Missouri Law Review

Volume 46
Issue 3 *Summer 1981*

Article 2

Summer 1981

First Amendment Defenses in Antitrust Litigation

E. Thomas Sullivan

FIRST AMENDMENT DEFENSES IN ANTITRUST LITIGATION

E. THOMAS SULLIVAN*†

---

† Associate Professor of Law, University of Missouri-Columbia. B.A., 1970, Drake University; J.D., 1973, Indiana University. The author wishes to express appreciation to his colleagues Professors Grant Nelson, Richard Tyler, David Fischer, Wayne Brazil, Alfred Neely, and David Shores for their review of an earlier draft of this Article. The author also acknowledges the able and insightful research assistance of Martin Loring, J.D., 1981, University of Missouri-Columbia, in the preparation of this Article.

I. INTRODUCTION

One of the most cited and frequently litigated statements from the Supreme Court in trade regulation jurisprudence is the broad charge, articulated in *FTC v. National Lead Co.*, that the government is not confined to blocking " 'the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal.' "[1] While the order entered in *National Lead,* which prohibited adoption of prices based on a zone system that had the purpose or effect of matching competitors' prices, was drawn more precisely than those in earlier basing point delivered price decrees,[2] many defendants and their counsel who find themselves litigating the potential broadsweep of antitrust and trade regulation orders suggested in *National Lead* are at a loss when defining the parameters of an order. Counsel often discover that the battlelines of trade regulation litigation center on the breadth and scope of the potential decree or order rather than on the issue of liability. This is evident particularly in the current enforcement approaches under the antitrust laws. As this Article will discuss, government enforcement agencies presently are pursuing broad behavioral orders designed to reduce business communications and market information disseminated between competitors. The enforcement theory centers on elimination of parallel conduct among firms by prohibiting public price announcements or discussions. The Supreme Court, however, has neither advanced nor developed a systematic approach in defining the permissible boundaries governing trade regulation orders. Given the implications that recent developments in the first amendment commercial speech area have on the permissible bounds of an order, the time is appropriate to address these issues.

There is increasing authority that the first amendment and numerous related arguments are the principal defenses for challenging ambiguous

1. 352 U.S. 419, 429 (1957) (quoting FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952)). In *National Lead,* respondents were charged with utilization of an arbitrary zone delivered pricing system in the sale of lead pigments. The Court sanctioned an FTC order prohibiting the quoting of prices calculated on a zone price system which had the purpose or effect of " 'systematically matching . . . the delivered prices of other sellers.' " *Id.* at 423 (quoting National Lead Co., 49 F.T.C. 791, 873 (1953), *modified,* 227 F.2d 825 (7th Cir. 1955), *rev'd,* 352 U.S. 419 (1957)).

2. *See, e.g.*, FTC v. Cement Inst., 333 U.S. 683 (1948). The Commission's order directed respondents to "forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy . . . to do or perform any of the following things." Cement Inst., 37 F.T.C. 87, 259-60 (1943), *vacated sub nom.* Aetna Portland Cement Co. v. FTC, 157 F.2d 533 (7th Cir. 1946), *rev'd sub nom.* FTC v. Cement Inst., 333 U.S. 683 (1948). While the *Cement Institute* decree prohibited a common course of action such as a combination or agreement, it was less specific on whether interdependent action was enjoined.

and otherwise unconstitutional orders that arguably invade constitutionally protected economic activity. That the activity sought to be regulated is purely economic or commercial in nature does not mean that it is constitutionally insignificant or unprotected. Since 1975[3] the Supreme Court has signaled that overbroad governmental regulations could be challenged even if the activities sought to be regulated were commercial or economic in nature. A year later the Court sounded the death knell to the previously entrenched notion[4] that the first amendment has no application to wholly economic or commercial communications.[5] In time, the Court's expansive development of the law in this area[6] made clear that first amendment defenses, even in the absence of a political content, extend to nondeceptive, ordinary business communications which are informational or promotional in nature.[7] Relying on a theory that the exchange of business and economic information is important to our free market exchange of ideas in the allocation of resources,[8] the Court has sanctioned, within the commercial speech context, the advertisement of price information. In so doing, the Court has recognized that the protected speech has a marketplace focus and concern for both purchaser-oriented[9] and seller-motivated[10] profit interests.

---

3. Bigelow v. Virginia, 421 U.S. 809 (1975) (newspaper advertising by abortion clinic may not be prohibited).

4. *See, e.g.*, Breard v. City of Alexandria, 341 U.S. 622, 641-45 (1951) (first amendment doesn't require city to allow magazine salesmen to solicit door-to-door); Valentine v. Chrestensen, 316 U.S. 52 (1942) (commercial speech not protected under the first amendment).

5. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (price advertising for prescription drugs may not be prohibited).

6. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980); *In re* Primus, 436 U.S. 412 (1978); First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978); Bates v. State Bar, 433 U.S. 350 (1977); Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Bigelow v. Virginia, 421 U.S. 809 (1975).

7. *Virginia State Bd. of Pharmacy*, 425 U.S. at 761.

8. *Id.* at 765.

9. *See, e.g.*, Bates v. State Bar, 433 U.S. 350, 374-75 (1977).

10. *See, e.g.*, *Virginia State Bd. of Pharmacy*, 425 U.S. at 761. Although the antitrust communications, which will be discussed subsequently in this Article, do not utilize necessarily traditional media advertising, they should be entitled to no less protection under the first amendment merely because the communications are spoken or written. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561-63, 567-68 (1980); First Nat'l Bank v. Bellotti, 435 U.S. 765, 773 n.7 (1978); Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 92 (1977); *Virginia State Bd. of Pharmacy*, 425 U.S. at 764. Specifically, the solicitation of a customer or the publication of a manufacturer's price list would come within the commercial speech doctrine. *See Central Hudson Gas & Elec. Corp.*, 447 U.S. at 580 (Stevens, J., concurring).

When economic-motivated communication is given first amendment protection, though limited, tensions develop between the proper governmental regulation of that business communication and the values which underlie the first amendment. Although the recent commercial speech developments are welcomed by the business community, the tension between them and traditional antitrust and trade regulation enforcement has led to uncertainty about the defenses available in trade regulation litigation.

This is especially true since the Court has suggested that the first amendment, at least in the commercial speech context, is inapplicable if the speech sought to be protected is part of an illegal activity.[11] This Article will explore the validity and strength of traditional first amendment defenses in antitrust litigation as they apply at the remedial order stage.[12]

11. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 389 (1973). *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949).

12. This Article will not discuss the first amendment defense established under the *Noerr-Pennington* doctrine. Under this doctrine, first articulated in Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), an antitrust violation cannot be predicated on efforts by competitors to petition for governmental action which has the intent or effect of restricting competition. *See also* UMW v. Pennington, 381 U.S. 657 (1965). In *Noerr*, the Supreme Court held that the antitrust laws proscribe only trade restraints by private action, not restraint on trade or monopolization that is the result of valid governmental action. 365 U.S. at 136. The Court's conclusion was based on the reasoning that the antitrust laws do not "prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Id.* The Court later made clear that the immunity imposed under the doctrine was grounded in the first amendment. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972); Missouri v. National Org. for Women, Inc., 620 F.2d 1301 (8th Cir.), *cert. denied*, 101 S. Ct. 122 (1980).

Certain limitations, however, have been imposed under the doctrine. If the concerted activity by competitors is a sham to conceal an attempt to interfere with a competitor's commercial interests, immunity from prosecution does not exist. 404 U.S. at 512; 365 U.S. at 144. *See* Outboard Marine Corp. v. Pezetel, 474 F. Supp. 168, 175 n.9 (D. Del. 1979). Moreover, lower federal courts have held that the immunity is inapplicable if the concerted efforts by competitors relate to private commercial transactions with the government, *e.g.*, the government, as a purchaser of goods, acts in a commercial capacity. *See, e.g.*, George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 31-34 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970). The rationale for this exception is that "the government . . . is not acting as a political body but as a participant in the marketplace." General Aircraft Corp. v. Air America, Inc., 482 F. Supp. 3, 7 (D.D.C. 1979). *See* Feminist Women's Health Center, Inc. v. Mohammed, 586 F.2d 530 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979); Sacramento Coca-Cola Bottling Co. v. Chauffeurs Local 150, 440 F.2d 1096, 1099 (9th Cir.), *cert. denied*, 404 U.S. 826 (1971).

It will focus on the development of those defenses, their application since the reawakening of the commercial speech doctrine, and limitations on their use. Specifically, the Article will discuss (1) whether and under what circumstances a remedial order can restrict economic conduct which arguably comes within the commercial speech doctrine, (2) whether any principles delimit the "illegal conduct" exception to the commercial speech doctrine, (3) whether traditional standards of overbreadth analysis and vagueness are applicable when the conduct is protected under the commercial speech doctrine, and (4) whether the structure of the industry should determine the extent of first amendment defenses. Finally, the Article will suggest a systematic approach to analyzing first amendment issues raised by antitrust decrees.

The analytical model developed proposes that before business communications and parallel conduct can be regulated by conduct-oriented orders, courts must find that there is a substantial governmental interest served by the order, that the restriction on the business speech directly advances the governmental interest, and that the order is no broader than necessary to achieve the governmental interest. Moreover, if the business communication is a substantial part or facilitating component of conduct found violative of the antitrust laws, it is not entitled to full commercial speech protection, but should be protected nevertheless by application of the overbreadth doctrine and the "narrowness" test from the sweep of an overbroad order that might deter competitive activity.

II. Development of Commercial Speech Protection

A. *The Early Rule*—Valentine

The principle that speech concerning a business or economic message is important because of its place in the competitive marketplace of ideas is a recent development.[13] The Supreme Court announced early that the first amendment ought not protect commercial advertising. In *Valentine v. Chrestensen*,[14] the Court upheld a city sanitary ordinance[15] which forbade distribution of handbills not devoted to an informational function or a public interest. The challenged conduct was the distribution of handbills advertising Valentine's business establishment. While part of the handbill was devoted entirely to soliciting customers, another part protested the City's failure to give Valentine wharfage facilities at a municipal pier where he could exhibit his submarine for commercial purposes.[16] Rejecting Valentine's argument that the totality of the handbill was worthy of constitutional protection because it contained a "protest against official

13. *See* notes 3-10 and accompanying text *supra*.
14. 316 U.S. 52 (1942).
15. The ordinance in question was part of the Sanitary Code, which stated specifically that it was intended to cover only "commercial and business advertising matter." *Id.* at 53 n.1.
16. *Id.* at 53.

conduct,"[17] the Court concluded implicitly that commercial speech, even though part of a public protest, was not entitled to first amendment protection. The fact that the commercial content was joined on the same handbill with a political protest did not dissuade the Court. The Court reasoned that if it extended constitutional protection to the handbill, it would be easy to evade a ban on commercial advertising under the guise of appending to the commercial message a political protest.[18] Thus, the Court was unwilling to consider the public or political significance of the handbill, and declared that the "Constitution imposes no . . . restraint on government as respects purely commercial advertising."[19]

For twenty-three years after *Valentine*, the courts, in varying degrees, followed *Valentine*'s admonition that commercial communications were without first amendment protection.[20] But the subsequent cases had difficulty construing governmental regulation within the ambiguous *Valentine* standard of "commercial speech." At first, the Supreme Court suggested that the central inquiry in defining commercial speech was whether the primary purpose or motive of the communication was business-oriented.[21] An incidental profit-oriented component which was part of an otherwise protected speech did not cause the communication to lose constitutional value.[22]

17. *Id.* at 55. *See also* Bigelow v. Virginia, 421 U.S. 809, 819 (1975) (political protest was "appended solely for the purpose of evading the ordinance").

18. 316 U.S. at 55.

19. *Id.* at 54. *See also* Schneider v. State (Town of Irvington), 308 U.S. 147 (1939); Lovell v. City of Griffin, 303 U.S. 444 (1938); Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608 (1935); Packer Corp. v. Utah, 285 U.S. 105 (1932) (indicated that commercial communications could be regulated). *But see* Martin v. City of Struthers, 319 U.S. 141 (1943).

20. *But cf.* Cammarano v. United States, 358 U.S. 498, 513-14 (1959) (Douglas, J., concurring) (freedom of speech and press not confined to discourse of particular kind and nature); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952) (motion pictures protected by first amendment despite fact that they are large-scale business conducted for profit); Breard v. City of Alexandria, 341 U.S. 622, 641-42 (1951) (selling periodicals does not exclude them from first amendment protection); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (Court indicated that a less broad standard would be applied in excluding commercial speech; if the commercial nature of the speech was incidental to an otherwise protected message, it might receive some protection). *See also* Martin v. City of Struthers, 319 U.S. 141 (1943); Jamison v. Texas, 318 U.S. 413 (1943) (Court continued to analyze the speech in terms of motive).

21. *E.g.*, Murdock v. Pennsylvania, 319 U.S. 105 (1943). While *Valentine* held implicitly that all communications transmitted for the primary motive of economic gain were considered commercial and not entitled to protection, this broad interpretation would include labor disputes and other activities where one made a living through communication.

22. *Id.* at 111.

B. *Evolution of First Amendment Protection*

1. Content-Based Analysis

The "primary purpose" standard delimiting the constitutional protection of commercial speech was denounced formally by the Court in the early 1960s, when it adopted a content-based analytical approach. In *New York Times Co. v. Sullivan*,[23] while reiterating that a profit-oriented message was not entitled to first amendment consideration, the Court focused on the content of the communication, rather than its purpose, in determining whether the speech was purely business in nature or informational in the sense of conveying ideas that were within the public interest.[24] The issue in question was whether a paid advertisement which had a public and political context could be the subject of a libel action. In chartering a new content-based approach, the Court did not reject outright *Valentine*'s command that purely business-motivated speech is unworthy of first amendment protection. Instead, the *New York Times* Court distinguished *Valentine* on the theory that the challenged Times publication was not commercial[25] because "[i]t communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern."[26]

The fact that the advertising in question had been paid for was deemed immaterial.[27] Under the content-based approach, the motive or the manner and forum in which constitutionally protected speech was disseminated was held not determinative.[28] The Court commented that if the

23. 376 U.S. 254 (1964). In *New York Times*, the Court for the first time enunciated a first amendment constitutional defense in defamation actions. A libel action was brought against the Times in Alabama by a city official. The suit was based on a paid advertisement the Times had published that described the poor treatment black students, while protesting segregation, had received in Montgomery. The jury returned a verdict against the Times. The Supreme Court reversed on the ground that the defamation law applied by the Alabama courts was insufficient constitutionally because it failed to provide the press with safeguards which were required by the first amendment. The Court held that the first amendment prohibits a public official from recovery in a defamation suit against the press, unless it is established that the libelous statement was made "with [actual] knowledge that it was false or with reckless disregard of whether it was false." *Id.* at 279-80.

24. *See also* Ginzburg v. United States, 383 U.S. 463, 474 (1966); Thomas v. Collins, 323 U.S. 516, 531 (1945).

25. 376 U.S. at 266.

26. *Id.*

27. *Id. See also* Cammarano v. United States, 358 U.S. 498, 514 (1959) (Douglas, J., concurring) (profit motivation should not be critical in determination of constitutional protection over speech).

28. 376 U.S. at 266.

content of "the allegedly libelous statements would otherwise be constitutionally protected . . . , they do not forfeit that protection because they were published in the form of a paid advertisement."[29] Thus, if the communication had a public interest content, it received protection, regardless of the commercial context.

The next indication of *Valentine*'s demise came in another press advertisement case. In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,[30] where a newspaper challenged an ordinance prohibiting gender-designated captions in advertising, the majority signaled that the Court would be willing to reconsider in future cases whether "the distinction between commercial and other speech"[31] should continue. Justice Powell, at the outset of the opinion, noted that commercial speech is not defined by "the mere fact that it relates to an advertisement."[32] *Valentine*'s primary motive analysis again was addressed and rejected:

> If a newspaper's profit motive were determinative, all aspects of its operations—from the selection of news stories to the choice of editorial position—would be subject to regulation if it could be established that they were conducted with a view toward increased sales. Such a basis for regulation clearly would be incompatible with the First Amendment.[33]

Valentine was characterized as a case in which the challenged speech did nothing more than propose a commercial transaction, notwithstanding the fact that it also contained a message of political significance.[34] Following this view, the employment advertisements of *Pittsburgh Press* were deemed more similar in content to *Valentine*'s business solicitation than to *New York Times'* information-oriented public interest advertisement. The gender-designated captions, therefore, were held to be "classic examples of commercial speech"[35] and, because of the nature of the content, not entitled to first amendment protection.

---

29. *Id.* (footnote omitted).

30. 413 U.S. 376 (1973).

31. *Id.* at 388. In *Pittsburgh Press*, a newspaper was charged with violating an ordinance which forbade "help wanted" advertisements being arranged according to gender-designated captions. The newspaper argued that the ordinance violated freedoms of speech and press because it restricted editorial judgment in the placement of advertising. The purpose of the ordinance was to prohibit discrimination, *inter alia*, on the basis of sex. *Id.* at 378. Against this attack the ordinance was upheld, but the Court hinted at its future retreat from the doctrine that commercial speech is not entitled to protection. "Whatever the merits of this contention may be [abrogating the distinction between commercial and other speech] in other contexts, it is unpersuasive in this case [because of the illegal nature of the underlying conduct]." *Id.* at 388.

32. *Id.* at 384. *See id.* at 388; *New York Times*, 376 U.S. at 266.

33. 413 U.S. at 385.

34. *Id. See* text accompanying notes 16-19 *supra*.

35. 413 U.S. at 385. *See, e.g.*, National Broadcasting Co. v. United States,

Pittsburgh Press is important for the present analysis, not because of its unwillingness to deviate from the *Valentine/New York Times* per se proscription against constitutional protection for economic-motivated speech, but because the speech (advertisement) sought to be protected could have facilitated or furthered an illegal activity—gender-based employment discrimination.[36] The Court held explicitly that speech which furthers illegal conduct, even if the conduct is commercial in nature, is not fully protected by the first amendment.[37] The Court justified the order banning advertisements in a gender-designated matter on the ground that the restriction on speech was incidental to the valid regulation of the underlying illegal commercial activity of discrimination in employment. Thus, the Court approved an ordinance, and an order drawn under it, which made it unlawful to publish an advertisement that aided an unlawful employment practice. On this point, *Pittsburgh Press* is not fully instructive because it failed to address how closely related or incidental to the illegal activity the speech must be before there can be valid government regulation of the economic activity.[38] The Supreme Court, however, did indicate that the advertisements might have received a degree of first amendment protection if the content of the message had been legal.[39] In the end, the Court reaffirmed *New York Times'* content analysis, although the result differed in that the advertising content in *Pittsburgh Press* was

319 U.S. 190 (1943); Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971), *aff'd mem.*, 405 U.S. 1000 (1972).

36. 413 U.S. at 388-89. The Court found that the placement of such an ad would aid an employer in indicating an illegal sex preference.

