

Weighing the Listener's Interests: Justice Blackmun's Commercial Speech and Public Forum Opinions

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Introduction

In constitutional law, Justice Blackmun is more frequently associated with privacy than with free speech. He made important contributions to the Supreme Court's First Amendment jurisprudence, however, particularly in the areas of commercial speech and public forum doctrine. His opinions in *Bigelow v. Virginia*,¹ *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,² and *Bates v. State Bar of Arizona*³ brought commercial speech within the protection of the First Amendment for the first time, and his criticism of the Court's recent practice of affording commercial speech only intermediate protection⁴ has proven influential. As the author of *Lehman v. City of Shaker Heights*,⁵ *Southeastern Promotions, Ltd. v. Conrad*,⁶ and *Burson v. Freeman*,⁷ Justice Blackmun also helped shape the Supreme Court's public forum doctrine, while his dissent in *Cornelius v. NAACP Legal Defense and Educational Fund*⁸ to the Court's categorical turn anticipated much of the current criticism of that doctrine and offers an appealing alternative.

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1. 421 U.S. 809 (1975).
2. 425 U.S. 748 (1976).
3. 433 U.S. 350 (1977).
4. See, e.g., *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 431-38 (1993) (Blackmun, J., concurring).
5. 418 U.S. 298 (1974) (plurality).
6. 420 U.S. 546 (1975).
7. 504 U.S. 191 (1992) (plurality).
8. 473 U.S. 788, 813-33 (1985) (Blackmun, J., dissenting).

In both commercial speech and public forum cases, Justice Blackmun's opinions reflect a distinctive balancing approach that takes seriously the listener's interests in receiving information and, sometimes, in not receiving information.⁹ While the Justice is frequently considered one whose views changed over the years,¹⁰ his approach to free speech demonstrates a remarkable consistency—not just across different areas of First Amendment law, but across time. The seeds of Justice Blackmun's listener-oriented balancing approach are evident in two opinions written during his first term on the Court. The commitment to balancing appears in his *Pentagon Papers* dissent, where he wrote:

I cannot subscribe to a doctrine of unlimited absolutism for the First Amendment at the cost of downgrading other provisions [of the Constitution]. . . . What is needed here is a weighing, upon properly developed standards, of the broad right of the press to print and of the very narrow right of the Government to prevent.¹¹

Justice Blackmun's concern for the listener is revealed in *Cohen v. California*¹² where he dissented from the Court's decision to overturn the conviction for disturbing the peace of a defendant who had worn a jacket reading "Fuck the Draft" into a courthouse. The Justice characterized Cohen's "absurd and immature antic" as "mainly conduct and little speech," and suggested that his slogan might constitute "fighting words."¹³ It seems likely, though, that Justice Blackmun was swayed by the argument "that Cohen's distasteful mode of expression was thrust upon unwilling or unsuspecting viewers."¹⁴

Cohen and the *Pentagon Papers* case are First Amendment classics, and one might have viewed Justice Blackmun's dissents in those cases as indications that he would be sympathetic to government efforts to suppress speech. Indeed, the conventional wisdom has viewed both balancing and a concern for the listener's interests as antithetical to strong protection for speech. Ironically, the balancing approach that Justice Blackmun championed in his commercial speech and public forum opinions proved to be substantially more protective of free speech than the more categorical approaches that the Court adopted

9. See *infra* notes 57-119, 218-79 and accompanying text.

10. See, e.g., Note, *The Changing Social Vision of Justice Blackmun*, 96 HARV. L. REV. 717 (1983).

11. *New York Times Co. v. United States*, 403 U.S. 713, 761 (1971) (Blackmun, J., dissenting).

12. 403 U.S. 15 (1971).

13. *Id.* at 27-28 (Blackmun, J., dissenting).

14. *Id.* at 21.

in the 1980s.¹⁵ Indeed, one of the lessons that emerges from studying Justice Blackmun's commercial speech and public forum opinions is that a balancing approach to the First Amendment—even one that weighs the listener's interests—may provide greater protection for speech than categorical approaches.

Balancing's association with less protection of speech is a legacy of the McCarthy era, when the Supreme Court used balancing to uphold government efforts to investigate and punish subversive activities.¹⁶ In dissent, Justice Black, criticized balancing as an abdication of the judicial role. According to Justice Black, balancing permitted the Court "to sustain laws suppressing freedom of speech and press on the basis of Congress' or our own notions of mere 'reasonableness.' Such a doctrine waters down the First Amendment so that it amounts to little more than an admonition to Congress."¹⁷ Justice Black was not overly dramatic in equating the Court's First Amendment balancing with reasonableness review. In fact, Justice Frankfurter—the Court's leading advocate of balancing—had equated the two himself. "Free-speech cases are not an exception to the principle that we are not legislators,"¹⁸ Frankfurter wrote. "How best to reconcile competing interests is the business of legislatures, and the balance they strike

15. The Court adopted a categorical approach to commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), by placing commercial speech in a separate category that is entitled to only an intermediate level of protection. The intermediate-scrutiny test that *Central Hudson* applies is a balancing test, *see id.* at 566, but so (in theory) are strict-scrutiny and rational-basis review. What makes *Central Hudson's* approach categorical and distinguishes it from Justice Blackmun's is *Central Hudson's* decision to treat all commercial speech differently from all non-commercial speech. *See infra* notes 130-65 and accompanying text.

