Consumer Protection and the First Amendment: A Dilemma for the FTC

Robert B. Reich

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
Consumer Protection and the First Amendment: A Dilemma for the FTC?

Robert B. Reich*

Truth in advertising is like leaven, which a woman hid in three measures of meal. It provides a suitable quantity of gas with which to blow out a mass of crude misrepresentation into a form that the public can swallow.

—Dorothy L. Sayers, *Murder Must Advertise*

Section 5(b) of the Federal Trade Commission Act directs the Commission to prevent any "unfair or deceptive act or practice in or affecting commerce." But neither the statute nor its legislative history defines "unfair or deceptive," and Congress has not clarified this extraordinarily broad legislative mandate or furnished criteria by which to appraise the success of the Commission's activities in this area. Nor have the courts stepped into the breach. Perhaps out of understandable reluctance to supply legislative-type standards where Congress avoided any hint of a standard, or because the goal of preventing unfairness or deception has not appeared to be sharply at odds with any other specific statutory or constitutional interest,

* Director, Office of Policy Planning and Evaluation, Federal Trade Commission.

I wish to thank my colleagues Richard Herzog, Darius Gaskins, Dennis Murphy, Tom Sugrue, Beverly Purdue, and Clare Dalton for their helpful comments. The views expressed in this article are my own, and should not be taken to represent the views of the Federal Trade Commission or any individual Commissioner.


2. The legislative history of the Federal Trade Commission Act indicates that Congress intended section 5(b) to serve as a flexible tool in the hands of the FTC. Senator Thomas, in commenting on the broad language of section 5(b), stated:

[U]nfair competition, like fraud, is a creature of protean shapes. It assumes one attitude to-day and another to-morrow. As with fraud, so will it be with unfair competition. In fraud there is a constant race between the rogue and the chancellor. In unfair competition there is going to be a constant race between the corporation and the commission . . . .

51 Cong. Rec. 11,598 (1914). See also 51 Cong. Rec. 11,084 (1914) (remarks of Senator Newlands); S. Rep. No. 597, 63d Cong., 2d Sess. 13 (1914).

For a description of the activities of the FTC in applying section 5(b) to deceptive advertising, see Developments in the Law—Deceptive Advertising, 80 Harv. L. Rev. 1008, 1019-1101 (1967).
courts have generally deferred to the Commission's findings of fact and choices of remedy. 3 Indeed, given the breadth of the Commission's area of responsibility, judicial review has played a surprisingly small role in defining the law of deception and unfairness and demarcating the extent to which protection of consumers must give way to competing interests.

It has therefore come as something of a rude shock for the Commission suddenly to learn from the Supreme Court that the first amendment protects commercial speech. Although the Court in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council 4 was especially solicitous of government regulation aimed at preventing deception, the elevation of commercial speech to first amendment status nevertheless suggests both a boundary to that regulation and a standard against which it must be measured. Lurking within the notion that the first amendment guards commercial speech is the veiled suggestion, already followed by at least one court of appeals, 5 that the courts must scrutinize Commission action more strictly to prevent unnecessary interference with constitutionally protected speech.

This turn of the law and the dilemma it poses for the Commission are particularly ironic in light of the Commission's recent scrutiny of state laws restricting advertising in certain occupations. In its investigations of state advertising restrictions relating to prescription drugs, 6 ophthalmic goods and services, 7 the funeral industry, 8 and medical services, 9 the Commission has taken the position that such restrictions may be unfair if they are not necessary to maintain high professional standards or to achieve other important state goals. 10 The Commission has

3. See notes 13-33 infra and accompanying text.
5. See Beneficial Corp. v. FTC, 542 F.2d 611, 618-20 (3d Cir. 1976), cert. denied, 97 S. Ct. 1679 (1977); text accompanying notes 62-69 infra.
10. The Commission's staff has proffered the view that such advertising bans constitute an unfair trade practice because, inter alia, their "economic and social utility to the public is substantially less than..."
thereby invoked a variation of an old first amendment theme: the state must fulfill its valid interests by means that impose the least possible restriction upon speech.\textsuperscript{11} At first blush it would seem somewhat hypocritical, if not downright arrogant, for the Commission on one hand to exhort state legislatures to tailor their regulation of commercial speech as narrowly as possible, yet at the same time to guard its own prerogatives to broadly remedy unfairness or deception.\textsuperscript{12}

The purpose of this Article is to offer a basis for reconciling these apparent contradictions. That the Commission's decision making must now accommodate the first amendment does not lead invariably to the conclusion that the courts should scrutinize those decisions more carefully and limit the Commission's discretion. Nor does it suggest that the Commission should be bound to practice what it preaches to the states and refrain from broadly "fencing in" proven violators. Instead, in the following discussion I suggest that the Commission should be left to accomplish the task that Congress gave it, and that if it does so successfully, it will necessarily fulfill its constitutional responsibilities as well.

I. COMMERCIAL SPEECH UNDER THE FTC ACT AND UNDER THE FIRST AMENDMENT: THE NEED FOR ACCOMMODATION

A. The Traditional Role

The courts have long acknowledged the FTC's expertise in discerning and remediing unfair or deceptive acts or practices.\textsuperscript{13}

\textsuperscript{11} See cases cited in note 70 infra.
\textsuperscript{12} See Beneficial Corp. v. FTC, 542 F.2d 611 (3d Cir. 1976), cert. denied, 97 S. Ct. 1679 (1977).
\textsuperscript{13} Commission investigations and inquiries may result from requests of government agencies, complaints by the public, or the initiative of the Commission itself. The Commission has delegated authority to Assistant Directors and Regional Directors to initiate investigations. 16 C.F.R. § 2.1 (1977). When the FTC staff intends to commence a formal investigation, they will notify the evaluation committee, which is composed of attorneys and economists; the committee will attempt to assure that the investigation is cost-effective, and that consumer injury may be substantial. A proposed respondent may be afforded an opportunity to have the matter disposed of by the entry of a consent order prior to completion of the investigation. Id. at §§ 2.14(a), 2.31(a). Proposed consent agreements or staff recommendations to bring an administrative com-
By and large, courts have taken quite literally the scant requirement that Commission fact finding be "supported by evidence" and have often deferred to the Commission's determination that a certain set of facts constitutes an unfair or deceptive act or practice. To find that an advertisement is deceptive, the Commission need not show that there has been an actual deception, but only that the advertisement has the capacity to deceive. In measuring such capacity, the Commission interprets the advertisement as the "average individual" or the "buying public" gen-

plaint are thereafter forwarded to the Commission for approval. Id. at § 3.11 (a). After issuance of a complaint, the matter is heard by an Administrative Law Judge. Id. at § 3.42(a). Upon appeal from or review of an initial decision, the Commission will exercise all powers that it could have exercised had it made the initial decision. Id. at § 3.54(a). If the respondent is found in violation, the Commission will issue a cease and desist order. 15 U.S.C. § 45(b) (Supp. V 1975). Within 60 days from the issuance of the order, the respondent may seek review and the Commission may seek enforcement, of the order in a circuit court. Id. at § 45(e) (1970). If a timely review of the order is not sought by the respondent, the Commission's order becomes final. Id. at § 45(g). A respondent's violation of a final order subjects him to a civil penalty which may be enforced by the Attorney General of the United States. Id. at § 45(l) (Supp. V 1975).

Pursuant to the Magnuson-Moss Warranty Federal Trade Commission Improvement Act of 1975, Pub. L. No. 93-637, tit. II, 88 Stat. 2183 (codified at 15 U.S.C. § 41 et seq. (Supp. V 1975)), the Commission is further empowered to prescribe rules that specifically define acts or practices that are unfair or deceptive, commence civil actions to recover civil penalties in district court against any respondent who violates such rules, and seek redress for injuries to consumers for dishonest or fraudulent acts or practices that were the subject of a cease and desist order.

15. See, e.g., FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965); Resort Car Rental Sys. Inc. v. FTC, 518 F.2d 962, 963 (9th Cir.), cert. denied, 423 U.S. 827 (1975); Doherty, Clifford, Steers & Shenfield, Inc. v. FTC, 392 F.2d 921, 925 (6th Cir. 1968); Libbey-Owens-Ford Glass Co. v. FTC, 352 F.2d 415, 417 (6th Cir. 1965); E.F. Drew & Co. v. FTC, 235 F.2d 735, 740 (2d Cir. 1956), cert. denied, 352 U.S. 969 (1957).
16. E.g., Thiret v. FTC, 512 F.2d 176, 180 (10th Cir. 1975) (false and deceptive advertising of steel siding); Spiegel v. FTC, 494 F.2d 59, 63 (7th Cir.), cert. denied, 419 U.S. 896 (1974) (use of "free trial" and "percent off" in advertising had capacity to deceive); Regina Corp. v. FTC, 322 F.2d 765, 768 (3d Cir. 1965) (fictitious "manufacturer's suggested retail prices" had capacity to deceive); Goodman v. FTC, 244 F.2d 584, 585 (9th Cir. 1967) (fictitious "guild" designation had capacity to deceive); Deer v. FTC, 152 F.2d 65, 66 (2d Cir. 1945) (use of "manufacturing" in trade name had capacity to deceive).
17. E.g., Korber Hats, Inc. v. FTC, 311 F.2d 358, 360-62 (1st Cir. 1962) (average customer would be deceived by use of "Milan" in hat label); Ward Laboratories, Inc. v. FTC, 276 F.2d 952, 954 (2d Cir. 1960), cert. denied, 364 U.S. 827 (1961) (average male customer would be deceived by suggestion that product could cure baldness).
commercial speech

18. Kalwajtys v. FTC, 237 F.2d 654, 656 (7th Cir. 1956).


20. Aronberg v. FTC, 132 F.2d 165, 167 (7th Cir. 1942). See also General Motors Corp. v. FTC, 114 F.2d 33, 36 (2d Cir. 1940), cert. denied, 312 U.S. 682 (1941).