37. *Id.*

38. For a more extensive discussion of this point, see text accompanying notes 30-35 *supra*. The Court also held, without explanation, that the modified order which had been entered by the state trial court was not overbroad. 413 U.S. at 390. Originally, the Pittsburgh Commission on Human Relations had ordered the newspaper to cease and desist from using a classification system that had sex-designated captions or references. On appeal, that order was modified by the Commonwealth court so that the newspaper could publish gender-designated columns for employers who were exempt from the antidiscrimination provisions of the law. The ordinance apparently applied only to employers who had five or more employees. Certain other categories were excluded from the law's coverage. *Id.* at 380. "The modified order . . . [barred] 'all reference to sex in employment advertising column headings, except as may be exempt under said Ordinance, or as may be certified as exempt by said Commission.' " *Id.* at 380-81 (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 4 Pa. Commw. Ct. 448, 470, 287 A.2d 161, 172 (1972), *aff'd*, 413 U.S. 376 (1973)). Arguably, had the order not been modified, the newspaper would have had a substantial challenge, under an overbreadth analysis, to the original broad sweep of the order.

39. 413 U.S. at 389.

found to be illegally discriminatory and, hence, not entitled to protection.[40]

2. Retreat from the Traditional Approach

Although post-*Valentine* cases altered the focus of the commercial speech analysis, the core holding that pure commercial speech was unprotected under the first amendment continued until 1975. In a series of cases beginning with *Bigelow v. Virginia*[41] in 1975 and culminating with *Central Hudson Gas & Electric Corp. v. Public Service Commission*[42] in 1980, the Court extended the reach of the first amendment. In the process, *Valentine* ultimately was overruled.

That *Valentine* stood on unsure footing became more obvious in *Bigelow* where the Court, confronted with a challenge to a statute prohibiting abortion advertising, commented that *Valentine*'s import did not support the proposition that commercial advertising was "unprotected per se."[43] Although the challenged advertisement in *Bigelow* appeared facially to be purely commercial, the Court strained in interpreting it to have "public interest" qualities, thus, distinguishing it from *Valentine*'s pure commercial speech exception. Therefore, the Court was able, albeit unpersuasively, to avoid outright rejection of *Valentine*.[44]

In concluding that Bigelow's misdemeanor conviction should be reversed because the solicitation had a public interest content entitled to first amendment protection, the Court introduced a balancing test that

---

40. In distinguishing *New York Times*, the Court in *Pittsburgh Press* ultimately found that the content of employment ads was more similar analytically to the solicitation handbills in *Valentine* than to the paid political advertisements in *New York Times*. *Id.* at 385.

41. 421 U.S. 809 (1975). Bigelow, a newspaper editor who had published an advertisement for abortion services, was convicted under a Virginia criminal statute that prohibited the circulation of a publication which encouraged abortion. The advertisement was placed by an out-of-state abortion clinic. *Id.* at 811-12. The conviction was affirmed by the Virginia Supreme Court. While Bigelow's appeal was pending before the United States Supreme Court, the Court decided Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Bolton, 410 U.S. 179 (1973). The Court vacated Bigelow's conviction and remanded the case to the Virginia court for further consideration. The Virginia court reached the same result based on Bigelow's lack of standing to make a constitutional challenge and Bigelow again appealed. 421 U.S. at 815.

42. 447 U.S. 557 (1980). For a discussion of *Central Hudson*, see notes 87-106 and accompanying text *infra*.

43. 421 U.S. at 820. The Court noted that "[t]he relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas." *Id.* at 826.

44. The "public interest" qualities were present, the Court opined, because the advertisement informed the public that abortions were free in New York, where there were no residency requirements. *Id.* at 822.

weighed first amendment interests against the public interest served by the regulation.[45] Although the Court in other first amendment contexts had advanced a balancing test,[46] the balancing approach used by the *Bigelow* Court suggested that, while it was willing to concede that commercial speech was entitled to some degree of first amendment recognition, it was not willing to give business-oriented speech the same status as political or opinion speech. The Court was cautious in pushing no further. It saved for another time the standard by which economic-motivated speech was to be protected, including the substantiality required of the governmental interest and the relative directness required of the governmental regulation to the interest being served.

In the Court term after *Bigelow,* a statutory proscription against the advertisement of prescription drugs provided the basis on which the Court ended its thirty-four year flirtation with *Valentine*'s inelastic restrictions. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[47] the Court for the first time directly confronted the question whether pure commercial speech was entitled to first amendment recognition. At issue was a Virginia statute that declared it unprofessional conduct for a pharmacist to advertise prescription drug prices. The question posited was whether a pure profit-oriented business solicitation that did " 'no more than propose a commercial transaction,' "[48] such as " 'I will sell you the X prescription drug at the Y price' "[49] should be deemed constitutionally protected.

Initially, the Court recognized that its past decisions indicated pure business-motivated speech deserved no protection.[50] But after weighing

---

45. *Id.* at 826. The Court noted that a factor which should be weighed is the relationship of the speech to the commercial activity. In addition, the Court looked at the commercial activity to determine whether it would adversely affect medical care. *Id.* at 827. The Court found Virginia's interests in that respect to be limited to medical care provided within the state. Since the advertising pertained to services being performed in another state, Virginia had no interest in it. Its purported interest was merely "an interest in regulating what Virginians may *hear* or *read* about the New York services." *Id.* Such an interest, the Court held, was negligible at best. *Id.* at 828.

46. *See, e.g.*, Procunier v. Martinez, 416 U.S. 396, 412-14 (1974); United States v. O'Brien, 391 U.S. 367, 378-80 (1968); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 463-65 (1958); Frohwerk v. United States, 249 U.S. 204, 206 (1919); Schenck v. United States, 249 U.S. 47, 52 (1919). *See also* note 93 *infra*.

47. 425 U.S. 748 (1976). The plaintiffs in the case were prescription drug consumers and pharmacists who challenged a Virginia state statute which made it unprofessional conduct for a pharmacist to advertise prescription drug prices.

48. *Id.* at 762 (quoting *Pittsburgh Press*, 413 U.S. at 385).

49. *Id.* at 761.

50. *Id.* at 758.

the interests[51] served by extending first amendment protection to pure commercial messages, the Court held squarely that a pure profit-oriented communication deserved some first amendment protection.[52]

---

51. For the first time the Court squarely confronted whose right it was protecting by the extension of the first amendment. It concluded that the right is enjoyed by both the advertiser and the recipient of the commercial message. *Id.* at 756-57. The Court reasoned that the advertiser's profit motive business interest alone was enough to bring it within the scope of protection, just as it had earlier expressed in labor dispute cases that "both the employee and the employer are protected by the First Amendment when they express themselves on the merits of the dispute." *Id.* at 762. *See* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969); Thornhill v. Alabama, 310 U.S. 88 (1940). There was no need, therefore, to require or invoke *New York Times*' or *Bigelow*'s public interest content analysis in order to find the advertisement protected. A business communication that proposed no more than a purchase or sale of a product was protected. But when the Court addressed the reciprocal right to receive the price information, it couched that right in terms of the public interest in the flow of commercial information, which is "indispensable to the proper allocation of resources in a free enterprise system." 425 U.S. at 765. The Court seemed, therefore, at least for the justification that consumers have a right to receive protected commercial speech, to return to the content-based public interest analysis utilized in *New York Times* and *Bigelow*. Overtones also were present that the Court, through its public interest analysis, was attempting to establish the right by aligning it with more traditional political or pure speech doctrines. The doctrinal debate concerning the first amendment underpinnings in this area is voluminous. *See, e.g.*, A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); Baker, *Commercial Speech: A Problem In the Theory of Freedom*, 62 IOWA L. REV. 1 (1976); BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963); Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U.L. REV. 372 (1979); Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979); Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975); D. Meiklejohn, *Commercial Speech and the First Amendment*, 13 CAL. W.L. REV. 430 (1977); Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971); Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U. ILL. L.F. 1080; Note, *The Constitutional Status of Commercial Expression*, 3 HASTINGS CONST. L.Q. 761 (1976); Comment, *Prior Restraints and Restrictions on Advertising After* Virginia Pharmacy Board*: The Commercial Speech Doctrine Reformulated*, 43 MO. L. REV. 64 (1978).

52. 425 U.S. at 762. The lesser protection afforded commercial communication did not cover such areas as false and deceptive, libelous, or illegal commercial speech. Those areas remained outside the first amendment protection. *Id.* at 770-71. *See* Friedman v. Rogers, 440 U.S. 1 (1979); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413

If the economic communications were not misleading, libelous, or related to an unlawful activity, the speech was still subject to a balancing test to determine the permissible boundaries of the government regulation.[53] As in *Bigelow*, it was unclear what balancing standard the Court utilized, although it implied that it would scrutinize under the first amendment the governmental interest and regulation more closely than it would under the rational relationship test employed in fourteenth amendment equal protection analysis.[54] In its now famous footnote 24, the Court summarized the central premise of its new doctrine: pure business-motivated speech enjoys some first amendment significance, but because it retains qualities that differentiate it from pure political speech, it does not enjoy the full panoply of rights afforded under the first amendment.[55] Thus, while the developments in the law to this point had endowed commercial communications with a substantial degree of protection, the scope of that protection remained constricted by the illegality rule of *Pittsburgh Press* and by the limitations inherent in *Virginia Pharmacy*.

C. *Limitations on Protection*

1. Illegal Conduct

The "illegal conduct" exception of *Pittsburgh Press* stems from well-established first amendment doctrine.[56] Its application to commercial speech thus is not unexpected. The scope and particularity of that application is, however, far from certain. *Bigelow*'s strained reasoning did not permit a clear break from *Valentine*, but did shed light on *Pittsburgh*

U.S. 376 (1973); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Konigsberg v. State Bar, 366 U.S. 36 (1961); United States v. Hunter, 459 F.2d 205 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972).

53. 425 U.S. at 766-70. In addition, the Court observed that it had long been a practice under first amendment protection to regulate speech regarding reasonable time, place, and manner, as long as the regulation did not single "out speech of a particular content." *Id.* at 771.

54. *Id.* at 769. *See* Schiro, *Commercial Speech: The Demise of a Chimera*, 1976 SUP. CT. REV. 45. When *Virginia Pharmacy* was decided, the Court, in noncommercial first amendment speech cases, had required a compelling interest in order for the government regulation to survive challenge. *See* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 467 (1977); Wooley v. Maynard, 430 U.S. 705, 716 (1977); Elrod v. Burns, 427 U.S. 347, 362-63 (1976); Buckley v. Valeo, 424 U.S. 1, 64 (1976) (per curiam); Shelton v. Tucker, 364 U.S. 479, 488 (1960). Generally, under the compelling interest test the inquiry would be: (1) whether the interest pursued by the government is "compelling"; (2) if so, whether the means employed are necessary to achieve the compelling governmental interest, *e.g.*, relative analysis between means and ends—whether well-tailored and narrowly drawn. The burden of persuasion on these issues is on the government.

55. 425 U.S. at 771 n.24.

56. *E.g.*, Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).

Press' illegal conduct exception. The Court implied that if the commercial message *furthered* a criminal scheme, it would not be protected.[57] *Pittsburgh Press* had held only that speech which itself is illegal or which advertises an illegal activity is without protection.[58] The *Bigelow* Court declined, however, to establish the precise extent of the illegal conduct exception. Moreover, the Court would not go so far as to state that the commercial *promotion* of an illegal activity came within the *Pittsburgh Press* illegal conduct ban, a notion that necessarily seemed to follow.[59]

The most recent Supreme Court case touching on the *Pittsburgh Press* illegal conduct exception was *Linmark Associates, Inc. v. Township of Willingboro*.[60] In *Linmark*, a township adopted an ordinance prohibiting the use of "For Sale" or "Sold" signs on real estate in the township. The ordinance was challenged on the ground that it restricted first amendment communications. In defense of the ordinance, the township argued that the ordinance served the interest of promoting racially integrated housing by stemming the flight of white homeowners from communities that were racially integrated.[61] While recognizing this societal interest as an important goal, the Court nevertheless struck down the ordinance because the township failed to demonstrate that the ordinance was *necessary* to assure that the community remained integrated, and because it impaired the dissemination of truthful commercial information. The Court declared the ordinance constitutionally infirm, as it had done in *Virginia Pharmacy*, on the theory that the regulation was too indirect or unnecessary to achieve the important governmental interests advanced.[62]

Implicit in *Linmark*'s reasoning is the finding that the information being disseminated and conduct involved were not illegal. This approach may shape the breadth of *Pittsburgh Press'* illegal conduct exception. Had there been evidence of substantial panic selling or that the "For Sale" signs were a major cause of panic selling,[63] then arguably the ordinance could have been upheld on the ground that the conduct was subject to regulation under *Pittsburgh Press*. If the intent or effect of the "For Sale" signs was to encourage or facilitate a blockbusting scheme, a practice that has been declared against public policy and illegal, then under the rationale of *Pittsburgh Press* the use of "For Sale" signs may not have been a protected activity.[64] The Court, however, chose not to cite the *Pittsburgh*

57. *Bigelow*, 421 U.S. at 828.
58. *Pittsburgh Press*, 413 U.S. at 388-89.
59. 421 U.S. at 828 n.14.
60. 431 U.S. 85 (1977).
61. *Id.* at 94-95.
62. *Id.* at 95.
63. *Id.* at 95-96.
64. *See* 42 U.S.C. § 3604(e) (1976); Barrick Realty, Inc. v. City of Gary, 491 F.2d 161, 163 (7th Cir. 1974). The United States Court of Appeals for the Seventh Circuit observed that "[t]he history of . . . [ordinances] banning 'For Sale' signs shows that . . . [they were] aimed at panic selling and that . . . [their] purpose was

Press illegal conduct exception, even though the signs purportedly helped to perpetuate the situation which apparently arose on its own.

Linmark may portend a shift away from a broad reading of the exception articulated in *Pittsburgh Press*. Indeed, the Court stated that it was expressing no view on whether the lower court opinions that cited *Pittsburgh Press* in upholding "For Sale" regulations survived *Bigelow*'s and *Virginia Pharmacy*'s protection of economic-oriented speech.[65] This ambivalence toward *Pittsburgh Press* and whether those lower court opinions were still good law is surprising particularly since they found specifically that the signs were causing "white flight" through blockbusting.[66]

Consequently, the scope of the application of *Pittsburgh Press'* illegal conduct exception remains unclear. In neither *Linmark* nor *Pittsburgh Press* was the illegality of the underlying conduct blatant or calculated, but the results differed. While *Pittsburgh Press* signaled that the transaction need not be inherently unlawful nor certain to occur for it to come within the exception, *Linmark* suggested that before the first amendment interests are discounted, the connection to an illegal activity must be more directly or causally linked. Remoteness to the illegality may be the central factor. With regard to trade regulation, this analysis suggests that before economic speech can be proscribed there must, at least, be a finding that it encouraged, promoted, instigated, or facilitated unlawful conduct. In short, the protection afforded economic speech may depend on the illegality of the interest served by the speech[67] and on the closeness of the connection between the speech and the illegal conduct.

2. Lower-Level Protection and Inapplicability of the Overbreadth Doctrine

Virginia Pharmacy went beyond the illegal conduct exception in limiting the applicable scope of the commercial speech. It foreshadowed

---

to halt resegregation." *Id.* The court found that the effect of the signs was inconsistent with the public policy expressed in the city ordinance and in 42 U.S.C. § 3604(e). Thus, the court held that use of the signs was not protected under the first amendment. But, unlike *Linmark*, the court found evidence in the record that real estate brokers who used the signs "actively encouraged resegregation by unlawfully urging whites to sell quickly before they had black neighbors and lower property values." 491 F.2d at 164. *See also* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) (quoting language in *Giboney*); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) ("[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.").

65. 431 U.S. at 95 n.9.

66. *Id.*; 491 F.2d at 163-64.

67. *See* Terry v. California State Bd. of Pharmacy, 395 F. Supp. 94, 100 (N.D. Cal. 1975); Holiday Magic, Inc. v. Warren, 357 F. Supp. 20 (E.D. Wis. 1973), *vacated*, 497 F.2d 687 (7th Cir. 1974).

the notion that the traditional first amendment defense of "overbreadth" would not be available for commercial speech. The Court did so by holding that commercial speech generally was entitled to less protection than other speech, and that such a distinction was compelled by certain qualities, its durability and verifiability, that differentiate commercial speech from other varieties. *Virginia Pharmacy* considered commercial speech hardier than other forms of communication because it is profit-oriented and because its content is subject to objective product verification. Thus, the communication is less likely to be deterred by government regulation.

> The truth of commercial speech, for example, may be more easily verifiable by its disseminator than . . . news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely.[68]

The precise application of this ambiguous logic to economic transactions is unclear.[69] The Court's reference to "chilling effect," while vague at best,

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

69. The Court also has indicated that commercial speech may be distinguished from other speech forms in that it may not be entitled to protection under the prior restraint doctrine. *Virginia Pharmacy* suggested that the valued constitutional prohibition against prior restraints may be inapplicable to business communications, again, because of their hardiness and objectivity. *Id.* No elaboration was given for this broad statement, nor has any been forthcoming in subsequent commercial speech decisions. *See* Friedman v. Rogers, 440 U.S. 1, 10 n.9 (1979). But the *Virginia Pharmacy* Court did cite the 1948 case of Donaldson v. Read Magazine, 333 U.S. 178, 189-91 (1948), where a prior restraint defense was rejected on the ground that the order entered enjoined "the continuation of conduct found fraudulent." *See also* FTC v. Standard Educ. Soc'y, 302 U.S. 112 (1937); E.F. Drew & Co. v. FTC, 235 F.2d 735 (2d Cir. 1956), *cert. denied*, 352 U.S. 969 (1957). By citing *Donaldson*, the Court seemingly implied that if the commercial communication is found misleading or deceptive, similar future conduct can be enjoined without offending the prior restraint doctrine. *But cf.* text accompanying notes 107-20 (argument advanced that Court's underlying assumptions do not apply in antitrust context). These cases also predated the adoption of commercial speech protection under the first amendment.

This limited reasoning in the *Virginia Pharmacy* footnote was not alien to at least one of the Court's prior commercial speech cases. In *Pittsburgh Press*, where the Court rejected a prior restraint defense, the majority opined that by definition there is no prior restraint once a court has ruled that the practice is unprotected speech.

> The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker,

> before an adequate determination that it is unprotected by the First Amendment.
>
> The present order [requiring the newspaper to stop arranging advertisements under gender-based categories] does not endanger arguably protected speech. Because the order is based on a continuing course of repetitive conduct, this is not a case in which the Court is asked to speculate as to the effect of publication.

413 U.S. at 390. Chief Justice Burger, Justices Douglas and Stewart were unpersuaded. Central to their dissent was the conclusion that this order was a classic prior restraint because it enjoined certain future publications—the very essence of the prior restraint doctrine. *Id.* at 396 (Burger, C.J., dissenting); *id.* at 400-04 (Stewart, J., dissenting).

