consistent with the spirit of official editorial control, Congress later empowered the SEC to license and regulate investment advisers.¹² Even after the Supreme Court's decision in *Lowe v. SEC*,¹³ the agency may suppress investment newsletters that are not "bona fide publications."¹⁴

Generally, a strong presumption of unconstitutionality exists against any system of prior restraint.¹⁵ When the surface of the Supreme Court's opinions concerning prior restraint is scratched, however, it is apparent that the burden of justification may be less when Congress has determined a need for suppression.¹⁶ Thus, the burden may have been diminished by Congress' enactment of the federal securities laws. Nonetheless, the burden still exists. Nor can it be successfully carried if effective alternatives exist that are less restrictive of first amendment interests.¹⁷

Survival of a system of editorial oversight, censorship, and governance, with minimal constitutional scrutiny, is largely attributable to a process that calibrates first amendment protection according to how a given form of expression is classified.¹⁸ Speech that promotes the sale of securities or renders investment advice may fit within the definition of commercial speech.¹⁹ Until the mid-1970's, commercial speech was considered beyond

12. See Investment Advisers Act of 1940, 15 U.S.C. § 80b-1 to 80b-21 (1982). The Act "was the last in a series of acts designed to eliminate certain abuses in the securities industry, abuses which were found to have contributed to the stock market crash of 1929 and the depression of the 1930's." *Lowe v. SEC*, 105 S. Ct. at 2563 (quoting *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 186 (1963)). It thus is part of a broader regulatory scheme consisting of the Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1982); Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended in scattered sections of 15 U.S.C. §§ 77b-78kk(1982)); Public Utility Holding Company Act of 1940, 15 U.S.C. §§ 79a to 79z-6 (1982); Trust Indenture Act of 1940, 15 U.S.C. §§ 77aaa-77bbbb (1982); and the Investment Company Act of 1940, 15 U.S.C. § 80a-1 to 80a-64 (1982).

13. 105 S. Ct. 2557 (1985).

14. 15 U.S.C. § 80b-2a(11)(D). For a discussion of the interpretation of this key phrase, see *infra* notes 84-146 and accompanying text.

15. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam).

16. See, e.g., *id.* Justice White concurred that publication of the Pentagon Papers could not be enjoined, but, in an opinion joined by Justice Stewart, hinted at a different result if Congress explicitly and appropriately authorized "prior restraints in circumstances such as these." *Id.* at 731 (White, J., concurring). Justice Marshall relied upon Congress' specific refusal to prohibit what the Executive sought to prevent. *Id.* at 742-47 (Marshall, J., concurring). Given the three dissenters and the nature of the White and Marshall concurrences, the presence of a pertinent Congressional statute could have altered the Court's decision.

17. *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 564-66 (1980).

18. The Court classifies speech and assigns it a value, based upon perceived social utility, that determines the degree of constitutional protection, if any, it is afforded. Thus, political speech generally is ranked higher and commercial speech given lesser protection. See *id.* at 561-63; *id.* at 579-83 (Stevens, J., concurring); *id.* at 595-99 (Rehnquist, J., dissenting).

19. Commercial expression originally was defined as speech which proposes a commercial transaction. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). Generally, a prospectus, like an advertisement, would seem to fit within that definition. The classification includes "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Elec.*, 447 U.S. at 561. The category is wide enough

the purview of the first amendment.²⁰ Even the Court's recent willingness to confer a constitutional mantle upon commercial speech has been qualified by the observation that the general prohibition against prior restraint may be inapplicable in the commercial speech context.²¹ Nonetheless, regulatory practices that were constitutionally tolerable when commercial expression was not protected may be tolerable no longer.²²

Official editorial control of expression in the investment marketplace rests largely upon the regulatory predicate of investor protection.²³ Put somewhat less flatteringly, the federal securities laws exist "to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition."²⁴ To the extent regulation promotes disclosure of material information, as it purports to do with respect to the offer and sale of securities,²⁵ it might appear harmonious with first amendment values associated with expression from "a multitude of tongues."²⁶ To the extent regulation makes government the chief editor of information disseminated to investors, however, the regulatory structure seems more consonant with "authoritative selection."²⁷

If measured against a strict reading of freedom of speech and of the press, a system that subjected promotional and advisory information to prior restraint and official editorial control would not be countenanced. The first amendment contemplates not only that the public will be poorly informed but also that the public may be misinformed and misled.²⁸ Such risk assumption, however, has been tolerated less in the commercial than in the political marketplace of ideas.²⁹ Disparate first amendment protection

to include investment newsletters but also, as discussed *infra* at notes 140-42, 145-46, 152-53, 171 and accompanying text, much speech of clear political and social value. The speech classification process and its underlying rationale creates intractable problems in the exercise of first amendment logic. See *infra* Part III.

20. See *Valentine v. Chrestensen*, 316 U.S. 52, 54-55 (1942).

21. *Virginia State Bd. of Pharmacy*, 425 U.S. at 771 n.24.

22. See *infra* notes 34-83 and accompanying text.

23. *SEC v. Ralston Purina Co.*, 346 U.S. 119, 124 (1953); see *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 186 (1963); Preamble to Securities Act of 1933, ch. 38, 48 Stat. 74.

24. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 64 (1973). Yet the Court acknowledges that such regulation may be premised upon "unprovable assumptions." *Id.* at 61.

25. See *supra* note 23.

26. The language originated in Judge Hand's opinion to the effect that dissemination of observations and ideas from multiple sources "and with as many . . . colors as possible . . ." is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a *multitude of tongues*, than through any kind of *authoritative selection*." *United States v. Associated Press*, 52 F. Supp. 362, 372 (1943), *aff'd*, 326 U.S. 1 (1945) (emphasis added).

27. See *id.*

28. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791-92 & n.31 (1978).

29. The Court has observed that "public and private benefits from commercial speech derive from confidence in its accuracy and reliability. Thus, the leeway for truthful or misleading expression that has

exists because of assumptions that commercial speech is more durable and easier to verify.³⁰

A constitutional distinction between political and commercial expression, based upon those articulated factors, is problematical.³¹ At minimum, such line-drawing is imprecise, not necessarily related to proffered rationales and quite possibly a futile exercise.³² Even if the assumptions underlying the attempted differentiation are correct, commercial speech remains a species of expression that is constitutionally protected. Although its immunity from regulation is qualified, any regulatory restriction may be no more extensive than is necessary to serve the government's interest.³³

Consideration of less restrictive alternatives for securities regulation that impinges upon first amendment interests is overdue. The SEC's commitment to official editorial control, despite the protected status of commercial expression, illuminates the issue. During the half century of its regulatory activity, the SEC has insisted that mandatory disclosure and investor protection are inextricable. Given the constitutional protection now afforded commercial speech, however, the SEC has become obligated to demonstrate rather than assume that its long-standing practices serve valid and substantial governmental interests in a way that least burdens first amendment interests.

Necessary constitutional analysis in the area has been neglected and the Court's decision in *Lowe v. SEC* in effect postpones the SEC's day of first amendment reckoning. This article pursues the constitutional inquiry. Part I examines the existing system of editorial control governing the promotion of securities. Alternative systems are proposed that might effectively promote regulatory objectives while placing a lesser burden on first amendment interests. Part II explains why regulation of investment newsletters offends the first amendment, and how the Court, in *Lowe v. SEC*, failed to safeguard adequately the pertinent constitutional interests. Part III discusses problems with classifying expression as commercial, including that pertaining to investments.

been allowed in other contexts has little force in the commercial arena." *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977). The Court also has suggested that lack of public sophistication may be a proper regulatory consideration. *See id.*; *see also Virginia State Bd. of Pharmacy*, 425 U.S. at 771 & n.24 (1976).

30. *See Bates v. State Bar of Arizona*, 433 U.S. at 383 ("[s]ince the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech."); *Virginia State Bd. of Pharmacy*, 425 U.S. at 771 n.24.

31. *See infra* notes 156-61 and accompanying text.

32. *See infra* notes 147-80 and accompanying text.

33. *Central Hudson Gas & Elec.*, 447 U.S. at 566.

I. THE MARKETPLACE OF INVESTMENT IDEAS: A SYSTEM OF AUTHORITARIAN SELECTION AND ITS ALTERNATIVES

The stated reason for regulating information regarding a security that is being offered or sold is to ensure full disclosure.³⁴ Presumably, the consequences of that philosophy include more informed investment decisions and diminished vulnerability to schemes that defraud or deceive by misrepresenting or omitting material facts. However, the nature of the system is more consistently akin to forced rather than full disclosure.