21. Exposition Press, Inc. v. FTC, 295 F.2d 869, 872 (2d Cir. 1961). For example, Judge Augustus Hand's oft-quoted remark that the Commission may, if it "thinks ... best ... insist upon a form of advertising clear enough so that, in the words of the prophet Isaiah, 'wayfaring men, though fools, shall not err therein,'" General Motors Corp. v. FTC, 114 F.2d 32, 36 (2d Cir. 1940), cert. denied, 312 U.S. 682 (1941), should be read in the context of his observation that "[w]hile we do not regard the plan used here as inevitably misleading, we think that in a good many cases it would be ... ." Id. at 35. See also Bantam Books, Inc. v. FTC, 275 F.2d 680 (2d Cir.), cert. denied, 364 U.S. 819 (1960); Charles of the Ritz Distribs. Corp. v. FTC, 143 F.2d 676 (2d Cir. 1944); Aronberg v. FTC, 132 F.2d 165 (7th Cir. 1942).

This principle "loses its validity if it is applied uncritically or pushed to an absurd extreme. ... A representation does not become false and deceptive merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom [it] is addressed." Heinz W. Kirchner [1963-1965 Transfer Binder] TRADE REG. REP. (CCH) ¶ 16,664, at 21,533-40 (1963), aff'd, 337 F.2d 751 (9th Cir. 1964); cf. FTC v. Sterling Drug, Inc., 317 F.2d 669, 676 (2d Cir. 1963) (no violation if the "ordinary" reader, to be misled, must have "not only a careless and imperceptive mind but also a propensity for unbounded flights of fancy").

22. E.g., J. B. Williams Co. v. FTC, 381 F.2d 884, 889 (6th Cir. 1967) (advertisement implies that most tiredness results from iron deficiency anemia); Continental Wax Corp. v. FTC, 330 F.2d 475, 477 (2d Cir. 1964) ("Six Month" floor wax trade name implies that wax lasts six months); Murray Space Shoe Corp. v. FTC, 304 F.2d 270, 272 (2d Cir. 1962) (advertisement implies that shoes have therapeutic value); Charles of the Ritz Distribs. Corp v. FTC, 143 F.2d 676, 680 (2d Cir. 1944) (trade name of "Rejuvenescence Cream" implies that cream will restore youth to skin).
bined as to convey a misleading representation on a casual reading.²³ And the Commission may "decide for itself" whether an advertisement creates such a misleading impression.²⁴

The Commission's findings of unfairness have been similarly treated by the courts. In FTC v. Sperry & Hutchinson,²⁵ the Supreme Court reasoned that an act need be neither a violation of the antitrust laws nor deceptive to be "unfair" under section 5,²⁶ and stated that the Commission should consider several factors in determining whether a practice is unfair, including:

(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).²⁷

Moreover, courts have held that it is no defense to a Commission determination of unfairness that the practice was long standing and had not previously been held unlawful under section 5, since

---

²³. E.g., J. B. Williams Co. v. FTC, 381 F.2d 884, 889 (6th Cir. 1967); Korber Hats, Inc. v. FTC, 311 F.2d 358, 360 (1st Cir. 1962); Murray Space Shoe Corp. v. FTC, 304 F.2d 270, 272 (2d Cir. 1962); Koch v. FTC, 206 F.2d 311, 317 (6th Cir. 1953); Lorillard Co. v. FTC, 186 F.2d 52, 58 (4th Cir. 1950).


²⁵. The Commission has discretion to weigh the validity of conflicting evidence, and its decision will not be overturned so long as there is some evidence in the record in support of the Commission's conclusion. See Bakers Franchise Corp. v. FTC, 302 F.2d 258 (3d Cir. 1962).

²⁶. Id. at 239-44. The Court noted that the court of appeals had incorrectly concluded that section 5 proscribed only practices that were contrary to the letter or spirit of the antitrust laws. While making it clear that the Commission's authority was much broader than that, the Court nevertheless held the cease and desist order at issue in the case improper. The only basis in the Commission's opinion for its finding of unfairness was antitrust violations. Since the court of appeals had found no violation of the antitrust laws, and that judgment was not attacked on appeal the order could not be sustained. Id. at 249-50. See also First Buckingham Community, Inc., 73 F.T.C. 938 (1968).

²⁷. 405 U.S. at 244-45 n.5 (quoting Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking. 29 Fed. Reg. 8324, 8355 (1964)). See generally Pitofsky, Beyond Nader: Consumer Protection and the Regulation of Advertising, 90 Harv. L. Rev. 661, 694-95 (1977).
the public should not be allowed to suffer because of the Commission's mistake, inadvertence, or lack of vigilance in the past. 28

The Commission's authority to formulate remedies to deal with unfair and deceptive acts and practices also has been broadly construed. As the Supreme Court observed:

The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in this area of trade and commerce. . . . [J]udicial review is limited. It extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy. . . . Congress has entrusted [the Commission] with the administration of the Act and has left the courts with only limited powers of review. The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.

The Commission is entitled not only to appraise the facts of the particular case and the dangers of the marketing methods employed . . . but to draw from its generalized experience. . . . Its expert opinion is entitled to great weight in the reviewing courts. 29

Accordingly, federal courts often have sustained Commission orders prohibiting the use of an unsubstantiated advertising message or descriptive term 30 or requiring affirmative disclosure of certain facts, 31 without any showing that the remedy em-


31. The cases require a wide variety of affirmative disclosures. E.g., Credit Card Serv. Corp. v. FTC, 495 F.2d 1004 (D.C. Cir. 1974) (statement on liability on lost credit cards required); Spiegel v. FTC, 494 F.2d 59 (7th Cir.), cert. denied, 419 U.S. 896 (1974) ("subject to credit
ployed was the only cure for the deception. Moreover, the Commission has been given broad latitude to "fence in" proven violators to prevent them from engaging in other potentially unfair or deceptive practices.\footnote{32} The Commission "is not limited to prohibiting 'the illegal practice in the precise form' existing in the past. . . . [I]t may fashion its relief to restrain 'other like or related unlawful acts.'\footnote{33}"

approval" required); Sunshine Art Studios, Inc. v. FTC, 481 F.2d 1171 (1st Cir. 1973) (customers have right to return nonconforming orders); P.F. Collier & Son Corp. v. FTC, 427 F.2d 261 (6th Cir. 1970) (door-to-door encyclopedia salespersons must disclose their purpose); All-State Indus. v. FTC, 423 F.2d 423 (4th Cir. 1970) (statement that notes would be negotiated to third parties required); J.B. Williams Co. v. FTC, 381 F.2d 884 (6th Cir. 1967) (statement required that most tiredness does not come from iron deficiency anemia); Exposition Press, Inc. v. FTC, 295 F.2d 869 (2d Cir. 1961) (statement required that royalty payments are not net returns); Bantam Books, Inc. v. FTC, 275 F.2d 680 (2d Cir.), \textit{cert. denied}, 364 U.S. 819 (1960) (clear and conspicuous designation of abridgment or republication under new title required on cover of book); L. Heller & Son, Inc. v. FTC, 191 F.2d 954 (7th Cir. 1951) (disclosure of foreign origin required); American Medicinal Prods., Inc. v. FTC, 136 F.2d 426 (9th Cir. 1943) (harmful consequences of "Re-Duce-oid" pills must be disclosed); Haskelite Mfg. Corp. v. FTC, 127 F.2d 765 (7th Cir. 1942) (disclosure of simulated materials required); Stupell Originals, Inc., 67 F.T.C. 173 (1965) (disclosure of risk of eye injury from toy required); cf. Beltone Elec. Corp. v. FTC, 402 F. Supp. 590 (N.D. Ill. 1975) (statement that hearing aids will not help many persons with hearing disabilities required); Campbell Soup Co., \textit{77 F.T.C. 664} (1970) (consent order accepted by FTC but Commission states in dicta that it could have required corrective advertising). \textit{But see} Ward Laboratories, Inc. v. FTC, 276 F.2d 952, 954 (2d Cir. 1960) (reviewing court states that "affirmative disclosure of a negative is always to be approached with caution"); Alberly v. FTC, 182 F.2d 36 (D.C. Cir. 1950) (negative delimitation improperly required by Commission).

32. \textit{In FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965), for example, the FTC had charged Colgate with false and deceptive practices for televising a commercial that purported to depict the moisturizing qualities of a shaving cream by applying it to and shaving sandpaper; in fact, the sandpaper was sand-covered plexiglass. The FTC issued an order forbidding the use of any "test, experiment or demonstration that . . . is represented as actual proof of a claim . . . and . . . is not in fact a genuine test, experiment or demonstration being conducted as represented." Id. at 382. The order applied not only to the shaving cream but to \textit{any product} the company advertised. The Court upheld the order against a challenge that it was too broad. \textit{See also} FTC v. National Lead Co., 352 U.S. 419, 431 (1957); Fedders Corp. v. FTC, 529 F.2d 1396 (2d Cir.), \textit{cert. denied}, 429 U.S. 818 (1976); Resort Car Rental Sys., Inc. v. FTC, 518 F.2d 962, 964 (9th Cir.), \textit{cert. denied}, 423 U.S. 827 (1975); Luria Bros. & Co. v. FTC, 389 F.2d 847, 862 (3d Cir. 1968).