That a prior restraint on speech has carried with it a presumption of unconstitutionality is, of course, not a new idea. *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); New York Times Co. v. United States, 403 U.S. 713 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Freedman v. Maryland, 380 U.S. 51 (1965); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Near v. Minnesota, 283 U.S. 697 (1931). Nor is it out of the mainstream to suggest that the prior restraint doctrine is a constitutional protection that is extended far beyond press speech and, therefore, arguably has application in the commercial speech field. *See, e.g.*, First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971). Thus, it would seem not an inconsiderable problem for the Court to brush aside so quickly, in commercial speech cases, the heavy presumption against a prior restraint. This is particularly true since by definition an order that enjoins future communication recognized to be protected under the first amendment is a prior restraint. Several analytical approaches are suggested.

First, as the majority opinion in *Pittsburgh Press* implied, the vice inherent in this field is the timing of the restraint; the fact that it is prior to either dissemination or judicial determination makes it highly suspect. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-31, at 725 (1978). When the issue is whether a judicially entered order enjoining future conduct violates the prior restraint doctrine, however, *Pittsburgh Press* dictates that an adequate prior determination that the underlying conduct or practice was an unprotected communication would render the doctrine inapplicable. Therefore, if an order is tailored narrowly to proscribe that conduct and its consequences and is based on a prior determination that the communicative speech was unprotected, then arguably under *Central Hudson* and *Pittsburgh Press* the fact that it prospectively restrained speech would not run afoul of the prohibition against prior restraint. *Pittsburgh Press*, 413 U.S. at 390. Thus, the relationship between the future repetitive communication and the challenged conduct would not require courts to speculate about the future effects of the order. The court would be able to judge beforehand the relationship between the business communication and the antitrust conduct in determining whether it was protected under the first amendment and, accordingly, draft a restraining order designed to avoid sweeping in communications unrelated to the illegal practices found. In short, the doctrine recognizes a difference between a restraint on speech prior to a judicial bespoke the potential inapplication of the constitutional overbreadth doctrine to commercial speech. But the Court chose not to support or expand its expressed assumption that speech is more durable, and thus entitled to less protection, when motivated by profit. It remained for future cases to flesh out the exact meaning and application of the intuitive assumptions underlying *Virginia Pharmacy*.

The vague overtones of *Virginia Pharmacy* were first embellished by the Court's persistent refusal to apply the overbreadth doctrine to commercial speech. Traditionally, overbreadth analysis has not been invoked to protect constitutionally protected rights of the challenger of the order, statute, or regulation. Rather, it has been employed to protect third parties not before the court from the sweep of an otherwise overbroad statute, regulation, or order.[70] Even though the challenger may not have constitu-

---

determination and the subsequent order which restrains the speech because it is related to unlawful conduct.

Moreover, with regard to limits on the availability of injunctive relief that touches on constitutional issues, courts, by analogy, might consider the distinctions drawn between injunctions against personal defamation and commercial or trade defamation. The decisional law seems to conclude that commercial libel or defamation can be enjoined, as an exception to the prior restraint doctrine, where the communications are a part of an overall scheme to coerce or destroy business. *See Right of Privacy—Availability of Injunctive Relief for Invasions of Privacy*, 39 MO. L. REV. 647, 656 (1974). To apply this reasoning as a basis for issuing orders that restrict business communications which are related to unlawful conduct would seem consistent with *Pittsburgh Press* and *Virginia Pharmacy*.

Finally, a litigant would seem hard pressed in overcoming the logic that to allow the prior restraint doctrine to be applied indiscriminately to an order which prohibits prospective commercial communications linked to antitrust conduct would make it nearly impossible to enforce the antitrust laws. The enforcement mechanism of the antitrust laws is generally always through the entry of an injunctive order prohibiting certain future conduct. *See generally* II P. AREEDA & D. TURNER, ANTITRUST LAW ¶¶ 327-30 (1978). The prior restraint doctrine then should not be applied as strictly in the commercial speech field with regard to injunctive orders as in other forms of speech, particularly when the order is issued after a judicial determination.

70. *See, e.g.*, Arnett v. Kennedy, 416 U.S. 134 (1974) (plurality opinion); Lewis v. City of New Orleans, 415 U.S. 130 (1974); Broadrick v. Oklahoma, 413 U.S. 601 (1973); Grayned v. City of Rockford, 408 U.S. 104 (1972); Colten v. Kentucky, 407 U.S. 104 (1972); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Dombrowski v. Pfister, 380 U.S. 479 (1965); NAACP v. Button, 371 U.S. 415 (1963); Thornhill v. Alabama, 310 U.S. 88 (1940).

The litigant who seeks to invoke the overbreadth doctrine in defining the breadth and scope of an order or decree faces several theoretical and practical problems. Generally, the doctrine has been applied to the clear, facial terms of a statute. The reason for this pattern is readily apparent: statutes are applicable to the population as a whole, so any deterrence to protected speech will find tional rights to be asserted or protected, the doctrine permits that party standing to assert the rights of others not party to the litigation on the theory that the overly broad reach of the order, statute, or regulation conceivably will deter constitutionally protected speech of third parties, whose rights will escape judicial review but for the invocation of the doctrine.

Presumably, the existence of a chilling effect will deter the third party from exercising his rights if he is unable to determine whether his conduct comes within the sweep of the order, statute, or regulation. Rather than risk the uncertainty of litigation, the party will refrain from the conduct in question. An overbroad order, therefore, might deter constitutionally protected business-oriented speech, a result at odds with the fundamental purpose of the antitrust laws and trade regulations, which are designed to promote competition on the merits. To alleviate this problem, the litigant who may not have first amendment rights to be protected is given standing to raise the overbreadth analysis as a defense for others. Once this problem of standing is solved, the law is then scrutinized on its face for potentially overbroad intrusions on protected speech which, if found, provide a basis to strike the law as unconstitutional. The net result is that a defendant being prosecuted under an overbroad order, statute, or regulation may avoid liability by asserting the first amendment rights of others, although the conduct with which he is charged could have been prohibited constitutionally by a more narrowly drawn law. The standing issue, otherwise grounds for summary rejection of the constitutional defense, is resolved by the existence of a chilling effect on third parties in their exercise of protected activities.

The application of an overbreadth analysis as a defense to government regulation of economic speech first surfaced in *Bigelow*. Bigelow, the managing editor, argued that Virginia's statute, which made it a misdemeanor to encourage through publication or other means the procuring of an abortion, was facially overbroad. The Virginia courts had ruled that, since commercial advertisements were unprotected,[71] the editor lacked standing to challenge a statute on overbreadth grounds because he lacked a legitimate first amendment interest. Although the statute was amended to correct the overbroad coverage after Bigelow was charged, thus mooting the issue on appeal before the Supreme Court, the Court indicated that it would be receptive to entertaining overbreadth challenges in commercial speech cases.[72] Indeed, the Court observed that the Virginia courts erred in denying Bigelow standing to raise the overbreadth argument.[73]

---

numerous targets. An order, however, is limited generally to the parties before the court; its unconstitutional impact will be limited. *But see* notes 107-20 and accompanying text *infra* (FTC cease and desist orders may apply to all who have knowledge of their terms).

71. *Bigelow*, 421 U.S. at 814-18.

72. *Id.* at 817.

73. *Id.*

A retreat was apparent, however, when the *Virginia Pharmacy* Court commented that the durability of commercial speech made it unlikely that it would be deterred by government regulation. The Court in *Bates v. State Bar*[74] seemed to recede further from the application of the overbreadth doctrine to commercial speech, and in so doing implicitly reaffirmed that purely economic-oriented speech is only entitled to reduced protection because it is constitutionally distinguishable from political or pure speech. It observed that the justification for its application in the business context is at best weak.[75] Citing *Virginia Pharmacy, Bates* commented that "[s]ince advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation."[76] Moreover, because the commercial message is directed at a service, the Court reasoned that the advertiser is in a position to know the truthfulness of the communication and would not refrain from advertising for fear that the communication was unprotected because it was untruthful. The Court declined, therefore, to apply the overbreadth doctrine to professional advertising,[77] and by implication to other types of commercial speech.

In two subsequent cases, the Court held that regulations on lawyers' in-person solicitations for economic gain are entitled to even less first amendment scrutiny than advertising. First in *Ohralik v. Ohio State Bar Association*,[78] and then in *In re Primus*,[79] the Court returned to a balancing test, indicating that a solicitation which had an economic motivation would receive less constitutional protection than solicitation which was politically oriented or which furthered a political expression.

In *Ohralik*, the Court refined the assumptions that underlie its unwillingness to apply the overbreadth doctrine to commercial speech. Because of the commercial speech qualities identified in *Virginia Pharmacy*, which make it different than pure speech, the Court reasoned that it "is not as

74. 433 U.S. 350 (1977). In *Bates*, the Court ruled that a state may not, consistent with first amendment constitutional values, prohibit price advertising for routine legal services. The advertisement in *Bates* offered legal services for "very reasonable fees" and listed prices for certain routine lawyering services. *Id.* at 385.

75. *Id.* at 380.

76. *Id.* at 381.

77. *Id.*

78. 436 U.S. 447 (1978). In *Ohralik*, a lawyer had solicited legal employment from two accident victims, one while still a patient in the hospital. The Court made it clear that it would distinguish between the *Bates* legal service price advertising and in-person solicitation for an economic gain. *Id.* at 455.

79. 436 U.S. 412 (1978). In *Primus*, an ACLU lawyer solicitated a client for reasons of political advocacy rather than pecuniary gain. The Court held that nonprofit-motivated communication was entitled to more first amendment protection than the profit-motivated conduct found in *Ohralik*. *Id.* at 426-32. Neither, however, was to receive full protection. *Id.* at 438-39.

likely to be deterred as noncommercial speech."[80] If the speech is not likely to be chilled, it "does not require the added protection afforded by the overbreadth approach."[81] But in contrast to *Bates*, the Court did not foreclose the argument entirely. It observed that if the doctrine did have application, it would have to be shown that the overbreadth of the regulation was both real and substantial.[82]

This same equivocal tone was expressed a year later in *Friedman v. Rogers*,[83] where the Court upheld a Texas regulation prohibiting the practice of optometry under a trade name. A total ban on use of trade names in that practice was constitutionally acceptable, the Court reasoned, because, notwithstanding the constitutional gains made in the commercial speech context, it was a reasonable regulation of the form of commercial information concerning a professional service. By regulating the form of the information, the state could avoid deception in the use of the trade name. In upholding the regulation, the Court rejected, without elaboration, the notion that more traditional first amendment defenses such as overbreadth analysis or prohibitions on prior restraints should be extended automatically to the commercial speech protections.[84]

Consequently, while the Court is reluctant to apply the first amendment overbreadth doctrine in the context of commercial speech,[85] it seems to have left the door open for future invocation of the doctrine should the proper circumstances arise.

D. *A Structured Approach*

One reading of the commercial speech cases through *Friedman* could lead to the conclusion that the Court, through its ad hoc approach, lacked

80. *Ohralik*, 436 U.S. at 462 n.20.

81. *Id.*

82. *Id. See* Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) (imposed requirement that overbreadth be substantial); notes 125-27 and accompanying text *infra*.

83. 440 U.S. 1 (1979). In Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980), the Court also equivocated on whether the overbreadth doctrine was inapplicable in commercial speech cases. Although the speech in question was found not to be commercial, the Court cited *Bates* for the proposition that the overbreadth doctrine was "inapplicable in *certain* commercial speech cases." *Id.* at 634 (emphasis added).

84. 440 U.S. at 10 n.9. Because there was substantial potential that the trade name with its close association "with price and quality information" could mislead the consumer, the Court had little difficulty in upholding the regulation over a commercial speech argument. *Id.* at 12-13.

85. This hesitation in applying the doctrine to commercial speech coincides chronologically with the Court's general reluctance to invoke the doctrine at all. *See* Arnett v. Kennedy, 416 U.S. 134 (1974) (plurality opinion); Lewis v. City of New Orleans, 415 U.S. 130 (1974); Broadrick v. Oklahoma, 413 U.S. 601 (1973); notes 125-42 and accompanying text *infra*.

a doctrinal framework in which to analyze first amendment defenses in commercial speech cases. Certainly *Bigelow, Virginia Pharmacy*, and *Bates* seem to stand on surer footing than the more recent decisions of *Ohralik* and *Friedman*, where the Court seemed ready to subordinate significantly the protection afforded commercial speech whenever there was the *potential* for overreaching or deception. As *Friedman* indicated, the risk alone was enough for the Court to concede any protection.[86]

This equivocal attitude toward a structured approach to the application of first amendment defenses within the commercial speech doctrine changed, however, in the recent decision of *Central Hudson Gas & Electric Co. v. Public Service Commission*.[87] The case is instructive, particularly in the trade regulation context, because the Court applied a systematic constitutional approach in reviewing an overbroad regulatory order. In *Central Hudson*, the New York Public Service Commission issued an order prohibiting the promotional advertising of the use of electricity. The state interest underlying the ban centered on energy conservation because there was an energy supply shortage. After the energy shortage ended, the promotional ban continued, but the regulations permitted informational advertising designed to encourage time shifts in energy consumption. Central Hudson, a public utility, challenged the promotional ban, arguing that it violated the commercial speech doctrine.[88] The New York Court of Appeals upheld the ban on the theory that there was "little value to advertising in 'the noncompetitive market in which electric corporations operate.' "[89] The Supreme Court reversed, holding that the ban violated Central Hudson's commercial speech rights.

After noting that the cornerstone of the commercial speech doctrine was based on the *informational* function of the communication, the Court established a four-tiered analysis for scrutinizing regulations and orders which restrict commercial speech. First, it must be decided whether the speech is protected, *i.e.*, whether it is commercial speech that is accurate and unrelated to illegal conduct.[90] If it is inaccurate or related to illegal conduct, then it is entitled to little constitutional protection.[91] But if it is not deceptive and does not encourage illegal activity, it can be regulated only if: second, the regulating authority has a substantial interest to be

86. 440 U.S. at 19-20 (Blackmun, J., concurring and dissenting).

87. 447 U.S. 557 (1980).

88. *Id.* at 560.

89. *Id.* at 561 (quoting Consolidated Edison Co. v. Public Serv. Comm'n, 47 N.Y.2d 94, 110, 390 N.E.2d 749, 757, 417 N.Y.S.2d 30, 39 (1979), *rev'd sub nom.* Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n, 447 U.S. 557 (1980)).

90. 447 U.S. at 563, 566.

91. Friedman v. Rogers, 440 U.S. 1 (1979); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973).

served by the regulation; third, the restriction on the speech advances directly the stated governmental interest;[92] and fourth, the restriction is not more extensive than necessary to serve that interest.[93]

The application of this new unitary test in *Central Hudson* to the challenged order banning promotional advertising resulted in the order being struck down.[94] In addressing whether New York had a substantial

---

92. Bates v. State Bar, 433 U.S. 350 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

93. 447 U.S. at 564-66. The Court cited *In re* Primus, 436 U.S. 412, 438-39 (1978), for the proposition that under the commercial speech doctrine the government restriction must be drawn as narrowly as possible to withstand constitutional analysis. But in *Primus* that rule was articulated in the context of political expression or association, not necessarily within the commercial speech doctrine. Restriction of political speech receives stricter scrutiny than restrictions of other types of speech. It is allowed only when necessary to advance a compelling state interest. First Nat'l Bank v. Bellotti, 435 U.S. 765, 786 (1978); NAACP v. Button, 371 U.S. 415, 438-39 (1963); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960). Once a compelling interest is shown, however, the test is the same: the restriction must be no broader than necessary to effectuate the interest. *Bellotti*, 435 U.S. at 786; Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam); Shelton v. Tucker, 364 U.S. 479, 488 (1960). *See* notes 45-46 & 54 and accompanying text *supra*. Thus, the only apparent distinction between the test employed in political speech cases and the test employed in commercial speech cases is that in the former the interest advanced by the government must be greater, *e.g.*, compelling, while in the latter the interest need only be substantial. Otherwise the analysis is similar. *See* note 99 *infra*.

The *Central Hudson* Court for the first time was extending this well-accepted first amendment constitutional defense to the commercial speech doctrine. *See generally* United States v. O'Brien, 391 U.S. 367 (1968). In *O'Brien*, the Court, in discussing cases that contain elements of speech and conduct, said that "government regulation is sufficiently justified if it . . . furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the indicental restriction on alleged First Amendment freedoms is *no greater than is essential to the furtherance of that interest*." *Id.* at 377 (emphasis added).

94. 447 U.S. at 566-71. Central Hudson's advertisements were not alleged to be either inaccurate or related to an unlawful activity. *Id.* at 566. *See* Friedman v. Rogers, 440 U.S. 1 (1979); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973).

The Court also rejected the reasoning of the New York courts that the speech sought to be protected had little value because the public utility had a monopoly over the supply and thus that "advertising in a 'noncompetitive market' could not improve the decisionmaking of consumers." 447 U.S. at 566-67. Finding that monopolistic and regulated utilities would not advertise unless there was some informational or promotional content that might be useful to the public and consumers in the decisionmaking process, the Court held that commercial speech by the monopolist or regulated entity was entitled to first amendment protection. *Id.* at 567.

interest in saving energy, the Court found that goal imperative and that the order banning promotional advertisements directly served that interest.[95] The order, however, was found to be constitutionally overbroad because it had the effect of reaching "all promotional advertising, regardless of the impact,"[96] and would have suppressed the promotion of information about electric devices or services that promote efficiency.[97] The burden was placed on the regulatory authority to demonstrate that a more limited, less sweeping order would not protect adequately the governmental interest.[98]

Although *Central Hudson* synthesizes several previously announced prerequisites for regulation, it nevertheless was evasive on several issues. First, how closely related must the commercial speech be to illegal conduct before the speech is not entitled to protection? Second, how substantial must the governmental interest be? Third, how directly must the restriction advance the governmental interest? Finally, how narrowly must the order be drawn? Although the Court has indicated that it will address these questions only on a case-by-case basis, some observations are warranted.

First, *Central Hudson* quantifies, to a degree, the substantiality standard derived from the balancing test first imposed in *Bigelow*. Regulatory authorities must establish that the governmental interest advanced is substantial,[99] and that the order directly advances that interest.[100] Second,

95. 447 U.S. at 568-69.
96. *Id.* at 570.
97. *Id. But see id.* at 602-04 (Rehnquist, J., dissenting).
98. *Id.* at 570-71.
99. Apparently, the substantiality test requires an "intermediate level of scrutiny," somewhere between the rational relationship test and the compelling governmental interest test. *See* note 93 *supra*. Justice Blackmun would accept this intermediate level of scrutiny only when there was evidence that the speech was misleading, coercive, or to regulate time, place, and manner restrictions. 447 U.S. at 573 (Blackmun, J., concurring). But if the speech is commercial and does not fall within these categories, he believes it can only be regulated when there is evidence of a clear and present danger. *Id.* at 575 (Blackmun, J., concurring). *See* Schenck v. United States, 249 U.S. 47 (1919). *Contra*, Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980); Friedman v. Rogers, 440 U.S. 1 (1979); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).

