NOTE

COMMERCIAL SPEECH IN CRISIS: CRISIS PREGNANCY CENTER REGULATIONS AND DEFINITIONS OF COMMERCIAL SPEECH

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Recent attempts to regulate Crisis Pregnancy Centers, pseudoclinics that surreptitiously aim to dissuade pregnant women from choosing abortion, have confronted the thorny problem of how to define commercial speech. The Supreme Court has offered three potential answers to this definitional quandary. This Note uses the Crisis Pregnancy Center cases to demonstrate that courts should use one of these solutions, the factor-based approach of Bolger v. Youngs Drugs Products Corp.*, to define commercial speech in the Crisis Pregnancy Center cases and elsewhere. In principle and in application, the* Bolger *factor-based approach succeeds in structuring commercial speech analysis at the margins of the doctrine.*

TABLE OF CONTENTS

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INTRODUCTION

"Pregnant? Need Help? Call Us!" urge highway billboards and subway ads across the country.[1] On the other end of the line are Crisis Pregnancy Centers ("CPC"s), also known as Pregnancy Resource Centers.[2] CPCs are nonprofit agencies that offer free pregnancy options counseling and related goods and services (e.g., free pregnancy testing, family planning advice, baby clothes) to pregnant women considering pregnancy termination.[3] Although CPCs vary in the goods and services they offer, supporters and opponents agree that their paramount, and typically undisclosed, mission is to convince women not to have abortions.[4]

Many CPCs use misleading or deceptive tactics to attract and retain the "abortion-minded"[5] and dissuade them from choosing abortion.[6] Despite their antiabortion stance, some CPCs imply that they offer abortion services or referrals to abortion providers by advertising in the "abortion" section of the Yellow Pages.[7] Others advertise advice on pregnancy "options," though the only option they advise is continuation of the pregnancy.[8] Some attempt to attract clients by setting up near abortion providers and copying their logos, hoping that women who have made an appointment with Planned Parenthood will walk into the wrong office.[9] Once the woman is through the door, she finds a clinic-like environment full of "counselors" who may fabricate or overemphasize the physical and mental health risks of abortion.[10]

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1. *See, e.g.*, Cecile S. Holmes, *Pro-Life Campaign: Billboard Campaign Offers Help to Women in Crisis Pregnancies*, CHRISTIANITY TODAY (Apr. 28, 1997), http://www.christianitytoday.com/ct/1997/april28/7t5082.html.

2. I use the term "Crisis Pregnancy Center" rather than "Pregnancy Resource Center" because this is the most oft-used and recognizable term. *See, e.g.*, MINORITY STAFF OF H.R. COMM. ON GOV'T REFORM SPECIAL INVESTIGATIONS DIV., 109TH CONG., REP. ON FALSE AND MISLEADING HEALTH INFORMATION PROVIDED BY FEDERALLY FUNDED PREGNANCY RESOURCE CENTERS, at i (2006) [hereinafter WAXMAN REPORT], *available at* http://www.chsourcebook.com/articles/waxman2.pdf (using the terms interchangeably); Nancy Gibbs, *One Woman at a Time*, TIME, Feb. 26, 2007, at 22.

3. *See* WAXMAN REPORT, *supra* note 2, at iii.

4. *Id.* Although each center typically does not advertise its ideological mission, the national umbrella organizations' websites make these aims clear. *See, e.g.*, *About Care Net*, CARE NET, https://www.care-net.org/aboutus/ (last visited Aug. 24, 2012).

5. CPCs sometimes refer to women considering pregnancy termination as "abortion-minded." *See, e.g.*, Thomas A. Glessner, *Reaching the Abortion-Minded Client Through Medical Services: Success Stories*, AT THE CENTER, Spring 2002, http://www.atcmag.com/v3n2/article7.asp.

6. *See* WAXMAN REPORT, *supra* note 2, at 1.

7. *Id.*

8. *Id.* at 2.

9. *See* Kathryn Joyce, *The Clinic Across the Street*, Ms., Fall 2010, at 27; *The Truth About Crisis Pregnancy Centers*, NARAL PRO-CHOICE AM., 2 (Jan. 1, 2012), http://www.naral.org/media/fact-sheets/abortion-cpcs.pdf.

10. *See* WAXMAN REPORT, *supra* note 2, at 7–14; NARAL PRO-CHOICE N.C. FOUND., THE TRUTH REVEALED: NORTH CAROLINA'S CRISIS PREGNANCY CENTERS 2 (2011), *available at* http://www.prochoicenc.org/assets/bin/pdfs/2011NARAL_CPCReport_V05_web.

Although many CPC volunteers and clients highly value the mission of CPCs and the services they provide, and apart from the debate over the legitimacy of CPCs, some local legislators have identified a public health problem.[11] Among other issues, the tactics of CPCs delay women from accessing termination or prenatal services. One physician explains the plight of her patient as follows:

> [My patient, Susan,] went to a [Crisis Pregnancy Center] in downtown Manhattan early in her second trimester, thinking that she could obtain an abortion there. The staff told Susan that she needed an ultrasound before the procedure. Then another ultrasound. They attributed the multiple tests to uncertainty about how advanced her pregnancy was. Because of these delays, Susan's pregnancy progressed into the third trimester. Susan was 32 weeks pregnant and still seeking an abortion when she consulted me at our hospital-based clinic. I had to tell her it was no longer possible: she was well beyond the legal limit for abortion in New York. Susan was shocked, as the "counselor" at the CPC had assured her she could have an abortion in the third trimester. Moreover, when I examined Susan, I found her case straightforward—one simple abdominal ultrasound would have dated her pregnancy easily. The CPC had no medical reason for keeping her waiting.[12]

To that end, Austin, Texas[13]; Baltimore, Maryland[14]; nearby Montgomery County, Maryland[15]; and New York City[16] have recently enacted legislation that requires CPCs to post warnings to potential clients about the

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pdf; *The Truth About Crisis Pregnancy Centers*, *supra* note 9, at 1, 3. The Waxman Report cites two of the most oft-repeated myths perpetuated by CPCs, the so-called "Abortion-Breast Cancer Link" and "Post-Abortion Trauma." On the former, see NAT'L CANCER INST., U.S. DEP'T OF HEALTH & HUMAN SERVS., ABORTION, MISCARRIAGE, AND BREAST CANCER RISK 1 (2010), *available at* http://www.cancer.gov/cancertopics/factsheet/Risk/fs3_75.pdf. On the latter, see TASK FORCE ON MENTAL HEALTH & ABORTION, AM. PSYCHOLOGICAL ASS'N, REPORT OF THE APA TASK FORCE ON MENTAL HEALTH AND ABORTION 92 (2008), *available at* http://www.apa.org/pi/women/programs/abortion/mental-health.pdf. CPC counselors may also tell women they are "ineligible" for abortion for some false reason or encourage women to wait for a miscarriage in the hopes of delaying access to time-limited abortion services. *See* NARAL PRO-CHOICE N.C. FOUND., *supra* note 10, at 24.

11. *See, e.g.*, N.Y.C., N.Y., Local Law No. 17 § 1 (Mar. 16, 2011). CPC advocates have vehemently fought negative characterizations of CPCs. *See, e.g.*, Gibbs, *supra* note 2, at 26–27; Heartbeat Int'l, *New York City Speaks Out About Pregnancy Help Centers*, YOUTUBE (Mar. 15, 2011), http://www.youtube.com/watch?v=9tnoBfrE3Ys.

12. *Hearing Before the Comm. on Women's Issues*, N.Y.C. Council (Nov. 16, 2010) (statement of Anne R. Davis, Medical Director, Physicians for Reproductive Choice and Health), *available at* http://documents.scribd.com.s3.amazonaws.com/docs/5zh48rj9mor1qkg.pdf?t=1289923327.

13. AUSTIN, TX., CITY CODE § 10-10 (2010) (amended 2012). Austin has suspended enforcement of the ordinance in the face of a recent lawsuit. Steven Ertelt, *Austin, Texas Suspends Law Attacking Pregnancy Centers*, LIFENEWS.COM (Nov. 11, 2011, 12:22 PM), http://www.lifenews.com/2011/11/11/austin-texas-suspends-law-attacking-pregnancy-centers/.