Until recently the courts had limited the Commission's remedial discretion only when the remedy proposed might unnecessarily abridge property rights encompassed in trade names. In FTC v. Royal Milling Co., the Commission barred the use of the words "milling company" since the company, though blending and mixing flour, did not manufacture it. The Supreme Court concluded that "less drastic means" might be adequate to cure the deception and remanded the case to permit the Commission to consider appropriate qualifying words. Similarly, in Jacob Siegel Co. v. FTC, the Court reversed and remanded a Commission order that infringed upon the use of a trade name on the ground that the Commission had not determined whether some less restrictive means would avoid the deception. The Court reasoned that because trade names are valuable business assets, they should not be destroyed if less drastic means, such as the addition of qualifying language, could accomplish the same result. Thus, the Commission may prohibit a trade name only when it finds that no qualifying language can correct the deception.

B. Protected Commercial Speech

Until recently, the first amendment was not considered a limitation on Commission factfinding or remedial discretion because the Supreme Court deemed "purely commercial advertis-

34. 288 U.S. 212 (1933).
35. 327 U.S. 608 (1946).
36. See also Magnaflo Co. v. FTC, 343 F.2d 313 (D.C. Cir. 1965) (full hearing required on question whether qualifying words will clarify ambiguity of "Lifetime Charge Battery"); Elliot Knitwear, Inc. v. FTC, 266 F.2d 787 (2d Cir. 1959) (Commission abused its discretion in not finding that qualifying words would cure ambiguity of cashmere content in "Cashmora" sweaters); Bear Mill Mfg. Co. v. FTC, 98 F.2d 67 (2d Cir. 1938) (excision of "Manufacturing" from trade name unwarranted where phrase "Converters, Not Manufacturers of Textiles" cures ambiguity).
37. E.g., Continental Wax Corp. v. FTC, 330 F.2d 475 (2d Cir. 1964) ("Six Month" excised from name of floor wax); Waltham Watch Co. v. FTC, 318 F.2d 28 (7th Cir. 1963) (excision of "Waltham" from name of imported clocks required unless qualifying words added); Bakers Franchise Corp. v. FTC, 302 F.2d 258 (3d Cir. 1962) ("Lite Diet" excised from bread name); Carter Prods., Inc. v. FTC, 268 F.2d 461 (9th Cir. 1958) ("Liver" excised from name of pills); Arrow Metal Prods. Corp. v. FTC, 249 F.2d 83 (3d Cir. 1957) ("Porcenamel" excised from name of awning products); Gold Tone Studios, Inc. v. FTC, 183 F.2d 257 (2d Cir. 1950) ("Gold Tone" excised from studio name); Deer v. FTC, 152 F.2d 65 (2d Cir. 1945) (FTC has discretion to determine whether "Manufacturing" must be excised from trade name); Charles of the Ritz Distrib. Corp. v. FTC, 143 F.2d 676 (2d Cir. 1944) ("Rejuvenescence" excised from name of skin cream); Herzfeld v. FTC, 140 F.2d 207 (2d Cir. 1944) ("Mills" excised from trade name); H.N. Heusner & Son v. FTC, 106
In 1975, however, the Court announced in Bigelow v. Virginia that the constitutionality of commercial advertising regulation was to be assessed by "weighing the First Amendment interest against the governmental interest alleged." One year later, in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, the Court held that even purely commercial advertising is not wholly outside the protection of the first amendment.

In Virginia Pharmacy, the Court struck down state restrictions on the promulgation of prescription drug price information. The Court made clear that not only does an advertiser or a publisher have a first amendment right to speak the truth in commercial advertising, but also that the public has a right to be informed. One of the primary values served by the first amendment, the Court noted, is protection of the public's right to receive the information necessary to informed decision making in the commercial as well as the political sphere.

F.2d 596 (3d Cir. 1939) ("Havana" excised from domestic cigar name); FTC v. Army & Navy Trading Co., 88 F.2d 776 (D.C. Cir. 1937) ("Army and Navy" excised from name of store no longer dealing substantially in surplus goods).

38. See Valentine v. Chrestensen, 316 U.S. 52 (1942). Compare Scientific Mfg. Co. v. FTC, 124 F.2d 640 (3d Cir. 1941) (FTC may not constitutionally prohibit distribution of false and misleading pamphlets on aluminum cookware by person not materially interested in cooking utensil trade) with Steelco Stainless Steel, Inc. v. FTC, 187 F.2d 693 (7th Cir. 1951) (distributor of stainless steel cooking utensils may be prohibited from false and deceptive advertising disparaging aluminum cookware). See also FTC v. National Comm'n on Egg Nutrition, 517 F.2d 485 (7th Cir. 1975), cert. denied, 426 U.S. 809 (1975); Regina Corp. v. FTC, 322 F.2d 765 (3d Cir. 1963); Murray Space Shoe Corp. v. FTC, 304 F.2d 270 (2d Cir. 1962); E.F. Drew & Co. v. FTC, 235 F.2d 756 (2d Cir. 1956), cert. denied, 352 U.S. 969 (1957); American Medicinal Prods., Inc. v. FTC, 136 F.2d 426 (9th Cir. 1943).

39. 421 U.S. 809 (1975). In Bigelow, an editor of a Virginia newspaper appealed his conviction under a Virginia statute that prohibited encouraging abortions through the sale or circulation of any publication. The newspaper had published an advertisement concerning referral services for legal abortions in New York. The Virginia supreme court affirmed the editor's conviction, rejecting his first amendment claim and holding that the advertisement was commercial, and thus properly prohibited under the State's police power. The Supreme Court reversed, holding that the mere existence of commercial interests in the advertisement did not strip the speech of first amendment protection.

40. Id. at 826.


42. Id. at 762. See also Bates v. State Bar, 97 S. Ct. 2691 (1977); Linmark Assoc., Inc. v. Township of Willingboro, 97 S. Ct. 1614 (1977).

43. 425 U.S. at 758-57.

44. Id. at 763-64.
cluding that commercial speech is protected, however, the Court went to great lengths to point out that “[s]ome forms of commercial speech regulation are surely permissible.” The Court noted that the time, place, and manner of commercial speech might be regulated, but gave no hint of the proper bounds of such restrictions. The Court further observed that untruthful commercial speech, like untruthful noncommercial speech, does not deserve protection “for its own sake,” and that there is “no obstacle to a state’s dealing effectively” with deceptive but not provably false commercial speech. The state may ensure “that the stream of commercial information flows cleanly as well as freely.”

Although the Court did not articulate any principles to guide regulation of false or deceptive commercial speech, it did offer a framework for analysis. The Court noted that commercial speech, while enjoying first amendment protection, nevertheless can be differentiated from noncommercial speech by virtue of its “greater objectivity and hardiness.” The truth of commercial speech can be more easily verified, and, since advertisers are motivated by the desire for commercial profit, such speech is less likely to be chilled; therefore “a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.” Important state interests, such as avoidance of falsity or deception, may justify greater restrictions on commercial speech, not because it is any less valuable than noncommercial speech, but because it is less vulnerable. It follows that any regulation designed to prohibit falsity or deception is legitimate so long as it does not impair the flow of truthful commercial information.

While the first amendment does not protect untruthful commercial speech “for its own sake,” it presumably affords some of the same protections accorded untruthful noncommercial speech. The only difference is one of degree, not of principle. As the Court recognized in Gertz v. Robert Welch, Inc., although an “erroneous statement of fact is not worthy of constitu-
tional protection, it is nevertheless inevitable in free debate.\textsuperscript{53} Therefore, "punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press."\textsuperscript{54} Although this risk is not as substantial in the commercial context, it nevertheless exists. The threat of a cease and desist order conceivably could deter an advertiser from investing in the development and communication of a truthful claim that might not survive FTC scrutiny. Therefore, although the government arguably may go further toward preventing false commercial speech than false noncommercial speech, its discretion to eliminate falsity is bounded by the principle that truthful speech not be deterred.