Prior to *Central Hudson*, the Court had not considered expressly the governmental interest in terms of a substantiality standard, although in *Bates*, for example, it discussed at length the asserted state interest and found it insufficient. Bates v. State Bar, 433 U.S. 350, 368-79 (1977). *See also* Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 94-97 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 766-70 (1976).

100. In both *Linmark* and *Virginia Pharmacy*, the governmental regulations were found constitutionally infirm because they were not necessary to achieve the objective of the recognized governmental interest. 431 U.S. at 95; 425 U.S. at 766-69.

if the substantiality and relation tests are met, the government can, consistent with first amendment values, regulate the *content* of the commercial speech.[101] Third, the government has a formidable burden to demonstrate affirmatively that the order as drawn is no broader than necessary to achieve the interest advanced.

This traditional first amendment defense, that a regulation or order be no more extensive than necessary, had not been applied previously in purely business-oriented speech cases. While there were vague signals in *Primus* and *First National Bank v. Bellotti*[102] that this defense was applicable, those cases were decided largely in the context of the political expressions which played a central role in the commercial solicitation involved.[103]

The requirement that an order be no broader than necessary to achieve a governmental interest could be the most litigated requirement in trade regulation litigation. It mandates that the order can "extend only as far as the interest it serves."[104] If a less restrictive order will suffice to protect that interest, the order must be tailored to protect only the substantial governmental interest promoted. In other words, to support an order the government must demonstrate that alternative means which would burden or impair the defendant less are unavailable.

According to *Central Hudson*, the mandate that orders be narrowly drawn and be as unintrusive as possible is distinguishable from the first amendment overbreadth doctrine.[105] Traditional overbreadth analysis was not applicable in *Central Hudson*, the Court reasoned, because the challenged order acted directly against the activities of Central Hudson, and, therefore, the chilling effect on third parties was not in issue. Because Central Hudson could argue on its behalf that the order directly affected its own constitutionally protected rights, there was no need to invoke third-party overbreadth analysis.[106]

---

101. The content-based regulation, for example, could take the form of requiring the communicator to include, *inter alia*, efficacy and price information and prescreening approval. 447 U.S. at 571 n.13. The Court was careful to point out that the content-based regulation was permissible in the commercial speech cases because of the subordinate protection it is afforded under the first amendment, as distinguished from other forms of expression. *Id.* at 562-63.

102. 435 U.S. 765 (1978). *See* note 93 *supra*.

103. 447 U.S. at 565.

104. *Id. See* Beneficial Corp. v. FTC, 542 F.2d 611, 618-19 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977); National Comm'n on Egg Nutrition v. FTC, 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978); Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978); Chrysler Corp. v. FTC, 561 F.2d 357, 364 (D.C. Cir. 1977).

105. 447 U.S. at 565 n.8. In footnote 14 the Court noted that, given the resolution of the challenge on first amendment grounds, it specifically declined to address the claims that the order also was violative of the equal protection clause and that it was overbroad and vague. *Id.* at 571 n.14.

106. *Id.* at 565 n.8.

The Court's approach suggests that the overbreadth doctrine as traditionally invoked may be inapplicable as a defense, although the order is overbroad in the sense that it is more extensive than necessary to serve the governmental interest. If this is true, the doctrine may not be transposed into a "single-party" analysis where the challenging party specifically attempts to invoke the doctrine by complaining that its own constitutional rights are affected. Therefore, one reading of *Central Hudson* may suggest that for a specific order challenged by a defendant whose rights are affected, the appropriate measure of the order's breadth is not whether it will have a deterrent or chilling effect, but whether it is broader than necessary to achieve the governmental interests. Under this reading of *Central Hudson,* the utility of the chilling effect concept in a single-party challenge is suspect.

III. APPLICABILITY OF THE OVERBREADTH DOCTRINE AND VAGUENESS—SUMMARY AND CRITICISM

A. *Third-Party Overbreadth*

Although the Court indicated in *Virginia Pharmacy* and *Bates* that the overbreadth analysis was inapplicable to commercial speech, the assumption that commercial speech is more easily verifiable than other types of speech and less susceptible to being chilled by overbroad regulation, arguably has little weight in the antitrust context. The type of regulation that the Court had in mind when it made this assumption was regulation based on the truth or falsity of advertising. According to this rationale, the speaker supposedly would know whether the information was true and would be deterred only from making false statements, which were unprotected anyway. The knowledge that his communication was in fact true would serve to soothe any fears he might have of subsequent prosecution, so his protected speech would not be chilled.

In the antitrust context of price information disclosures, however, regulation of speech often is not based on the truth or falsity of the communication. Price information will be disclosed generally for informational or promotional purposes. The justification for refusing to apply the overbreadth doctrine then becomes inapplicable. An order with an overly broad reach might render a defendant uncertain as to which of his communications fall within the proscribed area. As a consequence of that uncertainty, he may avoid engaging in various types of business-oriented speech, which in fact are protected but which he fears are prohibited. For instance, if a manufacturer is unable to communicate price information and policies to potential customers generally through trade publications or press releases, competition for the solicitation of customers could suffer. Moreover, a scarcity of market information relevant to production, costs, and price data may serve as a barrier to entry for new competition. As a result, competition among sellers will diminish.

The direct application of this theory can be seen in the adoption of a recent statute. 15 U.S.C. § 45(m)(1)(B) was enacted as part of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act.[107] It grants to the Commission the power to assess penalties on any person who, with actual knowledge,[108] violates a final cease and desist order,[109] even though that person was not a party in the proceeding from which the cease and desist order arose. In practice, every cease and desist order of the FTC which declares any act or practice to be unfair or deceptive is binding on any person who has actual knowledge of the terms of the order.[110]

Although the FTC has not yet invoked this provision,[111] its potential effect is patent. Its application will impart the broad scope of a statute on a cease and desist order of the FTC. An order could have a chilling effect on the protected commercial speech of its potential subjects. Third parties could be deterred from speech by the fear of prosecution and severe penalty.[112] Therefore, the actual litigant should, under an overbreadth analysis, be allowed to assert constitutionally protected rights of third parties.[113] If a

107. Pub. L. No. 93-637, 88 Stat. 2183 (1975) (current version at 15 U.S.C. §§ 45-46, 49-50, 52, 56-58, 2301-2312 (1976 & Supp. III 1979)).

108. 15 U.S.C. § 45(m)(1)(B)(2) (1976).

109. *Id.* § 45(m)(1)(B)(1).

110. The statute provides that, if the Commission applies an order to a third party, the issues of fact in the proceeding shall be tried de novo. *Id.* § 45(m)(1)(C)(2). Presumably, the prior finding that the conduct in question was unfair or deceptive is a question of law and, therefore, not subject to relitigation. *See* Asheville Tobacco Bd. of Trade, Inc. v. FTC, 294 F.2d 619 (4th Cir. 1961); Ford Motor Co. v. FTC, 120 F.2d 175 (6th Cir.), *cert. denied*, 314 U.S. 668 (1941). Thus, it would seem that the issues tried de novo would be limited to whether the conduct fell within the scope of the prior order.

111. There are no cases arising under this statute. It would appear that, for whatever reason, the Commission has chosen not to invoke the statute.

112. The statute provides for penalties of up to $10,000 per day. 15 U.S.C. § 45(m)(1)(B)-(C) (1976). The possible consequences of this statute are overwhelming. The Commission issues many cease and desist orders. A business enterprise, if it keeps in touch with what the Commission is doing, will acquire actual knowledge of these orders and become bound by them as if the orders were statutes or rules. Its only alternative is purposely to ignore what the Commission is doing. That is equally unsatisfactory because it leaves the enterprise with no knowledge of the principles which likely will be invoked to govern its conduct. There is no middle ground where it may make a good faith attempt to comply, yet avoid immediate liability for an inadvertent misstep.

113. The argument that an order of the FTC is overly broad is a difficult one to impress on the courts. The specific standard of review for such an order is that "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." FTC v. Colgate-Palmolive Co., 380 U.S. 374, 394-95 (1965) (footnote omitted).

As a result of this broad standard, the Commission is not reluctant to issue orders which extend far beyond the unlawful acts shown to have occurred. Orders court found that widespread application of the order would result in punishment of protected speech, enough to constitute "substantial overbreadth,"[114] the order should be struck down.

Critical to this analysis is the development of a protected status under the first amendment for commercial speech. The speech must merit constitutional protection before courts will waive the requirements of standing for a party asserting rights of others. Only since the post-1975 developments in commercial speech[115] has any such protection been forthcoming to the kind of speech in question here. Once the standing requirement has been satisfied by a showing of deterred speech, the commercial

often extend to other products, *e.g.*, FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965); AMA v. FTC, 638 F.2d 443 (2d Cir. 1980); Jay Norris, Inc. v. FTC, 598 F.2d 1244 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979); Carter Prods., Inc. v. FTC, 323 F.2d 523 (5th Cir. 1963); Benrus Watch Co. v. FTC, 352 F.2d 313 (8th Cir. 1965). Orders also have extended to other types of conduct, *e.g.*, Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); Rubbermaid, Inc. v. FTC, 575 F.2d 1169 (6th Cir. 1978), and to unrelated geographic divisions of or activities within the defendant's operation, *e.g.*, FTC v. Anheuser-Busch, Inc., 363 U.S. 536 (1960); Great Atl. & Pac. Tea Co. v. FTC, 557 F.2d 971 (2d Cir. 1977), *rev'd on other grounds*, 440 U.S. 69 (1979); Bankers Sec. Corp. v. FTC, 297 F.2d 403 (3d Cir. 1961); Grove Labs. v. FTC, 418 F.2d 489 (5th Cir. 1969); National Dairy Prods. Corp. v. FTC, 395 F.2d 517 (7th Cir.), *cert. denied*, 393 U.S. 979 (1968).

The circuit courts, however, since the recognition of commercial speech protection, have increased their scrutiny of regulatory orders. *See, e.g.*, ITT Continental Baking Co. v. FTC, 532 F.2d 207 (2d Cir. 1976); Beneficial Corp. v. FTC, 542 F.2d 611, 618-19 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977); American Home Prods. Corp. v. FTC, 402 F.2d 232 (6th Cir. 1968); National Comm'n on Egg Nutrition v. FTC, 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978); Spiegel, Inc. v. FTC, 411 F.2d 481 (7th Cir. 1969); Standard Oil Co. v. FTC, 577 F.2d 653, 661-63 (9th Cir. 1978); Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978); Chrysler Corp. v. FTC, 561 F.2d 357 (D.C. Cir. 1977).

Recently, in *In re* Litton Indus., Inc., No. 9123 (F.T.C. Jan. 5, 1981), the Commission, in marked contrast to prior decisions, narrowed the scope of its own order when it rejected a staff appeal to apply a cease and desist order to all of Litton's consumer products, not merely to microwave ovens. The staff had charged that Litton's microwave advertising was misleading under § 5 of the FTC Act. In rejecting the broad order, the Commision stated:

> The practices involved in this case related solely to microwave ovens and Litton has not been shown to have engaged in similar practices in connection with any other product . . . . [I]t is well established that a cease and desist order must bear a reasonable relationship to the practices found to be violative of the Act in each case.

Id., *quoted in* 997 ANTITRUST & TRADE REG. REP. (BNA) A-16 (Jan. 15, 1981).

114. *See* Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973); notes 125-27 and accompanying text *infra*.

115. *See* notes 23-55 and accompanying text *supra*.

speech doctrine further serves to heighten the level of scrutiny applied to the actual breadth of the order.[116] In short, an order encroaching on protected speech must survive the stricter examination which is inherent whenever the first amendment is invoked successfully.

Equally crucial to the vitality of this analysis is repudiation of the concept, first espoused in *Virginia Pharmacy*, that commercial speech is hardier and more durable than other speech.[117] As previously noted,[118] two assumptions underlie this argument: first, commercial speech is more easily verifiable, and thus less likely to be chilled by regulation based on truthfulness; second, since advertising is the sine qua non of profits and essential to commercial success, it is so strongly motivated as to survive any chilling effect which may in fact arise. The fallacy of these assumptions is poignant especially in the present context. First, FTC cease and desist orders are directed frequently toward aspects of commercial activity unrelated to truthfulness, such as when the Commission procedes under the "unfairness" portion of section 5 of the FTC Act.[119] Therefore, the fact that commercial speech may be verifiable more easily often will fail to insulate it from the chilling effect of an overbroad order. Second, the severity of penalty under the statute[120] may push to the breaking point the notion that profit motive will surmount the chilling effect. Although a large, thriving business enterprise may be willing and able to risk such a loss, the economically smaller or less successful business may not. Yet the

116. " 'Because First Amendment freedoms need breathing space to survive, government may regulate in this area only with narrow specificity.' " *In re* Primus, 436 U.S. 412, 432-33 (1978) (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

117. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976).

118. *See* notes 68-85 and accompanying text *supra*.

119. The Commission is charged with prevention of "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1) (1976). While "deceptive" generally is directed at the element of truthfulness, *see, e.g.*, Jay Norris, Inc. v. FTC, 598 F.2d 1244 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979); Encyclopaedia Britannica, Inc. v. FTC, 605 F.2d 964 (7th Cir. 1979), *cert. denied*, 445 U.S. 934 (1980), the "unfair" portion of the statute may be directed at various types of conduct unrelated to truthfulness. A common example is an order to cease and desist from price discrimination. *See, e.g.*, FTC v. Henry Broch & Co., 368 U.S. 360 (1962); FTC v. Ruberoid Co., 343 U.S. 470 (1952); National Dairy Prods. Corp. v. FTC, 412 F.2d 605 (7th Cir. 1969); Joseph A. Kaplan & Sons, Inc. v. FTC, 347 F.2d 785 (D.C. Cir. 1965). *See also* Rubbermaid, Inc. v. FTC, 575 F.2d 1169 (6th Cir. 1978) (order to cease and desist from resale price maintenance); Hamilton Mfg. Co. v. FTC, 194 F.2d 346 (D.C. Cir. 1952) (order to cease and desist from sale of devices to be used in a lottery or game of chance).

120. The penalty imposed may be up to $10,000 per violation. 15 U.S.C. § 45(m)(1)(B) (1976). Each day of continued conduct shall be treated as a separate violation. *Id.* § 45(m)(1)(C).

orders will apply equally to the large and the small, the strong and the weak. Moreover, the economically small and weak, who are the most likely to be chilled, are also the most in need of efficacious commercial communication to enhance their competitive position. Thus, the chilling effect which does result falls on those whose business can tolerate it the least. Their already inferior competitive position would be eroded further by the paralysis of commercial communicative activity, paralysis induced by the fear of violating an order previously imposed on another party or competitor.

B. *Single-Party Overbreadth*

As *Central Hudson* indicated, traditional overbreadth may be inapplicable where the party before a court is asserting that the order directly affected its own constitutional rights.[121] It is unclear, however, whether such reasoning is compelled logically. First, the Court has suggested, although contrary to its specific holding, that the overbreadth doctrine has application even in those instances where the challenger of the order has a constitutional right at stake. This additional invocation of the doctrine was noted implicitly when the Court observed that the doctrine "permits the invalidation of regulations [or orders] on First Amendment grounds *even when* the litigant challenging the regulation [or order] has engaged in no constitutionally protected activity."[122] Inferentially, the use of the words "even when" suggests the existence of protection in the single-party context when the challenger's own constitutional rights are at stake.

Traditional overbreadth analysis should remain a significant ground on which to strike an overly broad order which infringes on or has the potential of deterring constitutionally protected, truthful commercial communications of the challenging party, such as Central Hudson's promotion of efficient energy alternatives.[123] The mere fact that the challenger of the order is subject to some regulation for activity outside the ambit of protection should not serve to prohibit it from challenging an order which has the effect of chilling other constitutionally protected commercial communications. Especially pertinent in this single-party situation is the chilling effect that will result from the order's vagueness.[124] The party subject to the order will refrain from engaging in certain conduct because the terms of the order leave uncertain whether that conduct is prohibited. Thus, while *Central Hudson* seemingly discourages a single-party overbreadth challenge, it opens the door to a vagueness attack with the same theoretical basis.

121. *Central Hudson*, 447 U.S. at 565 n.8. *See* notes 105 & 106 and accompanying text *supra*.
122. 447 U.S. at 565 n.8 (emphasis added).
123. *See* note 97 and accompanying text *supra*.
124. *See* note 137 and accompanying text *infra*.

Assuming the validity of single-party overbreadth analysis, distinctions between the "broader than necessary" test and the chilling effect approach should be emphasized and retained. As an evidentiary concern, it would seem more difficult for a party to prove, in rebuttal to the government's burden of establishing the contrary, that an order will have a chilling effect than to demonstrate that the order is broader than necessary to serve the substantial interest involved. Proof of chilling effect on protected conduct should be sufficient to prove that it was not the least intrusive governmental regulation possible or that it is broader than necessary, while the converse would not be true. Therefore, the "broader than necessary" test would seem to impose a less onerous burden. Hence, although the challenger of the order might be able to point to the potential existence of a chilling effect, it would not want this higher evidentiary standard to be adopted as the threshold standard of appropriate breadth of an order.

C. *Retreat from the Overbreadth Doctrine*

Although the doctrinal soundness of the overbreadth doctrine seems unassailable, recent developments in the Supreme Court raise practical questions about the proper scope of its application. At the same time, some erosion of the doctrine is apparent.

Broadrick v. Oklahoma[125] marked a shift in the Court's approach to the overbreadth doctrine. *Broadrick* imposed the requirement that "particularly where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[126] Therefore, before a statute, order, or regulation can be struck down under an overbreadth analysis, the overbreadth must be substantial. In *Broadrick*, where a state statute limited political campaigning by state employees, the term was stated perfunctorily and applied;[127] its precise meaning in this context re-

---

125. 413 U.S. 601 (1973).

126. *Id.* at 615. Appellants, employees of the Oklahoma Corporation Commission, were charged with violation of a state statute which severely limited political campaigning by state employees. They sought an injunction against enforcement of the statute on the grounds that it was unconstitutionally vague and overbroad, arguing, *inter alia*, that it could be, and in fact had been, interpreted to prohibit such things as wearing political buttons or displaying bumper stickers. *Id.* at 609-10. *See also* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 462 n.20 (1978).

127. Justice Brennan noted in dissent that

> the Court makes no effort to define what it means by "substantial overbreadth." . . . [A] requirement of substantial overbreadth is already implicit in the doctrine. . . . Whether the Court means to require some different or greater showing of substantiality is left obscure by today's opinion, in large part because the Court makes no effort to explain why the overbreadth of the Oklahoma Act, while real, is somehow not quite substantial.

413 U.S. at 630-31 (Brennan, J., dissenting) (citation omitted).

mains unilluminated by subsequent decisions. The practical effect of this development remains uncertain. At least, *Broadrick* seems to signal that the present Court was reluctant to dilate the scope of the doctrine. Further evidence also indicates a possible desire by the Court to constrict it.