The offer or sale of a security is preceded by official editorial review of promotional materials.³⁵ Issuers of securities submit registration materials³⁶ to the SEC, which reviews them and orders editorial revisions. In so doing, it may insist upon deletion or augmentation of statements considered inaccurate, incomplete, or unverifiable.³⁷

The SEC thus wields tools of censorship akin to those long ago found intolerable in the English licensing system.³⁸ The English Licensing Act of 1662 prohibited publishing by persons not licensed by the Crown.³⁹ Similarly, the SEC may bar dissemination of promotional materials unless or until it has approved them.⁴⁰ For practical purposes, virtually all filings are revised at the SEC's behest.⁴¹ Resistance is likely to be counterproductive, because the agency has the power to suspend the effectiveness of a registration statement and thus block distribution of offering materials.⁴² Equally effective is its ability to delay the offering of securities until it is satisfied with the content of promotional materials.⁴³ The prospect of belated

34. See *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 186 (1963); *SEC v. Ralston Purina Co.*, 346 U.S. 119, 124 (1953); Preamble to Securities Act of 1933, ch. 38, 48 Stat. 74.

35. Review is part of the registration process discussed *supra* note 8. The registration statement provides a detailed description of the issuer and whatever else the SEC considers material. See 15 U.S.C. § 77aa (1982) (schedule of information required in registration statement).

36. See 15 U.S.C. § 77e(c) (1982). The nature of registration materials, including a prospectus, is discussed *supra* note 8.

37. See 15 U.S.C. § 77h(b) (1982). See also *In re Universal Camera Corp.*, 19 S.E.C. 648, 657 (1945). The SEC ordinarily sends a deficiency letter itemizing the changes, additions or deletions required before a registration statement can become effective and before offering materials can be disseminated to the public. See R. JENNINGS & H. MARSH, *SECURITIES REGULATION* 205 (1977).

38. English publishers, until 1694, had to be licensed by the Crown. Without a license, publication was unlawful. See 3 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1876 (Boston 1833).

39. Thus, the only permissible publications were those approved by the licenser. See *id.*; Emerson, *The Doctrine of Prior Restraint*, 20 *LAW & CONTEMP. PROBS.* 648, 650 (1955).

40. See 15 U.S.C. § 77e(a), (c) (1982).

41. T. HAZEN, *supra* note 10, at 67.

42. See 15 U.S.C. § 77h(b), (d) (1982).

43. To expedite approval and minimize delay and adverse publicity, most issuers comply with the Commission's editorial demands. See T. HAZEN, *supra* note 10, at 67-69.

editorial approval helps diminish resistance to editorial revisions and ensure compliance with the agency's content controls.⁴⁴

Editorial review thus is at the heart of the SEC's regulatory function.⁴⁵ The practice, however, is inconsistent with the principle that government regulation of the editorial process abridges first amendment rights.⁴⁶ Ordinarily, government cannot dictate what a publisher may or may not print.⁴⁷ To the extent that commercial speech was regarded as unprotected expression, that constitutional command easily could be disregarded.⁴⁸ Dilation of the first amendment's ambit to include commercial speech, however, at least necessitates a critical look at procedures adopted and developed on the premise that the expression being regulated was beyond constitutional concern. Even the limited mantle of first amendment security conferred upon commercial speech requires a regulatory system that comports with "constitutional . . . safeguards of individual rights."⁴⁹

The structuring of a first amendment sensitive system within existing constitutional contours requires first an understanding of limits imposed upon commercial expression. Commercial speech may be banned altogether if it is more likely to deceive the public than inform it.⁵⁰ If the expression is not misleading or related to an unlawful activity, government may regulate it only upon demonstrating that the regulation directly advances a substantial state objective and that no less burdensome alternative is available.⁵¹

44. See *id.*; L. Loss, *supra* note 7, at 129-30 (1983 & Supp. 1984).

45. The Division of Corporate Finance is responsible for reviewing all disclosure materials. In 1980, it had a review staff of 100 persons who processed more than 60,000 filings. R. KARMEL, *supra* note 7, at 262.

46. "It has yet to be demonstrated how governmental regulation of this crucial [editorial] process can be exercised consistent with First Amendment guarantees of a free press . . ." Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974) (denying right of reply to personal attacks in newspapers).

47. *Id.* at 255-56. See also *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 400 (1973) (Stewart, J., dissenting).

48. The SEC's longstanding position, adopted before protection was afforded commercial speech, is that editorial freedom is outweighed by the danger of speculative and harmful investment that may be occasioned by inaccurate or incomplete information. See Carl M. Loeb, Rhoades & Co., 38 S.E.C. 843, 853 (1959).

A rare challenge to the SEC's power to restrain dissemination of offering materials was rebuffed in *SEC v. Arvida Corp.*, 169 F. Supp. 211, 215 (S.D.N.Y. 1958). The court concluded that, prior to filing a registration statement, an issuer could not disseminate information aimed at conditioning the market for the offering. *Id.*

49. *Archer v. SEC*, 133 F.2d 795, 803 (8th Cir. 1943).

50. See *Friedman v. Rogers*, 440 U.S. 1, 13, 16 (1979); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464-65 (1978).

51. *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 564-66 (1980).

Given existing constitutional perimeters of protection for commercial speech, regulation logically should be least vulnerable to the extent it suppresses false or misleading speech or insists upon its revision. The agency acknowledges, however, that its editorial review process is neither calibrated for nor capable of ascertaining and screening out false or misleading representations.⁵² Essentially, the SEC assumes that promotional assertions are accurate and merely endeavors to ensure that discussion is comprehensive.⁵³ Assuming government has a valid interest in deterring misleading promotion of securities, therefore, it is questionable whether the editorial review system directly promotes that interest.

The SEC also is on unstable constitutional footing when it engages in content control, not because expression is false or misleading, but to promote its perception of full disclosure. Such regulation again necessitates heightened constitutional evaluation of the underlying regulatory interest and attention to less restrictive alternatives. Full disclosure, to the extent it is the product of official editorial standards and strict control, is a euphemism for forced disclosure. Lost in the process may be *meaningful* disclosure. Until recently, for instance, financial and operational projections could not be included in a prospectus, because the Commission did not consider them objectifiable or verifiable.⁵⁴ Thus, projection of a company's future revenues, plans, and economic performance, although pertinent information for an investor,⁵⁵ could not be included in a prospectus. Such official editorial control has not been entirely abandoned and may be so inflexible and shortsighted that it actually engenders misleading promotional materials.⁵⁶

52. The filing or effectiveness of a registration statement "shall [not] be deemed a finding by the [SEC] that [it] . . . does not contain an untrue statement of fact or omit to state a material fact." 15 U.S.C. § 77w (1982). It is unlawful to "represent that the [SEC] has passed upon the merits of any security, or given approval to it." See *In re Universal Camera Corp.*, 19 S.E.C. at 656; 15 U.S.C. § 77w.

53. See *In re Universal Camera Corp.*, 19 S.E.C. at 656-57.

54. See H. KRIPKE, *THE SEC AND CORPORATE DISCLOSURE: REGULATION IN SEARCH OF A PURPOSE* 17 (1979); *New Approaches to Disclosure in Registered Security Offerings—A Panel Discussion*, 28 *BUS. LAW.* 505, 506-07 (1973). The SEC, in 1979, adopted a rule allowing publication of statements regarding revenue, income and earning projections, plans for future company operations, and future economic performance. 17 C.F.R. § 230.175 (1984). Even so, such "soft information" is closely regulated and, absent a reasonable basis or good faith, may be deemed fraudulent. See *id.* § 230.175(a). It has been observed, moreover, that the SEC's "preoccup[ation] with using the securities laws as a mechanism for imposing liability," and disinclination "to enunciate or adhere to legal standards," stifles issuers' creativity and incentive to take risks. Thus, the regulatory changes are less meaningful than they could be. R. KARMELEL, *supra* note 7 at 267.

55. Because knowledge of such factors is critical to prudent business and investment decisions, censorship of such information approaches an official policy of omission of material facts, which could give rise to liability if practiced by a seller or purchaser. See 15 U.S.C. § 78j(b) (1982); 17 C.F.R. § 240.10b-5 (1984).

56. The SEC's liberalized rule regarding forward-looking information, discussed *supra* note 54,

Contemporary editorial regulation of the securities marketplace reflects a paternalistic philosophy toward investors.⁵⁷ A guardian's role may be a noble one,⁵⁸ given opportunities for fraud and deceit in the securities market and recurrent failure of promoters to resist such temptations. Even laudatory regulatory activities, however, must pass constitutional muster. A particular danger of unconstitutional overreaching exists when a regulatory system, purposely constructed to be paternalistic, must be measured against first amendment standards that do not suffer paternalism gladly.⁵⁹ Even if compelled disclosure directly advances government's regulatory interests, it is by no means the least restrictive means for doing so.