14. BALTIMORE, MD., HEALTH CODE §§ 3-501 to -506 (2009).

15. Montgomery Cnty., Md., Resolution No. 16-1252 (Feb. 1, 2010).

16. N.Y.C., N.Y., Local Law No. 17 (Mar. 16, 2011).

limitations of their services. The regulations vary, but they generally require entrance or waiting room signs to inform clients whether the CPC offers or refers clients for contraception and termination services.[17] The New York regulation requires similar disclaimers on the CPCs' advertisements.[18]

CPCs have fought back, arguing that the regulations unconstitutionally compel speech in violation of the First Amendment.[19] The federal courts have, so far, agreed.[20] In each case, the municipalities and abortion rights amici argued, inter alia, that the speech in question was commercial in nature and thus merited less First Amendment protection than noncommercial speech.[21] Commercial speech, unlike noncommercial speech, may be proscribed on the basis that it is deceptive or misleading.[22] The courts rejected the argument, concluding that the CPCs' speech was noncommercial, and therefore fully protected.[23] After determining that the regulations were not sufficiently "narrowly tailored," the courts granted preliminary injunctions to the CPCs.[24]

The CPC cases provide a fresh and previously unexamined lens through which to view commercial speech doctrine, a long-disputed, notoriously

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17. N.Y.C., N.Y., ADMIN. CODE § 20-816(f)(1) (current as of Aug. 28, 2012), *available at* http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=$$ADC20-816$$@TXADC020-816+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=56536113+&TARGET=VIEW (requiring both entrance and waiting room signs). The laws require the centers to communicate particular facts. In New York City, for example, the law requires disclosures of whether the center offers abortion, emergency contraception, and prenatal care. That statute also requires oral warnings to clients who call or visit, and CPCs must additionally state whether they employ medical professionals alongside a statement that the city recommends pregnant women seek medical assistance. *Id.* § 20-816(b).

18. *Id.* § 20-816(f)(1)(iii).

19. *See, e.g.*, Evergreen Ass'n v. City of N.Y., 801 F. Supp. 2d 197, 203 (S.D.N.Y. 2011). On compelled speech, see Wooley v. Maynard, 430 U.S. 705, 714 (1977).

20. *Evergreen Ass'n*, 801 F. Supp. 2d at 209; Tepeyac v. Montgomery Cnty., 779 F. Supp. 2d 456, 472 (D. Md. 2011), *aff'd in part, rev'd in part*, 683 F.3d 591 (4th Cir. 2012); O'Brien v. Mayor of Balt., 768 F. Supp. 2d 804, 817 (D. Md. 2011), *aff'd sub nom.* Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt., 683 F.3d 539 (4th Cir. 2012).

21. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770–73 (1976) (suggesting that commercial speech merits less protection than noncommercial speech).

22. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563 (1980). Some categories of noncommercial speech, such as "fighting words," receive no First Amendment protection. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942). If the municipalities had prevailed on the commercial speech argument, the courts would have then relied on a four-part test set forth in *Central Hudson* to determine whether the speech was protected. Under *Central Hudson*, if the speech is, first, commercial, and second, false and misleading, it merits no First Amendment protection. *See Cent. Hudson*, 447 U.S. at 566.

23. *Evergreen Ass'n*, 801 F. Supp. 2d at 206; *Tepeyac*, 779 F. Supp. 2d at 463; *O'Brien*, 768 F. Supp. 2d at 814.

24. *Evergreen Ass'n*, 801 F. Supp. 2d at 208–11; *Tepeyac*, 779 F. Supp. 2d at 468–72; *O'Brien*, 768 F. Supp. 2d at 817.

thorny area of First Amendment jurisprudence.[25] Pending and future CPC regulation cases, which will likely multiply as statutes multiply, offer courts an opportunity to reevaluate and clarify definitions of commercial speech.[26]

This Note argues that the CPC regulation cases reveal inadequacy in existing definitions of commercial speech and suggests paths for improvement. Part I argues that the CPC courts incorrectly and mechanistically applied an arbitrary selection of two haphazard "definitions" of commercial speech developed by the Supreme Court. Part II considers these and other definitions of what constitutes commercial speech, concluding that extant categorical definitions offer little guidance to courts. A factor-based definition, however, offers a useful alternative approach. Part III returns to first principles, arguing that the characteristics of commercial speech that have historically afforded it less, though some, protection under Supreme Court jurisprudence militate in favor of using this factor-based definition rather than categorical definitions. Part IV applies the factor-based approach to the CPC cases, concluding that although some of the CPCs' ideological speech might merit full First Amendment protection, their advertisements would probably be deemed commercial and thus subject to regulation. In the CPC cases and beyond, lower courts should follow the *Bolger v. Youngs Drug Products Corp.* Court in considering a variety of factors to determine whether speech is commercial or noncommercial rather than mechanistically applying flawed and limited definitions.

I. The Failings of the Core Commercial Speech Definitions Alone

This Part asserts that the Maryland and New York district courts incorrectly applied a rigid definition of commercial speech unsupported by Supreme Court jurisprudence. Specifically, these courts followed other lower courts in confusing the Supreme Court's definition of the core of commercial speech with its limits. Though the Supreme Court has not offered comprehensive guidance on the issue, lower courts should nevertheless consider alternative approaches.

Commercial speech doctrine is a mess.[27] Among other questions, courts and commentators disagree on whether and how much the First Amendment

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25. *See infra* note 27; Part II. Only one piece of legal scholarship has addressed the CPC cases, arguing that the regulations are unconstitutional and expressing apparent support for the work of CPCs. *See* Mark L. Rienzi, *The History and Constitutionality of Maryland's Pregnancy Speech Regulations*, 26 J. Contemp. Health L. & Pol'y 223, 245–51 (2010). The Supreme Court has at least once declined to consider a case involving CPCs and commercial speech. *See* Fargo Women's Health Org., Inc. v. Larson, 381 N.W.2d 176, 181 (N.D. 1986), *cert. denied*, 476 U.S. 1108 (1986).

26. San Francisco, for example, is considering adopting a similar statute. *See* Maria L. LaGanga, *San Francisco Takes On 'Crisis Pregnancy Centers'*, L.A. Times, Aug. 2, 2011, http://latimesblogs.latimes.com/lanow/2011/08/san-francisco-takes-on-crisis-pregnancy-centers.html.

27. *See, e.g.*, Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1, 2 (2000). For a history of commercial speech doctrine and the contention that the

protects commercial speech. Many jurists and commentators today, including Justice Thomas, advocate full protection for commercial speech.[28] On the other hand, many scholars argue that commercial speech merits no protection at all.[29] Recent decisions have varied wildly in both directions.[30]

Despite heated debate about the degree of protection that commercial speech actually does or should receive, the Court has never articulated a singular definition, test, or set of tests for what commercial speech is.[31] The first case to recognize the concept, *Valentine v. Chrestensen*, held that the First Amendment affords no protection at all to what it termed "purely commercial advertising."[32] The Court, however, failed to offer a definition or characterization of commercial speech (nor, for that matter, a textual or historical basis for the distinction).[33]

Even while later cases afforded protection to commercial speech and overruled *Chrestensen*, a singular definition remained elusive.[34] In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, for example, the Court first held that advertisements merited some protection without defining the limits of the commercial category.[35] Justice Rehnquist dissented vigorously, lamenting the "Procrustean" and hidden new line between commercial and noncommercial speech.[36] This confusion persists today.

Although there is no uniform definition for commercial speech, the CPC courts extracted two potential definitions of the concept from seminal com-

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"underlying controversies . . . continue to divide the justices," see DAVID M. O'BRIEN, CONGRESS SHALL MAKE NO LAW 49–60 (2010).

28. *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 522 (1996) (Thomas, J., concurring in part and concurring in the judgment); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 628 (1990); Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777 (1993).

29. *See, e.g.*, Thomas H. Jackson & John C. Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979).

30. *See* Edward J. Schoen et al., United Foods *and* Wileman Bros.*: Protection Against Compelled Commercial Speech—Now You See It, Now You Don't*, 39 AM. BUS. L.J. 467, 520 (2002). *Compare* United States v. United Foods, Inc., 533 U.S. 405 (2001) (striking down a regulation requiring mushroom growers to pay assessments for collective advertising), *with* Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997) (upholding a similar regulatory scheme for tree fruit producers).

31. J. Wesley Earnhardt, Recent Development, Nike, Inc. v. Kasky*: A Golden Opportunity to Define Commercial Speech—Why Wouldn't the Supreme Court Finally "Just Do It™"?*, 82 N.C. L. REV. 797, 798–99 (2004).

32. 316 U.S. 52, 54 (1942).