The Court adopted a categorical public-forum analysis in *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), and *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788 (1985), which divided government property into three categories with different rules applicable to each. Even if the property falls into the most protected, "public forum" category, the Court applies a balancing test to determine the permissibility of time, place, and manner restrictions. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). As with *Central Hudson's* approach to commercial speech, however, what makes the Court's public forum doctrine categorical and distinguishes it from Justice Blackmun's approach is that an initial categorization determines the test to be applied. *See infra* notes 241-70 and accompanying text.

16. *See, e.g., Communist Party of the U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961); *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Dennis v. United States*, 341 U.S. 494 (1951); *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950).

17. *Dennis*, 341 U.S. at 580 (Black, J., dissenting).

18. *Id.* at 539 (Frankfurter, J., concurring).

is a judgment not to be displaced by ours, but to be respected unless outside the pale of fair judgment.”¹⁹

Justice Black’s alternative was “absolutism,” an approach best defined by its opposition to balancing.²⁰ Categorical First Amendment analysis, such as that advocated by John Hart Ely and Lawrence Tribe,²¹ is a direct descendant of Justice Black’s absolutism.²² It “immunizes all expression *save that which falls within a few clearly and narrowly defined categories*,”²³ and, like absolutism, it opposes balancing.²⁴ Categorical analysis rejects the notion “that free speech values and the government’s competing justifications must be isolated and weighed in each case.”²⁵ Under a categorical approach, “the consideration of likely harm takes place at wholesale, in advance, outside the context of specific cases.”²⁶ The point is to remove discretion from judges,²⁷ thereby preventing them from being swept up in the “paranoia of the age.”²⁸

19. *Id.* at 540 (Frankfurter, J., concurring). The debate over balancing was also played out in the law reviews, most famously in an exchange between Laurent Frantz and Wallace Mendelson. See Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821 (1962); Laurent B. Frantz, *Is the First Amendment Law?—A Reply to Professor Mendelson*, 51 CAL. L. REV. 729 (1963); Wallace Mendelson, *The First Amendment and the Judicial Process: A Reply to Mr. Frantz*, 17 VAND. L. REV. 479 (1964).

20. See Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 737 (1963) (“‘Absolutes’ is the way Black refers to that part of his philosophy which denies to judges the power to weigh competing values.”).

21. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 105-16 (1980); LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 792-94 (2d ed. 1988).

22. See John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1500 n.74 (1975) (“Any categorization approach . . . can quite properly be labeled absolutist.”).

23. ELY, *supra* note 21, at 110 (emphasis in original).

24. Tribe and Ely have made a few pragmatic concessions to balancing. Both admit that judges necessarily weigh competing considerations in order to define which categories of speech are unprotected. See TRIBE, *supra* note 21, at 792-93; ELY, *supra* note 21, at 110. Both also allow that balancing is unavoidable when the government regulation is aimed at the noncommunicative aspect of expression—*e.g.*, regulations limiting the volume of loudspeakers. See TRIBE, *supra* note 21, at 791, 792; ELY, *supra* note 21, at 111. Tribe also seems prepared to recognize, albeit with “discomfort,” that some categories like commercial speech should receive a lesser degree of First Amendment protection. See TRIBE, *supra* note 21, at 896.

25. *Id.* at 792.

26. ELY, *supra* note 21, at 110.

27. See *id.* at 112.

28. Ely, *supra* note 22, at 1501; see also Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985). For an interesting theory on how balancing can be structured to avoid too much deference to the legislature, see David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 Nw. U. L. REV. 641 (1994).

Categorical analysis has inherited absolutism's reputation for protecting speech. However, the inflexibility of a categorical approach creates two related dynamics that tend to weaken First Amendment protection: *narrowing* and *dilution*. Because the Court is required to treat all cases in the same category the same way, it tends to define these categories narrowly and to dilute the level of protection afforded to each. As Martin Redish has noted, a categorical approach "will often prove to be either overprotective or underprotective in individual instances. Given such a choice, as a practical matter a court is considerably more likely to choose a rule that will be underprotective than one that will be overprotective."²⁹ The Supreme Court's experience with commercial speech and public forums illustrates these dangers. The Court's relegation of commercial speech to an intermediate category of protection³⁰ is a perfect example of dilution, while its limitation of public forums to places like streets and parks that have traditionally been used for expressive activities³¹ reflects the dynamic of narrowing. Justice Blackmun's balancing approach has proven more protective of speech in each area because it allows the flexibility to accommodate the legitimate interests at stake (particularly those of the listener), while still permitting broad access to government property for expressive activities³² and full First Amendment protection for commercial speech.³³

Part I of this Article examines Justice Blackmun's listener-oriented balancing approach for commercial speech and how it came to

29. Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159, 1186-87 (1982); see also Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 276 (1981) ("One danger of definitional-absolutist theories . . . is that the criteria of absolutism exerts an inward pull on the boundaries of coverage.").