In *Lewis v. City of New Orleans*,[128] where a majority struck down a city ordinance prohibiting the use of abusive language as unconstitutionally overbroad,[129] several members of the Court indicated strongly their hostility to the overbreadth doctrine. Justice Blackmun, joined by Chief Justice Burger and Justice Rehnquist, found that the function of the Court under the doctrine had been reduced to "parsing words in the context of imaginary events."[130] The dissent noted that "[o]verbreadth . . . in the field of speech . . . [has] become [a] result-oriented rubberstamp . . . . The more frequent our intervention, . . . the more we usurp the prerogative of democratic government. Instead of applying constitutional limitations, we do become a 'council of revision.' "[131]

The *Lewis* dissent suggested further that any chilling effect or overbreadth should be weighed against the interest served by the regulation.[132] Implicit in this language is the belief that a mere finding of chilling effect on protected speech of third parties is not enough; its effect must be balanced against competing interests. This balancing test could supplement the *Broadrick* requirement that the overbreadth be "substantial . . . in relation to the statute's plainly legitimate sweep."[133] In short, under this approach a balancing of both effects and interests may be required.

D. *Relationship Between Overbreadth and Vagueness*

Although *Broadrick* and the *Lewis* dissent portend change in traditional overbreadth analysis, subsequent cases to date have not advanced the apparent move toward interest balancing. Rather, in *Arnett v. Kennedy*,[134] the Court engaged in statutory construction which, if applied with regularity, could sound the demise of overbreadth analysis. The

128. 415 U.S. 130 (1974).

129. Appellant challenged a city ordinance making it unlawful " 'to curse or revile or to use obscene or opprobrious language toward or with reference to' " a police officer while in the performance of his duties. *Id.* at 132 (quoting NEW ORLEANS, LA., ORDINANCES 828 MCS § 49-7 (1969)). A majority of the Court found this language facially overbroad and unconstitutional because it swept broader than the "fighting words" doctrine. *Id.* at 132. *See* Gooding v. Wilson, 405 U.S 518, 522 (1972) (discussion of fighting words doctrine); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (fighting words doctrine announced and defined).

130. 415 U.S. at 137 (Blackmun, J., dissenting).

131. *Id.* at 140 (Blackmun, J., dissenting) (citation omitted).

132. *Id.* at 136-37 (Blackmun, J., dissenting).

133. 413 U.S. at 615. *See* notes 125-27 and accompanying text *supra*.

134. 416 U.S. 134 (1974) (plurality opinion).

respondent, who had been fired from a Civil Service job, contended that "although no constitutionally protected conduct of his own was the basis for his discharge . . . , the . . . [statute] . . . must be declared inoperative . . . because the generality of its language might result in marginal situations in which other persons seeking to engage in constitutionally protected conduct would be deterred from doing so."[135] Although the Court recognized this vintage overbreadth argument, it rejected the claim with a finding that Congress "obviously did not intend to authorize discharge . . . for speech which is constitutionally protected."[136] The Court declared the doctrine inapplicable when a limiting construction has the effect of narrowing the regulations' scope from an otherwise overbroad reach. Thus, the apparent overbreadth of the statute dissolves magically with a construction that excludes from its scope any constitutionally protected conduct. As Professor Tribe has pointed out, however, this construction leaves the statute patently vague, given the difficulty of predicting in advance what is and is not constitutionally protected.[137] Protected speech is chilled, not by overbreadth since the statute "excludes constitutionally protected speech," but by the vagueness reflected in the prospective speaker's inability to guess whether his speech will be subject to that protection and fall outside the statute's ban. The individual contemplating speech which appears to fall within the ambit of the regulation, but which may be deserving of first amendment protection, is in the same quandary as before. He is faced with the difficult choice of refraining from the speech and avoiding prosecution, or speaking his mind and incurring liability if a court later determines the speech to be unprotected.

Vagueness as a doctrine had its origin in the due process clause. It rests on concepts of fair notice and warning. As the Supreme Court cautioned early, if a regulation "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application," then it is constitutionally infirm.[138] If the prohibitions are not clearly defined or if reasonably clear guidelines are lacking, the regulation cannot stand.[139]

135. *Id.* at 163. Respondent was fired pursuant to 5 U.S.C. § 7501(a) (1970), which allowed discharge only for "such cause as will promote the efficiency of the service." He contended that that language could support discharge for constitutionally protected speech and thus was overbroad and vague.

136. 416 U.S. at 162.

137. L. TRIBE, *supra* note 69, § 12-26, at 716.

138. Connally v. General Const. Co., 269 U.S. 385, 391 (1926). *See* Smith v. Goguen, 415 U.S. 566, 572 (1974); Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971); Dombrowski v. Pfister, 380 U.S. 479, 491 (1965); Baggett v. Bullitt, 377 U.S. 360, 367 (1964); J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 726-27 (1978).

139. Smith v. Goguen, 415 U.S. 566, 575 (1974); Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

Recently, the "void for vagueness" defense has evolved into a concept with broader constitutional application. Although the vagueness doctrine is theoretically applicable to regulations of any substantive nature, it is enforced more vigorously if the regulation invades the province of the first amendment. Courts have noted that if the regulation "abut[s] upon sensitive areas of basic First Amendment freedoms,"[140] it will receive closer scrutiny under the watchful eye of the first amendment. Indeed, if conduct that is to be regulated comes within the bounds of the first amendment, the regulations may be required to be drawn more specifically than under due process standards.[141] Consequently, since business communications have been elevated to a level that warrants first amendment protection, the vagueness defense under both due process and first amendment analysis becomes available. They are, however, separate and distinct analyses.[142] For instance, a regulation can be overbroad, but its language clearly defined so as not to be vague. On the other hand, a regulation can suffer from ambiguous language, but not be overbroad either because it was drafted narrowly or because of a limiting or narrowing interpretation.

Vagueness, at least before the advent of commercial speech protection, had proved less a problem when invoked against an order of the FTC because the FTC allows anyone subject to its order to "request advice from the Commission as to whether a proposed course of action, if pursued by it, will constitute compliance with such order. . . . [T]he Commission will inform the respondent whether or not the proposed course of action, if pursued, would constitute compliance with its order."[143] Most courts have been willing to accept this opportunity for an "advisory opinion" as an adequate cure for vagueness of an FTC order.[144] A few courts, however, have been unwilling to accept this argument: "[T]his suggestion does not reach the core of the problem. The vice inherent in . . . [this] order lies . . . in the requirement that one who is subject to its terms must 'either expose his

140. Baggett v. Bullitt, 377 U.S. 360, 372 (1964). *See* Smith v. Goguen, 415 U.S. 566, 573 (1974); Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); United States v. National Dairy Prods. Corp., 372 U.S. 29, 36 (1963); Levy v. Parker, 478 F.2d 772, 789, 793 (3d Cir. 1973), *cert. denied*, 420 U.S. 972 (1975).

141. *See* Levy v. Parker, 478 F.2d 772, 793 (3d Cir. 1973), *cert. denied*, 420 U.S. 972 (1975).

142. Vagueness is often closely related to overbreadth. It is a rare case where one is asserted without the other. A statute may be found unconstitutionally vague when, as with overbreadth, it chills protected speech. Such chilling effect may occur when the statutory language is so imprecise as to leave one unable confidently to discern what it means. "Those . . . sensitive to the perils posed by the . . . indefinite language, avoid the risk . . . only by restricting their conduct to that which is unquestionably safe." Baggett v. Bullitt, 377 U.S. 360, 372 (1964).

143. 16 C.F.R. § 2.41(d) (1980).

144. *E.g.*, FTC v. Colgate-Palmolive Co., 380 U.S. 374, 394 (1965); Jay Norris, Inc. v. FTC, 598 F.2d 1244, 1251 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979); Fedders Corp. v. FTC, 529 F.2d 1398 (2d Cir.), *cert. denied*, 429 U.S. 818 (1976).

major business decisions to a Commission veto, or remain in the dark regarding their legal consequences.' "[145]

Justice Rehnquist's opinion in *Arnett*, which was joined by a majority of the present Court,[146] neatly avoided discussion of the vagueness problem which, under traditional analysis, would have rendered the statute in question constitutionally infirm. Fundamental to the *Arnett* opinion, however, is a principle that often has frustrated clear analysis. An analytical distinction should be maintained between chilling effect, overbreadth, and vagueness. Although not mutually exclusive, these concepts are consecutive, rather than concurrent, analytical steps. The finding of a chilling effect does not serve automatically to strike the statute as unconstitutional; it merely allows the defendant to avoid summary rejection of his defense for lack of standing. Once that feat is achieved, the challenger must continue to prove that the regulation encroaches on protected speech. Proof of mere chilling effect might not be sufficient in itself to fulfill this requirement because that chill is purely subjective; it is based on the person's fearful assumption that the regulation may be or will be invoked against him. If that assumption is or had been rendered erroneous by judicial interpretation to the contrary then, under *Arnett*, the regulation survives.[147] On the other hand, if the challenger demonstrates that the

145. Standard Oil Co. v. FTC, 577 F.2d 653, 661-62 (9th Cir. 1978) (quoting Joseph A. Kaplan & Sons, Inc. v. FTC, 347 F.2d 785, 791 (D.C. Cir. 1965)). These opinions seem to be based on the fact that the defendant was only minimally culpable and the order severely vague or broad. *See also* AMA v. FTC, 638 F.2d 443 (2d Cir. 1980).

146. Justice Rehnquist was joined in his entire opinion by Chief Justice Burger and Justice Stewart. Justices Powell and Blackmun concurred in the result and reasoning of Justice Rehnquist's overbreadth analysis.

147. The clarity of this distinction has not always been advanced. Summary analysis and imprecise terminology have prevailed in cases where the unconstitutionality was more patent. The two concepts have been blended together rather than maintained as a bifurcated analysis. In Thornhill v. Alabama, 310 U.S. 88 (1940), for example, the Court stated that "[i]t is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion." *Id.* at 97. Such language seems to indicate that proof of a chilling effect is the final step; that such a finding automatically will lead to a finding of unconstitutionality. Supporting the same conclusion is NAACP v. Button, 371 U.S. 415 (1963), where the Court found that "[t]he objectionable quality of . . . overbreadth . . . in the area of First Amendment freedoms . . . [depends on] a penal statute susceptible of sweeping and improper application. . . . The threat of sanctions may deter . . . almost as potently as the actual application of sanctions." *Id.* at 432-33 (citation omitted) (footnote omitted).

In cases such as *Thornhill* and *Button*, where the statutes were in fact patently overbroad, it is understandable how the two concepts, chilling effect and overbreadth, could blend together. In closer cases, however, such imprecise analysis causes confusion. Read narrowly, *Arnett* may do no more than insist on the regulation encroaches on protected speech, a court will proceed to examine it under the applicable first amendment analysis, be it the compelling or substantial interest test.[148] Finally, in single-party challenge suits, proof of a chilling effect is unnecessary to satisfy the requirement of standing. Nevertheless, the concept may have utility in convincing a court that the regulation is in fact overbroad. Although it does not lead automatically to a finding of overbreadth, a chilling effect, as an evidentiary matter, may be persuasive as to whether the regulation touches on constitutionally protected speech.

The cumulative effect of *Broadrick, Arnett*, and the *Lewis* dissent seemingly calls into question the remaining vitality of the overbreadth doctrine.[149] Recently, however, the Court in *Village of Schaumburg v. Citizens for a Better Environment*[150] reaffirmed the overbreadth doctrine, holding that the court of appeals was correct in deciding that a village ordinance that prohibited door-to-door or on-street solicitation of contributions for charitable purposes was overbroad.[151] Moreover, *Village of Schaumburg*, which was decided only four months prior to *Central Hudson*, implied that the overbreadth doctrine had application "in certain commercial speech cases."[152]

IV. THE IMPACT OF ECONOMIC THEORIES ON BUSINESS COMMUNICATIONS AND ITS EFFECTS ON FIRST AMENDMENT PROTECTION

The development of constitutional protection of economic speech, from *Pittsburgh Press* through *Ohralik*, makes clear that conduct that is a component of an illegality can be regulated, even though speech is implicated.[153] *Ohralik* was expressive, particularly in dictum, that the exchange of price and production information among competitors can be regulated to a degree without offending first amendment interests.[154] The *Ohralik*

maintenance of the analytical distinction. Read more broadly, the case reflects judicial willingness, previously expressed in *Broadrick* and the *Lewis* dissent, to narrow the parameters of the overbreadth doctrine itself.

148. *See* notes 54 & 93 *supra*.

149. Although these trends may not be settled law, their apparent favor with the present Court at least must warn the prospective litigant and counsel of the scrutiny with which arguments based on overbreadth will be received. This would seem true particularly in the context of business-motivated speech given the Court's announced reluctance to apply the doctrine there. *See* notes 68-85 and accompanying text *supra*. *See generally* Bates v. State Bar, 433 U.S. 350, 380-81 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976).

150. 444 U.S. 620 (1980).

151. *Id.* at 634-35.

152. *Id.* at 638-39.

153. *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).

154. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).

Court did not elaborate on this theory, however, nor has the Court done so specifically in the trade regulation context in subsequent cases. The four-tiered standard articulated in *Central Hudson* is the only doctrinal attempt and that, of course, was not within the antitrust or trade regulation field. Nevertheless, it is, together with several earlier antitrust cases, instructive on the constitutional limitations of antitrust orders.

A. *Interseller Price Communications Under the Sherman Act*

1. Early Developments

Even before the development of first amendment protection of pure economic speech, the Supreme Court suggested in *Sugar Institute, Inc. v. United States*[155] that disclosure and exchange of price information were lawful. In *Sugar Institute*, the Court condemned, as a violation of section 1 of the Sherman Act, an agreement that required adherence to price terms which had been announced publicly by members of a sugar manufacturers' trade association. The Court approved, however, the advance announcement of price information. The order entered by the trial court in *Sugar Institute* forbade the following conduct, although the trial court did not hold the practice of price announcements to be illegal:

> Effectuating any system for . . . reporting . . . among . . . competitors or to a common agency, information as to current or future prices, terms, conditions . . . [r]elaying by or through The Sugar Institute . . . information as to current or future prices, terms, conditions . . . [g]iving any prior notice of any change or

---

155. 297 U.S. 553 (1936). Earlier Supreme Court decisions had ruled that the exchange of price information among competitors would be analyzed under a rule of reason standard. *See* Cement Mfrs.' Protective Ass'n v. United States, 268 U.S. 588 (1925); Maple Flooring Mfrs.' Ass'n v. United States, 268 U.S. 563 (1925); United States v. American Linseed Oil Co., 262 U.S. 371 (1923); American Column & Lumber Co. v. United States, 257 U.S. 377 (1921). When evidence existed that the purpose or effect of the agreement to exchange price information was to restrict competition the agreement was found violative of § 1 of the Sherman Act. *Id.* But price and production data exchanges were approved when the data disseminated was on closed transactions and the information was available to all who had a commercial interest. Maple Flooring Mfrs.' Ass'n v. United States, 268 U.S. 563 (1925).

Initially, a first amendment defense was not recognized in these early price exchange cases. *See American Column & Lumber Co.*, 257 U.S. at 412 (Holmes, J., dissenting); *id.* at 416 (Brandeis, J., dissenting); G. LAMB & C. SHIELDS, TRADE ASSOCIATION CASE AND PRACTICE 35-37 (1971). Later, however, it gained recognition. *See Maple Flooring Mfrs.' Ass'n*, 268 U.S. at 583. *But see* Ohralik v. Ohio State Bar Ass'n, 436 U.S. at 456. *See generally* D. O'BRIEN & D. SWANN, INFORMATION AGREEMENTS, COMPETITION AND EFFICIENCY 117-20 (1969); Stocking, *The Rule of Reason, Workable Competition and the Legality of Trade Association Activities*, 21 U. CHI. L. REV. 527 (1954).

contemplated change in prices, terms, conditions . . . or relaying, reporting or announcing any such change in advance thereof.[156]

When the Supreme Court reviewed the portion of the decree enjoining disclosure of price information, it eliminated this portion from the order. The Court reasoned that the "mere open announcement of prices" was not unlawful, although the *agreement* not to deviate from announced prices, which had the effect of eliminating price concessions and reductions, was found to be unlawful.

Sugar Institute's sanction of the public disclosure of price information may be distinguishable on its facts and, therefore, not be susceptible to broad interpretation. First, the particular prices and terms of those prices were not fixed by agreement. Second, the Court pointed out carefully that the price announcements could not be enjoined without careful consideration of the institutional role they played in the practice of the particular trade. The restraint on the announcements of current and future prices was eliminated because it would prevent the traditional practice in the industry of selling on "moves." A "move" was an announcement that, at a particular time in the future, prices would be increased. Such announcements were followed usually by a flurry of buying by sugar users who wanted to stock up before the price increased. The practice of selling on moves was necessitated by the fact that raw material costs amounted to about eighty percent of total production costs. The price announcements always reflected an increase in the price of raw sugar, a price over which competitors had no control and that was not subject to manipulation to a competitor's own advantage. Since an increase in raw material costs affected all refiners equally, the announcements did not result in price increases by competitors that would not have otherwise occurred. Selling on moves, therefore, was found by the Court to be an inevitable, rational practice in the industry and not necessarily anticompetitive.[157]

Although *Sugar Institute* appears to provide authority that a decree enjoining consciously parallel price leadership and price announcements may not sweep so broadly as to prohibit public announcements of prices or price changes, the decision arguably can be interpreted more narrowly.[158] The Court's allowance of the continuation of price announcements seems to be based primarily on the fact that the announcements, coupled with the increase in sales that always followed, constituted an elementary and essential part of the sales process of the industry. In short, *Sugar Institute*

156. 297 U.S. at 603.

157. *Id.* at 584-85, 601-02.

158. More recently, in Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980) (per curiam), the Court indicated that the distinction drawn in *Sugar Institute* "between the lawful right to publish prices and terms of sale . . . and an agreement among competitors limiting action with respect to the published prices" would dissolve if the publication of prices and terms of sale was a part of an arrangement to fix prices. *Id.* at 649-50.

teaches that before an order can enjoin the exchange of price information, the court first must inquire how closely the disclosure is related to the unlawful agreement to tamper with prices, and second, what role the price announcement or exchange played in the trade practice,[159] as distinguished from its role in the price-fixing conspiracy.

Under this interpretation of *Sugar Institute*, the result in *Pittsburgh Press* was presaged. It also helps to explain the application of the illegal conduct exception. If a price information communication between competitors or the public is related to an agreement to fix prices, then *Sugar Institute* would serve as no shield from regulation. *Sugar Institute* indicates, however, that the relationship between the communication and the price-fixing agreement must be more than merely incidental before the price communication can be enjoined. Although *Pittsburgh Press* lacked clarity on this point, its holding seems consistent with this interpretation.

The second prong of *Sugar Institute* may have been subconsciously the impetus for the market structure analysis and economic theory that achieved acceptance in *United States v. Container Corp. of America*.[160] In determining the role that a price communication played within an agreement to fix prices, *Sugar Institute* considered how the communication was affected by market conditions and trade practice, while *Container* focused on how the market structure was determinative of the legality of the communication.