33. *See Chrestensen*, 316 U.S. at 54.

34. *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809 (1975) (recognizing some First Amendment protection for commercial speech).

35. 425 U.S. 748 (1976).

36. *See Va. State Bd. of Pharmacy* , 425 U.S. at 787 (Rehnquist, J., dissenting).

mercial speech cases. The courts[37] relied first on *Bolger v. Youngs Drug Products Corp.*, in which the Court defined commercial speech as that which "proposes a commercial transaction."[38] Second, the courts[39] invoked a definition from *Central Hudson Gas & Electricity Corp. v. Public Service Commission*, in which the Court explained that commercial speech is "expression related solely to the economic interests of the speaker and its audience."[40] The CPC courts thus asked whether the CPC engaged in speech proposing a commercial transaction or speech related solely to the economic interests of the CPCs and their audience. Concluding that the CPCs did not, the courts characterized the speech as noncommercial and analyzed it under that rubric.[41]

A close examination of the origin and effects of the definitions used by the courts, however, indicates serious problems with their application in the CPC cases. First, neither "definition" was the result of the Supreme Court setting out to define commercial speech. In *Central Hudson*, the Court struck down a state regulation categorically banning advertisements by public utilities promoting electricity use.[42] The Court held that "[the regulation] restricts only commercial speech, that is, expression related solely to the economic interests of the speaker and its audience."[43] In context, the economic interests definition indicates only that commercial speech is *at least* speech that affects the economic interests of the speaker and its audience.[44] From this, courts can confidently conclude only that economic interests speech is a subset of commercial speech; the full scope of commercial speech may well extend beyond the confines of economic interests speech.

Bolger, decided three years later, lends credence to this reading. In *Bolger*, the Court sustained an as-applied challenge to a federal law banning unsolicited circulars advertising contraception.[45] Youngs, a contraceptives manufacturer, attempted to distribute informational pamphlets on sexually transmitted infections and unintended pregnancy that also advertised its

37. *See* Evergreen Ass'n v. City of N.Y., 801 F. Supp. 2d 197, 204 (S.D.N.Y. 2011); Tepeyac v. Montgomery Cnty., 779 F. Supp. 2d 456, 463 (D. Md. 2011), *aff'd in part, rev'd in part*, 683 F.3d 591 (4th Cir. 2012); O'Brien v. Mayor of Balt., 768 F. Supp. 2d 804, 813 (D. Md. 2011), *aff'd sub nom.* Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt., 683 F.3d 539 (4th Cir. 2012).

38. 463 U.S. 60, 66 (1983) (internal quotation marks omitted).

39. *See* cases cited *supra* note 37.

40. 447 U.S. 557, 561 (1980). *Tepeyac*, unlike other cases that use both definitions, seemed to characterize the commercial transaction definition as a clarification of the economic interests definition. *See Tepeyac*, 779 F. Supp. 2d at 463.

41. *See Evergreen Ass'n*, 801 F. Supp. 2d at 204–06; *Tepeyac*, 779 F. Supp. 2d at 463–64; *O'Brien*, 768 F. Supp. 2d at 813.

42. *Cent. Hudson*, 447 U.S. at 559–61.

43. *Id.* at 561.

44. There are at least two ways to read this sentence, however, and the other would be to read the "that is" as an "equals" sign. The rest of this Part explains that this second reading is unlikely since other Court decisions support the subset reading.

45. *Bolger,* 463 U.S. at 75.

family planning products.[46] The case explicitly identified "speech which does no more than propose a commercial transaction"[47] as the "*core*" of commercial speech, not the limit or definition of it.[48] *Bolger* went on to find that even though some of the speech in that case—the informational pamphlets—was *not* "proposing a commercial transaction," *all* of the speech was commercial. The Court considered several factors in so finding, indicating that it considered a multifactor definition necessary to determine whether the speech in question was commercial in nature.[49] In considering and discarding the "commercial transaction" definition, the Court demonstrated that the definition was neither necessary nor sufficient in determining whether speech is "commercial."[50] In other words, after *Bolger*, even speech that does not propose a commercial transaction may qualify as commercial speech.

Despite the implication in *Central Hudson* and the clear explanation in *Bolger* that courts may start, but not finish, with analysis of the "core" of commercial speech, the courts that decided the CPC cases are not the first to mechanistically apply the core definitions alone in distinguishing commercial speech from noncommercial.[51] Courts using these definitions in this way ask (1) whether the speech proposes a commercial transaction and (2) whether it is related solely to the economic interests of the speaker. If the answer to either question is yes, the speech is commercial. If not, the speech is noncommercial.

The Supreme Court, however, has given lower courts little reason to adopt this categorical approach. The Court has repeatedly noted significant ambiguity in what qualifies as commercial speech.[52] Though the Court has acknowledged that commercial speech may be "usually defined" as speech that proposes a commercial transaction, that descriptive definition stops

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46. *Id.* at 62.

47. *Id.* at 66 (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976)) (internal quotation marks omitted). Additionally, the Court has moved from characterizing this core as that which "does *no more* than propose a commercial transaction" to that which proposes a commercial transaction. *See Va. State Bd. of Pharmacy*, 425 U.S. at 762 (emphasis added). This shift may indicate an expansion of what constitutes even "pure" commercial speech. *See* David F. McGowan, Comment, *A Critical Analysis of Commercial Speech*, 78 CALIF. L. REV. 359, 383 (1990).

48. *Bolger*, 463 U.S. at 66 (emphasis added).

49. *Id.*

50. *Id.*

51. *See, e.g.*, United States v. Philip Morris USA Inc., 566 F.3d 1095, 1143 (D.C. Cir. 2009); El Día, Inc. v. P.R. Dep't of Consumer Affairs, 413 F.3d 110, 115 (1st Cir. 2005); Keene Corp. v. Abate, 608 A.2d 811, 814 (Md. Ct. Spec. App. 1992).

52. *See, e.g.*, Edenfield v. Fane, 507 U.S. 761, 765 (1993) ("[A]mbiguities may exist at the margins of the category of commercial speech . . . ."); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 419 (1993) (noting "the difficulty of drawing bright lines that will clearly cabin commercial speech"); *see also* Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 87 (1999).

short of declaring the limits of what constitutes commercial speech.[53] More often, the Court has characterized speech proposing a commercial transaction as "pure" commercial speech, reinforcing the *Bolger* "core" notion.[54] Most tellingly, the Court has clearly indicated that though "commercial speech" doubtlessly includes speech proposing a commercial transaction, it can also include more.[55]

Still, the lower courts could be forgiven for relying on the apparent certainty offered by the core definitions, particularly since the Court has demonstrated its wariness in establishing the outer limits of the category.[56] The Court's opinions offer little guidance, as they often skip the question of what constitutes commercial speech and proceed directly to the constitutional analysis, relying on the "commonsense distinction" between commercial and noncommercial speech or the parties' stipulation to the commercial nature of the speech.[57]

Conflating the "core" of commercial speech with all commercial speech prevents lower courts from properly characterizing speech that, while not "purely" commercial, may nevertheless be as commercial as the "impure" commercial speech in *Bolger*.[58] This exclusion should trouble all but the most zealous commercial speech advocates for its capacity to preclude potentially constitutional government regulation of speech. Although the courts in the CPC cases treated the core definitions from *Bolger* and *Central Hudson* as the only available definitions of commercial speech, even the limited guidance offered by the Supreme Court makes clear that there are alternatives. The next Part analyzes these and other available definitions of commercial speech.

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53. United States v. United Foods, Inc., 533 U.S. 405, 409 (2001). *But see* Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 473–74 (1989). Although the *Board of Trustees* Court indicated that the commercial transaction definition is "the" definition for commercial speech, at least one later case clearly indicates some speech beyond the core may "count" as commercial speech. *See* Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 479 n.1 (1997) (Souter, J., dissenting). Indeed, in *Board of Trustees* itself, the Court ultimately found that although not all of the speech in question proposed a commercial transaction, it was nevertheless commercial in nature. 492 U.S. at 473–75.

54. *See, e.g.*, Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 340 (1986); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 (1985).

55. *See, e.g.*, *Glickman*, 521 U.S. at 479 n.1 ("[C]ommercial advertising generally and these programs in particular involve messages that go well beyond the ideal type of pure commercial speech hypothesized in *Va. State Bd. of Pharmacy*, which would do 'no more than propose a commercial transaction.' " (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 762 (1976))); *Zauderer*, 471 U.S. at 637.