Justice Frankfurter made essentially the same point in criticizing Justice Black's approach:

Absolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules. The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.

Dennis v. United States, 341 U.S. 494, 524-25 (1951) (Frankfurter, J., concurring).

30. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980).

31. See, e.g., *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992).

32. See, e.g., *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 813-33 (1985) (Blackmun, J., dissenting).

33. See, e.g., *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 431-38 (1993) (Blackmun, J., concurring).

be supplanted by a more categorical approach. Part II demonstrates how Justice Blackmun used the same listener-oriented balancing approach in the public forum area, while the Court again moved to a more categorical analysis. Part III looks at recent developments in both areas. Within the last few years, several members of the Supreme Court have criticized its current public forum doctrine, and five members of the current Court appear ready to reconsider its categorical approach to commercial speech. By examining two types of cases that categorical approaches find hard to handle—restrictions on protesters in public forums around abortion clinics and mandatory disclosure requirements for commercial speakers like cigarette warning labels and registration requirements for securities—I argue that the Court should abandon its categorical approaches in both areas in favor of a listener-oriented balancing approach.

I. Commercial Speech

Justice Blackmun's First Amendment jurisprudence is most strongly identified with the protection of commercial speech.³⁴ Justice Blackmun launched the Court's commercial speech jurisprudence in three majority opinions and remained, until his retirement, the Court's most vigorous protector of commercial speech.³⁵

When Justice Blackmun joined the Court in 1970, the last word on commercial speech was *Valentine v. Chrestensen*,³⁶ a brief unanimous opinion in which the Court stated that "the Constitution imposes no . . . restraint on government as respects purely commercial advertising."³⁷ Justice Blackmun's opinions would soon change that.

34. See, e.g., Ronald K.L. Collins & David M. Skover, *Commerce & Communication*, 71 TEX. L. REV. 697, 727-31 (1993) (referring to the protection of commercial speech as "Justice Blackmun's First Amendment"); Karen Nelson Moore, *Justice Blackmun's Contributions on the Court: The Commercial Speech and State Taxation Examples*, 8 HAMLINE L. REV. 29, 31-43 (1985) (discussing Justice Blackmun's contributions in the area of commercial speech). The Justice also singled out his commercial speech opinions as demonstrating his concern for First Amendment rights. See *Consolidated Edison Co. of New York v. Public Serv. Comm'n of New York*, 447 U.S. 530, 549 (1980) (Blackmun, J., dissenting).

35. See *Discovery Network*, 507 U.S. at 431-38 (Blackmun, J., concurring).

36. 316 U.S. 52 (1942).

37. *Id.* at 54. *Chrestensen* upheld the constitutionality of an ordinance banning advertising handbills. Alex Kozinski and Stuart Banner have argued convincingly that the Justices rejected *Chrestensen's* suit because they saw it (1) as an attempt to revive substantive due process review of economic legislation and (2) as an opportunity to limit the potentially expansive right to distribute handbills (in a public forum), which they had recently recognized in *Schneider v. State*, 308 U.S. 147 (1939). See Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 756-74 (1993).

In *Bigelow v. Virginia*,³⁸ he held that an advertisement for abortion services was protected by the First Amendment. One year later, he extended that protection to purely commercial advertising in *Virginia Pharmacy*.³⁹ And the following year, in *Bates v. State Bar of Arizona*,⁴⁰ he struck down limitations on advertising by attorneys.

Bigelow, *Virginia Pharmacy*, and *Bates* articulated a distinctive approach to commercial speech issues: a balancing approach that emphasized the listener's interests. Although this approach initially enjoyed the support of every member of the Court but Justice Rehnquist, it was soon supplanted by a more categorical approach championed by Justice Powell. *Central Hudson*⁴¹ codified Powell's approach in an intermediate scrutiny test which has remained the Court's test for restrictions on commercial speech to this day.⁴² Despite the theoretical advantages of a categorical approach in limiting a judge's discretion, *Central Hudson's* test proved highly manipulable. It was watered down over the next decade until it was hardly more stringent than the rationality review Justice Rehnquist had favored in *Virginia Pharmacy*.