Container was the first explicit indication that the Supreme Court would expand its analysis to consider market structure effects on price exchanges. In *Container*, eighteen defendants accounted for ninety percent of the corrugated container production in a particular geographical region. The defendants agreed to exchange current price information on request; no other conduct was challenged.[161] Although market entry was easy, sellers numerous, and elasticity of demand low, the Supreme Court, speaking through Justice Douglas, found that the exchange violated the Sherman Act. The Court relied largely on structural analysis,[162] rather than evidence of culpable conduct.

In scrutinizing whether the exchange had an anticompetitive purpose or effect, the Court relied on an economic structure theory which suggested that in a market dominated by a few sellers, where the product is homogeneous and fungible, and where competition centers on price, price

159. *Cf.* Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979) (Court examined market purpose of a blanket licensing agreement to determine whether it was a per se illegal price-fixing arrangement). *See* CBS, Inc. v. ASCAP, 620 F.2d 930 (2d Cir. 1980) (court affirmed the original district court opinion that blanket licenses did not restrain competition), *cert. denied*, 101 S. Ct. 1491 (1981).

160. 393 U.S. 333 (1969).

161. *Id.* at 335.

162. *Id.* at 336-37.

exchanges tend to stabilize prices.[163] Based on this price theory, the Court drew certain inferences. Because the corrugated container industry was

---

163. *Id.* at 337. The economic argument supporting price disclosure centers on the idea that if there is more market information available to competitors, there is a greater chance that allocative efficiency will be enhanced. Allocative efficiency generally refers to maximization of consumer desires in light of limited available seller resources. A competitive market in terms of allocative efficiency will be characterized by prices being at or near production (including distribution) costs. Markets dominated by monopolies, on the other hand, will produce low allocative efficiency since prices will be far above costs due to the failure to maximize consumer preferences. When buyers and sellers have a wide variety of market information available they will buy and sell at the lowest prices, thereby promoting efficiency and competition in the market. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 268 (1977). In sum, the more informed competitors are about the market conditions of supply and demand, the more likely the market will be efficient. *See* United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978).

Economists believe that one of the variables affecting competition in the market is the structure of the market. The perfectly or purely competitive market (atomistic structure) is characterized by a large numbers of buyers and sellers, so numerous that price decisions by any one competitor have no effect on the pricing or output decisions of another. F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 10 (2d ed. 1980). The perfect competition model, in addition, assumes that the product sold is homogeneous and that buyers and sellers have perfect market information about prices. Rarely, if ever, will such a market exist. For example, products sold between competitors may not be homogeneous, perfect price information may not be available, or market entry may not be complete. Thus, where the competition is not perfect the market forces, such as informational disclosures, will, in the absence of cartelization, promote competition and lower prices as buyers will seek sellers with the lowest prices. The result is that allocative efficiency will be promoted.

This economic theory that the vigor of competition is related positively to the *number* of firms in the relevant industry must, however, be functionally related to the concentration ratio in the market. Market concentration ratio is generally defined "as the percentage of total industry sales . . . contributed by the largest few firms, ranked in the order of market share." *Id.* at 56. Few industries fit the model of pure competition described above, and indeed the economic theory applied in *Container* is one used to describe a model of competition in a concentrated market where there are few sellers.

A concentrated, oligopolistic market, in contrast to pure competition, is one characterized as having a few sellers each of whom believes that its price decisions will have a direct effect on the output and price decisions of its competitors. *Id.* at 11. This phenomenon is known as interdependence. It predicts that each seller will take into account the pricing and output decisions of each competitor. *See* Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal,* 75 HARV. L. REV. 655 (1962). Therefore, if one competitor reduces prices with the result that sales are expanded, those sales will come from sales of other competitors, and the result will be that the other competitors, acting interdependently, will reduce promptly their prices accordingly.

dominated by eighteen of fifty-one firms in a market with an inelastic demand for products, the Court found the conclusion "irresistible that the exchange of price information . . . had an anticompetitive effect in the industry, chilling the vigor of price competition."[164]

Knowing that this response will follow, the original seller will not reduce prices to increase sales or market share because any gain will be nullified swiftly by the retaliatory reactions of rival sellers. The actions of a seller in a concentrated market will be determined then by the oligopolistic structure of the market, which dictates interdependent pricing and output decisions. The result of this interdependent pricing is that no seller in the oligopoly will push a price cut. "Each firm recognizes the group's common interest in orderly pricing, and hence in adherence to the accepted price structure." F. SCHERER, *supra*, at 152-53 (1st ed. 1970). As a consequence, price competition is avoided. *See generally* P. AREEDA, ANTITRUST ANALYSIS 224-33 (2d ed. 1974); P. ASCH, ECONOMIC THEORY AND THE ANTITRUST DILEMMA 50 (1970); J. BAIN, INDUSTRIAL CONCENTRATION 112-23, 273-87, 315-20, 430-68 (1967); F. SCHERER, *supra*, at 131-40, 152-53 (1st ed. 1970); L. SULLIVAN, *supra*, at 330-74; INDUSTRIAL CONCENTRATION: THE NEW LEARNING (H. Goldschmid, H. Mann & J. Weston eds. 1974); Bain, *Relation of Profit Rate to Industry Concentration: American Manufacturing, 1936-40*, 65 Q.J. ECON. 293 (1951); Markham, *The Nature and Significance of Price Leadership*, 41 AM. ECON. REV. 891 (1951); Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44 (1964). *But see* H. DEMSETZ, THE MARKET CONCENTRATION DOCTRINE 7 (1973); R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 44-77 (1976); Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562 (1969).

One school of economists and lawyers argues that an exchange or disclosure of price information among competitors in a highly concentrated market will increase further the already present structural phenomenon of "interdependence," thereby facilitating anticompetitive performance through coordinated behavior. L. SULLIVAN, *supra*, at 268, 270, 273. *Container* accepted this supposition and inferred anticompetitive conduct from market structure. The analysis of market structure was deemed critical to predicting anticompetitive market behavior. *See id.* at 270-73. It was the first occasion where the Court applied an economic theory to regulate price information disclosures. Justice Douglas observed that while "[p]rice information exchanged in some markets may have no effect on a truly competitive price . . . [t]he exchange of price data tends toward price uniformity" in oligopolistic markets. 393 U.S. at 337.

In sum, the structure of an industry may indicate that it is predisposed toward collusive stabilization of prices when there is price information exchange. The more oligopolistic the market the more likely an exchange will encourage price collusion. In a highly concentrated industry, where the few sellers are likely to know or have access to the demand and supply information anyway, a prohibition on disclosure of price information will not deter price competition significantly. *See* R. POSNER & F. EASTERBROOK, ANTITRUST 198 (1981).

164. 393 U.S. at 337. *Container* has been criticized for, *inter alia*, its cursory analysis of the conduct evidence and for its treatment of the structural evidence. Specifically, Professor Lawrence Sullivan has commented that the conduct evidence in *Container* fell "short of showing a violation," given the facts that there

2. Toward a Structural Approach and Per Se Rule

The *Container* decision signaled a new turn in antitrust analysis. The Court analyzed the legality of economic communications principally under a market structure test rather than a conduct test. The analysis focused on the structure of the market in determining the impact of the conduct on competition. In short, the industry's structure became the most relevant consideration in determining the legality of the defendants' conduct. Although this structural approach predated by six years the acceptance of first amendment defenses in business speech, had the approach retained the full vitality expressed in *Container*, it would have been a major force in delimiting the communications permitted in the antitrust speech field.

If, under a structural analysis, disclosures of economic information are inherently suspect and deemed unlawful in an industry defined as concentrated or oligopolistic, such communication per se would not be entitled to first amendment protection.[165] Regardless of whether the communication actually played a role in fixing prices, *Container*'s logic that there is a predisposition toward collusion in a concentrated market would be sufficient to declare a mere exchange a restraint of trade. There would be no need to scrutinize, under *Sugar Institute*, whether an agreement to fix prices existed, the actual relationship the exchange played to any agreement between the competitors, the impact it had on price changes in the market, or the function it played in relation to trade practices in the industry. The structure of the market would determine the legality of the disclosure.[166] From this analysis, it follows under *Pittsburgh Press* that business disclosures may be entitled to little first amendment protection, and broad injunctive orders could be drawn accordingly.

3. Less Structural Emphasis and the Adoption of Rule of Reason

Although ambiguous, *Container* suggested a per se rule: it is not necessary to establish evidence of either unlawful purpose or anticom-

---

was "no agreement by the participants not to change a quotation after reporting it," the exchanges were infrequent, and the data was available from records of the defendants and customers. L. SULLIVAN, *supra* note 163, at 272. *See* 393 U.S. at 335-36. He also is critical of the structural evidence, characterizing it as "borderline." This would include the following: (1) a moderate degree of concentration, (2) cross-elasticity of demand among products, (3) ease of entry into the market, and (4) over-capacity. L. SULLIVAN, *supra* note 163, at 272.

165. Commentators have disagreed on whether price information exchanges should be regulated under an economic theory approach. *Compare* Maginness, *The Exchange of Price Information as a Restraint of Trade: Reassessing Per Se Rules in Light of First Amendment Protection of Commercial Speech*, 48 FORDHAM L. REV. 1005 (1980) *with* Note, *Antitrust Liability for An Exchange of Price Information— What Happened to* Container Corporation?, 63 VA. L. REV. 639 (1977).

166. R. POSNER, *supra* note 163, at 143-47.

petitive effect in order to find an antitrust violation for price information exchanges in an oligopolistic market. The importance of this evidentiary approach is obvious in terms of the scope of an order. If the central analysis focuses on structure rather than culpable conduct, an order can be drawn more broadly. The Court retreated from this position, however, in subsequent cases.

In *United States v. Citizens & Southern National Bank*,[167] the Court stated unequivocally that the disclosure of price information is not a per se violation of the Sherman Act.[168] Interestingly, *Citizens & Southern* did not cite for this proposition the majority opinion in *Container*, but rather the concurring opinion of Justice Fortas. With regard to the standard of legality for price information disclosures, Justice Fortas made clear that the dissemination and exchange of price information by sellers was not a per se violation, but required actual proof "that the practice resulted in an unreasonable restraint of trade."[169] The dissent in *Container* was equally persistent on the evidentiary burden required under a structural analysis. Justice Marshall, joined by Justices Harlan and Stewart, concluded that

> [g]iven the uncertainty about the probable effect of an exchange of price information . . . [in a market that does not have all the characteristics of a true oligopoly], I would require that the Government prove that the exchange was entered into for the purpose of, or that it had the effect of, restraining price competition.[170]

More recently, in *United States v. United States Gypsum Co.*,[171] a

---

167. 422 U.S. 86 (1975).

168. *Id.* at 113. The defendant was charged with an illegal acquistion under § 7 of the Clayton Act and with a per se violation of § 1 of the Sherman Act for an exchange of credit information. Georgia state banking laws proscribed branch banking, but permitted banks to own up to five percent of the stock of other banks beyond the city limits where the main bank was located. Defendant acquired five percent ownership of six suburban banks through the "five percent" state banking law. Georgia thereafter amended its law permitting de jure branch banking countywide. The defendant then sought acquisition of all of the stock of the six banks. After the Federal Deposit Insurance Corporation authorized all but one of the purchases, the Department of Justice sued.

169. 393 U.S. at 339 (Fortas, J., concurring).

170. *Id.* at 343 (Marshall, J., dissenting).

171. 438 U.S. 422 (1978). The defendants in *Gypsum*, several manufacturers of gypsum board, were charged criminally with price fixing under § 1 of the Sherman Act. The defendants raised § 2(b) of the Robinson-Patman Act, 15 U.S.C. § 13(b) (1976), as a defense to the Sherman indictment, arguing that in order to prevent consumer fraud concerning price, it was necessary to engage in interseller price verification. The Court rejected this argument, holding that § 2(b) does not necessarily contemplate actual price verification between competitors. 438 U.S. at 453. *But see* Cement Mfrs.' Protective Ass'n v. United States, 268 U.S. 588 (1925) (Sherman Act exemptions for price verification plan in response to customers' practices of fraud). *See also* Great Atl. & Pac. Tea Co. v. FTC 440

criminal case, the issue confronting the Court was whether an interseller price verification plan among competitors, for the purpose of defending a Robinson-Patman price discrimination charge, was exempt from the Sherman Act's coverage. The Court held that the exchange of business information among competitors does "not constitute a per se violation of the Sherman Act."[172] Directing its reasoning to the structural analysis of *Container*, the Court noted that "[t]he exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive."[173]

Factors that can be considered in determining the legality of the interseller communication, according to *Gypsum*, are, *inter alia*, the structure of the industry and the nature of the information exchanged.[174] In contrast to *Container*, these evidentiary concerns are not used to condemn the commercial communication as per se illegal; rather, they can be evaluated only in the context of whether the challenged *conduct* had an anticompetitive purpose or effect—the standard rule of reason analysis. Thus, *Gypsum* reaffirmed that interseller price communications should be regulated only on a rule of reason basis. It signaled also that the Court had less penchant for a strict *Container*-like structural approach in evaluating business information disclosures.

In contrast to *Container, Gypsum* permits a more reasoned approach by the courts in analyzing the character of business data disclosures. It recognizes that in some industries disclosure of economic information directed at competitors and customers can have competitive effects. It cautions, in addition, that a per se structural approach would inhibit societal benefits that could be derived from such disclosure. Such benefits can be achieved when the communication makes competitors and customers more aware of market price, demand, and supply information.[175] The availability of market information can also reduce barriers to entry. Information exchanges, thus, can lead to greater competition through more direct competition on price and more efficient allocation of resources.

U.S. 69 (1979); Galanti, *It Once Again Takes Two To Tango*: Great Atlantic & Pacific Tea Co. v. FTC, 21 WM. & MARY L. REV. 387 (1979).

172. 438 U.S. at 441 n.16. *See also id.* at 436 n.13.

173. *Id.* at 441 n.16.

174. The Court pointed out that, although not unlawful per se, current price information disclosures have been held anticompetitive, and thus unlawful. *Id. See* note 155 *supra*. *See also* Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. at 80 (Court took account of oligopolistic market structure in Robinson-Patman Act case to determine competitive effect if buyer were required to disclose to seller a competitor's bid price).

175. Maple Flooring Mfrs.' Ass'n v. United States, 268 U.S. 563, 582-83 (1925); American Column & Lumber Co. v. United States, 257 U.S. 377, 412-13 (1921) (Holmes, J., dissenting).

Therefore, under *Gypsum* and *Sugar Institute*, industry structure may help predict the effect that certain conduct will have in a market, but it ought not preclude evidence establishing that the disclosure was not part of an agreement to fix prices or that, in fact, there existed no agreement to fix prices, or that the disclosure had a competitive effect on the market. When conduct evidence is available to analyze the character of the business disclosure or market reaction to the disclosure, this evidence should be preferred as a predictor of anticompetitive significance rather than utilization of a structural model under an *a priori* approach. If a commercial speech defense is raised, this suggested approach is liberal enough to permit evidence regarding the relative relationship that the communication had to an agreement to fix prices and the role it played in the trade practice. Of course, if conduct evidence establishes that the communication is a part of or bears a close relationship to concerted action among competitors to tamper with the price structure,[176] or that the conduct had a necessary tendency to restrain competition, it would be without first amendment protection.[177]

4. Current Enforcement Approaches

Recent trends in the enforcement of the antitrust laws indicate an emerging tension between the enforcement approaches of the Justice Department and the FTC and first amendment interests. Both agencies have indicated in the last several years that they will pursue, in addition to structural relief,[178] broad behavioral remedies or conduct orders against alleged antitrust violators. The target of the enforcement efforts has been oligopoly pricing. The design and effect of behaviorally oriented orders are to reduce business communications and market information disseminated between competitors. The enforcement threory is directed as prohibiting price announcements or the discussion, in public, of price changes by competitors. Specifically, the new enforcement effort centers on routing out parallel conduct by firms in an oligopolistic market.[179] Two recent cases illustrate the point.

176. *E.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940).

177. *See* FTC v. Beech-Nut Packing Co., 257 U.S. 441, 454 (1922).

178. *E.g.*, *In re* Exxon Corp., No. 8934 (F.T.C. July 17, 1973) (complaint); *In re* Kellogg Co., No. 8883 (F.T.C. April 26, 1972) (complaint).

179. The problem of parallel conduct by competitors in a concentrated industry has plagued antitrust enforcement efforts. Although parallel conduct might be considered anticompetitive if pricing patterns among competitors can be shown, establishing an antitrust violation has proven elusive without evidence of an agreement or tacit collusion. The enforcement argument is based on the economic pricing theory of interdependence: sellers in an oligopoly recognize that their own price and production decisions are dictated, given the industry structure, in large part by what the reactions of other sellers will be to price

moves. Anticipating those reactions, competitors adopt parallel pricing. *See* note 163 *supra*.

The government has challenged pricing in oligopolistic industry patterns by alleging that "conscious parallelism" is the functional equivalent of an agreement, and thus is proscribed under the Sherman Act. That theory, however, was rejected by the Court in Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540-41 (1954). *See* A. NEALE & D. GOYDER, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 84-85 (3d ed. 1980).

In *Theatre Enterprises*, the Court erased doubts created by the meaning of its earlier decision in Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939). *Interstate Circuit* held that parallel action by competitors (identical modifications in licensing contracts) was sufficient circumstantial evidence to sustain a jury finding of conspiracy to fix prices, in the absence of direct evidence of an agreement. *Id.* at 226-27. *See also* United States v. Masonite Corp., 316 U.S. 265, 275 (1942); C-O-Two Fire Equip. Co. v. United States, 197 F.2d 489, 494 (9th Cir.), *cert. denied*, 344 U.S. 892 (1952). The *Interstate Circuit* Court went on to declare, in dictum, that "[i]t was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. . . ." 306 U.S. at 226. This was interpreted to mean that no agreement need be shown in order to establish a violation. *See* American Tobacco Co. v. United States, 328 U.S. 781 (1946); Triangle Conduit & Cable Co. v. FTC, 168 F.2d 175 (7th Cir. 1948), *aff'd by an equally divided Court per curiam sub nom.* Clayton Mark & Co. v. FTC, 336 U.S. 956 (1949).