56. *E.g.*, Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (per curiam) (dismissing as improvidently granted a writ of certiorari for a case implicating a novel commercial speech question); *see also* Earnhardt, *supra* note 31, at 799; *infra* note 101.

57. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 553 (2001); Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 183 (1999); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 505 (1981) (plurality opinion).

58. *See supra* note 53.

II. The *Bolger* Factor-Based Approach: A Useful and Necessary Alternative

This Part analyzes available definitions of commercial speech in terms of logical coherence and administrability by applying them to the speech in the CPC cases. Section II.A demonstrates that categorical application of the core definitions of commercial speech alone offers courts little guidance in assessing speech and yields incoherent results, particularly when used to distinguish non-core commercial speech from noncommercial speech. Section II.B argues that the Supreme Court's factor-based definition as set forth in *Bolger* offers an administrable alternative for characterizing speech as commercial or noncommercial beyond this core.

A. *Inconsistent and Illogical Results in the CPC Cases*

The commercial transaction and economic interests definitions yield incoherent and confusing results as applied to the speech in the CPC cases. In applying these categorical definitions, the courts in the CPC cases concluded that the CPCs' speech was not commercial for three underlying reasons: (1) the motivations of the speakers, (2) the potentially undesirable outcomes, and (3) the generally ideological nature of the speech's content.[59] Consideration of each reason reveals fundamental flaws in the mechanical application of the two definitions.

The courts in the CPC cases began their analyses with consideration of the motives of the speakers, but the question of speaker motives raises clear problems in the context of charitable organizations.[60] One court reasoned that a CPC was not generally proposing a commercial transaction or engaging in speech related to economic interests because "the [CPC] engag[ed] in speech relating to abortion and birth-control based on strongly held religious and political beliefs rather than commercial interests or profit motives."[61] Taken to its logical conclusion, this reasoning suggests that all nonprofit

59. The Maryland district court also concluded that even if the regulations affected some commercial speech, such speech was so intertwined with ideological speech that the two could not be separated. *See* O'Brien v. Mayor of Balt., 768 F. Supp. 2d 804, 813 (D. Md. 2011), *aff'd sub nom.* Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt., 683 F.3d 539 (4th Cir. 2012).

60. The "economic interests" of the speaker form an explicit part of the economic interests definition, while the motivations of the speaker inform, at least, whether she believes herself to be proposing a commercial transaction.

61. *O'Brien*, 768 F. Supp. 2d at 813; *see also* Evergreen Ass'n v. City of N.Y., 801 F. Supp. 2d 197, 205 (S.D.N.Y. 2011) ("Plaintiffs' missions—and by extension their charitable work—are grounded in their opposition to abortion and emergency contraception."); Tepeyac v. Montgomery Cnty., 779 F. Supp. 2d 456, 463–64 (D. Md. 2011) ("Plaintiff is allegedly motivated by social concerns."), *aff'd in part, rev'd in part*, 683 F.3d 591 (4th Cir. 2012). Although the commercial transaction "test" does not facially suggest consideration of the speaker's motive, the courts evidently used the two tests in tandem. *See supra* note 40 (explaining the Maryland district court's deliberate tandem use).

speech is noncommercial. The Supreme Court has rejected this contention.[62] For example, nonprofits that advertise products or services for sale may do so to further their charitable aims rather than make a profit, but they nevertheless can "propose a commercial transaction."[63] Few would argue that such advertisements should be free from usual advertising regulations.

More importantly, even if courts could effectively engage in the type of speculation often required to establish a speaker's subjective motives, those motives are often mixed. Neither the commercial transaction definition nor the economic interests definition offers courts guidance in balancing or parsing mixed motives. As Justice Stevens has noted, "[E]ven Shakespeare [was] motivated by the prospect of pecuniary award."[64] Art created for both money and the sake of creation is not "commercial" speech in the First Amendment analysis.[65] On the other hand, the Court has made clear that an organization that commercially advertises a good or service cannot merely "link" its good to a political or religious issue to make it noncommercial.[66] Even if courts are able to ascertain the motives of the speaker, the resulting categorizations may be both under- and overinclusive.[67]

Further, whose motives matter most? The CPC cases perfectly illustrate that the "economic interests of the speaker and its audience" are often divergent. Undoubtedly, CPCs provide limited pregnancy services because of their religious and/or ideological opposition to abortion.[68] But their target audience—pregnant women seeking information and services—listens for

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62. *See O'Brien*, 768 F. Supp. 2d at 814 n.9 (citing Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980)).

63. *Id.* Although some areas of the law distinguish between products and services, *see, e.g.*, U.C.C. § 2-103(1)(k), 1 U.L.A. 373 (2003), no logical basis exists for distinguishing products from services in the context of commercial speech. Indeed, the Court has treated attorney services, for example, as subject to commercial regulation. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 629 (1985).

64. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 580 (1980) (Stevens, J., concurring in the judgment).

65. Indeed, taken to its logical conclusion, "[e]conomic motivation could not be made a disqualifying factor without enormous damage to the first amendment." Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 Nw. U. L. Rev. 372, 382 (1979). The Court has made clear that newspapers engage in fully protected speech, despite at least some paid advertisements and a profit interest. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266 (1964).

66. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 68 (1983). Also consider the original commercial speech case, *Valentine v. Chrestensen*, 316 U.S. 52 (1942). The respondent in *Chrestensen* violated a city ordinance prohibiting street distribution of advertising by passing out a handbill advertising admission prices for visitors to his submarine. In response to the city's refusal to allow him to dock at a public wharf, he printed a second version with political messages on the reverse and tried again. Neither the police nor the Court was impressed. *Id.* at 53.

67. *See Cent. Hudson*, 447 U.S. at 579.

68. *See supra* note 4.

nonideological reasons.[69] The courts considered the fact that the services were free as militating in favor of finding the speech noncommercial.[70] But for women seeking pregnancy testing and other pregnancy-related services, cost concerns are undoubtedly an "economic" factor in selecting services.[71] The fact that the services are free is what makes them desirable.[72] The courts' evident failure to consider the motives or interests of the audience does not necessarily reveal any inherent flaw with the definitions. But even if the courts had considered the issue, the core definitions would have left them ill equipped to deal with the problem of divergent motives.

After considering the motives of the speaker, the courts turned their attention to the problem of undesirable results. They reasoned that if the mere offering of free goods or services constituted commercial speech, churches offering communion wine would also be engaging in commercial speech.[73] Finding reduced speech protections for CPCs would, by the courts' logic, necessarily result in finding reduced speech protections for churches and similar organizations. Because of these undesirable results, the courts concluded that the CPCs' speech must not propose a commercial transaction.[74]

As the CPC cases demonstrate, one of the primary problems with the commercial transaction definition is that, in practice, it prevents a court from classifying an offer of free goods or services as "commercial speech," even though such a finding might be warranted in some cases. Few would disagree, for example, that an advertised "free sample" should be subject to advertising regulations applicable to similar products available for purchase. But because courts use "proposing a commercial transaction" as a categorical, in-or-out test, finding any one instance of speech "commercial" worries courts bound by stare decisis. If this particular speech "proposes a commercial transaction," very similar speech might also be "commercial." In other words, the reasoning goes as follows: Assuming *A* and *B* express similar messages, if *A* is commercial, then *B* is commercial, and since we do not want *B* to be commercial, *A* must not be commercial. To protect *B*, courts

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69. In fact, CPCs target women who have already decided that they want or are at least considering an abortion and who may not be seeking or even be open to ideological discussions of abortion. *See* Glessner, *supra* note 5.

70. *See* Tepeyac v. Montgomery Cnty., 779 F. Supp. 2d 456, 463 (D. Md. 2011), *aff'd in part, rev'd in part*, 683 F.3d 591 (4th Cir. 2012).

71. At least one court considered the "commercial context" of the speech of a CPC in determining its speech to be commercial. *See* Fargo Women's Health Org., Inc. v. Larson, 381 N.W.2d 176, 181 (N.D. 1986).

72. For example, poverty is one of the most significant barriers preventing women's access to prenatal services. *See* John L. Kiely & Michael D. Kogan, *Prenatal Care*, *in* FROM DATA TO ACTION: CDC'S PUBLIC HEALTH SURVEILLANCE FOR WOMEN, INFANTS, AND CHILDREN 105, 108 (Ctrs. for Disease Control & Prevention ed., 1994), *available at* http://www.cdc.gov/reproductivehealth/ProductsPubs/DatatoAction/pdf/rhow8.pdf.