Since 1993, however, the Court's protection of commercial speech has strengthened, and there are indications that the Court may wish to abandon *Central Hudson's* intermediate scrutiny test entirely. The turning point was *Discovery Network*,⁴³ in which the Court rejected the notion that commercial speech is inherently less valuable than noncommercial speech and applied an approach that was strikingly similar to Justice Blackmun's. Subsequently, in *44 Liquormart*,⁴⁴ five of the current Justices expressed their dissatisfaction with *Central Hudson* in the course of striking down restrictions on advertising the price of alcohol.⁴⁵ In Part III, I will argue that the Court should aban-

38. 421 U.S. 809 (1975).

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

40. 433 U.S. 350 (1977).

41. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980).

42. For explanation of the categorical nature of Powell's approach, see *supra* note 15, *infra* notes 130-62 and accompanying text.

43. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993).

44. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

45. Justice Stevens, joined by Justices Kennedy and Ginsburg, proposed that truthful, nonmisleading commercial speech receive full First-Amendment protection. *Id.* at 501-04. Justice Thomas refused to apply *Central Hudson* and urged a return to *Virginia Pharmacy*. *Id.* at 518-28 (Thomas, J., concurring). Justice Scalia also expressed "discomfort" with *Central Hudson* but was uncertain about what should replace it. *Id.* at 517-18 (Scalia, J., concurring).

don *Central Hudson* and return to the listener-oriented balancing approach that Justice Blackmun articulated in *Bigelow*, *Virginia Pharmacy*, and *Bates*, but first it is necessary to recount the story of commercial speech during Justice Blackmun's time on the Court.

A. Justice Blackmun's Balancing Approach: *Bigelow*, *Virginia Pharmacy*, and *Bates*

Not only had the Court stated in *Chrestensen* that commercial advertising was outside the scope of the First Amendment,⁴⁶ it had repeatedly relied on the distinction between commercial and noncommercial speech over the following three decades.⁴⁷ However, individual Justices began to question whether commercial speech should be entirely outside the scope of the First Amendment. In 1959, Justice Douglas, who had joined the *Chrestensen* opinion, described that ruling as "casual, almost offhand" and stated that "it has not survived reflection."⁴⁸

In 1973, the issue of commercial speech was raised again in *Pittsburgh Press*, a case challenging a restriction on printing help-wanted ads in sex-designated columns.⁴⁹ The Court avoided reconsidering *Chrestensen* on the ground that, because employment discrimination was illegal, "[a]ny First Amendment interest which might be served by advertising an ordinary commercial proposal" was "absent."⁵⁰ Nevertheless, between the dissenters in *Pittsburgh Press* and those in *Lehman v. City of Shaker Heights*⁵¹ the following Term, the number of Justices expressing doubts about *Chrestensen*'s continuing validity swelled to seven.⁵² Justice Blackmun was among the *Pittsburgh Press* dissenters, agreeing with Justice Stewart that *Chrestensen* should be

46. See *supra* notes 36-37 and accompanying text.

47. See *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 384-88 (1973); *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964); *Breard v. City of Alexandria*, 341 U.S. 622, 642-43 (1951); *Thomas v. Collins*, 323 U.S. 516, 533 (1945); *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943); *Jamison v. Texas*, 318 U.S. 413, 417 (1943).

48. *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring).

49. 413 U.S. 376 (1973).

50. *Id.* at 389.

51. 418 U.S. 298 (1974). For further discussion of *Lehman*, see *infra* notes 218-28 and accompanying text.

52. See *Pittsburgh Press*, 413 U.S. at 393 (Burger, C.J., dissenting); *id.* at 398 (Douglas, J., dissenting); *id.* at 401 (Stewart, J., dissenting); *id.* at 404 (Blackmun, J., dissenting); *Lehman*, 418 U.S. at 314 n.6 (1974) (Brennan, J., joined by Stewart, Marshall, and Powell, JJ., dissenting).

read narrowly⁵³ but, significantly, disassociating himself from Justice Stewart's attack on balancing.⁵⁴

Justice Blackmun's opinion for the Court in *Bigelow* severely narrowed *Chrestensen*⁵⁵ and his opinion in *Virginia Pharmacy* overruled it.⁵⁶ Rather than proceed in strict chronological order through *Bigelow*, *Virginia Pharmacy*, and *Bates*, I treat them together because they adopt a consistent approach that is better illustrated by drawing on all three cases.