Regulation of statements that are not provably false but are nevertheless deceptive or misleading would seem similarly permissible to ensure that the stream of commercial information flows "cleanly."\textsuperscript{55} But because a portion of such statements will in fact be truthful, the deterrent principle that limits the permissible regulation of false statements is insufficient to assure unimpaired communication of truthful statements. To guarantee that truthful commercial information flows "freely" as well as cleanly, the regulation of deceptive, but not necessarily false, commercial speech presumably would be subject to the additional requirement that it pose the least possible hindrance to the flow of potentially truthful information. If a statement were deceptive only because of the context in which it appeared and if qualifying language could cure the deception, prohibiting the statement itself would appear unjustifiable. Similarly, were the deception attributable to inferences likely to be drawn from literally truthful information and if a slight change in phraseology could eliminate the deceptive inference, there would be no basis for prohibiting the message. As the Court noted in \textit{Virginia Pharmacy}, it may be permissible only "to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive."\textsuperscript{56}

Finally, \textit{Virginia Pharmacy} strongly suggests that barring truthful commercial speech simply because it might cause consumers to act against their best interests is not justified. Accord-

\begin{itemize}
\item \textsuperscript{53} \textit{Id.} at 340.
\item \textsuperscript{54} \textit{Id.}
\item \textsuperscript{55} See text accompanying note 49 supra.
\item \textsuperscript{56} 425 U.S. at 771 n.24 (emphasis added).
\end{itemize}
ing to the Court, the free flow of commercial information is "in-
dispensable to the proper allocation of resources in the free enter-
prise system," and the government is ill-equipped properly to
allocate those resources based on its own view of the consumers' best interests. Thus, for the Court, the marketplace of ideas has
a firm analogue in the commercial marketplace, and the liberal democratic notion of the relationship of free speech to the
achievement of optimal political choices has its analogue in the
relationship of commercial speech to allocative efficiency. If
one premise underlying the first amendment interest in noncom-
mercial speech is that citizens should be able to make their own political choices even if such choices are harmful or unwise, a
corollary premise is that the government should not make com-
mercial choices for consumers. The Court explicitly discussed
this premise in Virginia Pharmacy:

It appears to be feared that if the pharmacist who wishes
to provide low cost, and assertedly low quality, services is per-
mitted to advertise, he will be taken up on his offer by too many unwitting customers. They will choose the low-cost, low-quality service and drive the "professional" pharmacist out of business. They will respond only to costly and excessive advertising, and end up paying the price. They will go from one pharmacist to another, following the discount, and destroy the pharmacist-customer relationship. They will lose respect for the profession because it advertises. All this is not in their best interests, and all this can be avoided if they are not permitted to know who is charging what.

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. If they are truly open, nothing prevents the "professional" pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer. But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.

Viewed in this light, the first amendment protects consum-
ers' opportunities to choose for themselves the price they are

57. Id. at 765 (citations omitted).
58. Id. at 760 (quoting Bigelow v. Virginia, 421 U.S. 809, 825-26 (1975)).
60. 425 U.S. at 769-70 (emphasis added).
willing to pay for differing degrees of quality, service, or even safety. A free flow of commercial information will tend to alert consumers to available options; if there is a demand for different degrees of quality, service, or safety at corresponding prices, the market will be segmented according to this demand, and vendors will have an incentive to supply truthful information about their particular products in comparison to other products. As a result, consumers will easily find products that adequately fulfill their needs and desires. The "danger" in suppressing information is that some consumers might be forced to purchase more quality, service, or safety than they would choose to pay for if fully informed of their options.  

Taken together, these principles appear to delineate the bounds of permissible commercial speech regulation and to suggest that the FTC's authority to prevent "unfair or deceptive" advertising must accommodate the first amendment. But they do not necessarily suggest that the Commission can no longer shape remedial relief to "fence in" violators and proscribe deception and unfairness in all its various forms. That limitation would be appropriate only if the first amendment goal of protecting truthful commercial speech were at odds with the goal of protecting consumers from unfairness or deception, so that pursuit of one might entail a sacrifice of the other. But if the two interests are entirely consistent, so that protection of the free flow of truthful commercial speech follows necessarily from the pursuit of consumer protection, there is no reason to narrow the scope of the Commission's authority. 

This distinction between the need to accommodate the first amendment and to restrict the Commission's authority apparently has been lost on at least one court of appeals. In Beneficial Corp. v. FTC, the Commission filed a complaint charging the company with unfair and deceptive trade practices in connection with preparing income tax returns and making consumer loans in violation of section 5 of the FTC Act. Beneficial, which

61. The Court in Bigelow also expressed distaste for government paternalism observing that "Virginia is really asserting an interest in regulating what Virginians may hear or read about [lawful] New York services." 421 U.S. at 827. The Court suggested that the state could have availed itself of a less restrictive alternative by disseminating information to enable women in Virginia who were considering a New York abortion "to make better informed decisions when they leave." Id. at 824. But see Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971), aff'd, 405 U.S. 1000 (1972).  
specialized in making personal loans based on credit worthiness, had entered the tax return preparation business in the belief that customers who needed funds to pay taxes would find it convenient to borrow from Beneficial. When Beneficial found that most tax service customers would actually receive tax refunds, the company decided to advertise an “instant tax refund.” The tax refund loan, however, was simply Beneficial’s normal loan service based on the credit worthiness of the borrower. After an evidentiary hearing, an administrative law judge found that Beneficial had violated section 5. On administrative appeal, the Commission concluded:

The early Instant Tax Refund advertising is, on its face, totally misleading about the true nature of Beneficial’s offer. Instead of making clear that Beneficial is simply offering its everyday loan service, the advertising implies that Beneficial will give a special cash advance to income tax preparation customers with a government refund due, in the amount of their refund. The natural impression, since the Instant Tax Refund is stressed as exclusive and special is that this cash advance is different from a normal consumer loan.

Both the administrative law judge and the Commission concluded that only a total ban on the use of the phrase “instant tax refund” or any words of similar import could remedy the violation. The Commission reasoned:

In fact, since its inception ... the Instant Tax Refund phrase has deceived continuously, and Beneficial’s repeated efforts to explain it have not cured the false impression it leaves. ... No brief language is equal to the task of explaining the Instant Tax Refund slogan, for the phrase is inherently contradictory to the truth of Beneficial’s offer. In truth, the Instant Tax Refund is not a refund at all, but only Beneficial’s every day loan service ...; nor is it in the least related to any tax refunds, for the size of the loan Beneficial wishes to sell is geared to the customer’s credit limit instead of his government refund and many people due a government refund do not qualify for an Instant Tax Refund loan at all ...

Accordingly, the Commission ordered Beneficial to cease and desist from using the term “instant tax refund” in advertising its consumer loan business.

On appeal before the Third Circuit, Beneficial contended that explanatory words could have cured any tendency to mislead, and that forcing it to abandon entirely its copyrighted and heavily promoted phrase was unwarranted. The court agreed. Acknowledging that it ordinarily was obliged to defer to the

63. Id. at 617.
64. Id. at 622.
Commission's exercise of discretion in framing remedial orders, the court nevertheless noted that it was "dealing in this case with the government regulation of a form of speech. The first amendment requires, we believe, an examination of the Commission's action that is more searching than in other contexts." The court concluded that "the remedy for the perceived violation can go no further in imposing a prior restraint on protected commercial speech than is reasonably necessary to accomplish the remedial objective of preventing the violation." The court rejected the Commission's determination that no qualifying language could adequately dispel the deception inherent in Beneficial's use of the phrase "instant tax refund" and suggested two examples that would preserve intact the "instant tax refund" phrase. The court concluded that the Commission had "exceeded its remedial authority" because it failed "to consider fully the feasibility of requiring merely that advertising copy be rewritten in lieu of total excision of the offending language." Accordingly, the "instant tax refund" portion of the order was vacated.

The court of appeals assumed without discussion that because the free flow of truthful commercial speech is protected by the first amendment, the Commission's discretion to frame remedial relief must be narrowed accordingly. And it follows quite naturally from this assumption that the court must use its independent judgment to assure that the Commission used the least restrictive means of preventing deception. The logic of this approach is unassailable, once the initial assumption is accepted. In fact, the federal government itself used similar

65. Id. at 618-19.
66. Id. at 619.
67. For the text of the two examples suggested by the Third Circuit and a criticism thereof, see text accompanying note 118 infra.
68. 542 F.2d at 619.
69. Id. at 621.
70. Cf. United States v. Robel, 389 U.S. 258, 268 (1967) ("[w]hen legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms."); Shelton v. Tucker, 364 U.S. 479, 488 (1960) (state statute held invalid; Court stated that "this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."); Martin v. City of Struthers, 319 U.S. 141 (1943) (city ordinance held to violate the first amendment). See also text accompanying note 11 supra.
reasoning in a recent first amendment challenge to a state ban on attorney advertising. In response to the state's argument that such advertising is inherently misleading because the quality of legal services may be impossible to measure and the amount of work involved may vary enormously from case to case, the government noted that the state's restriction was overly broad; rather than ban all such advertising, the state needed only to ban comparative claims that one lawyer was better or less expensive than another.\footnote{71} Indeed, if it is assumed that the first amendment requires a narrowing of administrative discretion, there is no apparent reason why administrative factfinding that bears upon first amendment rights should be any more immune from judicial scrutiny than is the choice of remedy.\footnote{72} Accordingly, it would not be unreasonable for a reviewing court to judge independently what constitutes deception or unfairness.