Commercial expression, although not fully protected under the first amendment, must be regulated no more extensively than is necessary to serve proper governmental interests.⁶⁰ The command applies generally to regulation of commercial speech, but should apply with particular force to a system of prior restraint. Official censorship of commercial speech, like censorship of any other form of expression, endangers diversity of information by denying an audience access to an idea or a thought.⁶¹

The function of any censor is to censor.⁶² The specific role of an SEC censor is to censor in the interest of investor protection. It is the fundamental mission of the SEC to protect investors and the investment

excludes from its purview investment companies that must register with the agency. *See* 17 C.F.R. § 230.175(b)(1)(ii) (1985). Sales literature concerning a conventional mutual fund, for instance, may tout past but not future performance. An advertisement promoting a government securities fund thus might emphasize a higher interest rate yield for a prior period. If interest rates were declining in the meantime, however, an investor's prospective return would be lower than the advertised rate. Editorial regulation, to the extent it enables a fund to advertise higher returns than it actually is earning, thus may contribute to investor deception.

57. The Court has rejected officious suppression by government, at least to the extent the underlying concern is that the public may act irrationally upon information. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791-92 & n.31 (1978); *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 95-97 (1977).

58. Such a role need not necessarily implicate the first amendment. *See* Barrett, Jr., "The Uncharted Area"—*Commercial Speech and the First Amendment*, 13 U.C.D. L. Rev. 175, 190, 208-09 (1980).

59. *See Bellotti*, 435 U.S. at 791-92 & n.31.

60. *Central Hudson Gas & Elec.*, 447 U.S. at 566.

61. *See generally* Emerson, *supra* note 39. Official editorial review scrutinizes "the innocent and borderline as well as the offensive, the routine as well as the unusual." *Id.* at 656. The danger is that meaningful expression may be lost.

62. *See Freedman v. Maryland*, 380 U.S. 51, 57 (1965); *Times Film Corp. v. Chicago*, 365 U.S. 43, 67-68 (1961) (Warren, C.J., dissenting).

marketplace's integrity.⁶³ Agency goals and first amendment interests thus inevitably clash.⁶⁴

For example, registration materials, including prospectuses, are edited by Commission attorneys who, assuming they identify with agency goals and have normal interests in career advancement, are more likely to have bleeding pens than not.⁶⁵ A staff attorney who edits lightly because he is motivated by devotion to diversity of expression, rather than the official model of disclosure, would not likely be recognized for having effectively served agency objectives. Given a confluence of career and agency goals, the normal tendency would be to maximize content challenges and demands for precision, amplification and other change.⁶⁶ Assuming performance evaluations are based largely upon how well an employee furthers agency objectives by diligent and detailed content oversight and control, the incentive exists to censor more rather than less.⁶⁷

Such regulation evinces an abandonment of the risk, contemplated by the first amendment, that the public may be duped or misled.⁶⁸ The consequent inclination is toward official censorship, at least to the extent considered necessary for investor protection. As a regulatory starting point, such a premise seems poorly attuned to the command that government must minimize first amendment burdens. Furthermore, it invites regulatory insensitivity.

Perhaps a more logical and useful departure point, in searching for alternatives that better comport with constitutional interests, necessitates considering whether diversity of expression might be as useful and desirable a regulatory goal as it is a first amendment objective.⁶⁹ The protected nature of commercial speech at least mandates experimentation to determine whether less heavyhanded strategies regulate effectively.

A common assumption about protected speech is that the more voices and ideas heard the better.⁷⁰ Diversity has been valued so highly that when

63. See *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 186 (1963); *SEC v. Ralston Purina Co.*, 346 U.S. 119, 124 (1953).

64. Even persons who identify themselves with civil liberty goals and interests have acknowledged that their sensitivity tends to diminish when pursuing regulatory objectives. See R. KARMEI, *supra* note 7 at 25-27.

65. Cf. *id.* at 27 (ambitious SEC attorneys have tendency to increase regulatory burdens on business because the attorneys want to prevail in controversial, precedent-setting cases).

66. Cf. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 84-86 (1969) (career ambitions of FTC staff influence regulatory results).

67. See generally *Times Film Corp.*, 365 U.S. at 67-68 (Warren, C.J., dissenting).

68. See *Bellotti*, 435 U.S. at 791-92.

69. The alternative to a multitude of tongues is a "standardization of ideas." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). See also *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963). Presumably, multiple viewpoints are as useful in the commercial marketplace of ideas as in the political one.

70. See, e.g., *CBS v. FCC*, 453 U.S. 367, 396 (1981) (limited right of reasonable access for legally

some avenues of expression are perceived as not being available to all, government has designed and imposed remedies. In the electronic forum, for instance, it has constructed devices intended to promote diversity by elevating the rights of information receivers above those of information suppliers.⁷¹

The commitment to diversity as a natural and effective safeguard against evil reflects adherence to the maxim that bad speech is remedied by competing speech.⁷² To the extent values associated with diversity of expression also may inhere in an effective regulatory scheme, the theoretical framework would exist for a less restrictive system of securities regulation. Content diversity would serve first amendment interests better than content control. Diversity-based regulation, moreover, might serve regulatory objectives at least as effectively and actually better facilitate capital formation.⁷³

Development of a more constitutionally sensitive allocation of disclosure responsibilities, however, will necessitate experimentation. Reform may require no more than creativity and innovation within the present system. The existing regulatory process requires issuers to submit disclosure materials for official clearance.⁷⁴ The SEC's staff communicates its editorial comments to the authors. Then, as a condition for dissemination, the authors must make revisions. Although the system functions as a mechanism for suppression and control, it could be adapted to one for diversity. Such a conformation might entail less agency review and more reliance upon general rulemaking.⁷⁵ Or, the agency could use its editorial prowess to inform the public directly of agency concerns.

Publishers, in either event, and in recognition of the values associated with a free exchange of ideas and information, would not be obligated to conform their publications to rigid official standards and tastes. The SEC, although it would abandon strict control and suppression as a regulatory device, might set more general guidelines for disclosure or target its comments directly to the public. The latter procedure would inject the SEC itself into the marketplace of ideas and perhaps enhance the forum's

qualified candidates for federal office); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390-93 (1969) (fairness doctrine regarded as a means to promote diversity).

71. The fairness doctrine, for instance, requires broadcasters to present balanced programming of controversial issues of public importance, pursuant to the notion that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion*, 395 U.S. at 390.

72. See *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). The Court's analytical evolution regarding so-called bad speech directed toward advocating insurrection or illegal conduct is discussed *infra* note 95.

73. R. KARMEL, *supra* note 7, at 268-69.

74. See *supra* notes 35-37 and accompanying text.

75. R. KARMEL, *supra* note 7, at 268-69.

robustness.⁷⁶ Such a role need not be feared, so long as it is subject to the competitive nature of the information marketplace and enjoys no special privilege or rank.⁷⁷ Competitive expression would safeguard against undue government influence, which permeates the existing system. Presumably, diminished content control would facilitate more innovative, creative, and thus effective corporate communication.⁷⁸

Official comment would be useful to the extent it contributed to the multitude of tongues from which correct decisions may be made.⁷⁹ Furthermore, it directly would advance the government's interest in full disclosure and informed investment decisionmaking. If governed by such a system, a publisher of promotional material, who disagreed with the Commission regarding the contents of a publication, could abide by his own editorial judgments. The SEC, if its comments or suggestions were disputed, could publish its response and thereby invite investor attention to purported deficiencies, contribute to viewpoint formation and facilitate more educated and critical inquiry and evaluation.

Essentially, the agency would engage in much the same routine as it does now. It would do so, however, by competing in, rather than controlling, the information marketplace. Agency staff still would review publications and offer observations and comments. Instead of suppression, diversity would be the key to investor protection. Presumably, investors would be better served to the extent they received information from more than one source. Consistent with agency goals and investor needs, disclosure would be more genuinely full, because investors would be exposed to differing accounts of material information. In sum, without a major structural overhaul, the SEC could regulate as a critic that communicated directly to the public, instead of as a censor.⁸⁰

76. Although generally disfavoring constitutionalization of a government right to speech, one theorist has acknowledged that "[g]overnment speech can amplify the voices of individuals attempting to participate in debates dominated by . . . organized interest groups . . . [and] provide a necessary check on the power of corporations . . . to dominate the communications networks." Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 866 (1979).