1. *Why Protect Commercial Speech?*

In Justice Blackmun's view, commercial speech deserved First Amendment protection for two reasons—one general and one specific. The first and more general reason was simply the absence of any good reason to exclude it from First Amendment protection. Frederick Schauer has observed that in defining the coverage of the First Amendment, one has a choice between “defining in” and “defining out.”⁵⁷ Under a “defining in” approach, one starts with a theory of the First Amendment's purpose and protects only speech which serves that purpose.⁵⁸ Under a “defining out” approach, one starts with the premise that all speech is protected and creates categories of unprotected speech only when there is a good reason to do so.⁵⁹ As Schauer observes, *Virginia Pharmacy* is a “defining out” opinion: “the primary question there was not, ‘Should commercial speech be covered?’, but in effect rather, ‘Why shouldn't commercial speech be covered?’”⁶⁰

Justice Blackmun's second and more specific reason for protecting commercial speech was that it served the listener's interest in mak-

53. See *Pittsburgh Press*, 413 U.S. at 401 (Stewart, J., dissenting) (“Whatever validity the *Chrestensen* case may still retain when limited to its own facts, it certainly does not stand for the proposition that the advertising pages of a newspaper are outside the protection given the newspaper by the First and Fourteenth Amendments.”).

54. See *id.* at 402 (Stewart, J., dissenting) (“So long as Members of this Court view the First Amendment as no more than a set of ‘values’ to be balanced against other ‘values,’ that Amendment will remain in grave jeopardy.”); *id.* at 404 (Blackmun, J., dissenting).

55. *Bigelow v. Virginia*, 421 U.S. 809, 819-20 (1975).

56. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 760 (1976).

57. See Schauer, *supra* note 29, at 279-80.

58. See *id.*

59. See *id.*

60. See *id.* at 281; *Virginia Pharmacy*, 425 U.S. at 762 (citations omitted) (“Our question is whether speech which does ‘no more than propose a commercial transaction,’ is so removed from any ‘exposition of ideas,’ and from “‘truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,’” that it lacks all protection. Our answer is that it is not.”).

ing informed decisions.⁶¹ As Justice Blackmun put it most famously in *Virginia Pharmacy*, “the particular consumer’s interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.”⁶² He pointed out in that case that “[t]hose whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged.”⁶³ *Bigelow* had also emphasized the listener’s interests, and so would *Bates*.⁶⁴ The speaker’s interest, by contrast, was downplayed in each of these opinions and was typically cast in negative terms. In *Virginia Pharmacy*, for example, Justice Blackmun wrote: “[W]e may assume that the advertiser’s interest is a purely economic one. That hardly *disqualifies* him from protection under the First Amendment.”⁶⁵ In Justice Blackmun’s view, the primary First Amendment interest served by commercial speech was that of the listener.⁶⁶

61. Martin Redish anticipated this point. See Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 472 (1971) (“By providing the consuming public with information, commercial speech aids in the attainment of society’s goal of intellectual self-fulfillment and, more importantly, helps the individual to rationally plan his life to achieve the maximum satisfaction possible within the reach of his resources.”). For a fascinating attempt to sketch the contours of a listener-oriented First Amendment doctrine more generally, see Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 BROOKLYN L. REV. 5, 9-40 (1989).

62. *Virginia Pharmacy*, 425 U.S. at 763.

63. *Id.*

64. See *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975) (“Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience”); *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977) (noting that the listener’s interest in commercial speech is “substantial”).

65. *Virginia Pharmacy*, 425 U.S. at 762 (emphasis added). See also *Bigelow*, 421 U.S. at 818 (emphasis added) (“The fact that the particular advertisement in appellant’s newspaper had commercial aspects or reflected the advertiser’s commercial interests did not *negate* all First Amendment guarantees.”); *Bates*, 433 U.S. at 364 (“Even though the speaker’s interest is largely economic, the Court has protected such speech in certain contexts.”). For further discussion of the speaker’s interest, see *infra* notes 114-17 and accompanying text.

66. Those who have argued against protecting commercial speech have had to argue that the listener’s interest is not served by commercial speech or is not cognizable under the First Amendment. Edwin Baker, for example, has argued that profit-motivated commercial speech distorts rather than enhances the listener’s decisions. See C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 15 (1976); see also Collins & Skover, *supra* note 34, at 710-27 (cataloguing the ills caused by commercial speech). Thomas Jackson and John Jeffries, on the other hand, have denied that there is a meaningful difference between one’s interest in receiving commercial information and one’s more general interest in economic liberty. See Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 33 (1979) (“Exactly the same values that are impaired by Virginia’s ban against

2. *The Balancing Approach*

Justice Blackmun made his analytic approach plain in *Bigelow*. First, commercial speech was not to be treated differently from other speech. "Advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest."⁶⁷ The relationship of speech to a commercial activity that the State might legitimately regulate was one factor that the court could balance, but it did not make commercial speech categorically different from non-commercial speech.⁶⁸ Second, treating commercial speech like other speech meant forswearing labels and balancing the interests in each case. Again in *Bigelow*, Justice Blackmun wrote:

[A] State cannot foreclose the exercise of constitutional rights by mere labels." Regardless of the particular label asserted by the State—whether it calls speech "commercial" or "commercial advertising" or "solicitation"—a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation.⁶⁹