73. *E.g.*, Evergreen Ass'n v. City of N.Y., 801 F. Supp. 2d 197, 205 (S.D.N.Y. 2011) (citing O'Brien v. Mayor of Balt., 768 F. Supp. 2d 804, 814 (D. Md. 2011), *aff'd sub nom.* Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt., 683 F.3d 539 (4th Cir. 2012)).

74. *See id.*

are thus overcautious to avoid characterizing *A* as commercial instead of recognizing that the problem might be with the definition itself.[75]

The concern with overinclusiveness also animated one court's third underlying concern, the seemingly ideological nature of the speech in question. The district court in Maryland rejected the city of Baltimore's attempt to analogize the regulation to regulation of other advertisements, with the court contrasting the "highly commercial" interests affected by, for example, attorney fee advertisements with the noneconomic interests affected by the topics of abortion and birth control.[76]

Again, the lower court's attempt at categorical application of the economic interests definition failed. First, while abortion may be an ideological issue for most Americans, it is also a practical, often economic, issue for women.[77] Second, an abortion provider advertising services or a pharmaceutical company hawking a particular brand of contraception undoubtedly engages in commercial speech;[78] *Bolger* itself involved a contraceptive manufacturer's challenge to a federal prohibition on mail ads for contraception. Though the speech was related to the "ideological" issue of contraception, the Supreme Court considered it commercial.[79]

Categorical application of the commercial transaction and economic interests definitions thus poses two overarching problems: the Supreme Court evidently intended these definitions to outline only the core of commercial speech, and they are difficult or impossible to apply coherently. The definitions offer no guidance to courts seeking to, first, establish the motives of either the speaker or audience, and second, consider the mixed motives of one party or the disparate motives of both. Further, they cause courts to be overly cautious in characterizing speech as commercial for fear of expanding the ostensibly bright lines around speech "proposing a commercial transaction." Additionally, the definitions drive courts to separate commercial speech from noncommercial speech based on specious, content-based categories, at least in the case of contraception and abortion.

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75. This dovetails with commentators' concerns regarding over- and underinclusiveness. *See supra* note 67 and text accompanying notes 64–67.

76. *See* O'Brien v. Mayor of Balt., 768 F. Supp. 2d 804, 814 (D. Md. 2011), *aff'd sub nom.* Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt., 683 F.3d 539 (4th Cir. 2012). The court was referring to Supreme Court cases characterizing attorney fee advertising as "commercial." *See, e.g.*, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985).

77. Approximately one in three American women will have an abortion in her lifetime. *See* GUTTMACHER INST., IN BRIEF: FACTS ON INDUCED ABORTION IN THE UNITED STATES 1 (2011), *available at* http://www.guttmacher.org/pubs/fb_induced_abortion.pdf. One study found that 73 percent of the women surveyed cited an inability to afford one or more children as a reason for pregnancy termination. *See* Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSP. ON SEXUAL & REPROD. HEALTH 110, 112 (2005).

78. *See* Bigelow v. Virginia, 421 U.S. 809, 818–26 (1975) (acknowledging that abortion advertisements constitute commercial speech).

79. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 68 (1983).

B. *A More Administrable Alternative to the Core Definitions Alone*

The factor-based definition developed in *Bolger* offers a workable alternative to the core definitions alone. In addition to setting out the commercial transaction test, the *Bolger* Court offered an alternative way to define commercial speech. After concluding that most of the speech in question in that case constituted "core" commercial speech doing "no more than propos[ing] a commercial transaction,"[80] the Court observed that some of the speech also went well beyond this core:

> The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech. Similarly, the reference to a specific product does not by itself render the pamphlets commercial speech. Finally, the fact that Youngs has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech. The combination of all these characteristics, however, provides strong support for the District Court's conclusion that the informational pamphlets are properly characterized as commercial speech.[81]

The Court thus considered several factors in its analysis of whether the speech was commercial: (1) whether the speech was an "advertisement," (2) whether the speech referred to a specific product, and (3) whether the speaker had an "economic motivation" for engaging in the speech.[82] It later considered a fourth factor in concluding that this combination overcame any concern that the speech in question was linked to "important public issues."[83] While no factor was dispositive or even necessary, each helped the Court assess speech beyond the limits of "pure" commercial speech proposing a commercial transaction.

Lower courts' insistent reliance on the core definitions is perplexing, since, as noted in Part I, the Court has made clear that some speech beyond the "core" of commercial speech may nevertheless be commercial, and the multifactor *Bolger* definition is the only test the Supreme Court has used to characterize speech beyond this core.[84] At least where the core definitions alone fail, courts should rely on the *Bolger* factor-based approach.[85] Ideolog-

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80. *Id.* at 66–67 (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 762 (1976)).

81. *Id.*

82. *Id.*

83. *Id.* at 66–68.

84. *Id.* The Court also often speaks of the "commonsense distinction" between commercial and noncommercial speech. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562 (1980); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978). This conclusory characterization does not constitute a "definition," however, and the Court typically considers other factors. *See, e.g.*, *Cent. Hudson*, 447 U.S. at 562.

85. Although some courts have questioned the continued applicability of the *Bolger* definitional approach, *e.g.*, Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 710 (9th Cir. 1999), *vacated en banc*, 220 F.3d 1134 (9th Cir. 2000), the Supreme Court continues to cite the approach favorably. *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S.

ical or doctrinal preferences for increasing or decreasing commercial speech protection aside, the Court has clearly expressed that the economic interests and commercial transaction definitions are useful in distinguishing only "pure" commercial speech.[86]

This factor-based approach is not only strongly recommended by precedent; it also offers significant administrability advantages relative to the core definitions alone. First, where the motives of speaker and audience appear mixed or disparate, the factor-based test allows courts to account for them both, weighing, for instance, Shakespeare's pecuniary as well as artistic interests.[87] Further, the fact that no one factor is dispositive or even necessary at least theoretically invites courts to consider disparate motives. Second, the flexibility of the test allows courts to avoid undesirable results and overinclusivity problems. With a factor-based test, courts should have less anxiety about expanding the "box" of speech "proposing a commercial transaction." Following *Bolger*, courts could also consider the ideologically charged issues of contraception and abortion alongside the practical, economic realities of their use.

The *Bolger* factor-based definition nonetheless poses potential disadvantages.[88] In application, lower courts may treat each factor as confusedly and as categorically as they treat the core definitions. For example, as to the first factor, courts may treat the term "advertisement" as mechanically as they now treat "speech proposing a commercial transaction."[89] More fundamentally, a worry with any factor-based test is that its flexibility offers little notice to speakers and limited guidance to courts. A balancing test may allow courts to place a thumb on the scale, particularly where there are ideological preferences in favor of affording commercial speech full or no protection. This may be doubly true in the context of the contentious issues of pregnancy and abortion.

410, 422–23 (1993). Courts are unlikely to abandon the core definitions altogether, but they can work in conjunction with the *Bolger* definition, as in *Thomas v. Anchorage Equal Rights Commission*. Where the speech is non-core but nevertheless potentially commercial, the court should apply the *Bolger* factor-based approach. *See, e.g.*, Am. Future Sys., Inc. v. Pa. State Univ., 752 F.2d 854, 861–62 (3d Cir. 1984); *see also infra* text accompanying note 88.

86. Perhaps lower courts follow the Supreme Court in using the core definitions to mask surreptitious consideration of the "social meaning" of the speech in question. *See* Post, *supra* note 27, at 18.

87. The "advertisement" factor incorporates the listener's interests, although the *Bolger* factor-based approach does not otherwise explicitly address the listener. *See infra* Part III.

88. *See* Nathan Cortez, *Can Speech by FDA-Regulated Firms Ever Be Noncommercial?*, 37 AM. J.L. & MED. 388, 389 (2011) ("This test capably distinguishes paradigmatic examples of commercial and noncommercial speech. But it is unsatisfactory when categorizing less traditional or even mixed speech . . . ."). Cortez, however, does not clarify what is meant by "unsatisfactory" nor does he cite any cases for the proposition. Further, Cortez evidently does not consider the *Bolger* test relative to others. Lower courts that have used the *Bolger* test, at least, consider its application "satisfactory." *See, e.g.*, *Am. Future Sys. Inc.*, 752 F.2d at 862. Even those courts that have expressed skepticism or wariness at the continuing applicability of the *Bolger* test have evidently applied it without disparaging its administrability. *See, e.g.*, *Thomas*, 165 F.3d at 709–12.