The distinction between the Commission's responsibility to accommodate the first amendment in its consumer protection


\footnote{72} The appropriate scope of review of administrative factfinding that implicates constitutional rights has undergone a gradual evolution since the Court in \textit{Ohio Valley Water v. Ben Avon Borough}, 253 U.S. 287 (1920), held that due process required states to provide an opportunity to submit questions of confiscation to a judicial tribunal "for determination upon its own independent judgment as to both law and facts." \textit{Id.} at 289. See also \textit{St. Joseph Stock Yards Co. v. United States}, 298 U.S. 38 (1936); \textit{Spring Valley Water Co. v. San Francisco}, 165 F. 667 (N.D. Cal. 1908). But notwithstanding the gradual demise of \textit{Ben Avon}, see, e.g., K. Davis, \textit{Administrative Law Text} § 29.08, at 541 (3d ed. 1972), the preferred status of first amendment rights has led courts to adopt a broader scope for reviewing restrictions on them than on property rights. See \textit{St. Joseph Stock Yards Co. v. United States}, 298 U.S. 38, 77 (1936) (Brandeis, J., concurring). In \textit{Grove Press, Inc. v. Christenberry}, 175 F. Supp. 488 (S.D.N.Y. 1959), \textit{aff'd}, 276 F.2d 433 (2d Cir. 1960), for example, the district court granted a declaratory judgment and injunction reversing the order of the Postmaster General that \textit{Lady Chatterley's Lover} was obscene and thus nonmailable. The district court held that the book was not obscene within the statute making obscene articles nonmailable and ruled that the issue of obscenity was fully reviewable. \textit{Id.} at 494, 502. The court of appeals agreed, reasoning that the determination whether a work of art is obscene has little to do with considerations of administrative expertise, and "the constitutional overtones implicit in the issue" indicated that the scope of review should be very broad." \textit{Grove Press, Inc. v. Christenberry}, 276 F.2d 433, 435-36 (2d Cir. 1960). The court of appeals observed that full review is required when first amendment rights are involved; "[e]ven factual matters must be reviewed on appeal against a claim of denial of a constitutional right." \textit{Id.} at 436 (citations omitted). See also \textit{Huntley v. Public Util. Comm'n}, 69 Cal. 2d 67, 71, 442 P.2d 685, 687, 69 Cal. Rptr. 605, 607 (1968).
activities, suggested by Virginia Pharmacy, and the need for the courts to narrow the Commission's discretion, suggested by Beneficial Finance, is therefore critical. In the remainder of this Article, I intend to provide both a basis for drawing this distinction and a framework for accommodating the Commission's statutory responsibility under section 5 with its constitutional responsibility under the first amendment.

II. A FRAMEWORK FOR ACCOMMODATION

If there is a single characteristic that differentiates commercial speech from noncommercial speech, it is that commercial speech is a commodity in trade, whose price, availability, and quality will depend to a large extent on consumer demand. Sellers engage in commercial speech to propose a transaction that generates net revenues. If consumers do not want or need the information, they will be unwilling to pay for it and will purchase lower priced products from competing sellers who do not advertise, or who advertise less.

Because of this peculiarity of commercial speech, its "free flow" at any given time will be "impaired" to the extent that consumers underestimate their need for commercial information, and thereby underinvest in it. Government intervention to protect consumers from unfairness or deception can—and should—enhance the free flow of commercial information rather than encumber it, by enabling consumers to invest more fully in it. Ac-

73. This characterization of commercial speech is, of course, by no means definitive or exhaustive. In recent years several courts and commentators have struggled to define commercial speech precisely so as to distinguish it from noncommercial speech. For a summary of these efforts, see Comment, First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine, 44 U. Chi. L. Rev. 205 (1976). The virtue of characterizing commercial speech as a commodity is that such a characterization focuses on the necessary relationship between its supply and demand. Those who engage in noncommercial speech do not care about generating net revenues from their endeavor, but those who offer commercial information do so with the expectation that their investment will yield a profit. This holds true whether the supply of commercial information is responsive to demand or helps to create it. Even if it is assumed that advertising creates consumer demand for the product being advertised, see, e.g., J. Galbraith, The Affluent Society 149 (2d ed. 1969); J. Galbraith, The New Industrial State 272-73 (1967), advertisers will invest in the provision of commercial information only to the extent that they can profit from their investment. Their ability to manufacture demand will be limited; the point at which marginal demand begins to fall below the marginal cost of providing information will mark the extent of their investment.
cordingly, the goals of protecting consumers and protecting the first amendment rights of sellers who engage in commercial speech are entirely compatible, as the following discussion makes clear.

A. Commercial Information as a Commodity in Trade

Consumers bear several related costs when they purchase goods or services, the most visible of which is the purchase price. Other costs are often hidden: the product may cause bodily injury or impair health (even a relatively inexpensive Hungarian goulash can become substantially more expensive with the consumer's every subsequent visit to the doctor complaining of gastric upset); use of the product may cause property damage (a new waterbed causes a ceiling to collapse); the product may require expensive or time-consuming maintenance and servicing (spare parts must be specially ordered from Albania); the product may require enormous amounts of fuel; it may need to be totally replaced in a relatively short time (what looked like cast iron proves in fact to be reinforced cardboard); it may be inadequate to perform the tasks that the consumer had in mind, requiring her to forego those tasks or spend more to do them; or, to reverse the coin, the product may be more than adequate, capable of doing far more than the consumer needed, which indicates that the consumer paid an unnecessarily high price for it.

Rational consumers will wish to minimize the product's purchase price plus any hidden costs, while receiving a product that fulfills their needs. But to accomplish this feat, they must bear still other costs. First, consumers must define their needs. Diagnostic information, which identifies and measures such particular requirements, can be expensive. For example, to avoid the potential effects of Hungarian goulash, the consumer may have to undergo a battery of tests to determine what kind of foods his peculiar stomach can abide; similarly, to avoid having a waterbed crash through the ceiling, he may have to employ a structural engineer to measure the tolerance of his upstairs floor. Second, after discovering their particular needs, consumers must learn the capabilities of different products to fulfill those needs. Product testing information, revealing, for example, the contents of a particular Hungarian goulash or the fully-inflated weight of a particular water bed, also can be costly.

For the purposes of the following discussion, "purchase price" comprises the seller's cost and profit, including the cost of advertising.
Third, for the diagnostic and product testing information to be useful, consumers must have access to it. Communication, in the form of product advertising and consumer searching, itself is costly.\textsuperscript{75}

To be sure, the combined cost of diagnosis, product testing, and communication conceivably could exceed the total cost of the “best” product. But it would be nonsensical for consumers to expend more resources trying to locate a product than the potential savings available from finding it. For example, if a consumer has discovered three adequate lawnmowers of equal price, the best of which would save him $1 in convenience and quality, there is no reason to spend more than $1 to discover which of the three is truly the best. Accordingly, rational consumers will purchase product information only to the point where the marginal cost of obtaining that additional information is likely to exceed any marginal gain in the total value of the product. In short, rational consumers will set out to minimize the total cost of finding the product plus the total cost of the product itself (including all hidden costs).\textsuperscript{76} Thus, the “best” purchasing decision is not “best” in absolute terms, but only relative to the cost of the diagnosis, testing, and communication necessary to make it. That some consumers may accept high total product costs, in the form of risky, inadequate, or high energy-consuming products, does not necessarily indicate that the market is not functioning efficiently, for such a choice may reflect a rational trade-off against even higher information costs.

It follows that a less costly range of products (including potential hidden costs) will require less costly attempts to ensure that the purchasing decision is a good one. If the price of the product is low, and the adverse consequences of a bad choice are minimal, self-diagnosis may be completely adequate (“I know

\textsuperscript{75} A slightly different typology has been used by Nelson, who distinguishes between “search qualities”—qualities of a brand that the consumer can determine prior to purchase—and “experience qualities”—qualities that the consumer cannot determine prior to purchase. See Nelson, Advertising as Information, 82 J. Pol. Econ. 729 (1974); Nelson, Information and Consumer Behavior, 78 J. Pol. Econ. 311 (1970). Darby and Korni use the term “credence qualities” to describe qualities that cannot be evaluated through normal use of a product, but can only be assessed by gaining additional costly information. See Darby & Korni, Free Competition and the Optimal Amount of Fraud, 16 J. Law. & Econ. 67 (1973).

\textsuperscript{76} See generally Stigler, The Economics of Information, 69 J. Pol. Econ. 213 (1961).
what kind of food agrees with me”); as will self-searching (“let’s see if there’s a restaurant in the neighborhood”); and self-testing (“it looks like a dive, but I’ll try it once”). Alternatively, consumers might rely on the judgment of trusted friends, who are aware of their particular needs (“you’ll love the ambiance, but don’t eat the goulash”). If the product thereafter proves worthy, the cost of diagnosing, testing, and locating it in the future can be greatly reduced by merely repurchasing it. Indeed, the business value of “goodwill” derived from an established trade name or marketing technique is that consumers are willing to pay a premium for what they save by avoiding costly diagnosing, testing, and searching for the product (although the internal cost to the business of assuring uniform and consistent quality will increase accordingly). 77

Occasionally, of course, it is more reasonable to look elsewhere for reliable information. Where an incorrect purchasing decision could pose high risks to health or property, or could result in substantial economic loss (high purchase price or other “once in a lifetime” qualities), self-diagnosis or self-testing is unwise. Prudence would dictate, for example, seeking out expert advice about the need for maintenance or repair of complex machinery (be it automobile, home plumbing, or one’s own body). Similarly, it would seem advisable to refrain from ingesting unidentified pills or investing a small fortune in an untested machine “just to see if it works” and to rely instead on tests performed by others. Indeed, it is often necessary for sellers to offer new products at a discount or to guarantee “complete satisfaction or your money back” in order to offset consumers’ understandable reluctance to sail such uncharted seas. By the same token, if the sources of diagnostic or product testing information are scattered, but the group of consumers who want the information are identifiable and can be reached through some common medium, it may be more efficient for the sources to communicate their information than for the consumers to spend their own time and resources trying to locate the sources. For example, a shipper specializing in Caribbean cruises could locate prospective purchasers by advertising in the New Yorker far more efficiently than prospective purchasers could locate the particular shipper by writing to shipping companies.