Justice Blackmun's analytic approach is related to his reasons for protecting commercial speech. His "defining out" methodology and his recognition of the listener's interests on the one hand and his preference for balancing over categories on the other are two manifestations of a skepticism toward overarching First Amendment theories. To apply a "defining in" approach one needs a First Amendment theory,⁷⁰ but Justice Blackmun was unwilling to settle on a single theory of the First Amendment's purpose. In this respect, it is interesting to note his treatment in *Virginia Pharmacy* of Alexander Meiklejohn's theory that the First Amendment is primarily designed to facilitate democratic decisionmaking.⁷¹ Justice Blackmun took note of the theory and argued that even under this theory commercial speech might be entitled to First Amendment protection,⁷² but ultimately he kept

drug price advertising are also invaded by . . . most other instances of governmental regulation of the economy.").

67. *Bigelow*, 421 U.S. at 826 (emphasis added).

68. *See id.* ("To the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged.").

69. *Id.* (quoting *NAACP v. Button*, 371 U.S. 415, 429 (1963)).

70. *See Schauer*, *supra* note 29, at 279-80.

71. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

72. Justice Blackmun's argument was that the free availability of commercial information helped the public make decisions about how the free enterprise system should be regulated. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). Some commentators have argued more generally that commer-

Meiklejohn at arms length.⁷³ Justice Blackmun's skepticism of the position that the First Amendment was designed for a single purpose in turn made him receptive to the argument that the First Amendment interests of the listener required the protection of commercial speech.⁷⁴ Balancing also manifests a skepticism towards overarching theories of the First Amendment. Steven Shiffrin has observed that balancing rests on the proposition "that there are limits to the level of generality we can achieve in free speech theory without falling into triviality or falsehood."⁷⁵ Any categorical approach requires rules to be formulated at a greater level of generality than balancing. Justice Blackmun not only doubted that such rules could be formulated to produce correct results in concrete cases, he also feared that categorical labels might be used to ignore the real interests at stake and ultimately to "foreclose the exercise of constitutional rights."⁷⁶

3. *Scrutinizing Government Interests*

As discussed earlier, Justice Blackmun viewed the First Amendment interests at stake in the commercial speech context as largely those of the listener.⁷⁷ Against those interests, it was necessary to weigh the government interests allegedly served by the regulation. As *Bates v. State Bar of Arizona*⁷⁸ illustrates, however, Justice Blackmun's review of government interests was not at all deferential.⁷⁹ Arizona advanced six specific justifications for its restrictions on

cial speech helps develop a faculty for rational decisionmaking. See David F. McGowan, Comment, *A Critical Analysis of Commercial Speech*, 78 CAL. L. REV. 359, 412-16 (1990); Redish, *supra* note 61, at 443-44.

73. See *Virginia Pharmacy*, 425 U.S. at 765 & n.19.

74. Compare Jackson & Jeffries, *supra* note 66, at 5-6 (positing that the First Amendment "protects only certain identifiable values" such as self-government and self-fulfillment through free expression and arguing that commercial speech should not be protected because it does not serve these values); Baker, *supra* note 66, at 9-25 (positing that the First Amendment protects freely chosen self-expression and arguing that commercial speech should not be protected because it is dictated by profit).

75. Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1254 (1983). Shiffrin also observes that acceptance of balancing requires rejection of any theory that would exclude one or more of the values of speech. See *id.*

76. *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975) (quoting *NAACP v. Button*, 371 U.S. 415, 429 (1963)).

77. See *supra* notes 61-66 and accompanying text.

78. 433 U.S. 350 (1977).

79. For a good discussion of purpose scrutiny in constitutional law, see Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297 (1997).

advertising by lawyers. Justice Blackmun spent twelve pages examining and rejecting them.⁸⁰

First, the State argued that advertising would undermine the professionalism of lawyers. Justice Blackmun found this connection “severely strained” because it “presume[d] that attorneys must conceal from themselves and from their clients the real-life fact that lawyers earn their livelihood at the bar.”⁸¹ Second, the State argued that attorney advertising was inherently misleading, but Justice Blackmun was not persuaded. Even if advertisements were an incomplete basis upon which to choose an attorney, some information was better than none.⁸² Third, although advertising might “stir[] up litigation,” Justice Blackmun would not “accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action.”⁸³ Fourth, the State claimed that advertising would raise attorneys’ costs and therefore the prices of their services, but Justice Blackmun thought it as likely that competition from advertising would drive prices down.⁸⁴ Fifth, Justice Blackmun could not see how advertising itself would lower the quality of lawyers services because “[a]n attorney who is inclined to cut quality will do so regardless of the rule on advertising.”⁸⁵ Finally, he rejected the argument that banning all advertising was the only way to prevent deceptive advertising.⁸⁶