89. *See supra* text accompanying note 75.

None of these disadvantages is fatal. First, as demonstrated by the CPC cases, the existing core definitions already leave speakers ill equipped to predict whether their speech will be protected, and they provide little guidance to courts.[90] Further, the administrability of each *Bolger* factor suggests that, if anything, some speakers and courts would have more notice as to what kind of speech is commercial. For example, asking whether the speech is an "advertisement," assuming that term retains its commonsense meaning, is more straightforward than asking whether speech proposes a commercial transaction. Additionally, the factor-based test is compatible with the current core definitions used by many lower courts. The core definitions could form a starting point as they did in *Bolger* itself.[91]

Finally, the fact that the *Bolger* definition directly confronts the question of contentious "important public issues" suggests that the *Bolger* factor-based approach is less susceptible to tacit ideological preferences than the core definitions alone. On the one hand, this factor could serve as an invitation to courts to consider ideological preferences in deeming some issues "important" and others "unimportant." On the other, the core definitions alone may already obscure such considerations.[92] In nodding at political or ideological speech, generally the most sacrosanct category of fully protected speech, this factor at least forces transparency.[93] By requiring overt discussion of ideologically fraught issues, this factor may also incentivize evenhanded consideration of otherwise implicit preferences.

Those courts that have applied the *Bolger* factors have capably used the definition to distinguish non-core commercial speech from noncommercial speech. In *American Future Systems, Inc. v. Pennsylvania State University*, for example, the Third Circuit avoided the in-or-out strictures of the core definitions by applying the *Bolger* factor-based approach.[94] The court rejected a challenge to a university's solicitation policy brought by a company seeking to host Tupperware party–style events in college dorms.[95] The court reversed the lower court's holding that because the product demonstrations

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90. For a survey of cases reaching disparate and sometimes contradictory results, a problem "stemming at least in part from the Supreme Court's propensity to apply the basic 'commercial proposal' commercial speech definition more broadly and without much helpful analysis," see STEVEN G. BRODY & BRUCE E.H. JOHNSON, ADVERTISING AND COMMERCIAL SPEECH: A FIRST AMENDMENT GUIDE § 2.3 (2d ed. 2012).

91. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66–67 (1983).

92. *See supra* note 86.

93. This factor is also reminiscent of the long-established First Amendment distinction between content-based and viewpoint-based regulations, in that courts should consider the content, but not the viewpoint, in assessing the presence of an "important public issue." Courts are accustomed to this distinction. *But cf.* Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 50–51 (2000) (arguing that the Court has improperly developed and applied the content-neutrality principle).

94. *See* 752 F.2d 854, 862 (3d Cir. 1984).

95. *Am. Future Sys*, 752 F.2d at 856–58, 867.

had educational and social value, they were noncommercial.[96] With the commercial transaction definition alone, for example, the court might have concluded that most of the speech was educational, with a commercial transaction proposed only at the end of the interaction. Instead, the court held that since "the speech . . . [was] essentially an advertisement" and "it specifically refer[red] to [the company's] products, and [the company's] motivation for engaging in the speech [was] purely economic," the speech was undoubtedly commercial.[97] Despite the transparently commercial nature of the speech, reliance on the nomenclature of "commercial transaction" alone might have achieved a different and less logical result.

The factor-based definition functions particularly effectively in less clear-cut cases. In *Procter & Gamble Co. v. Amway Corp.*, for example, the Fifth Circuit tackled a long-running rumor, allegedly spread by Amway, that Procter & Gamble supported or associated itself with Satanism.[98] Like the CPC cases, *Amway* involved an ideologically driven organization (Amway) and an ideological issue (religion) in a commercial context.[99] An allegation of Satanism does not propose a commercial transaction, nor is it related *solely* to the economic interests of the speaker or the audience. To the contrary, the rumor relates to religion and social mores, which traditionally are fully protected areas of speech. But the speech in question (an internal voicemail perpetuating the rumor that was forwarded to distributors and which distributors then cited in fliers offering Amway products as alternatives) mentioned specific products, and in that sense, was an advertisement. The court remanded for a factual determination on the third *Bolger* factor—whether commercial interests motivated Amway to spread the rumor—thus leaving open the possibility that the speech would be deemed commercial.[100] The court's nuanced analysis would have been impossible with the core definitions alone.

For better or worse, many state and lower courts have carried on with the core definitions alone, and the Supreme Court has declined to correct them.[101] In terms of functionality, the commercial transaction and economic

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96. *See id.* at 861–62.

97. *Id.* at 862.

98. 242 F.3d 539, 542–44 (5th Cir. 2001).

99. Sociologists have described Amway as a "quasi-religious" organization with a conservative political agenda. *See* David G. Bromley, *Quasi-Religious Corporations: A New Integration of Religion and Capitalism?*, *in* RELIGION AND THE TRANSFORMATIONS OF CAPITALISM: COMPARATIVE APPROACHES 135, 142–53 (Richard H. Roberts ed., 1995); Rachel Burstein & Kerry Lauerman, *She Did It Amway*, MOTHER JONES, Sept./Oct. 1996, at 48.

100. *Amway*, 242 F.3d at 552.

101. *See* Kasky v. Nike, Inc., 45 P.3d 243 (Cal. 2002), *cert. granted*, 537 U.S. 1098, *cert. dismissed as improvidently granted*, 539 U.S. 654 (2003) (declining an opportunity to reconsider commercial speech definitions in false advertising cases). The Court's reluctance to wade into the fray indicates that any clarification is likely to be incremental. For a sample of the criticism of the California court's approach, see Thomas C. Goldstein, Nike v. Kasky *and the Definition of "Commercial Speech"*, 2002–2003 CATO SUP. CT. REV. 63, 64, and William Warner Eldridge IV, Case Note, *Just Do It:* Kasky v. Nike, Inc. *Illustrates that It Is Time to Abandon the Commercial Speech Doctrine*, 12 GEO. MASON L. REV. 179 (2003).

interest definitions are deeply flawed when applied beyond the "core" of commercial speech, while a factor-based test affords needed flexibility and nuance despite some limitations. Ease or consistency of application, however, is not the only concern that should inform adoption or rejection of the various commercial speech definitions. Does the factor-based definition serve the underlying rationale of drawing a line between commercial and noncommercial speech? The next Part attempts to answer this question through an examination of the principles that afford commercial speech some, but limited, protection.

III. First Principles and the *Bolger* Factor-Based Approach

This Part considers the *Bolger* factor-based definition alongside the traditionally stated rationale for commercial speech protection, concluding that the factor-based approach serves the underlying theory of commercial speech. The Court has identified three primary characteristics that justify and limit protection for commercial speech. The factor-based definition capably identifies speech that possesses each of these characteristics. Section III.A argues that the factor-based approach distinguishes speech that serves the audience interest in the free flow of information. Section III.B contends that the test capably identifies speakers able to verify the speech. Finally, Section III.C argues that the *Bolger* approach serves the rationale that a speaker's commercial self-interest will render her speech "hardy." Considering commercial speech at this level of generality does not suggest that all commercial speech cases should be decided by this return to first principles. But since the definitions used by courts fail in many respects, as explained in Part II, such a return illuminates the usefulness of the alternative factor-based definition.

A. *Audience Interest*

The informational value of commercial speech is the primary justification for affording it any protection at all.[102] In moving away from the commercial speech exception suggested or established by *Chrestensen*, the Court has justified protection of commercial speech on the basis of its similarities to noncommercial speech:

> As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate . . . .

102. *E.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563 (1980).

> . . . Generalizing, society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely "commercial," may be of general public interest.[103]

In *Virginia State Board of Pharmacy*, for example, the Court struck down a ban on advertising pharmaceutical prices, reasoning that the audience had a significant interest in finding affordable medication.[104] The audience's interest in the type of information that, for example, advertisements communicate justifies affording commercial speech some level of protection.[105]

Though this rationale expanded protection for commercial speech, it is also fundamentally a limiting principle.[106] Commercial speech is protected because of its similarity to ideological speech and *in spite of* its differences. Unlike ideological speech, which serves a host of interests, commercial speech is only sometimes—and then only to a certain extent—valuable. The Court has not, for example, suggested that commercial speech inherently furthers democratic self-governance or the fulfillment of individual potential, classic rationales for political or ideological speech protection, at least not to the extent noncommercial speech does.[107] The primary rationale for protecting commercial speech thus focuses above all else on the significant but limited interests of the listener.[108] Any definition of commercial speech should serve this principle, effectively determining whether the speech in question serves this interest.[109]

The first factor in the *Bolger* definition, whether the speech is an "advertisement[],"[110] inherently serves the audience's significant-but-limited interest in the free flow of information. The information it contains, like prescription medication prices, is important to the audience as consumers, but not to the audience as participants in a democratic society or as political actors. Advertisements do not usually contain types of expression important

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103. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976). For the argument that the Court overstated the value of the listener's interest in commercial information, see Farber, *supra* note 65, at 379–80.