77. See Cunningham, Perceived Risk and Brand Loyalty, in Risk Taking and Information Handling in Consumer Behavior 528 (D. Cox ed. 1967).
Some sources of diagnostic and testing information sell nothing but such information, in which case the consumer pays primarily for reliability and good judgment. Consumer guides, independent testing laboratories, newspaper reviewers, and various types of appraisers fit within this category, as do—on a slightly more general level—training manuals, adult education courses, and how-to-do-it books. Because property rights in such information are limited, however, and difficult to enforce against a recipient who is apt to share the information freely with others, the direct cost of developing and communicating diagnostic and testing information is likely to be borne by parties who also have a pecuniary interest in the products under scrutiny. Some of these parties in effect function as agents and select the products on behalf of consumers; in exchange, they charge consumers a premium for the quality of their selection. Travel agents, stock brokers, realtors, and fancy department stores all bear much of the direct cost of diagnosing, testing, and communicating and then pass these costs on to consumers who find it more efficient to rely upon such intermediaries than to carry on their own diagnosis, test, and search. Alternatively, reliable information about product risks or inadequacies can sometimes be derived from competitors, for whom the cost of developing such information may be less than the expected revenues generated in sales of their own product—assuming, of course, that the competitor's own product does not share similar defects.

Of course, sellers often can generate test information about their products more efficiently than any other source because they have direct access to and control over the products. They can run tests at a routine step in the production or marketing process and are aware of the particular product characteristics that require most careful attention. Similarly, sellers of maintenance or repair services often can generate diagnostic information more efficiently than other sources because they can both diagnose and respond to a particular need in a single transaction.

Rational consumers are likely to select the source of information that is both least expensive and most reliable, relative

79. In oligopolistic markets, sellers may want to avoid disclosing the advantages of their products and the disadvantages of competitors' products for fear of triggering competition, or creating opportunities for entry or expansion of sales by new entrants. See Pitofsky, Beyond Nader: Consumer Protection and the Regulation of Advertising, 90 Harv. L. Rev. 661, 664-66 (1977).
to the total product cost at stake. The sources of such information likewise can be expected to bear the direct cost of producing it only insofar as consumer demand produces adequate revenues. In this way, the information market should generate approximately the "right" amount of reliable information to enable consumers to make adequately informed purchasing decisions.

Problems arise, however, because even rational consumers may underestimate the risk of economic loss or personal injury attendant upon their purchasing decision, or may overestimate the reliability of diagnosis or product testing information. If the information is sold in conjunction with the product, the seller has no incentive to inform the consumer accurately of the consumer's need for the product, or of the product's hidden defects. Alternatively, the consumer may overestimate the proportion of the purchase price actually attributable to diagnoses or tests; the consumer may have preferred to purchase a more reliable diagnosis or test than the one actually received and to purchase a correspondingly less elaborate product. (Indeed, many consumer complaints about unnecessary work performed by auto mechanics or doctors may be attributable to this type of misestimation.) In either case, as a result of such misestimations, consumers may discover—too late—that they expended too little for information relative to the potential savings of a better purchasing decision.

Misestimations of reliability of information or risk of loss could be reduced, of course, if consumers or sellers, or both, were required to exercise more care in their transactions; but how much care, and who should exercise it are complex issues. The ultimate question is not whether caveat emptor or caveat venditor is the correct principle, but under what circumstances and to what extent one principle is to be preferred to the other. If consumers and sellers could bargain with each other over the allocation of this responsibility, free from the cumbersome costs of transacting those bargains, presumably they would automatically allocate the responsibility to the party in the best position to minimize the likelihood of misestimations.80 In the real world of unequal bargaining power and lack of coordination among consumers, however, liability rules may be necessary to help achieve this result. Indeed, common law causes of action sounding in

---

contract or tort in effect require the seller to bear the cost of assuring that his product is fit for ordinary use and not unreasonably dangerous, since "ordinary use" and "unreasonable danger" signal instances where consumers are likely to have well-established expectations that can be dispelled only if the seller warns that the product is being sold "as is" or presents unusual risks. But in other circumstances the administrative cost of private litigation to ascertain whether consumers or sellers could most reasonably take precautions necessary to avoid misestimation is likely to be prohibitive. 81 More direct forms of government regulation therefore may be appropriate.

Viewed in this light, the purpose of FTC regulation of commercial speech is not to avoid unfairness or deception at all cost, but rather to allocate the responsibility for avoiding misestimations of risk and reliability to the seller 82 when the seller is likely to be better able than the consumer to minimize them. The principles that should guide this allocation derive from hypotheses about the allocation that consumers and sellers would achieve from free bargaining, were such bargaining possible.

1. Assuring the Reliability of Representations

Sellers should not be required to test the reliability of their representations if it is more efficient for consumers to obtain equally or more reliable product testing information on their own. For example, there is no reason to require sellers to test relatively inexpensive products to assure the accuracy or truthfulness of product claims which consumers are likely to test themselves before making definite decisions about future pur-

82. For simplicity's sake, the following discussion focuses on instances in which the seller is likely to be in the best position to minimize the cost of misestimations and the cost of avoiding misestimations. But sometimes third party "information brokers" may be best situated—when the cost to them of discovering defects in sellers' products is likely to be less than the cost to the sellers individually. The Commission's recent holder-in-due-course rule, preserving consumers' claims and defenses against third party financiers, responds to such a situation. See 16 C.F.R. § 433 (1977). Pursuant to the rule, financiers—who are best situated to "police" the market and guard against defective products marketed by sellers who border on insolvency—must in effect bear the direct cost of discovery; such costs presumably are passed on to consumers in the form of more costly credit. But consumers come out ahead because the direct cost to them of guarding against defective products and insolvent sellers would be much greater.
chases. Consumers are likely to discount a claim that a certain candy bar “tastes yummy” or will “melt in your mouth” because the literal truthfulness of the claim is not particularly important to the purchasing decision; indeed, most consumers probably interpret such statements as mere invitations to try the product, rather than as product testing information. In contrast, it may be appropriate to require sellers rigorously to test the accuracy of performance claims made about expensive products (in terms of total costs) that are rarely repurchased and about which little can be learned upon inspection, such as an automobile or a vacation in the Orient. In these instances, it is more efficient for sellers to assure the reliability of their claims and for consumers to depend on that assurance than for consumers to look elsewhere for the information. Were it not for the high cost of bargaining over the reliability of this information, consumers would probably rather pay sellers to assure its reliability than purchase “reliability insurance” at a higher cost from another party, or go without any insurance and either not rely on the information at all or rely on it and bear the high risk (and cost) of overestimating its reliability. Between these two extremes lies a continuum of circumstances in which it would be most efficient for consumers to some extent to rely on the accuracy of sellers’ claims, and in which sellers should to a corresponding extent undertake product testing to support their claims.

Although it is not the purpose of this Article to examine the extent to which the FTC in practice has adhered to this principle, it is worth noting that the legal theory supporting the Commission’s advertising substantiation program is entirely consistent with it. In Pfizer, Inc., the Commission held that it is an unfair trade practice to make affirmative product claims without having a “reasonable basis” for such claims. Although the complaint against Pfizer, charging unfair and deceptive advertising of the anesthetic properties of an ointment, was dismissed because the evidence on the record was inconclusive, the

---

83. Such insurance, if actually available, would protect purchasers against losses caused by their reliance on a seller’s claims if the claims proved untruthful. The FTC might be seen as a sort of reliability insurer; although it does not reimburse for losses, it does attempt to prevent losses by ensuring the reliability of sellers’ claims.
84. 81 F.T.C. 23 (1972).
85. Id. at 62.
86. Id. at 73.
Commission indicated that, in determining whether the vendor had a "reasonable basis" for making his claim, it would look to various factors, including the possible consequences of a false claim, the degree of consumer reliance on the claim, and whether a reasonably prudent advertiser should have discovered the facts before making the claim. Accordingly, the Commission reasoned that substantiation is most necessary where:

[T]he complexity of a consumer product, and accordingly the large amount of detailed product information necessary to an informed decision, makes the costs of obtaining product information prohibitive. . . . [W]ith the development and proliferation of highly complex and technical products, there is often no practical way for consumers to ascertain the truthfulness of affirmative product claims prior to buying and using the product.

Given the imbalance of knowledge and resources between a business enterprise and each of its customers, economically it is more rational, and imposes far less cost on society, to require a manufacturer to confirm his affirmative product claims rather than to impose a burden upon each individual consumer to test, investigate, or experiment for himself. Similarly, the Commission has held that "substantial scientific test data" is required to support a claim that "involves a matter of human safety . . . which consumers themselves cannot verify since they have neither the equipment nor the knowledge to undertake the complicated . . . tests required [and therefore] must rely on the technical expertise of the manufacturer to assure the validity of its claims." Where consumers have less reason to depend upon seller's representations, however, a less

87. Id. at 64.
88. Id. at 61-64. The Commission in Pfizer offered the following comparison:


"Reasonableness is determined by a straightforward balancing of costs and benefits. If the risk yields a net social utility (benefit), the victim is not entitled to recover from the risk-creator; if the risk yields a net social disutility (cost), the victim is entitled to recover. The premises of this paradigm are that reasonableness provides a test of activities that ought to be encouraged and that tort judgments are an appropriate medium for encouraging them."

This balance admittedly gives more consideration to the producers' interests than does the test suggested by Adam Smith: "[T]he interest of the producer ought to be attended to only so far as it may be necessary for promoting that of the consumer." Smith, An Inquiry Into The Nature and Causes of the Wealth of Nations, 625 (Modern Library Edition, 1937).