77. Government may "add its own voice to the many that it must tolerate, provided it does not drown out private communication." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 590 (1978). Cf. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

78. R. KARMEI, *supra* note 7, at 269.

79. See *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).

80. The constitutional moorings for such a system already are in place. The Court itself has observed that limited supplementation of a commercial representation may be constitutionally countenanced. See *Bates v. State Bar of Arizona*, 433 U.S. at 350, 384 (1977). Such regulation would be akin to requiring cigarette manufacturers to print on packages a warning that cigarette smoking is hazardous to health. See 15 U.S.C. § 1333 (1982). It likewise would resemble a regulator's order that a utility, promoting a controversial viewpoint in a bill insert, include a competing viewpoint. Consolidated

The diversity-oriented process also might alleviate one of the most troublesome practical aspects of the present regulatory system. Investors often do not bother to read prospectuses or other promotional materials.⁸¹ Such a reality seriously undercuts the validity of a system that is premised upon meaningful disclosure and invests considerable resources in promoting it.⁸² Censorship and other editorial control mechanisms are difficult to countenance even when important state interests are at stake.⁸³ It further strains tolerance to censor when the regulatory purpose is not even being well served. Forced disclosure is an empty and costly exercise, if those supposedly being protected are disinterested in or unaffected by it. Constitutional modernization of a regulatory system in a manner that encourages new and diverse avenues of disclosure, and perhaps includes direct communication of agency comments to the investing public, might be a particularly effective device for capturing the attention of investors, educating them and promoting informed decisionmaking. If so, the result would be a system that not only protected investors more effectively but comported better with first amendment guarantees.

II. FROM FORCED DISCLOSURE TO RESTRAINT

The Brandeis-Frankfurter model of securities regulation, which for half a century has furnished the basis for suppression and editorial control, at least shares some values with the first amendment.⁸⁴ Both the Brandeis-Frankfurter formula and the first amendment favor disclosure, although they differ with respect to degree of and tolerance for editorial compulsion. To the extent the SEC moves beyond content control calculated to promote disclosure, and actively endeavors to suppress information, even that common ground is lost.

Edison of New York v. Public Serv. Comm'n, 447 U.S. 530, 543 (1980). Both examples represent a more sensitive accommodation of regulatory and first amendment interests in the commercial sector, pursuant to the principle that bad propaganda is best exposed by counterpropaganda. J. FRIEDRICH, *MAN AND HIS GOVERNMENT: AN EMPIRICAL THEORY OF POLITICS* 169 (1963).

81. The concept that an investor makes an informed decision based upon reading a prospectus thus has been criticized as an "official myth." See Kripke, *The SEC, the Accountants, Some Myths and Some Realities*, 45 N.Y.U. L. REV. 1151, 1153, 1164-70 (1970).

82. It is argued that investment professionals do read the disclosure materials and relate the information to investors. See T. HAZEN, *supra* note 10, at 32. The point, however, does not validate the requirement that investors must receive copies of prospectuses. See 15 U.S.C. § 77e(b)(2). It also undermines the need for content control, since investment professionals render advice based upon what they have gleaned from both official and unofficial sources.

83. See *United States v. Progressive, Inc.*, 467 F. Supp. 990, 992 (W.D. Wis. 1979), *dismissed without opinion*, 610 F.2d 819 (7th Cir. 1979).

84. Brandeis, consistent with first amendment principles, observed that "[s]unlight is . . . the best of disinfectants; electric light the most efficient policeman." L. BRANDEIS, *supra* note 7, at 92.

A. *Lowe v. SEC: A Statutory Detour Around Constitutional Principles*

So far as the SEC and judiciary are willing to elevate investor protection concerns over first amendment interests, the federal securities laws present multiple opportunities for tinkering with press freedoms.⁸⁵ The SEC's effort to use the Investment Advisers Act of 1940,⁸⁶ which generally provides for the licensing and regulation of persons who provide investment counseling,⁸⁷ is a case in point. An investment adviser, for purposes of the Act, is "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in [them] . . . or . . . as part of a regular business, issues or promulgates analyses or reports concerning securities."⁸⁸ The definition, drafted some thirty-five years before the Court brought commercial speech within the scope of first amendment protection, at first blush could include such publications as the *Wall Street Journal*, *Forbes*, or *Barrons* and even daily general interest newspapers and magazines to the extent they maintain business sections.

The SEC did not attempt to reach those publications, however, because it assumed they fit within a provision which excludes as an investment adviser "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation."⁸⁹ Nonetheless, in *Lowe v. SEC*, the agency attempted to suppress certain investment newsletters which, like those it does not touch, discussed the

85. Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1982), together with SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1984), promulgated thereunder, constitute a general antifraud provision that could be used abusively. A Rule 10b-5 violation can be established, for instance, if a person with a duty to disclose trades upon confidential information. *See Dirks v. SEC*, 463 U.S. 646, 653-55 (1983). The government successfully has prosecuted a *Wall Street Journal* reporter pursuant to the theory that he owed a duty to his employers not to trade on or benefit from the content of forthcoming articles likely to affect the price of stock. *United States v. Winans*, 612 F. Supp. 827 (S.D.N.Y. 1985). The SEC, in a parallel civil action, alleged a Rule 10b-5 violation based upon breach of a purported duty to readers. *SEC v. Brant*, [1984 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 91,483, at 98,411 (S.D.N.Y. May 17, 1984). Specifically, it was alleged that the columnist failed to disclose to readers his financial interest in the securities about which he wrote. *Id.* A duty between a financial reporter for a newspaper of general interest and his readers was delineated in *Zweig v. Hearst Corp.*, 594 F.2d 1261, 1266-69 (9th Cir. 1979). Such a premise is constitutionally troublesome because no principled basis would exist for precluding the regulation of journalists whose reports would affect the securities market. The government, for instance, might allege a breach of duty because a journalist emphasized tension and danger in the Middle East without disclosing his holdings in oil company stocks. Either claim necessitates official news judgment decisions and journalistic review that do not comport with the first amendment. *See Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241, 254-58 (1974).

86. 15 U.S.C. §§ 80b-1 to 80b-21 (1982).

87. *Id.* § 80b-3.

88. *Id.* § 80b-2(a)(11).

89. *Id.* § 80b-2(a)(11)(D).

investment marketplace⁹⁰ and made observations that were as much political, social, and economic as they were commercial.⁹¹ The SEC's effort to restrain publication was not occasioned by actual harm from or problems with the newsletters' content.⁹² They were not alleged, for instance, to be false and misleading.⁹³ Rather, the agency sought to suppress them because the publisher had been convicted of various fraud-related crimes.⁹⁴ The stated concern was that publishing afforded him further "opportunities for dishonesty and self-dealing."⁹⁵

Instead of rebuking the SEC for first amendment insensitivity and charting constitutional perimeters for its regulatory authority, the Court dismissed the agency's longstanding construction of the "bona fide publication" exception in favor of its own.⁹⁶ Thus, it observed that a publication is "bona fide" and thereby excluded from the definition of an investment adviser if it provides impersonal or disinterested rather than individualized or promotional advice to the subscriber.⁹⁷

At best, it can be hoped that, of the several conflicting statutory constructions that emerged as the *Lowe* case moved through the federal court system,⁹⁸ the Supreme Court majority in the end struck the right one.

90. See *Lowe v. SEC*, 105 S. Ct. 2557, 2560 (1985).

91. See *SEC v. Lowe*, 725 F.2d 892, 907 (2d Cir. 1984) (Briant, J., dissenting), *rev'd*, 105 S. Ct. 2557 (1985).

92. See *Lowe v. SEC*, 105 S. Ct. at 2560–61.

93. *Id.* at 2561, 2572.

94. See *id.* at 2559–60.

95. See *id.* at 2560 (quoting *In re Lowe Management Corp.*, [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,873, at 84,324 (SEC May 11, 1981)). The phrase "opportunities for dishonesty and self-dealing" has a disturbingly familiar ring. It echoes the vague "bad tendency" analysis of the early free speech cases that countenanced regulation or punishment of expression pursuant merely to some remote harm or ill-defined evil. See *Abrams v. United States*, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting); see also *Gitlow v. New York*, 268 U.S. 652, 668 (1925) (great deference afforded legislative determination that certain expression advocating insurrection was dangerous); *Masses Publishing Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917) (suppression or punishment of expression countenanced to the extent words used were potentially "keys of persuasion . . . [and] triggers of action"). Such analysis since has been "thoroughly discredited." *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969) (state may not forbid advocacy of force or illegal conduct unless expression is directed toward inciting or producing imminent unlawful action and is likely to succeed). See generally J. NOVAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 875 (1983).

96. The SEC traditionally has concluded that a publication is not "bona fide" if it is "primarily a vehicle for distributing investment advice." *Lowe v. SEC*, 105 S. Ct. at 2572 (quoting *Investment Advisers Act Rel. No. 563*, 42 Fed. Reg. 2953 n.1 (1977) (codified at 17 C.F.R. § 276 (1984)). Although the Court may properly resort for guidance to the agency's construction, it was not bound by the agency's reading. See *United States v. Clark*, 445 U.S. 23, 33 n.10 (1980); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

97. *Lowe v. SEC*, 105 S. Ct. at 2571–73.