104. 425 U.S. at 763–64, 770.

105. For a criticism of this rationale, see Jackson & Jeffries, Jr., *supra* note 29.

106. Professor Halberstam, for example, has characterized the Court's interpretation of the First Amendment to protect commercial speech *only* where it "enable[s] listeners to receive valuable 'information' about the market." Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 775–76 (1999).

107. *See, e.g.*, Friedman v. Rogers, 440 U.S. 1, 10 (1979). On the self-governance theory, see generally ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948). On fulfillment of individual potential, see MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 21 (1984).

108. Many cases follow this pattern, considering listeners' and society's interests in turn. *See, e.g.*, Linmark Assocs. Inc. v. Twp. of Willingboro, 431 U.S. 85, 92 (1977).

109. Such a consideration need not result in line-drawing between commercial speech in the public interest and commercial speech that is less important to the public interest. *See Va. State Bd. of Pharmacy*, 425 U.S. at 765.

110. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66–67 (1983).

for other reasons, but if, like the contraceptive pamphlets in *Bolger*, they do, the court can consider this factor alongside the fourth factor—whether the speech pertains to an important public matter.[111]

At first blush, the "advertisement" factor alone seems to offer little more than the core definitions, but the question of whether the speech is an advertisement more effectively operationalizes the audience's interest than either of the core definitions. On the one hand, the advertisement is the paradigmatic example of commercial speech,[112] clearly covered by both the commercial transaction and the economic interests definitions. But although the core definitions include "advertisements," the question of whether the speech is an advertisement offers some advantages. First, unlike the question of whether the speech "proposes a commercial transaction," the advertisement factor is merely one nondispositive factor among several others. Thus, courts avoid anxiety about expanding the category of what "proposes a commercial transaction."[113] Further, it recognizes as commercial speech that which does not offer a "transaction" per se but is nevertheless an "advertisement" in which the audience interest is limited (for example, where a store advertises a "grand opening" event or a free sample of a product). As discussed in Part II, the inquiry is also more administrable than asking whether the speech in question pertains solely to the economic interests of the speaker and the audience, a question the CPC courts evidently considered unworkable, undesirable, or irrelevant.[114]

B. *Speaker Verification*

In addition to reduced audience interests, a primary reason for affording commercial speech less protection than noncommercial speech is its verifiability.[115] Commercial speakers are "well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity" because of their "extensive knowledge of both the market and their products."[116] In other words, the presumptive expertise of some speakers imbues them with a higher level of responsibility for ensuring that the speech is truthful and not misleading. This rationale suggests that definitions of commercial speech should consider the identity of the speaker. Courts should approach this factor cautiously, since this characteristic assumes that the commercial speaker is speaking on a factually verifiable matter. A statement of belief, even if

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111. Further, speech "does not retain its commercial character when it is inextricably intertwined with the otherwise fully protected speech." Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 782 (1988); *see also id.* at 795–96.

112. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 495 (1996) (using the terms "advertising" and "commercial speech" interchangeably).

113. *See supra* text accompanying note 75.

114. *See supra* Part II.

115. This term is borrowed from Farber, *supra* note 65, at 385.

116. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 n.6 (1980).

from an expert commercial speaker, is inherently subjective and unverifiable.

The second *Bolger* factor, whether the speech refers to a specific product or service,[117] serves the verifiability rationale. A speaker talking about a given product is presumably a creator, seller, or purveyor of that product. She is thus best placed to know whether the things she says about the product are true.[118] Further, a statement about a product, rather than, for example, a company's ethos, is more likely to be a factually verifiable statement. This element thus considers the identity of the speaker without assuming, for example, that all corporations engage in commercial speech all the time.[119]

The most significant disadvantage of the product factor is not a disadvantage of the factor per se, but rather of the rationale. Creators and sellers of products often face uncertainty about a product's safety or efficacy. Reliable, peer-reviewed studies are expensive and difficult to orchestrate. Even where a product is repeatedly and rigorously tested, uncertainty may persist.[120] The risks and benefits of the hormonal contraceptive pill, for example, have flung it in and out of public favor since its creation.[121] This problem, however, is with the verifiability rationale, not the product factor.[122] Foundational concerns with the verifiability rationale aside, the product factor effectively serves this rationale as part of a multifactor test.

C. *Durability*

Finally, courts reason that commercial speech should be afforded less protection than other forms of speech because of its durability. "[C]ommercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation.' "[123] In other words, the same concerns about deterring freedom of expression that might apply in the context of ideological speech apply less readily in the commercial speech context. A speaker's

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117. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66–67 (1983). For more information on products and services, see *supra* note 63.

118. Other areas of the law reflect this idea. Tort law, for example, holds all direct and indirect sellers of an unreasonably dangerous product liable for injuries caused by the product. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965).

119. This conforms to current commercial speech doctrine. *See, e.g.*, Cent. Me. Power Co. v. Pub. Utils. Comm'n, 734 A.2d 1120, 1126 (Me. 1999). Much of the criticism of the California Supreme Court's *Kasky* decision pertains to this concern. *See supra* note 101.

120. Despite ample scientific evidence to the contrary, expert scientists have defended the health benefits of, for example, boxing, unprotected sex, and smoking. *See* Ian Sample, *Smoking Is Good for You*, GUARDIAN, Aug. 6, 2003, http://www.guardian.co.uk/lifeandstyle/2003/aug/07/shopping.health.

121. *See* Amanda Schaffer, *The Pill, a Rock Opera*, SLATE (Jan. 29, 2008, 4:59 PM), http://www.slate.com/articles/health_and_science/medical_examiner/2008/01/the_pill_a_rock_opera.html.

122. *See* Farber, *supra* note 65, at 385–86.

123. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 n.6 (1980).

commercial self-interest in speaking should overcome her concerns about suppression, so that a chilling effect is unlikely. For example, false advertising restrictions are unlikely to deter companies from advertising since they have a profit motive to continue promoting their products up to the bounds of regulation. By contrast, if political candidates were subject to equivalent "false advertising" regulations, candidate debates would become obsolete. An ideological speaker is more sensitive to speech restrictions and more likely to be deterred from speaking at all.

The third *Bolger* factor, whether the speaker has an "economic motivation" for engaging in the speech, serves this "hardiness" rationale.[124] As discussed in Part II, mixed motives may create challenges in administering this factor, but the economic motivation factor most explicitly serves the underlying rationale by directly considering the economic self-interest of the speaker.[125] The more a speaker is motivated by remuneration, the greater the chance that profit motives will overcome chilling concerns. Even if the process of determining a speaker's motives poses some administrability problems, the final *Bolger* factor reinforces this first principle.

The final *Bolger* consideration, whether the speech is linked to "important public issues," also serves the hardiness rationale.[126] Where even otherwise commercial-looking speech addresses an ideologically fraught issue, courts should handle that speech gingerly lest noncommercial speech on that issue be stifled. As explained in Part II, however, many "important public issues," such as contraception and abortion, are also practical, "economic" issues for many people.[127] The arguable overrepresentation of cases related to contraception and abortion in Supreme Court commercial speech jurisprudence reflects this tension.[128] Again, however, the question is but one nondispositive consideration, allowing courts to find, for example, that even though contraception may be an important public issue, it is also an FDA-approved medication available for purchase like any other product.

IV. Applying the *Bolger* Factor-Based Approach to the CPC Cases

The CPC cases demonstrate the necessity, administrability, and utility of the *Bolger* factor-based approach. First, a factor-based definition is neces-

124. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67–68 (1983).

125. For a criticism of the durability rationale, see Farber, *supra* note 65, at 385–86. Farber and other commentators have criticized the durability rationale on the basis that the ideological speech of a fanatic is arguably hardier than some commercial speech. Nonetheless, courts have reasoned that commercial speakers are generally more willing than ideological speakers to push against the limits of a regulation without responding as readily to chilling effects. *See* Bates v. State Bar of Az., 433 U.S. 350, 383 (1977) ("Since the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech.").