Theatre Enterprises, however, precluded an expansive reading of *Interstate Circuit* by holding that evidence of interdependent consciously parallel action, standing alone, is not sufficient to support a finding of an illegal agreement under the Sherman Act. 346 U.S. at 540-41. Subsequent cases indicate that the agreement requirement can be met if there is evidence of consciously parallel conduct plus so-called "plus factors" (evidence that a defendant's conduct is not in its individual best interest). *See, e.g.*, First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253 (1968); Naumkeag Theatres Co. v. New England Theatres, Inc., 345 F.2d 910, 911-12 (1st Cir.), *cert. denied*, 382 U.S. 906 (1965); Michelman v. Clark-Schwebel Fiber Glass Corp., 534 F.2d 1036 (2d Cir.), *cert. denied*, 429 U.S. 885 (1976); Venzie Corp. v. United States Mineral Prods. Co., 521 F.2d 1309, 1314 (3d Cir. 1975); Klein v. American Luggage Works, Inc., 323 F.2d 787 (3d Cir. 1963); Golf City, Inc. v. Wilson Sporting Goods Co., 555 F.2d 426 (5th Cir. 1977); Hallmark Indus. v. Reynolds Metals Co., 489 F.2d 8 (9th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974); Independent Iron Works, Inc. v. United States Steel Corp., 322 F.2d 656 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963); American Tel. & Tel. Co. v. Delta Communications Corp., 408 F. Supp. 1075, 1088-92 (S.D. Miss. 1976), *aff'd*, 579 F.2d 972 (5th Cir. 1978); United States v. National Malleable & Steel Castings Co., [1957] Trade Cas. (CCH) 73,580 (N.D. Ohio 1957), *aff'd per curiam*, 358 U.S. 38 (1958). *But see* Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700 (1969); United States v. GM Corp., 384 U.S. 127 (1966); Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978); Mages v. Spalding Sales Corp., [1975] 2 Trade Cas. (CCH) 67,538 (N.D. Ill. 1975); Wall Prods. Co. v. National Gypsum Co., 326 F. Supp. 295 (N.D. Cal. 1971). *See generally* R. BORK, THE ANTITRUST PARADOX 178-97 (1978); 1 M. HANDLER, TWENTY-FIVE YEARS OF ANTI-

In 1976 the Department of Justice, General Electric, and Westinghouse Electric filed joint motions to modify a consent decree entered in 1962.[180] The original consent decree between the parties arose out of a civil action brought by the government alleging a price-fixing agreement on large turbine generators. The government suit charged that the defendants agreed on price adjustments on certain turbine generators and, in general, coordinated price increases. The consent decree enjoined the defendants from, among other things, communicating "pricing information to one another until after the information had been released"[181] in the trade. The decree, however, did permit publication of price books and public exchange of competitive information.

The government sought to modify the consent decree in 1976 based on an investigation begun in 1962 which revealed that there had been an elimination of price competition by the "conscious adoption and publication of identical pricing."[182] The post-1962 scheme allegedly utilized a pricing book detailing prices regarding all aspects of the complex machinery in question, formulas for computing prices, and examples of how the formulas were to be used. The price books allegedly enabled each defendant to predict the price and type of machine on which each competitor would bid.[183] A price protection plan also was utilized. It was coupled with a public announcement of all outstanding orders and prices. If the price paid by any customer was discounted, all buyers in the previous six months would receive retroactively the same discount. The government concluded that the price book, with its published multiplier, and the protection plan resulted in identical pricing in the turbine generator industry. Through the use of internal documents, the government hoped to establish that the price-fixing result was intentional. Rather than face another civil suit, the defendants agreed to join in the modification of the 1962 order.

In general, the consent decree prohibited the defendants from engaging in a broad range of communications relevant to pricing. It prohibited the publication or distribution of so-called price-signaling information.[184]

TRUST 531 (1973); 2 *id.* at 793; C. KAYSEN & D. TURNER, ANTITRUST POLICY 106-09 (1959); Nye, *Can Conduct Oriented Enforcement Inhibit Conscious Parallelism?*, 44 ANTITRUST L.J. 206, 222 (1975); Posner, *supra* note 163; Turner, *supra* note 163.

180. United States v. GE Co., [1977] 2 Trade Cas. (CCH) 72,715 (E.D. Pa. 1977); 42 Fed. Reg. 17,004 (1977).

181. 42 Fed. Reg. 17,005 (1977). At the same time the civil suits were filed, the Department, in 1960, filed an indictment against the defendants. The corporate defendants pleaded guilty and the individual defendants entered pleas of nolo contendere.

182. [1977] 2 Trade Cas. (CCH) at 72,716.

183. *Id.*

184. The price signaling theory was first advanced by the Justice Department in United States v. GM Corp., [1974] 2 Trade Cas. (CCH) 97,656 (E.D. Mich.

The defendants were enjoined from disclosing to any nonemployee its price lists, price changes, quotations, bids, or pricing policies for turbine generators.[185] The order, in essence, was designed to prohibit (1) the signaling or communication of an invitation from one competitor to another on eliminating elements of competition; (2) certain conduct that acted as an enforcement device on the agreed-on prices; and (3) dissemination of price-related commercial data from which competitors could track each other's pricing policies.[186]

1974). The court in *GM* held that the government failed to prove that price announcements were invitations or signals to competitors to fix prices. The court concluded, "Neither a pricing move by a competitor, nor a requested pricing change by a customer, can be regarded as an invitation to conspire which precludes a business from acting in its best economic interest by changing its prices when desirable. . . . The public announcement of a pricing decision cannot be twisted into an invitation or signal to conspire; it is instead an economic reality to which all other competitors must react." *Id.* at 97,671. *See also* Universal Lite Distribs., Inc. v. Northwest Indus., Inc., 452 F. Supp. 1206, 1217 (D. Md. 1978), *aff'd as to this issue*, 602 F.2d 1173 (4th Cir. 1979).

185. The critical requirements of the modification were as follows: (1) development of new price lists after the modified order became effective; (2) refraining from pricing procedures involving the use of the multiplier factor; (3) refraining from revealing new price lists to nonemployees of the defendants; (4) refraining from revealing information concerning bargaining, performance guarantees, pricing formulas, price changes, spare part prices, and performance specifications; and (5) strictly controlling possession of the new price books, with warnings attached that unauthorized possession could lead to penalties. [1977] 2 Trade Cas. (CCH) at 72,719.

186. *See generally* P. AREEDA, *supra* note 163, at 229-30. The defendants in *GE* denied the theory of the government's case. Conceding that equal price levels existed between the two competitors, they argued that this result was due to either price leadership by GE or conscious parallelism between the two competitors. While admitting interdependent pricing, the defendants argued that the duopoly structure of the industry dictated that each consider the other's pricing decisions in order to compete. The government maintained, however, that from the defendants' conduct ("public exchange of assurances"), the requisite "agreement" element of a § 1 Sherman Act violation could be inferred. Central to the government's burden of establishing an agreement between the parties was its theory that the one manufacturer would, through public announcements, communicate a signal or invitation to the other to follow its lead in pricing. When a similar price move followed, according to the theory, the invitation had been accepted. Through internal documents of Westinghouse, the government represented that it could establish Westinghouse "perceived the GE actions as an invitation to stabilize prices." The government was prepared to show evidence of an agreement through a pattern of conduct by demonstrating that Westinghouse adopted GE's price increases, published a price book similar to GE's, adopted the multiplier system, announced customer orders, and adopted a price protection plan like GE's. 42 Fed. Reg. 17,006-07 (1977).

The conduct-oriented modified decree in *GE/Westinghouse*, which attempted to fence in and proscribe all forms of price signaling that resulted in a pattern of equal pricing, was heralded as the government's new theory in attacking parallel conduct.[187] The government was prepared to argue that its new "signaling" theory went beyond mere conscious parallelism and that, from the evidence, a conspiracy to restrain trade could be inferred.[188] The constitutional scope of the order, however, escaped review because the defendants chose not to challenge its breadth.

The *GE/Westinghouse* decree is illustrative of the type of trade regulation order that requires vigorous scrutiny under the first amendment. To be sure, the order was broad. But arguably, it stayed fairly close to the approximate scope of the defendants' prior alleged unlawful conduct. If the defendants' business communications facilitated, or otherwise were implicated closely in an unlawful price-fixing scheme, then clearly under *Pittsburgh Press* the speech could be prohibited. Only if the speech was *incidental* to, rather than a part of, the price-fixing arrangement might it escape less rigorous regulation. Similarly, if the order exceeded the permissible bounds of regulation because it was more extensive than necessary to serve the governmental interests in the enforcement of the antitrust laws, then the order's scope may be curtailed under *Central Hudson*. It is difficult, however, under the facts of *GE/Westinghouse* to characterize the order as overbroad.[189] While the restrained speech was purely commercial, its close relation to an antitrust consequence allegedly demonstrated that it served as a facilitating device in bringing about a tacit agreement. The defendants might have challenged this order successfully, if they had been able to establish that their price books, multipliers, public announcements, and disclosures of other price-related information were not designed to and did not contribute to the scheme to fix prices.

The FTC also advanced recently the price signaling theory in an action under section 5 of the FTC Act charging unfair methods of competition in a complaint against manufacturers of gasoline "antiknock" additives. In *In re Ethyl Corp.*,[190] the FTC seeks to test the constitutional sweep of a proposed conduct-oriented order which is designed to prohibit price signal-

187. 42 Fed. Reg. 17,007 (1977).

188. *Id.* at 17,004.

189. From a *Central Hudson* overbreadth standpoint, the weakest link in the order was the proscription found in § 2(f)(ii)-(iii), (g) against disclosure of performance guarantee information and specifications of the large turbine generators. Arguably these restraints, particularly on disclosure of the specifications, were, at best, only tenuously related to price and hence to any the price-fixing scheme. *See generally* Posner, *Information and Antitrust: Reflections on the* Gypsum *and* Engineers *Decisions*, 67 GEO. L.J. 1187, 1201 (1979).

190. No. 9128 (F.T.C., filed May 30, 1979) (complaint), *noted at* [1976-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,579.

ing, together with other facilitating practices. Apparently, the Commission staff will attempt to establish its charge of unfairness in the absence of evidence of a conspiracy, agreement, or improper intent. The case, like *GE/Westinghouse*, is directed at oligopoly parallel pricing.

The complaint alleges that the four respondents, who had a total market share of eighty percent, maintained uniform prices for antiknock compounds by "signaling" future price changes to competitors.[191] Each manufacturer allegedly accomplished this by (1) utilizing a thirty-day price change advance notice clause in all sales contracts, (2) frequently disclosing advance price changes, (3) selling only on a uniform delivered price basis, and (4) dealing on a most-favored customer arrangement whereby a customer is entitled to the lowest price at which the manufacturer sells to other buyers.[192] The pivotal theory is that price signaling, facilitated by advance price change announcements in the press, forewarned competitors of price changes, thus enabling coordination of prices throughout the industry. By precluding selling through any means other than an established delivered pricing system, no price distinction was made for actual delivery costs among buyers.[193] Finally, the FTC argues that most-favored customer clauses create a disincentive for price reduction.

The proposed conduct-based order is similar to the consent decree entered in *GE/Westinghouse*. It, too, would challenge directly any first amendment protection for public dissemination or communication of price information. The order would prohibit the publication, distribution, or communication to any person (except an employee) of any current or future price information, "except to convey to a customer or potential customer the current price of specific antiknock compound."[194] It would, in addition, proscribe the disclosure of any price change prior to the effective date, or any price book or list, including information concerning transportation charges. The order further would prohibit other alleged facilitating practices such as refusing to sell on a price system other than on

191. *Id.* Apparently, the Commission has economic evidence that the antiknock compound market was plagued for a three-year period by decrease in demand and excess capacity, while at the same time the sellers increased prices 18 times on an industry-wide basis, at the same time and in the same amount, without granting any discounts. The Commission staff argues that these market conditions should have dictated lower, not higher, prices and that the price increases exceeded the rate of inflation. 917 ANTITRUST & TRADE REG. REP. (BNA) A-33 to -35 (June 7, 1979).

192. 917 ANTITRUST & TRADE REG. REP. (BNA) A-33 to -35 (June 7, 1979).

193. *See, e.g.*, FTC v. Cement Inst., 333 U.S. 683 (1948); Triangle Conduit & Cable Co. v. FTC, 168 F.2d 175 (7th Cir. 1948), *aff'd by an equally divided Court per curiam sub nom.* Clayton Mark & Co. v. FTC, 336 U.S. 956 (1949). *See generally* G. STIGLER, THE ORGANIZATION OF INDUSTRY 147-64 (1968).

194. *In re* Ethyl Corp., No. 9128 (F.T.C., filed May 30, 1979) (complaint).

the established delivered price system, and the most-favored customer clause.

The proposed order is designed to reduce the amount of commercial information available to competitors—a result at odds with post-*Bigelow* commercial speech cases. Since the theory of the case is that the practices have had the effect of reducing uncertainty about a competitor's prices, thus facilitating reduction of price competition, the purpose behind the order rests on an economic theory: by delaying the ability of competitors to match price increases, uncertainty about price movements is created, with the result that price uniformity and stability will be inhibited.[195]

The *Ethyl* order is problematic in several respects. First, like the *GE/Westinghouse* decree, its proscription against communicating current or future prices to the public is broad. Under the order the manufacturers could not disclose *future* prices to anyone, other than an employee, or disclose *current* prices to customers generally. Press releases containing price changes would be prohibited as would other communications means. In addition, communications with other parties that may have a need to know would be prohibited. Only in response to a request fron an individual customer to bid or to engage in negotiations could a manufacturer convey information relating to future prices. Moreover, the ban on communications is without time limitations. Arguably, this order might chill competitive vigor in the solicitation of customers, leading to less competition among the sellers. It also will lead to less competitive price information available to customers. Furthermore, a decrease in market information may result in increased barriers to entry for new competition. Each of these results is at odds with the fundamental policy behind the antitrust laws. If the challenged practices are found anticompetitive, however, the order, under *Pittsburgh Press*, can be drawn to dismantle those practices and to curb their consequences. For example, if the market practices utilized by competitors facilitated price verification and stabilization, then the practices and their consequences can be constitutionally restrained. The first amendment limitations on the order, as discussed herein, cannot be defined specifically until the impact of the challenged conduct and its consequence is determined.

Moreover, the order goes beyond the earlier price signaling theory in *GE/Westinghouse*. In *Ethyl*, the FTC essentially seeks to challenge noncollusive, nonexclusionary conduct. The complaint does not charge an agreement or conspiracy to inflate prices artificially. Because noncollusive parallel conduct allegedly achieves a result similar to that of a traditional agreement, it is challenged as unfair under section 5.[196] *GE/Westing-*

195. 917 ANTITRUST & TRADE REG. REP. (BNA) A-33 to -35 (June 7, 1979).

196. *See* FTC v. Cement Inst., 333 U.S. 683, 721 n.19 (1948); FTC v. Beech-Nut Packing Co., 257 U.S. 441, 455 (1922); Triangle Conduit & Cable Co. v. FTC, 168 F.2d 175, 180-81 (7th Cir. 1948), *aff'd by an equally divided Court per*

house, on the other hand, was commenced on the theory that there was a conspiracy between the defendants to fix prices. The Justice Department asserted that from the facts an inference of agreement could be made. To establish the inference, the government was prepared to argue that internal documents of the defendants would demonstrate that GE, through public signals, was inviting Westinghouse to accept its offer to stablize prices, and that Westinghouse perceived GE's actions as invitations to join. Each defendant in its own way, then, allegedly was exchanging public assurances that prices would not be cut.[197]

Hence, the underlying rationale for *GE/Westinghouse* and *Ethyl* is dissimilar. The former was based on specific evidence from which an inference of an illegal conspiracy could have been drawn in establishing an antitrust violation. The latter, however, rests not on an unlawful antitrust agreement, but on an unfairness concept based on the mere unilateral adoption of commercial practices, which allegedly enhances mutual confidence in industry-wide prices, regardless of collusion or consciousness of a competitor's practice. In other words, the Commission staff will attempt to establish that certain business practices, when employed unilaterally and commonly by oligopoly firms, have the effect of reducing the uncertainty about pricing decisions of competitors and, hence, are "unfair" under section 5.

Although there is some authority in the early decisional law supporting the position that interdependent parallel pricing, even though noncollusive, will support an unfairness charge under section 5, these cases are equivocal on the issues raised in *Ethyl*.[198] For instance, in *FTC v. Cement*

---

curiam sub nom. Clayton Mark & Co. v. FTC, 336 U.S. 956 (1949); Boise Cascade Corp., 91 F.T.C. 1, 23-34 (1978), *enforcement denied*, [1980] 2 Trade Cas. (CCH) 75,662 (9th Cir. 1980). *Cf.* Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939) (§ 5 of FTC Act may be violated without express agreement). *But cf.* Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541 (1954) (Court noted that conscious parallelism alone does not establish a Sherman Act conspiracy). *See* Turner, *supra* note 163; note 179 *supra*. *See generally* Statement of FTC, Notice of the Staff: In re Commission Policy Toward Geographic Pricing Practices (Oct. 12, 1948).

Recently, the United States Court of Appeals for the Ninth Circuit held "that in the absence of evidence of overt agreement to utilize a pricing system to avoid price competition, the Commission must demonstrate that the challenged pricing system has *actually* had the effect of fixing or stabilizing prices. Without such effect, a mere showing of parallel action will not establish a section 5 violation." Boise Cascade Corp. v. FTC, [1980] 2 Trade Cas. (CCH) 75,662, 75,665 (9th Cir. 1980) (emphasis added).

197. 42 Fed. Reg. 17,006-07 (1977).

198. *See* FTC v. Cement Inst., 333 U.S. 683, 721 n.19 (1948); FTC v. Beech-Nut Packing Co., 257 U.S. 441, 455 (1922); Triangle Conduit & Cable Co. v. FTC, 168 F.2d 175, 180-81 (7th Cir. 1948), *aff'd by an equally divided Court per curiam sub nom.* Clayton Mark & Co. v. FTC, 336 U.S. 956 (1949). *But see* Boise

Institute[199] and *Triangle Conduit & Cable Co. v. FTC*,[200] the two principal cases which presented delivered pricing systems similar to that in *Ethyl*,[201] the cases did imply in dictum that an agreement or conspiracy is not a necessary ingredient to a section 5 charge,[202] as long as there is evidence that the conduct has a "dangerous tendency unduly to hinder competition."[203] In both *Cement Institute* and *Triangle Conduit*, however, the courts explicitly found an agreement or collusion by the competitors,[204] neither of which is charged in *Ethyl*. Moreover, the Supreme

---

Cascade Corp. v. FTC, [1980] 2 Trade Cas. (CCH) 75,662, 75,665 (9th Cir. 1980); Crouse-Hinds Co., 46 F.T.C. 1114 (1950).

Recently, an FTC Administrative Law Judge rejected an invitation by the FTC staff to abandon the rule, announced in United States v. Colgate & Co., 250 U.S. 300 (1919), that it is not a violation of § 1 of the Sherman Act for a manufacturer to announce unilaterally a pricing policy change with the caveat that the manufacturer will refuse to deal with the retailer should the product be sold below the designated price. In *In re* Russell Stover Candies, Inc., 1008 ANTITRUST & TRADE REG. REP. (BNA) F-1 (F.T.C. March 16, 1981), the Administrative Law Judge rejected the theory that the announcement of a price change and subsequent acceptance by a dealer-customer constituted a vertical agreement to fix prices. Judge Needelman concluded that from a price "invitation and acceptance" theory, one cannot infer an agreement, even a tacit agreement in a vertical relationship between a supplier and customer, in the absence of evidence of coercion. Moreover, the "mere announcement of pricing policy followed by compliance does not constitute a coerced agreement." *Id.* at F-5.