98. The district court concluded that even though the statute defining "bona fide" did not formally differentiate between personal and impersonal advisers, the SEC may more freely regulate personal advisers. See *SEC v. Lowe*, 556 F. Supp. 1359, 1369, 1371 (E.D.N.Y. 1983), *rev'd*, 725 F.2d 892 (2d

Given the disparate readings by the district court, a split appellate court and a divided Supreme Court, however, it might be reasonable to suspect that the statutory intent is indecipherable and construction thus was a product of guesswork and subjectivity.

At worst, the Court's interpretation twists and stretches the plain purpose of the statute. It is questionable whether the statute contemplated distinctions between promotional and disinterested advice, or between individualized and impersonal advice.⁹⁹ Legislative history includes references to investment advisers as persons who furnish "disinterested, impartial advice,"¹⁰⁰ as well as those who advise from "time to time on the advisability of buying or selling stocks . . . [including those who] . . . supervis[e] . . . investments . . . on a personal basis."¹⁰¹ If the Court had stepped back from the thick legislative growth for a general view of the forest, however, it would have seen that the central purpose of the legislation was to protect the investing public from fraud and deceit by investment advisers.¹⁰² Given that design, and the fact that when the statute was crafted commercial speech had no first amendment protection, the Court's distinctions seem contrived. A more sensible construction, consistent with that used by the SEC from the outset, is that a "bona fide publication" is a medium that presents diverse and general discussion of news, including

Cir. 1984), *rev'd*, 105 S. Ct. 2557 (1985). Given constitutional dictates, however, the court held that the statute must be construed to allow a publisher of impersonal advice who is willing to comply with regulatory requirements to register and publish. *Id.* at 1369.

The Second Circuit also determined that the Act did not distinguish between personal and impersonal advice. Rather, the meaning of "bona fide" turned on whether a publication was engaged in "customary newspaper activities," as opposed to dealing primarily with reports assessing securities. *SEC v. Lowe*, 725 F.2d 892, 896-98 (2d Cir. 1984), *rev'd*, 105 S. Ct. 2557 (1985). Because investment newsletters primarily offer assessments of securities, the court held that they were not "bona fide" publications. *Id.* A dissenting judge, however, would have adopted the district court's reading of the statute. *Id.* at 903, 908 (Brieant, J., dissenting).

The Supreme Court majority concluded that the statute differentiates between (1) personal and impersonal advice; and (2) promotional material ("tout sheets") and disinterested commentary. The Court held that impersonal and disinterested publications, including the *Lowe* newsletters, fit the statutory definition of "bona fide." *Lowe v. SEC*, 105 S. Ct. at 2571-73. Neither of the lower courts had found such distinctions in the statute. Justice White's concurring opinion essentially adopted the SEC's view that the legislation contemplated no such distinctions. *Id.* at 2576-77 & nn.2-4 (White, J., concurring).

99. See *Lowe v. SEC*, 105 S. Ct. at 2575-82 (White, J., concurring).

100. *Investment Trusts and Investment Companies: Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 76th Cong., 3d Sess. 47 (1940) (statement of David Schenker, Chief Counsel, SEC Investment Trust Study).

101. *Investment Trusts and Investment Companies: Hearings on H.R. 10065 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 76th Cong., 3d Sess. 87 (1940) (statement of James White, attorney, Scudder, Stevens & Clark).

102. See *Lowe v. SEC*, 105 S. Ct. at 2577 n.4 (White, J., concurring); *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 185, 191 (1963).

business and financial matters, as opposed to one with the primary purpose of rendering investment advice.¹⁰³

Such a reading would have afforded no escape from the constitutional question. If the Court had to torture the meaning of the statute, avoidance of the first amendment issue was particularly inappropriate.¹⁰⁴ At minimum, the treacherous and perhaps futile nature of the statutory decoding exercise has yielded a decision that does not engender confidence. Assessment of the constitutional issue could have stood on less slippery footing.¹⁰⁵ Moreover, the constitutional issue could have been decided without addressing the perilous matter of classifying the expression.

Even assuming the speech was commercial in nature, the Court would have had to find a valid and substantial regulatory interest, means that directly advanced it, and a minimal first amendment burden.¹⁰⁶ Although investor protection is a legitimate governmental interest,¹⁰⁷ suppression is too drastic a method of promoting it.¹⁰⁸ Given less restrictive alternatives for protecting investors, such as enforcement of antifraud provisions, restraint of publication is intolerable.¹⁰⁹ Nor would the possibility that expression might be false or misleading support a prior restraint. Even if speech is classified as commercial, speculation that it may be fraudulent does not permit deviation from insistence upon demonstrably extraordinary circumstances to sustain suppression.¹¹⁰

The Court's first amendment analysis thus could have been simple and limited. However, the *Lowe* case also raised more profound and far-reaching constitutional questions that were bypassed. The opinion left unanswered (1) how the press generally should be defined; (2) to what extent character might be a prerequisite for publishing or might affect the general scope of the SEC's power to suppress information; and (3) whether

103. See *Lowe v. SEC*, 105 S. Ct. at 2577 n.4 (White, J., concurring).

104. To the extent a controversy may be resolved on statutory grounds, it is unnecessary to decide constitutional questions. See *Escambia County, Florida v. McMillan*, 104 S. Ct. 1577, 1579 (1984). Avoidance of a constitutional issue is appropriate, however, only when construction of the statute is "fairly possible." *Crowell v. Benson*, 285 U.S. 22, 62 (1932). See *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 518 (1926). See generally *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341-56 (1936) (Brandeis, J., concurring).

105. Justice White, joined by Chief Justice Burger and Justice Rehnquist, found the first amendment question unavoidable and the first amendment interest infeasible. See *Lowe v. SEC*, 105 S. Ct. at 2574-75, 2586-87 (White, J., concurring).

106. See *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980).

107. See *supra* note 63 and accompanying text.

108. See *Lowe v. SEC*, 105 S. Ct. at 2586 (White, J., concurring).

109. See *id.* But see *supra* note 85 regarding the dangers of overly zealous enforcement in the nature of subsequent punishment.

110. See *Lowe v. SEC*, 105 S. Ct. at 2586 (White, J., concurring); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

investment newsletters should be classified as commercial or noncommercial speech.

B. "The Press": A Definitional Problem

Judicial efforts to determine the meaning of "bona fide publication," in the course of the *Lowe* litigation, revealed the dangers of subjectivity and selectivity that exist in attempting to define "the press." Implicit in the SEC's effort to restrain publication was its conclusion that the investment newsletters were not part of the bona fide press. Despite the Court's search for a sensitive standard, the exercise is a perilous one. Any determination of "bona fide" necessitates line-drawing and thus classification and exclusion. Line-drawing also begets more line-drawing, as new facts or circumstances emerge that necessitate extension, bending, or realignment.¹¹¹ Mutability thus creates a special vulnerability to shifting values or subjectivity.

The analytical route chosen by the Court now must traverse those hazards. The Court's articulation of a "bona fide publication" standard, however, may create more acute first amendment risks than it anticipated or than existed previously. If the requirement is that advice be disinterested, it is conceivable that a writer or columnist who discussed investments in a publication of general interest might be swept within the definitional ambit of an investment adviser and thus within the SEC's regulatory purview.¹¹² Similarly, a columnist who occasionally addressed individual readers' questions about investments might be deemed to be giving "personal advice" that required regulatory control. Either result would be constitutionally catastrophic.¹¹³ Nonetheless, the Court's newly formulated standard invites the problem.¹¹⁴

111. The Court's effort to define commercial speech exemplifies the continuing, hazardous, and perhaps intractable nature of the process. Commercial speech originally was regarded as expression inviting a commercial transaction. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). The line subsequently was adjusted to include, within the ambit of commercial speech, expression relating to the economic interest of the speaker and audience. See *Central Hudson Gas and Elec.*, 447 U.S. at 561. Such an expansion of the classification, however, may sweep otherwise fully protected speech within its purview. See *id.* at 580-81 (Stevens, J., concurring); *infra* notes 145-80 and accompanying text.

112. See *Lowe v. SEC*, 105 S. Ct. at 2577 n.4 (White, J., concurring).

113. See *supra* note 85.

114. The SEC's interpretation of the statute could also present this problem. The agency has taken the position that, even if a publication is "bona fide," columnists who offer investment advice in it are investment advisers because of the narrow scope of their writing. See *Lowe v. SEC*, 105 S. Ct. at 2577 n.4 (White, J., concurring); Lovitch, *The Investment Advisers Act of 1940—Who Is an "Investment Adviser"?*, 24 KAN. L. REV. 67, 94 n.222 (1975); see also *SEC v. Lowe*, 725 F.2d at 908 (Briant, J., dissenting) (SEC's interpretation of Act, if adopted, creates possibility that a court could enter prior restraint against bona fide newspaper that published investment recommendations).