This was not the balancing approach of Justice Frankfurter.⁸⁷ Nowhere in this discussion—not even in the consideration of the economic effects of advertising—is there a hint of deference to the State’s judgments. Indeed, Justice Blackmun candidly acknowledged in *Virginia Pharmacy* that justifications that had been sufficient to sustain advertising bans challenged on due process and equal protection grounds would be inadequate to survive the “close inspection” required by the First Amendment.⁸⁸ Unlike Justice Frankfurter,⁸⁹ Justice Blackmun thought that the balancing required by the First

80. See *Bates v. State Bar of Arizona*, 433 U.S. 350, 368-79 (1977).

81. *Id.* at 368.

82. See *id.* at 372-75.

83. *Id.* at 375-76.

84. See *id.* at 377-78.

85. *Id.* at 378.

86. See *id.* at 379.

87. See *supra* notes 18-19 and accompanying text.

88. *Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 769 (1976).

89. See *Dennis v. United States*, 341 U.S. 494, 539-40 (1951) (Frankfurter, J., concurring) (“Free-speech cases are not an exception to the principle that we are not legislators.”).

Amendment was quite different from that required by the due process and equal protection clauses.⁹⁰ Moreover, Justice Blackmun found repeatedly that:

on close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. . . . It appears to be feared that if the pharmacist who wishes to provide low cost, and assertedly low quality, services is permitted to advertise, he will be taken up on his offer by too many unwitting customers.⁹¹

Justice Blackmun rejected such justifications as "highly paternalistic,"⁹² grounding this rejection in the First Amendment itself: "It is precisely [the] 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."⁹³

4. *The Listener's Interest and "Commonsense Differences"*

Justice Blackmun was willing to permit greater regulation of commercial speech, however, when it was necessary to protect the listener's autonomy. In *Bigelow*, he suggested that the State's interest in shielding its citizens from information might be entitled to more weight if the advertisement were "deceptive or fraudulent," if "it related to a commodity or service that was . . . illegal," or if it "would invade the privacy" of a State's citizens or thrust its message upon them as a "captive audience."⁹⁴ In each of these examples, the listener's autonomy would be enhanced, or at least would not be harmed, by restrictions on commercial speech. Though the "captive audience" problem is the clearest example of state action to protect the listener,⁹⁵ restrictions on deceptive advertising or ads that propose illegal transactions fall under this heading as well. As Justice Blackmun later explained, "[a] listener has little interest in receiving false, misleading, or deceptive commercial information Furthermore,

90. See also Bhagwat, *supra* note 79, at 331-34 (arguing that the legitimacy of governmental purposes varies with the right at issue).

91. *Virginia Pharmacy*, 425 U.S. at 769; see also *Bigelow v. Virginia*, 421 U.S. 809, 827-28 (1975) ("Virginia is really asserting . . . an interest in shielding its citizens from information about activities outside Virginia's borders This asserted interest, even if understandable, was entitled to little, if any, weight under the circumstances."); *Bates*, 433 U.S. at 375 ("we view as dubious any justification that is based on the benefits of public ignorance").

92. *Virginia Pharmacy*, 425 U.S. at 770.

93. *Id.*

94. *Bigelow*, 421 U.S. at 828.

95. For further discussion of the "captive audience," see *infra* notes 220-22, 271-79 and accompanying text.

to the extent it exists at all, a listener has only a weak interest in learning about commercial opportunities that the criminal law forbids."⁹⁶

In the last section of *Virginia Pharmacy* and in its famous footnote 24, Justice Blackmun elaborated on the ways in which commercial speech might be regulated, suggesting that certain restrictions on commercial speech might be permissible even though the same restrictions on noncommercial speech would be forbidden. In particular, he suggested that the government could prohibit deceptive or misleading advertising.⁹⁷ To prevent deceptive advertising, it might be permissible to require additional information and disclaimers⁹⁸ or even to impose prior restraints.⁹⁹

Justice Blackmun's explanation for this different treatment of commercial speech was that there were "commonsense differences" between commercial and noncommercial speech.¹⁰⁰ Commercial speech was "more easily verifiable by its disseminator" and was "more durable" because of the profit motive.¹⁰¹ Commentators have questioned both the comparative verifiability and durability of commercial speech. They have argued that commercial ads stating that eggs are good for you¹⁰² or that "America is turning 7-Up,"¹⁰³ may in fact be more difficult for the speaker to verify than much political speech.¹⁰⁴ It is also questionable, they have suggested, whether a profit motive

96. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 432-33 (1993) (Blackmun, J., concurring).

97. *Virginia Pharmacy*, 425 U.S. at 771-72 & n.24. Compare *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (requiring "actual malice" for false statements about public officials).