The decision indicates, however, that the so-called *Colgate* doctrine, followed in this case, does not shield a defendant from the price signaling, "invitation and acceptance" theory if a *horizontal* (between competitors, *e.g.*, GE and Westinghouse) pricing arrangement is established. Furthermore, the decision does not stand for the proposition that an agreement must be proven to exist under § 5. The complaint and briefs of complaint counsel were clear that the FTC was not proceeding under the § 5 "unfairness" jurisdiction. Rather, the staff argued that respondent's pricing policy amounted to a per se violation of § 1 of the Sherman Act. Complaint counsel's brief noted:

> The complaint makes no charge that, in the alternative Russell Stover's conduct is an unfair method of competition in violation of § 5 independent of the Sherman Act. If this court finds that Russell Stover's conduct does not meet the Sherman Act's requisite elements, it should not find a violation based on the more lenient § 5 standards.

Brief for Complainant, *In re* Russell Stover Candies, Inc., 1008 ANTITRUST & TRADE REG. REP. (BNA) F-1 (F.T.C. March 16, 1981), *quoted in id.* at F-6.

199. 333 U.S. 683 (1948).

200. 168 F.2d 175 (7th Cir. 1948), *aff'd by an equally divided Court per curiam sub nom.* Clayton Mark & Co. v. FTC, 336 U.S. 956 (1949).

201. 333 U.S. at 721 n.19; 168 F.2d at 180-81.

202. 333 U.S. at 721 n.19; 168 F.2d at 180-81.

203. FTC v. Beech-Nut Packing Co., 257 U.S. at 454. *But see* Boise Cascade Corp. v. FTC, [1980] 2 Trade Cas. (CCH) 75,662, 75,665 (9th Cir. 1980).

204. 333 U.S. at 708-09; 168 F.2d at 180. In count two of *Triangle Conduit*, the FTC charged conscious parallelism, apart from an agreement, on the theory

Court has not addressed the issue for thirty-two years since its equally divided opinion in *Triangle Conduit* affirmed the lower court decision, and recent developments in the lower federal courts indicate that parallel pricing patterns will not establish a section 5 violation in the absence of an agreement, unless the challenged pricing conduct "actually had the effect of fixing or stabilizing prices."[205]

Furthermore, the Court has not chosen to accept a case where the issue squarely presented has been whether, under first amendment standards, an order under section 5 can proscribe dissemination of commercial information where the evidence indicates interdependent pricing in an oligopolistic market, but where there is no collusion or agreement to affect prices or to violate the antitrust laws. Thus, at least three critical issues remain unresolved. First, the courts must decide whether parallel pricing violates section 5 in the absence of an anticompetitive intent or an illegal agreement.[206] Second, it is far from clear what impact *Pittsburgh Press'* illegal conduct exception to first amendment protection of commercial

---

that individual competitors utilized a delivered pricing system with knowledge of the fact that other competitors did as well. Count one of the complaint alleged a conspiracy. The United States Court of Appeals for the Seventh Circuit found that a conspiracy had been established under count one and went on to hold that individual conduct, as charged under count two, which does not satisfy the agreement required of the Sherman Act nevertheless may be an unfair method of competition under § 5. Commentators have urged that *Triangle Conduit*'s influence as precedent for an independent violation under § 5 for consciously parallel action is suspect because "a conspiracy had been properly established . . . and the second charge was essentially directed to preventing its revival." A. NEALE & D. GOYDER, *supra* note 179, at 88. Apparently, before the *Boise Cascade* and *Ethyl* cases, the FTC decided that it would prosecute under § 5 only if there was evidence of conspiracy. *See Interim Report on the Study of the Federal Trade Commission Pricing Policies*, S. DOC. NO. 27, 81st Cong., 1st Sess. 62-63 (1949), *cited in* Boise Cascade v. FTC, [1980] 2 Trade Cas. (CCH) 75,662, 75,665 (9th Cir. 1980). *Accord*, Crouse-Hinds Co., 46 F.T.C. 1114 (1950).

205. Boise Cascade Corp. v. FTC, [1980] 2 Trade Cas. (CCH) 75,662, 75,665 (9th Cir. 1980). Thus, the Commission, in *Ethyl*, will have to establish an actual anticompetitive price effect or the existence of an agreement.

206. This is not to suggest that there are no legal theories which arguably support a challenge to oligopoly parallel pricing under § 1 of the Sherman Act or § 5 of the FTC Act. Evidence of voluntary interdependent pricing behavior by firms in a concentrated industry might permit an inference that there was a meeting of the minds by the competitors so as to warrant a conclusion that there was a tacit agreement. This could be established by evidence similar to that urged in *GE/Westinghouse*. *See* Posner, *supra* note 163. As the Court in *Interstate Circuit* observed when discussing consciously parallel conduct: "It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it." *Interstate Circuit*, 306 U.S. at 226. *But cf.* Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541 (1954) (conscious parallelism alone not Sherman Act violation). The concept of interdependence as it relates to oligopoly behavior

speech will have on the regulation of nonconcerted parallel pricing under section 5. Finally, it is unclear what restraining role the fourth prong of *Central Hudson* might play on the scope of an order, should the courts decide to bring nonconcerted parallel pricing within the ambit of section 5.

B. *A Suggested Approach*

The Court has not yet settled on the analytical boundaries it will follow in addressing the kind of evidence, structural or conduct, that will support a sweeping antitrust order that inhibits first amendment business communications such as the exchange or disclosure of price information. Nevertheless, its recent antitrust decision in *National Society of Professional Engineers v. United States*,[207] read together with *Central Hudson*, indicates that regulatory agencies can seek broad antitrust orders so long as the order complies with the "narrowly drawn" requirement of *Central Hudson*. The defendants in *Professional Engineers* challenged, on first amendment grounds, an injunction entered by the district court which had found that the defendants' canon of ethics violated section 1 of the Sherman Act because it had the effect of restraining competition among engineers. The injunction enjoined the trade association "from adopting any official opinion, policy statement, or guideline stating or implying that competitive bidding is unethical."[208] The injunction, in addition, ordered the association to state affirmatively that "it did not consider competitive bidding to be unethical."[209]

The Court had little problem in resolving the challenge to the first part of the order. It explicitly sanctioned broad governmental power to fashion appropriate restraints on future activities, notwithstanding first amendment defenses. In this regard it noted that trial judges can take into account the fact that an order "may impinge upon rights that would other-

---

then takes on a meaning closer to concerted conduct than to mere independent response by competitors to the same set of market facts, in that, given the concentration and structure of the market, each competitor before acting will consider a rival's reaction and act accordingly. If each competitor is aware that each firm will act similarly, then the reaction to each other's moves would seem to be understood implicitly. This definition arguably would fall within *National Lead*'s "planned common course of action" definition in describing concerted action. FTC v. National Lead Co., 352 U.S. 419 (1957).

207. 435 U.S. 679 (1978). In *Professional Engineers*, the government brought a civil antitrust action against a professional trade association, alleging that its rules of ethics were in violation of the antitrust laws because they prevented member engineers from engaging in competitive bidding until an engineer had been selected for a project. The Supreme Court, applying a rule of reason analysis, affirmed the district court's finding that the canon of ethics violated § 1 of the Sherman Act.

208. *Id.* at 697 (footnote omitted).

209. *Id.* at 686 n.8.

Missouri Law Review, Vol. 46, Iss. 3 [1981], Art. 2

wise be constitutionally protected,"[210] but stated that such rights will not prevent the issuance of a broad order to remedy the illegal conduct. As long as the "relief represents a reasonable method of eliminating the consequences of the illegal conduct,"[211] it will be upheld even though it goes beyond the precise conduct found violative of the law. Should the defendant believe that the order as applied will interfere with legitimate communications or expressions, the remedy is to petition a court for relief or modification of the original order.[212]

Viewed broadly, *Professional Engineers* seems to negate, at least by implication, first amendment defenses in the adoption of orders regulating antitrust conduct. Viewed in the context of the more recent *Central Hudson* and the lower court opinion in *Professional Engineers*, however, the opinion should not be interpreted so literally.[213] *Central Hudson*, which was decided two years after *Professional Engineers*, failed to cite *Professional Engineers* when it struck down an overbroad order as more extensive than necessary and, thus, offensive to the first amendment. Arguably this dichotomy may be reconcilable because *Central Hudson* did not involve violations of the antitrust laws, while *Professional Engineers* did. Perhaps the Court is suggesting that a broader order is constitutionally permissible when the injunctive order seeks to remedy and fence in illegal conduct and its consequences, of which the communication is a part. The force of such an interpretation, however, is undercut by the action of the court of appeals in *Professional Engineers*.

Addressing the second part of the district court's injunction, the United States Court of Appeals for the District of Columbia held that the first amendment would not permit an order requiring the association to state affirmatively "that it does not consider competitive bidding to be unethical."[214] The court reasoned that such an order would "be more intrusive than necessary to achieve fulfillment of the governmental interest."[215] This, of course, is the exact standard applied in *Central Hud-*

210. *Id.* at 697-98.

211. *Id.* at 698. *See, e.g.*, United States v. Glaxo Group, Ltd., 410 U.S. 52, 64 (1973); International Salt Co. v. United States, 332 U.S. 392, 400-01 (1947). Chief Justice Burger dissented from this part of the *Professional Engineers* opinion. He believed that the first amendment protected the right of the association to state publicly that the competitive bidding practice, in its opinion, was unethical. *Id.* at 701 (Burger, C.J., concurring and dissenting).

212. *See also* FTC v. Henry Broch & Co., 368 U.S. 360, 367-68 (1962) (enforcement proceedings are the proper place to litigate the breadth of an order). A narrower order was rejected because "[u]pon any future enforcement proceeding, the Commission and the Court of Appeals will have ready at hand interpretive tools . . . for use in tailoring the order, in the setting of a specific asserted violation." *Id.* at 366. *But see* Standard Oil Co. v. FTC, 577 F.2d 653, 661-62 (9th Cir. 1978).

213. *See* cases cited note 104 *supra*.

214. National Soc'y of Professional Eng'rs v. United States, 555 F.2d at 984.

215. *Id.* The questions of affirmative disclosure and corrective advertising

son, where the overbroad order was found to infringe on first amendment commercial speech rights. This part of the order was not before the Supreme Court in *Professional Engineers* because the government did not seek review of the modification by the court of appeals.[216] Thus, a clear, definitive resolution of the issue remains elusive.

It is reasonable to suggest, nevertheless, as the court of appeals did, that in those cases where *Pittsburgh Press* would deny commercial speech protection to economic communications because they are related to illegal conduct, the charged party should not be denied, at the relief stage, the other traditional first amendment defenses of overbreadth, vagueness, and the requirement that the order be drawn as narrowly as possible. When the antitrust violation has been established, *Central Hudson*'s requirement that the order be no more extensive than necessary to achieve the governmental interest ought to be a restraining force within *Professional Engineers*' requirement that the relief represent a reasonable method of eliminating the consequences of the illegal conduct. Moreover, this approach is consistent with that utilized in *Pittsburgh Press*, where the Court in reviewing the challenged order considered whether it was broader than necessary to achieve the governmental interest.[217] In other words, the "reasonableness" standard should be interpreted to include *Central Hudson*'s dictate that the scope of an order be only as broad as necessary to reach speech that has a sufficiently close relationship to the anticompetitive conduct and its consequences.[218] Otherwise, the chill that might result from overbreadth will affect the vigor of competition, through reduced informational content in the marketplace.[219] As *Central Hudson*

---

have arisen in a variety of situations, *e.g.*, Encyclopaedia Britannica, Inc. v. FTC, 605 F.2d 964 (7th Cir. 1979) (past practice to initiate deceptive sales contacts designed to conceal commercial purpose; court upheld order requiring affirmative disclosure of that purpose at initial contact), *cert. denied*, 445 U.S. 934 (1980); National Comm'n on Egg Nutrition v. FTC, 570 F.2d 157 (7th Cir. 1977) (order required affirmative statement of relationship between eggs and heart disease; court modified to require only statement that there was a controversy over that question), *cert. denied*, 439 U.S. 821 (1978); Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977) (court upheld order requiring affirmative statement in all advertisements that Listerine did not help prevent colds), *cert. denied*, 435 U.S. 950 (1978). *Cf.* Beneficial Corp. v. FTC, 542 F.2d 611 (3d Cir. 1976) (order banned use of deceptive sales phrase; court modified to allow defendant the choice of curing the deception by explanatory language), *cert. denied*, 430 U.S. 983 (1977). *See generally* Note, *First Amendment Limitations on FTC Corrective Advertising Orders*, 66 GEO. L.J. 1473 (1978).

216. 435 U.S. at 686 n.8.

217. 413 U.S. at 390.

218. This standard has long been applied to review cease and desist orders of the FTC. *See* note 113 *supra*. *See generally* Schmidt v. Lessard, 414 U.S. 473, 476 (1974) (per curiam); FED. R. CIV. P. 65(d).

219. Recently, the Supreme Court expressed concern that over-deterrence could chill "procompetitive conduct lying close to the borderline of impermissible

instructs, the burden is on the regulatory authority to demonstrate that a more limited, less sweeping order would not protect adequately the governmental interest in enforcement of the antitrust laws and to assure that the market intervention will not overregulate the market behavior.

V. CONCLUSION

As Justice Stevens noted in *Central Hudson*, "speech proposing a commercial transaction" embraces a wide range of activities.[220] In the antitrust context, it includes the range of communications from the solicitation of customers to the publication of price, production, and warranty information.[221] Whether such communications will be shielded under the first amendment from regulation will depend largely on an evidentiary analysis under *Pittsburgh Press* and *Central Hudson*. Whether the enforcement agency is the Justice Department or the FTC, the agency should be sensitive to first amendment considerations, take into account the limitations imposed by the Constitution, and proceed with caution when proposing regulatory orders. The focus of the analysis should be the relationship the communication has to other conduct which evidences anticompetitive effect. The role that the business communication plays with other facilitating devices cannot, however, be merely incidental. Nor should mere parallel conduct suffice, in the absence of evidence indicating that the communication was against the commercial self-interest of the speaker. Moreover, evidence of the structure of the industry also may help predict the effect that such conduct can have on marketplace competitiveness. It should not, however, be the determining factor of illegality.

If the economic communication is an essential, substantial, or facilitating part of a scheme violative of the antitrust laws, under *Pittsburgh Press* it will not be entitled to commercial speech protection. But such conduct should not be proscribed under an order or injunction that sweeps so broadly as to deter other conduct that may be competitive. The traditional first amendment defenses such as the overbreadth doctrine, the vagueness standard, and the narrowness test ought to be available to insure that competitive speech, which is otherwise constitutionally protected, is not chilled. As long as there is a significant likelihood of substantial overbreadth, there is utility in retention of the overbreadth doctrine, at least in the single-party challenge context. This is true particularly with regard to business communications in the nonmedia advertising area where verification, the rationale behind the abolition of the overbreadth

---

conduct." United States v. United States Gypsum Co., 438 U.S. 422, 441 (1978). By analogy, this effect can be produced by an overbroad order, as well. *See generally* Sullivan, *New Perspectives in Antitrust Litigation: Toward a Right of Comparative Contribution*, 1980 U. ILL. L.F. 389, 413-14.

220. 447 U.S. at 580 (Stevens, J., concurring).

221. *See id.* (Stevens, J., concurring).

doctrine, is inapplicable. At least, *Central Hudson*'s admonition that the regulatory authority bears the burden to establish affirmatively that an order is no broader than necessary to achieve the interest advanced should be applied to remedial orders approved under *Pittsburgh Press*.

In sum, the model of analysis with regard to constitutional limitations on trade regulation orders which restrict commercial communications should include the following inquiry: whether the speech/conduct comes within one of the regulated categories, *i.e.*, a false or deceptive communication, or related to or an element of illegal conduct. If the conduct does fall within one of these categories, it can be regulated. In regulating, the agencies and courts should consider whether the order as drafted will have a chilling effect on protected communications of either the defendant or others. If the answer is in the affirmative, then traditional overbreadth analysis should be applied if the overbreadth is substantial. This step in the analysis is especially important, because of the application of the Magnuson-Moss statute, if the order is an FTC cease and desist order. In addition, the court should consider whether the terms of the order are vague and, therefore, susceptible to varying interpretations. Moreover, the agencies and courts should determine if the order is broader than necessary to effectuate the desired regulation. The existence of a chilling effect on protected conduct of the defendant or third parties is a relevant consideration in this step of the analysis, but is not a prerequisite.

Finally, if the commercial speech/conduct is found not to be false, deceptive, or related to an illegal practice, it can be regulated only if (1) the regulating authority has a substantial interest to be served by the regulation, (2) the order as drawn directly advances the stated governmental interest, and (3) the restriction is not more extensive than necessary to serve the interest. Under either analysis, the regulatory authority has the burden to demonstrate that the order meets the criteria.

While this Article has suggested that past trends in the enforcement of the trade regulation laws by the Justice Department and FTC indicate a tension between enforcement approaches and first amendment interests, recent developments, most notedly under the FTC's "unfair acts and practices" authority under section 5, suggest that the Congress and the Reagan Administration are inclined to scrutinize more carefully the regulatory agencies' enforcement innovations. For instance, Congress withdrew recently the Commission's "unfairness" jurisdiction to promulgate a rule regulating television advertising for children.[222] Subsequently, the FTC staff recommended that a trade regulation rule to regulate advertising for children was unworkable and that the rulemaking proceeding should be terminated.[223] Similar concerns have been observed by officials of the new

222. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980).

223. 1008 ANTITRUST & TRADE REG. REP. (BNA) AA-1 (April 2, 1981); 484 TRADE REG. REP. (CCH) 7 (April 6, 1981).

Administration,[224] cautioning that the recent enforcement policies have "reduced the amount of useful information"[225] in the marketplace. Moreover, the Commission apparently has made a conscious decision to shift the enforcement emphasis from rulemaking to adjudication on a case-by-case approach.[226] To the extent that these recent events portend a shift in enforcement emphasis, the regulatory agencies and courts should give more thoughtful consideration to the limitations placed on their regulatory oversight responsibilities by the commercial speech doctrine and to the first amendment constitutional implications of remedial orders, so that competitively useful commercial information is not denied consumers and competitors because of the deterrence that may result from overbroad or vague orders.[227]

224. *See, e.g.*, Statement of David Stockman, Director of the Office of Management and Budget, before the House Government Operations Committee's Consumer and Monetary Affairs Subcommittee (March 16, 1981), *reprinted in part in* 1006 ANTITRUST & TRADE REG. REP. (BNA) G-1 (March 19, 1981).

225. *Id.*

226. *See, e.g.*, 1012 ANTITRUST & TRADE REG. REP. (BNA) A-3 to -4 (April 30, 1981); 1001 ANTITRUST & TRADE REG. REP. (BNA) A-16 (Feb. 12, 1981); 991 ANTITRUST & TRADE REG. REP. (BNA) A-5 (Nov. 27, 1980); 488 TRADE REG. REP. (CCH) 3 (May 4, 1981); 487 TRADE REG. REP. (CCH) 9 (April 27, 1981); 483 TRADE REG. REP. (CCH) 10 (March 30, 1981).

227. *See* note 219 *supra*.