Id. at 62 n.13.
rigorous standard of substantiation has been required. And where consumers have no reason to rely on claims, or no reason to construe representations as conveying product testing information, the Commission has deemed such claims mere "puffing" that need not be substantiated.

2. Disclosing Potential Loss

Consumers may underestimate the potential loss associated with various purchasing decisions, particularly if they are unaware of health or property risks entailed in using the product, or if the sellers' claims lead consumers to believe that such risks are lower than they are in fact. But the responsibility for avoiding underestimations should be allocated to sellers only in instances where sellers can most efficiently provide information about the risks.

The seller of a waterbed, for example, is probably in the best position to disclose its fully inflated weight and to warn consumers that because the fully inflated bed may endanger the floor upon which it is placed, they should be particularly careful to check the soundness of their floor before they buy. But there is no apparent reason for the seller of a normal bed to disclose its weight. A potential purchaser who lives in an unusually brittle house should bear the responsibility of knowing that bed weight is a factor to be considered in making his purchasing decision and of inquiring about the weight of particular beds. To take another example, because of economies of scale and access, drug manufacturers are better situated than consumers to bear the direct costs of testing for the risks new drugs might pose to persons with any one of a variety of common ailments and disabilities, and of communicating the results of such testing by warnings on drug labels. But in determining the risks new drugs would pose to persons with very rare ailments, it is probably more efficient for hospitals or independent testing laboratories to engage in testing and communication at the specific re-


91. H.W. Kirchner Co., 63 F.T.C. 1282, 1290, 1293 (1963). A cigarette manufacturer's claim that its product was "less irritating" was held to be capable of objective measurement, Liggett & Meyers Tobacco Co., 55 F.T.C. 354, 375 (1958), while a claim that a toothpaste will "beautify the smile" has been found to be within the "puffing" defense, Bristol-Myers Co., 46 F.T.C. 162, 175-76 (1949), aff'd, 185 F.2d 58 (4th Cir. 1950).
quest of those who suffer such ailments, since those individuals are far more likely than manufacturers to know that prior testing is necessary. Similarly, the direct cost of diagnosis to ascertain whether a potential drug user has any of the conditions listed on the drug label is probably more efficiently borne by prospective users than by manufacturers or sellers. In all cases, were it not for high transaction costs, appropriate allocations of responsibility would naturally occur because consumers would prefer to purchase this information from the cheapest reliable source whenever they thought the purchase was preferable to remaining uninformed and thus bearing the cost of underestimating potential loss.

Once again, the legal framework supporting the Commission’s affirmative disclosure program is consistent with this analysis. The Commission may order affirmative disclosure if it finds that failure to disclose is misleading because of unexpected material consequences resulting from use of the product or because other statements in the advertisement create false expectations. For example, in complaints challenging alleged fraudulent land sales schemes, the Commission has charged separate violations for failure to disclose specific details about future land development programs and failure to disclose that the purchase price of lots was not all-inclusive (for example, that paved roads and sewer systems were not available, and telephone service and electricity were available only at unreasonable prices).

Sellers or manufacturers are better able than individual consumers to spread the cost of diagnosing or testing over all consumer transactions. It might therefore seem fairer, although less efficient, if drug manufacturers bore the direct cost of diagnosing or testing even for rare ailments than if the sufferer commissioned his own diagnosis or test. In effect, this allocation of cost would entail a wealth transfer from ordinary drug users to potential users with the rare ailment. If such potential users deserve subsidization, however, it would be less costly to subsidize individual diagnoses or tests directly from public funds (or from special taxes upon the sale of drugs) than to require manufacturers to test the effect of a new drug on all such persons, some of whom would never use it.

See J.B. Williams Co. v. FTC, 387 F.2d 884, 889 (6th Cir. 1967).

See, e.g., Horizon Corp., [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,845 (1975); AmRep Corp., [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20, 846 (1975). See also J.B. Williams Co. v. FTC, 381 F.2d 884 (6th Cir. 1967) (involving failure to disclose, in connection with advertisements of the iron tonic Geritol, that most fatigue has nothing to do with iron deficiency anemia); Keele Hair & Scalp Specialists, Inc. v. FTC, 275 F.2d 18 (5th Cir. 1960) (involving failure to disclose that most baldness cures will not work because baldness is hereditary).
Similarly, in a number of cases, the Commission challenged vocational school advertising on the ground that failure to disclose the percentage of enrollees who do not complete the course and do not obtain employment on graduation is unfair and deceptive.\(^ {95} \)

3. **Excising Truthful Information Only as a Last Resort**

The third principle follows as a corollary to the first two. Once it is determined that sellers are better able than consumers (or third parties) to minimize the direct cost of avoiding misestimations, it follows that the sellers should use the least costly means of achieving that end—whether it be by assuring the truthfulness of claims through product testing, by disclosing additional information, or by eliminating certain truthful claims altogether. The last option is likely to be the most costly to consumers, since elimination of any truthful claim may force consumers to purchase similar information elsewhere at a higher price. The fact that a particular product poses dangers to health or safety, generates high life-cycle costs, or is inadequate for many tasks for which it might be used, does not necessarily require barring truthful information about what it can do. The truthful information itself is valuable. Notwithstanding all its risks and inadequacies, the product may be ideal for some consumers; eliminating the truthful information would increase the cost of finding the product, with no commensurate benefit. For other consumers, the truthful information could induce more rigorous comparative shopping for another adequate product that has none of the costly disadvantages.\(^ {96} \) Accordingly, the Commission should prohibit truthful information only as a last resort—when no other means of avoiding misestimations is available.

Indeed, this principle seems to underlie the requirement in *Royal Milling* and *Jacob Siegel* that before the FTC orders the excision of a trade name it must consider less drastic alternatives to remedy the deception.\(^ {97} \) Trade names are valuable business assets because they are an inexpensive and efficient source of

---


96. For example, the mention by one waterbed seller of the weight of his product in his advertising may alert consumers that weight is a factor to consider in making a purchasing decision.

97. See notes 34-37 supra and accompanying text.
product information. Any prohibition upon use of a trade name will increase the cost to consumers of finding satisfactory products. Excision is justifiable, therefore, only if there is no less costly way to avoid the misestimations that the trade name might induce.

This principle also underlies many of the Commission's recent rulemaking efforts. For example, when it became apparent that cigarette smoking was hazardous to health, the Commission, rather than prohibiting advertising altogether, required only that all advertising affirmatively disclose the hazard. Other current or proposed rules governing disclosure of octane ratings of gasoline, nutritional qualities of food, durability of light bulbs, care and labeling of textile wearing apparel, funeral services, used cars, and potential side effects of over-the-counter antacids similarly rely upon affirmative disclosures of limited usefulness, inadequacy, risk, or value.

4. Not Deterring Sellers from Providing Truthful Information

Truthful information can also be indirectly eliminated if the high cost of product testing or disclosing additional information deters sellers from making truthful claims that require such expenditures. The fourth principle, therefore, is that the allo-

99. To be sure, even when there is no less costly way to avoid misestimations, elimination of truthful information is appropriate only if the resulting cost of misestimations exceeds the value of the truthful information.
108. See, e.g., Firestone Tire & Rubber Co. v. FTC, 481 F.2d 246
cation of responsibility to sellers to test their product claims or to disclose additional information should not deter sellers from making truthful claims, unless the truthful claims themselves are more likely to induce consumer misestimations than to produce better purchasing decisions.

For example, if a seller's claim that his acupuncture service "reduces pain" must be based upon rigorous scientific data, the combined cost to the seller of commissioning tests and advertising may exceed total revenues generated by the message. If so, the seller simply will not make this claim. This is inefficient if the untested claim would have been valuable to consumers who were in the market for a pain reliever and who would have appropriately assessed the claim's reliability. In these circumstances, the cost of a less rigorous testing requirement, such as testimonials from a random selection of recipients of the acupuncturist's services, would be more proportional to the degree of consumer reliance on the claim; and revenues generated by the claim would probably exceed its cost.

By the same token, if the acupuncturist were required to disclose that the claim that acupuncture "reduces pain" is not scientifically based, the direct cost of communicating the entire message might exceed the revenues it generated; consequently, the acupuncturist would cease making the initial claim. Consumers would be harmed by this loss if the claim's value in aiding their purchasing decisions would have exceeded its capacity to induce them to overestimate the efficacy of acupuncture. The disclosure requirement would be an unnecessary "product" for which consumers would not willingly have bargained (had they had the opportunity), and to which the resulting disparity between the acupuncturist's marginal costs and marginal revenues would be largely attributable. On the other hand, consumers would benefit if the opposite were true; that is, if the claim's capacity to induce overestimation of the efficacy of acupuncture exceeded its value as an aid to accurate purchasing decisions. In this case, consumers willingly would have paid the acupuncturist to stop making his claims (had such transactions been possible), and the resulting disparity between the marginal cost of com-

(6th Cir.), cert. denied, 419 U.S. 1112 (1973). A similar analysis would be applicable to corrective advertising orders designed to cure lingering deception caused by past advertising. Such orders should not be so draconian that the mere possibility of their invocation deters advertisers from making certain truthful claims—unless such claims themselves were likely to induce misestimations to a greater extent than they would induce better purchasing decisions.
municating the message and the marginal revenues generated would be largely attributable to the fall in consumer demand for the services.