Pursuit of a satisfactory definition of the bona fide press might be less troublesome if an acceptable one of the general press existed. However, none does. Efforts to define the press have traveled three basic avenues. An institutional definition of the press, advanced by former Justice Stewart, would establish perimeters of press freedom around that industry whose business it is to publish.¹¹⁵ Stewart's perspective has been criticized for its narrowness, however, since it excludes artists, scientists, novelists, and even the lonely pamphleteer.¹¹⁶

A second alternative regards the press as any entity that communicates information or opinion to the public.¹¹⁷ Such a focus is criticized for being overly broad to the point that the press is indistinguishable from speech.¹¹⁸ Adoption of a functional definition arguably would make the freedom of speech and press clauses redundant.¹¹⁹

The third option essentially is a registry definition that attempts to itemize all media constituting the press rather than identify a common characteristic or associative element.¹²⁰ It is criticized because each medium in effect must be assessed individually in a forum that may invite rationalizations for denying press status.¹²¹ At minimum, the process risks subjectivity or fear-motivated decisions that may deny first amendment protection by denying first amendment recognition.¹²²

An investment newsletter might qualify under any of the three definitions. To the extent it is the product of someone in the business of publishing it would fall within the institutional definition. A role in informing the public would fit the functional definition. Even assuming a workable definition of the press, however, determination of its bona fide status

115. Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 633-34 (1975).

116. Chief Justice Burger, for instance, has found "difficulty with . . . conferring special status on a limited group." He sees no difference between the right of those who seek to disseminate ideas by way of a newspaper and those who give lectures or speeches and seek to enlarge the audience by publication and wide dissemination. . . . [T]he First Amendment does not "belong" to any definable category of persons or entities: It belongs to all who exercise its freedoms.

First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 801-02 (1978) (Burger, C.J., concurring). See Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77, 99 (1975).

117. See Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 651-52 (1975).

118. See *id.*

119. See *id.* The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I.

120. See *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938).

121. A medium's first amendment status is determined by the judiciary. See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389 (1969); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952).

122. Motion pictures, for instance, were denied first amendment recognition for nearly 40 years, in part because of a perceived "capability for evil." See *Joseph Burstyn*, 343 U.S. at 502; *Mutual Film Corp. v. Industrial Comm'n of Ohio*, 236 U.S. 230, 244 (1915).

invites a subjectivity problem akin to that associated with whether a medium falls within a registry definition of the press.¹²³ The Court's new standard, as noted above, is bedeviled by precisely the same hazards of subjectivity and selectivity.

The notion that a publication must be evaluated to determine whether it is part of the bona fide press is demonstrably dangerous. Motion pictures, for instance, were denied first amendment protection for nearly forty years, because the Supreme Court determined they were not part of the press.¹²⁴ If the permissibility of a prior restraint or other editorial control hinges upon official determination of a medium's authenticity, therefore, a continuing invitation exists for first amendment mischief. Determination of a publication's bona fide nature absent a satisfactory definition, much less objective standards, poses a risk to constitutional interests that is intolerably high. A preferable and logically supportable resolution could have been reached if the Court read the bona fide press requirement within the context of its time. Because the Investment Advisers Act of 1940 was passed long before commercial speech was recognized as protected expression, the bona fide requirement properly could have been read today as an obsolete appendage. If it had done so, the Court could have avoided the dangerous process of identifying to whom the first amendment belongs. Future SEC efforts to secure a prior restraint thus could not be justified, consistent with modern constitutional analysis, except on the basis of real and immediate need rather than subjective evaluation.¹²⁵

C. *The Good Character Standard for Publishing*

Related to the premise that some publications should be excluded from the press is the assertion that some persons should be restrained from publishing. The SEC advanced the notion by rationalizing the need for a prior restraint as a device for denying an opportunity for dishonesty and self-dealing.¹²⁶ The agency's formulation and advocacy of a good character requirement for publishers reinforces the case for a heavy presumption

123. The Court has noted the "practical and conceptual" difficulty of categorizing publishers as newsmen vel non and found it "a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods." *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972).

124. See *supra* note 122.

125. See *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Near v. Minnesota*, 283 U.S. 697, 716 (1931); *United States v. Progressive, Inc.*, 467 F. Supp. 990, 992 (W.D. Wis. 1979), *dismissed without opinion*, 610 F.2d 819 (7th Cir. 1979).

126. See *supra* note 95 and accompanying text.

against any prior restraint.¹²⁷ Still, the Court was unwilling to embrace fully the notion that a person's status is irrelevant to his right to publish,¹²⁸ and even failed to observe that suppression is impermissible when harm is speculative.

A system of prior restraint traditionally is regarded as especially pernicious because it freezes rather than just chills expression.¹²⁹ A thought is denied an audience and vice versa.¹³⁰ Even if a publisher's character is unsavory or unsound, that trait alone does not rise to the level of extraordinary danger that justifies a prior restraint.¹³¹ Valuable insight and commentary is not under the exclusive control of the chaste.¹³² To the extent any valid general observation can be made on the subject, it is likely that useful or meaningful expression is more a product of competence rather than character.¹³³ Neither can be a touchstone for content regulation, however, without inviting subjective preferences and judgments that endanger first amendment guarantees.¹³⁴

Suppression under any circumstance cannot be countenanced when an adequate remedy at law is available. To the extent a publisher engages in fraud or deceit, he may be punished¹³⁵ and even required to disgorge ill-gotten gains.¹³⁶ Such a result does not offend the first amendment.¹³⁷ By

127. See *New York Times Co.*, 403 U.S. at 713 (1971).

128. See *Lowe v. SEC*, 105 S. Ct. at 2576-78 & nn. 3-4 (White, J., concurring).

129. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) (quoting A. BICKEL, *THE MORALITY OF CONSENT* 61 (1975)).

130. See *id.*

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

132. Newspaper publishers who because of character or morality have become subject to public reproach nonetheless do not forfeit the right to publish. Their removal is a matter of private or business judgment rather than governmental concern.

133. Cf. *In re Policy Regarding Character Qualifications in Broadcast Licensing*, 87 F.C.C.2d 836, 840-41 (1981); Sharp & Lively, *Can the Broadcaster in the Black Hat Ride Again? "Good Character" Requirement for Broadcast Licensees*, 32 FED. COM. L.J. 173 (1980) (good moral character is no guarantee of competent broadcast service; similarly poor character does not necessarily correlate with poor broadcast service).

134. See *Southeastern Promotions v. Conrad*, 420 U.S. 546, 556 n.8, 560-61; *id.* at 563-64 (Douglas, J., dissenting in part and concurring in part) (1975) (municipality may not deny use of facility for expression that does not conform with community orthodoxy); cf. *Poulos v. New Hampshire*, 345 U.S. 395, 407-08 (1953) (city council arbitrarily and unreasonably denied park permit to Jehovah's Witnesses, but criminal conviction upheld because licensing ordinance valid on its face and defendant failed to obtain judicial review of unlawful denial).

135. See, e.g., 15 U.S.C. § 78j(b) (1982) and 17 C.F.R. § 240.10b-5 (1984) (general antifraud provisions that impose liability for material misrepresentations and omissions in connection with offer, sale, or purchase of security); 18 U.S.C. § 1341 (1982) (mail fraud); 18 U.S.C. § 1343 (1982) (wire fraud).

136. See, e.g., *SEC v. Manor Nursing Centers*, 458 F.2d 1082, 1103-06 (2d Cir. 1972).

137. Government may regulate an activity, provided it has authority to do so and any incidental effect on speech is minimized. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 382 (1968).

attempting to obtain a prior restraint based upon speculated wrongdoing, however, the SEC disregards the basic notion that the first amendment shelters both the savory and the unsavory.¹³⁸

D. *Investment Newsletters and the Classification Ritual*

The SEC's commitment to suppression, despite the fact that commercial expression is within the first amendment's purview, betrays a disturbing insensitivity toward the first amendment. To the extent investment newsletters can be viewed as inviting commercial transactions (in effect advertising) or relating solely to the economic interest of the publisher and reader, they can be classified as vehicles of commercial expression.¹³⁹ However, investment newsletters, whether disinterested and impersonal or not, may do more than advertise or address discrete economic concerns. By presenting fact and opinion about political, economic, and financial conditions, as the newsletters implicated in the *Lowe* case did, they transcend existing definitions of commercial speech.¹⁴⁰ Even if such expression is offered primarily to assess investment opportunities and climate, selected offering of newsworthy facts and generalized observation reflects an editorial process upon which the Supreme Court confers a higher degree of protection.¹⁴¹ Such expression defies easy classification.¹⁴² The SEC's readiness to simplify the problem by denominating such expression as commercial, and its eagerness to regulate in the face of such uncertainty,¹⁴³ does little to engender confidence in its ability to handle future first amendment issues with care.¹⁴⁴ The Court's response, which neither instructs the agency on its constitutional responsibility nor urges more first amendment sensitivity, is no more reassuring.