126. *See Bolger*, 463 U.S. at 67–68.

127. *See supra* note 77 and accompanying text.

128. *See, e.g.*, *Bolger*, 463 U.S. at 60; Carey v. Population Servs. Int'l, 431 U.S. 678, 700 (1977) (contraception advertisements); Bigelow v. Virginia, 421 U.S. 809 (1975) (abortion advertisements).

sary in structuring courts' analysis of the CPCs' speech since such speech probably falls outside of "pure" commercial speech.[129] As in *Bolger*, the CPCs' speech "cannot be characterized merely as proposals to engage in commercial transactions."[130] The records in the CPC cases do not indicate, for example, that the regulated CPCs sell goods or services.[131] The colorable commercial speech claim and the Supreme Court's clear indication that some commercial speech exists outside "pure" commercial speech bounds, however, requires structured analysis beyond the core.[132]

The *Bolger* factor-based approach helpfully structures consideration of the speech in the CPC cases, providing a readily administrable tool for analysis of the CPCs' speech.[133] Take, for example, the New York regulation.[134] The first two factors—whether the speech in question is an "advertisement" and whether the speech refers to a specific product—immediately highlight a crucial issue: the New York CPC regulations affect significantly different types of CPC speech. They require disclaimers on advertisements as well as on-site warnings.[135] Where the CPCs engage in advertising (the first factor) of particular goods and services (the second factor), such as free pregnancy tests and pregnancy options counseling, the *Bolger* factors militate heavily in favor of considering that speech "commercial" for the purposes of analyzing the regulation.[136] This inquiry satisfies intuitions about what "looks" like commercial speech: the CPCs' advertisements of goods and services appear superficially indistinguishable from the speech of any other business.[137] As such, the advertising regulations are similar to others held to regulate only commercial speech.[138] Where the CPC is required to post a sign in its office indicating whether it provides or refers for abortion services, however, the regulation is

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129. *See supra* Part II.

130. *See Bolger*, 463 U.S. at 66.

131. *See* cases cited *supra* note 20.

132. *See supra* Part I.

133. Because the category of CPCs includes a wide variety of organizations engaged in many different types of speech, the question arises as to *which* speech to analyze. The CPC courts and this Note consider the speech in which CPCs generally engage. *See, e.g.*, Tepeyac v. Montgomery Cnty., 779 F. Supp. 2d 456, 464 (D. Md. 2011), *aff'd in part, rev'd in part*, 683 F.3d 591 (4th Cir. 2012).

134. N.Y.C., N.Y., Local Law No. 17 (Mar. 16, 2011); *see supra* text accompanying notes 16–18.

135. N.Y.C., N.Y., ADMIN. CODE § 20-816(f)(1) (current as of Aug. 28, 2012), *available at* http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=$$ADC20-816$$@TXADC020-816+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=56536113+&TARGET=VIEW.

136. At least one court found such advertisements to be commercial speech subject to false advertising regulations. *See* Fargo Women's Health Org., Inc. v. Larson, 381 N.W.2d 176, 181 (N.D. 1986).

137. Except insofar as the goods and services are free. *But see supra* notes 60–63 and accompanying text.

138. *See* Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1339 (2010).

more likely to affect the CPCs' day-to-day ideological speech and thus fall outside the scope of commercial speech.[139]

The third and fourth *Bolger* factors provide equally administrable inquiries that mitigate in the opposite direction of the first two factors. The CPCs do not have an "economic motivation" for engaging in speech, suggesting that the "hardiness" typical of commercial speech is absent. Their antiabortion, pro-childbirth agenda falls squarely within the bounds of traditionally fully protected, ideological speech. This also satisfies intuitions about commercial speech: in the privacy of the office, a CPC counselor's engagement with a pregnant woman appears far less commercial than advertisements.[140] Additionally, the CPCs' speech is undoubtedly linked to the "important public issues" of abortion and contraception, giving the speech an ideological patina. Those issues are, however, also practical, economic issues for CPC clients.[141] Given the underlying rationale of commercial speech doctrine, this final *Bolger* factor suggests that courts handle this presumably less hardy speech with care. The clients' practical interests, however, likewise suggest that this factor not be dispositive.[142] Furthermore, in *Bolger* itself, the Court reasoned that the commercial nature of the first three factors overcame concerns as to the fourth factor.[143] Because the CPC advertising regulations affect speech that directly addresses clients' practical interests (e.g., "Access our free services!") rather than the ideological interests of either speaker or listener, this factor militates in favor of finding at least the advertisements to be commercial.

If the courts had characterized the CPC advertisements, but not their in-office speech, as commercial, the regulations requiring advertising disclaimers would be upheld, at least insofar as CPCs engage in deceptive or misleading speech. Under *Central Hudson*, regulation of misleading or deceptive CPC advertisements is constitutional because governments may simply ban deceptive or misleading commercial speech outright.[144] CPCs that do not offer abortions yet advertise in the "abortion" section of the Yel-

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139. The regulations variously require signs on the front door and in the waiting room. *See supra* notes 17–18. Since CPCs attempt to attract clients by setting up in storefronts near abortion providers, however, there is an argument that front-door signs constitute speech more akin to "advertising." *See supra* note 9. The Court has suggested that regulation of "onsite" versus "offsite" advertisements may be constitutionally distinguishable, at least in applying the *Central Hudson* test. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 508 (1981) (plurality opinion).

140. *But see* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 457 (1978) (holding that in-person solicitation for legal services may be regulated more readily than generic attorney advertisements). *Ohralik* is distinguishable from the CPC cases for a variety of reasons, but it suggests that the Court is willing to consider one-to-one solicitations just as "commercial" as printed advertisements.

141. *See supra* note 77.

142. The *Bolger* test itself rejects the notion that any one factor is dispositive. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983).

143. *Id.* at 66–68.

144. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980).

low Pages, for example, engage in deceptive speech.[145] Even if the courts found that some CPCs engaged in nonmisleading, nondeceptive advertising, the mere potential to mislead would still require courts to sustain the regulation.[146] Further, the Supreme Court has suggested that disclaimers and other forms of compelled speech may raise fewer First Amendment concerns than prohibitive regulations in the commercial speech context.[147]

The CPC cases demonstrate the necessity and utility of the *Bolger* factor-based test. On the one hand, the speech of CPCs is unique, in that the ideological motivations of the speaker may vary sharply from the nonideological considerations of the listeners. On the other hand, the CPC cases are similar to many other potential commercial speech cases. Like *Amway* and *American Future Systems*, the CPC cases involve speech that requires nuanced consideration that cannot be accomplished using the limited, categorical commercial speech definitions alone. That said, the flexibility of the *Bolger* definition carries the risk of unpredictability. Although the *Bolger* factors are independently administrable in the CPC cases, they still leave courts to weigh opposing interests. That risk, however, is worth the benefit of a nuanced, structured, internally logical inquiry that the core definitions alone cannot supply.[148] Further, each element of the structured inquiry does provide speakers and lawmakers with some additional notice. For example, lawmakers concerned about CPC deception could focus their attention on regulations of CPC advertisements rather than waiting room signage since the latter might interfere with protected speech. The *Bolger* definition thus affords a finer-toothed comb than the blunt, in-or-out core definitions alone.

CONCLUSION

The *Bolger* factor-based definition of commercial speech, used independently or in conjunction with definitions that identify the "core" of commercial speech, is both necessary and more administrable than the core definitions alone. Additionally, the *Bolger* definition serves fundamental principles of commercial speech doctrine and provides helpful guidance in the CPC cases and beyond. The CPC courts' incorrect and mechanistic misapplication of these core definitions is representative of lower courts' frequent confusion of "pure" commercial speech with its limits. The core definitions yield inconsistent and illogical results, at least in the context of the CPC cases. Since the Supreme Court has indicated that commercial speech may exist beyond the "core," courts should use the other available commercial speech definition supplied in *Bolger*. The *Bolger* factor-based definition offers advantages in administrability and capably identifies characteristics of commercial speech that have historically afforded it less, but

145. WAXMAN REPORT, *supra* note 2, at 3.

146. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 652–53 (1985).

147. *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 772 n.24 (1976).

148. *See supra* Part II.

some, protection. The courts should integrate this definition into future commercial speech jurisprudence.