B. THE FREEDOM TO SELL AND PURCHASE COMMERCIAL INFORMATION

The principles guiding efficient allocation of the costs of protecting consumers also protect the first amendment rights of those who engage in commercial speech. As Virginia Pharmacy makes clear, first amendment protection of commercial speech is linked to the notion that the free flow of commercial information is "indispensable to the proper allocation of resources in the free enterprise system." Viewed in these terms, the "freedom" of sellers to engage in commercial speech is in effect the freedom to supply truthful diagnostic, testing, or search information with the expectation that the revenues generated will exceed the cost of supplying the information. And the "freedom" of consumers to receive commercial speech is in effect the freedom to obtain truthful commercial information at the least cost—up to that point where the marginal cost of such information equals the marginal savings in better purchasing decisions.

Any enhancement of consumer demand for truthful commercial information therefore will induce a correspondingly greater exercise of sellers' "right" to supply it. As we have seen, both consumers' overestimations of the reliability of product information and their underestimations of potential loss involved in the purchase may result in an underinvestment in commercial information relative to the savings such investment could generate. Thus, in placing the direct cost of avoiding misestimations upon sellers when they are in the best position to minimize that cost (and deeming a seller's failure to bear such costs under these circumstances to be "deceptive" or "unfair"), government intervention in effect enables consumers to summon from sellers the amount and quality of truthful commercial information consumers need (and would have demanded had such transactions been costless).

That sellers must bear the direct costs of substantiating or disclosing additional information in these circumstances cannot be construed as an infringement on their first amendment right to engage in truthful commercial speech. So long as sellers' revenues exceed the cost of supplying this information, the costs are

109. 425 U.S. at 765.
simply passed on to consumers who willingly pay for the information. If revenues generated by the information do not exceed the cost of supplying it, it can fairly be assumed that consumers are simply unwilling to purchase the product itself, given its total costs. Sellers may, of course, continue to advertise the product, but they have no first amendment right to profit from sales to consumers who are not apprised of its risks or inadequacies.

By the same token, as we have seen, a rational consumer protection policy would use the least costly means of avoiding consumer misestimations, and this principle equally serves to protect sellers' first amendment rights. Since commercial information is a product whose price is negotiated between seller and consumer, the means of avoiding misestimations that is least expensive for consumers will necessarily be the least costly means for sellers. And because any excision of truthful information supplied by the seller is potentially costly for consumers, excision will be a last resort, when neither substantiation nor additional disclosures can remedy the misestimation. Thus, government intervention to protect consumers will pose the least possible restriction upon seller's rights to supply truthful information.

Finally, a rational policy of consumer protection would seek to avoid any "chilling effect" upon the supply of commercial information brought about by an unnecessarily rigorous substantiation or disclosure requirement. This, too, is entirely consistent with the protection of sellers' first amendment rights because it also helps to assure the free flow of truthful commercial information.

In sum, so long as the overarching goal of government consumer protection regulation is to maximize the flow of truthful commercial information at the least cost, thereby enabling consumers to make the best product choices relative to the cost of information, the first amendment rights of commercial speakers will also be protected. Both goals require that regulation be carefully tailored to those instances where the market fails to maximize this flow, and that remedies go no further than necessary to enable consumers to avoid misestimations of reliability or potential economic loss.

III. JUDICIAL REVIEW OF FTC FACTFINDING AND CHOICE OF REMEDIES

The preceding discussion suggests that so long as the FTC's consumer protection activities yield substantial benefits by
maximizing the flow of truthful commercial information to consumers, the first amendment rights of those who engage in commercial speech are necessarily protected. If that is the case, there is no reason for courts to narrow the Commission's discretion to frame remedial relief or to scrutinize more carefully the Commission's factfinding.

Courts traditionally have substituted their judgment for that of administrative agencies in determining whether the agencies have employed means that least restrict first amendment interests.\textsuperscript{110} Indeed, this principle underlies the federal government's first amendment challenge to state regulations barring lawyer advertising. Moreover, courts on occasion have substituted their judgment on issues of fact where the agencies' factfinding bears directly upon first amendment interests.\textsuperscript{111} Such substitutions of judicial judgment, however, are premised on the presumption that the agency lacks both expertise in discerning the least restrictive alternative or in recognizing first amendment interests, and neutrality in weighing first amendment values against competing demands.\textsuperscript{112} Reviewing courts are thought to have the neutral perspective and expertise necessary to make what are often difficult trade-offs between the first amendment and competing government interests.\textsuperscript{113} According to this view, it is appropriate for the courts to defer to agency expertise in the agency's area of substantive responsibility, but they should not defer to agencies when first amendment rights are involved.

This premise may be correct with regard to state licensing boards. These boards have no particular expertise in protecting first amendment rights because their avowed mission is to foster high professional standards, not to avail consumers of satisfactory goods and services at least cost.\textsuperscript{114} There is no reason, therefore, to assume that state licensing boards will properly balance

\textsuperscript{110} See, e.g., NLRB v. Golub Corp., 388 F.2d 921 (2d Cir. 1967); Coppus Eng'r Corp. v. NLRB, 240 F.2d 564 (1st Cir. 1957).

\textsuperscript{111} See note 72 supra.


\textsuperscript{114} See 425 U.S. at 751.
the goal of maintaining high professional standards against the principles of the first amendment.

But the premise may be totally incorrect with regard to the FTC's consumer protection mission. Although the FTC has no particular expertise in safeguarding first amendment rights, and there is no reason to assume that it could appropriately weigh first amendment rights against competing values, a primary goal of the Commission's consumer protection efforts is to minimize the cost to consumers of searching for the "right" product and purchasing the "wrong" one. This goal is entirely consistent with safeguarding the first amendment interests of those who engage in commercial speech. Thus, unlike state licensing boards, the FTC has acquired de facto expertise in protecting the flow of truthful commercial speech by virtue of its statutory responsibility to protect consumers, and accordingly there is no need for a reviewing court's neutrality or constitutional expertise.

The Commission has been criticized in recent years for failing to select targets and remedies with cost efficiency in mind—and thereby failing to adhere to the very principles that should guide the efficient allocation of the costs of consumer protection. But in the context of judicial review this criticism is beside the point. The issue is not whether the Commission could fulfill its statutory responsibilities more effectively, but whether the Commission has a greater capacity than reviewing courts to do so. There can be little doubt that the Commission has greater expertise than the courts in maximizing the flow of truthful commercial information. Because its staff is experienced in assessing supply and demand in the commercial information market, it is better able than reviewing courts to discern methods of "fencing in" proven violators that least impede the free flow of truthful information. Thus, the courts should defer to the Commission whenever it expressly finds that there are no less drastic means of curing a deception.


116. To support such a finding, it may be necessary during the administrative hearing for the Commission staff to bear the burden of proving the absence of less drastic alternatives. The suggestion that the burden is on the government to show lack of other available means was made in Sherbert v. Verner, 374 U.S. 378, 407 (1963). See also Talley
Indeed, Beneficial itself reveals how unsuited reviewing courts are to the delicate task of properly allocating the costs of consumer protection. The Commission had explicitly considered whether a remedy less drastic than elimination of the "instant tax refund" phrase in Beneficial's advertising would be adequate to cure the deception. But because Beneficial was simply offering its everyday loan service, which was completely unrelated to the customer's eligibility for a tax refund, the Commission determined that any use of the phrase was inherently deceptive. The court of appeals rejected this conclusion and offered the following examples of qualifying language that would retain the "instant tax refund" phrase but would not, in the court's view, convey the deceptive impression:

Beneficial's everyday loan service can provide to regularly qualified borrowers an Instant Tax Refund Anticipation loan whether or not the borrower uses our tax service.

or

Beneficial's everyday loan service can provide any regularly qualified borrower an instant loan in anticipation of his tax refund. We call it an Instant Tax Refund Anticipation Loan.

But it is evident that these examples have the same defect as Beneficial's initial advertisement. Use of the phrase "Instant Tax Refund Anticipation Loan" still implies that the availability of the loan has something to do with a possible tax refund, or that eligibility for such a refund expedites or improves one's chances for obtaining a loan. Either alternative could well induce consumers who expected a tax refund to assume that their prospects for obtaining a loan from Beneficial were enhanced, or that Beneficial would offer a better deal than its competitors. Consumers might therefore underinvest in commercial information in pursuit of a possibly better borrowing opportunity.

The court in Beneficial was wrong, not because it required that in identifying and curing deception the Commission take cognizance of the first amendment and use means that interfere least with the free flow of truthful information, but because it incorrectly assumed that the first amendment required it to substitute its judgment for that of the Commission. Had any affirmative disclosure been sufficient to cure the deception, the Commission presumably would have invoked it, thereby pre-

117. For a discussion of Beneficial, see notes 62-72 supra and accompanying text.
118. 542 F.2d at 619.
serving for consumers the "instant tax refund" phrase as an economical shorthand method of communication. The fact that the Commission could discern no less drastic means of curing the deception should have been dispositive of the first amendment issue as well.

The apparent dilemma for the FTC of reconciling its broad remedial discretion to protect consumers from false and deceptive advertising with the dictates of the first amendment after Virginia Pharmacy is no dilemma at all so long as reviewing courts understand the purpose and nature of the Commission's consumer protection mission. Because commercial information is a commodity in trade, the first amendment interests of those who supply it are coterminous with the consumer interests of those who demand it. In protecting the latter, the Commission guards the former. Thus, while the first amendment protects the free flow of commercial information as well as of ideas and opinions, in the free marketplace of commerce the FTC should have primary jurisdiction.