Drawing a line between types of expression remains a subjective and perhaps futile exercise because fully protected and less protected speech

138. See *Cohen v. California*, 403 U.S. 15, 25-26 (1971).

139. See *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976).

140. See *SEC v. Lowe*, 725 F.2d 892, 907 (2d Cir. 1984) (Briant, J., dissenting), *rev'd*, 105 S. Ct. 2557 (1985).

141. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 254-58 (1974).

142. The problem of classifying expression as political or commercial has been manifest in Court decisions. See, e.g., *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980) (advertisements promoted nuclear power); *Bigelow v. Virginia*, 421 U.S. 809, 812-13 (1975) (advertisements encouraged abortion).

143. See *Lowe v. SEC*, 105 S. Ct. at 2585 (White, J., concurring); *SEC v. Lowe*, 556 F. Supp. 1359, 1365 (E.D.N.Y. 1983) ("The SEC has urged that [the investment newsletter] be classified as commercial speech, and thus subject to a greater degree of regulation and restraint than other publications."), *rev'd*, 725 F.2d 892 (2d Cir. 1984), *rev'd*, 105 S. Ct. 2557 (1985).

144. See *supra* note 64.

often are intertwined.¹⁴⁵ The classification process, moreover, invites procrustean attempts to force a given expression into one category or the other. That propensity was illustrated in the *Lowe* case when the SEC argued that the newsletters should be classified as commercial and the publisher maintained they should be denominated noncommercial.¹⁴⁶ Lost on both sides was the reality that the publications had multiple dimensions and defied an exclusive label.

The classification process may devalue protected expression or be incapable of making meaningful or fine distinctions. To that extent, it promises unsatisfactory constitutional results. Although the Court bypassed the opportunity, the practice of and theory underlying such categorization merits critical rethinking.

III. COMMERCIAL SPEECH: THE DIFFICULTIES AND DANGERS OF LINE-DRAWING

The Supreme Court has acknowledged that the line between commercial speech and fully protected expression is not “easy to draw.”¹⁴⁷ Although invited by both sides in *Lowe v. SEC* to draw a line, it declined.¹⁴⁸ The Court neither articulated a standard nor hinted that it was shying away from the difficulty of classifying expression with inextricably commercial and noncommercial dimensions. In the past, rather than being daunted by the difficulty or danger of classifying, it has concluded that the formidability of the task affords “no reason for avoiding the undertaking.”¹⁴⁹

Such determination to rise to a challenge would be admirable if deliberation might yield acceptable constitutional perimeters. It is difficult to foresee useful and sound principles emerging that can delineate commercial speech in a meaningful fashion. On the other hand, one can envision the commercial speech classification being valued and retained because of the disinclination to surrender a content regulating mechanism.¹⁵⁰ If retention actually were based upon fear of letting go, an uncontrived and constitutionally satisfactory premise for the classification would be unlikely.

145. See *Central Hudson Gas & Elec.*, 447 U.S. at 580–81 (Stevens, J., concurring); *SEC v. Lowe*, 725 F.2d at 907 (Bricant, J., dissenting).

146. See *Lowe v. SEC*, 105 S. Ct. at 2585 (White, J., concurring).

147. *In re Primus*, 436 U.S. 412, 438 n.32 (1978).

148. See *Lowe v. SEC*, 105 S. Ct. at 2574; *id.* at 2585 (White, J., concurring).

149. *Primus*, 436 U.S. at 438 n.32.

150. See *Central Hudson Gas & Elec.*, 447 U.S. at 581 (Stevens, J., concurring) (some efforts to regulate commercial speech have been based upon nothing more than “fear that the audience may find the . . . message persuasive”). To the extent commercial business regulation is countenanced pursuant to “unprovable assumptions,” it is reasonable to postulate that undifferentiated fear of consequences is the motivating force. See *supra* note 24 and accompanying text.

Concern over the consequences of expression easily can be transformed into a basis for regulation if the content can be slotted into a classification meriting less first amendment protection. As the SEC argued in *Lowe*, one constitutional key to regulating expression regarding investment is that the speech is commercial in nature.¹⁵¹ The fundamental problem with the commercial speech classification, however, is that it is incapable of delineating a category not susceptible to abuse.¹⁵² A classification system can serve as a hatching ground for otherwise constitutionally impermissible agendas. Existing definitions of commercial speech, which embrace expression concerning economic self-interest or inviting an economic transaction, can sweep in speech of a clearly political nature. Solicitation of funds for a political cause, for instance, can be viewed restrictively and thus within the definition of commercial speech. Such solicitation already has been so regarded by at least one member of the Court,¹⁵³ who thus demonstrated the potential ease with which a facile classification may bypass first amendment interests.

The precarious status of commercial speech is anomalous, given its important function in contemporary society. The Court itself recognizes that commercial speech plays a central role in the daily lives of most people.¹⁵⁴ It even acknowledges that, for many if not most citizens, commercial speech is more relevant and essential to their well-being than political speech.¹⁵⁵ Rather than elevating commercial speech to a constitutional par with political expression, however, the Court has diluted its protection. It has done so in a manner that is consistent with its perception that commercial speech is more durable¹⁵⁶ and more easily verified by the speaker.¹⁵⁷ The Court's rationales, however, consist of conclusory observations subject to so many possible exceptions that their utility and safety are diminished. Furthermore, the opinions fail to identify conclusively any unique harm, specially attributable to commercial speech, that might afford a basis for its diluted first amendment protection. Instead, the

151. See *supra* notes 143-46 and accompanying text.

152. At least one member of the Court has identified serious problems with both the commercial and noncommercial definitions. Justice Stevens has observed that a definition of commercial speech, whether it relates to economic self-interest or focuses upon whether an economic transaction has been proposed, could embrace noncommercial speech, including "questions frequently discussed and debated by our political leaders." *Central Hudson Gas & Elec.*, 447 U.S. at 580-81 (Stevens, J., concurring).

153. See *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 641 (1980) (Rehnquist, J., dissenting).

154. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 763 (1976).

155. *Id.*

156. See *id.* at 771 n.24.

157. See *id.*

Court's reasoning seems to rest upon some perceived but unarticulated common wisdom.

The assumption, for instance, that commercial speech is a hardier species of expression underestimates the resiliency inherent in political speech. A prominent example of political expression that is at least as durable is election campaign rhetoric.¹⁵⁸ If commercial speech is presumed hardy because the motive to make a profit is likely to be persistent or enduring, much the same can be said for the desire to be elected. Thus, if resiliency is a characteristic upon which first amendment status should hinge, an effective argument could be made that speech calculated to promote a political candidacy should be afforded diminished protection. Such a conclusion, reached from the durability premise, is logical but indefensible. The hardiness rationale thus is unsatisfactory because it not only fails to provide a persuasive basis for treating commercial expression differently from political expression but also creates a weapon for endangering what is now protected.

The rationale that commercial speech may be regulated because it is more easily verified is equally flawed and dangerous. A false and misleading commercial advertisement is not necessarily more verifiable than a false and misleading political campaign promise. Promoters in either category are capable of knowingly or recklessly misrepresenting the nature of the services they would perform. To the extent that either shortchanges the truth, as a conscious device for obtaining money or votes, the authentication problem is essentially of the same magnitude.

Related to the verification factor may be a concern that false and misleading commercial advertising poses a more profound threat to public safety and thus should be more closely regulated.¹⁵⁹ Consistent with that premise, government might be entitled to intervene if a lawn mower manufacturer falsely promoted his product with an advertisement that "our lawn mowers cut grass, not feet. Test this remarkable product on your own toes."

Government undoubtedly could articulate genuine public safety reasons for regulating such expression. But even such a rationale would be transferable to the political arena. There would be an equally forceful reason for regulation when, for instance, President Johnson ran for reelection in 1964

158. Like commercial advertisements, moreover, television and radio enable political advertisements to be delivered directly and effectively into the home. *See Branti v. Finkel*, 445 U.S. 507, 528 n.9 (1980) (Powell, J., dissenting).

159. *See Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), *aff'd*, 405 U.S. 1000 (1972).

and promised not to send more American troops to Southeast Asia. Arguably, no more persons could be misled and physically injured by the commercial misrepresentation than were by the presidential one.

The verifiability concern, like the hardiness factor, actually seems to cut in favor of more tightly regulating political rather than commercial expression. The lawn mower representation, for instance, could be much more easily verified by the public, given the informed counterpublicity that likely would ensue and normal skepticism engendered by self-preservation. Although both political and commercial information are subject to competitive and adversarial expression that may balance or correct, consumer-oriented protection mechanisms, constructed by government and the private sector, make it even easier for the public to verify commercial representation. To the extent verification may be more readily performed by the public, and consistent with traditional notions of the first amendment as an autonomy-engendering principle,¹⁶⁰ a case for more exacting regulation of political expression and less stringent control of commercial expression might be strengthened.

The observation that political speech may be as or more durable, as easy or easier to verify and as or more dangerous, does not mean in any given instance that it will be so. The real point is that so many variables affect either category of speech that generalized distinctions are not really useful. Durability, verifiability, and harmfulness may characterize political speech at least as adroitly as they do commercial speech. If such rationales are accepted for the full weight of their implications, some political speech that is now fully protected might be equally or more vulnerable to regulation. Such a consequence is unthinkable so long as the first amendment is subscribed to as a nonpaternalistic, risk-contemplating guarantee.¹⁶¹

Still, it might be argued that risk and danger are acceptable only to the extent speech is transcendently meaningful¹⁶² or serves some articulated constitutional policy. Theorists have formulated various value systems with which it has been proposed first amendment protection should be coextensive. Thus, the first amendment has been read as a vehicle assembled to aid society in truth-seeking¹⁶³ and informed decisionmaking¹⁶⁴ or the individual in self-fulfillment.¹⁶⁵ Identification of those policies is the product of

160. See *supra* note 59 and accompanying text.

161. *Id.*

162. See generally Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 14-16, 23-25 (1976); Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 9-14 (1979).

163. See J. S. MILL, ON LIBERTY ch. II (Boston 1863).

164. See A. MEIKLEJOHN, POLITICAL FREEDOM 75 (1960); O.W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 185-86 (1920).

165. See T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-7 (1970).

scholarly observation and insight which contribute to appreciation of the first amendment's loftier functions. It is a treacherous exercise, however, to single out any particular set of first amendment values and elevate it above first amendment language.

The process of identifying and articulating first amendment values has been a competitive one. The Emerson self-fulfillment model, for instance, focuses more upon individual preferences and concerns¹⁶⁶ than the Mill-Holmes-Meiklejohn models that value speech more for its ability to contribute to the collective good.¹⁶⁷ The problem with attempting to conform the first amendment to a given set of values is that the central principle becomes adjusted by and coextensive with whichever of the competing values are chosen. The Court's inclination to establish a hierarchy of speech rights, pursuant to its perception of the social utility of expression, thus makes first amendment protection largely a function of the majority's first amendment dogma.¹⁶⁸

Subscription to a single value system to the exclusion of others, in structuring a mode of first amendment analysis, undermines the pluralistic fabric of the underlying principle. Although the significance of commercial speech and other forms of expression may be belittled in some instances,¹⁶⁹ subjective value-based line-drawing evinces a cultural arrogance inconsistent with diversity-tolerant notions associated with the first amendment. Speech, regardless of how it is classified, may serve multiple purposes, by design or effect, and thus defies categorization. A message that may be identified as commercial and thus devalued from one perspective may be identified with other purposes and thus prized from another.¹⁷⁰

The dangers of subjectivity and insensitivity thus caution against classification pursuant to value preferences. Even in a marketplace of ideas that functioned in the narrowest sense, to sort out political truth consistent with

166. *See id.*

167. *See supra* notes 163–64 and accompanying text.

168. The Court's preference for one value system over another delineates the contours of first amendment rights. The Court, for instance, in reaffirming the validity of fairness regulation in broadcasting but denying a public right of access, predicated its decision upon society's interest in informed decisionmaking. *See CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 122 (1973) (quoting A. MEIKLEJOHN, *POLITICAL FREEDOM* 26 (1960)). A value preference for individual self-fulfillment presumably would have led to a different result in favor of access.

169. *See, e.g., Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 589–99 (1980) (Rehnquist, J., dissenting); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (regulation of social satire as indecent speech).

170. Television commercials in France, for instance, have become valued for their artistic qualities. Because of that dimension, a significant segment of the audience values them more highly than the programming which they sponsor. Smart, *French Commercials—Something to Savor, Even in Theaters and a Museum*, *Christian Sci. Monitor*, May 13, 1985, at 1, col. 1.

the Meiklejohn formula, a classification scheme is problematical. Classification that preselects the types of ideas fit to compete may exclude expression that would aid the search for political truth. Regulation of an investment newsletter that addresses political, social and economic concerns evinces precisely such a paternalistic filtration system. Exposure to such a publication potentially would help shape the reader's view of the world¹⁷¹ and, at least incrementally, would contribute to the collective knowledge from which informed social decisions are made.

An official boundary between political and commercial speech is no less subject to gerrymandering than that between political and indecent speech. Classification of a social satire as indecent speech subject to regulation¹⁷² is a disquieting model. Restriction of expression that challenges society's penchant for classifying speech¹⁷³ is particularly suffused with irony and demonstrates the undesirability of official clearance for entry into the marketplace of ideas. Experience suggests that precisely because lines are not "easy to draw,"¹⁷⁴ the task should be avoided.

Since risk assumption is acceptable in the political forum, even to the extent that expression is durable, verifiable, and harmful, and segregating expression is a delicate and dangerous exercise, it is reasonable to consider whether the principle might be practical and more constitutionally desirable in the commercial arena. Possibly the hard lessons learned in the course of attempting to regulate political speech¹⁷⁵ are instructive for purposes of avoiding constitutional damage in the commercial context. Expression that advocates insurrection or unlawful activity, for instance, may be classified as political, but it is safeguarded unless the content tends toward and is likely to produce imminent unlawful activity.¹⁷⁶ Only imminence and immediacy can justify repression; even if speech is designed to incite violent and unlawful conduct, the most effective remedy for such speech should be more speech.¹⁷⁷ Government intervention thus is not

171. Cf. Mininberg, *Circumstances Within Our Control: Promoting Freedom of Expression Through Cable Television*, 11 HASTINGS CONST. L.Q. 551, 591 (1984) (political values result from cultural conditioning involving a vast range of issues and events and even including televised commercials, soap operas, athletic events, and news programs).

172. See *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

173. *Id.* The satirical monologue, which the Court classified as indecent, is set forth in the appendix to the Court's opinion. The subject of the monologue was society's judgment that certain words were "filthy." *Id.* at 751-55.

174. See *supra* note 147 and accompanying text.

175. Early efforts to punish advocacy of unpopular ideas, at least for now, are "thoroughly discredited." See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *supra* note 95.

176. See *id.*

177. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood . . . the remedy to be applied is more speech . . ."); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). See *supra* note 95.

countenanced, if time and opportunity exist for full discussion.¹⁷⁸

The utility of a risk assumption model, premised upon opportunity for response, has been demonstrated in connection with other speech problems.¹⁷⁹ Imminence, dimension, and likelihood of harm have been appropriate regulatory considerations in a variety of first amendment settings.¹⁸⁰ The common thesis is that regulation is not countenanced unless the opportunity for more speech to undo its pernicious effect is absent. Instead of misplaced notions of durability and verifiability, a more constitutionally sentient departure point for the regulation of commercial speech would be whether the opportunity exists to counter false, misleading, or harmful expression. To the extent it does, competitors, critics, or government itself would be counted upon to present a balancing or contrasting viewpoint. Only when a competitive forum could not respond to a harm, because of disability rather than disinclination, might regulatory action be properly contemplated. Even then, the contours of any response would have to be defined by what least burdens first amendment rights.

If principles governing political and commercial speech were coextensive, the vexing need to distinguish between expression would terminate and the dangers inherent in such line-drawing would abate. Troublesome questions regarding speech with dual or multiple characteristics could be avoided as unnecessary rather than finessed or bungled. Regulation pursuant to a proper, compelling interest would not be precluded but would be conditioned upon an inadequate marketplace response or remedy. Such a standard would afford a universally least restrictive alternative more attuned to broad spectrum diversity and less susceptible to official mischief.

178. *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring).

179. *See, e.g.*, *Landmark Communications v. Virginia*, 435 U.S. 829, 844–45 (1978) (contempt of court); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562–63 (1976) (prejudicial pretrial publicity); *Brandenburg*, 395 U.S. at 447 (speech promoting unlawful political ends); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 633–34 (1943) (compelled flag salute).

180. *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457 n.13, 461–62, 465–66 (1978).