98. *Virginia Pharmacy*, 425 U.S. at 771 n.24. Compare *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256-58 (1974) (holding right-of-reply statute unconstitutional); *Wooley v. Maynard* 430 U.S. 705, 714 (1977) ("the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all"); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348 (1995) ("The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit.").

99. *Virginia Pharmacy*, 425 U.S. at 771 n.24. Compare *New York Times Co. v. United States*, 403 U.S. 713, 714 (per curiam) (heavy presumption against the constitutional validity of prior restraints).

100. *Virginia Pharmacy*, 425 U.S. at 771 n.24.

101. *Id.*

102. See Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 Nw. U. L. REV. 372, 385 & n.64. (1979).

103. See Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 635 (1990).

104. See Farber, *supra* note 102, at 386 ("A political candidate knows the truth about his own past and his present intentions, yet misrepresentations on these subjects are immune from state regulation.").

makes speech more durable than a religious or artistic motive.¹⁰⁵ And, even if businesses will inevitably continue to advertise, shouldn't we be concerned that businesses will change the *content* of their ads because of government regulation?¹⁰⁶

Each of these criticisms is valid in a narrow sense, but each also misses the central theme of *Virginia Pharmacy*'s footnote 24—that because businesses can verify *some* information about their products and have an economic incentive to convey some information about their products, “*truthful and legitimate commercial information*” will continue to reach the consumer.¹⁰⁷ Thus, even though the “commonsense differences” identified in footnote 24 appear to focus on the speaker, Justice Blackmun's main concern here, as in the rest of *Virginia Pharmacy*, is the interest of the listener. If a statement touting the health benefits of eggs cannot be verified by the advertiser, then it is not much use to the consumer. And if it is in fact misleading, then it may harm the consumer.¹⁰⁸ But there are presumably things that any egg seller knows about her eggs (starting with their price) that would be useful to a consumer and would induce him to buy eggs. Thus, if asked whether we should be concerned that regulation will cause businesses to change the content of their ads, Justice Blackmun would answer “no”—not if it causes them to make the ads more accurate and therefore more useful to the listener.

Moreover, only when one reads footnote 24 as primarily concerned with the interests of the listener can one can make sense of Justice Blackmun's suggestions that the government might require commercial ads to carry disclaimers or information to prevent deception and that the prohibition against prior restraints might not apply.¹⁰⁹ The speaker presumably has the same interest in controlling the content of her speech and in its immediacy whether that speech is commercial or noncommercial. But because the listener has no interest in receiving deceptive commercial speech, his interest may be

105. See Kozinski & Banner, *supra* note 103, at 637.

106. See Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 633 (1982) (“The possibility of regulation would not deter him entirely from advertising, but it might deter him from making certain controversial claims for his product.”).

107. *Virginia Pharmacy*, 425 U.S. at 771 n.24 (emphasis added).

108. Martin Redish also asks: “If a consumer organization is constitutionally protected in asserting that a certain product does not do what is claimed, why should the product's manufacturer not be similarly protected in contending that it does?” See Redish, *supra* note 106, at 633. One answer, is that the manufacturer has a greater incentive than a consumer organization to bend the truth, which may mean that tighter restrictions are necessary to protect the listener.

109. See *Virginia Pharmacy*, 425 U.S. at 771 n.24.

served by disclaimers and even by the prior restraint of misleading ads.

The same point explains *Bates's* holding that the doctrine of overbreadth is not applicable to commercial speech.¹¹⁰ Justice Blackmun explained the holding in terms of *Virginia Pharmacy's* "commonsense differences"—if commercial speech was more durable and more easily verified, it was less "susceptible to being crushed by overbroad regulation"¹¹¹—but the analysis is easily recast in terms of the listener's interest. Indeed, *Bates* observed that "use of overbreadth analysis reflects the conclusion that the possible harm to society from allowing unprotected speech to go unpunished is *outweighed* by the possibility that protected speech will be muted."¹¹² From the listener's viewpoint, the question is whether it is worth protecting false and misleading commercial speech (which would harm consumers) in order to foster truthful commercial speech (which would benefit them). Because, in Justice Blackmun's view, an advertiser would always have the ability and the incentive to convey truthful information to consumers,¹¹³ there was simply no need to tolerate misleading commercial speech. Indeed, since an advertiser might think that misleading ads would be more effective in selling her products, providing the additional protection of overbreadth might *discourage* truthful commercial speech.

But what about the speaker's interests? Should they matter at all in the analysis of commercial speech issues? Under Justice Blackmun's framework, the interest of the speaker in conveying truthful information about her product coincides with the listener's interest in receiving that interest and is therefore protected. But there are at least two interests of the speaker that Justice Blackmun does not seem to recognize. First, the speaker may have an interest in conveying false or misleading information in order to sell her product. This interest, Justice Blackmun suggests, is either illegitimate or is outweighed by the listener's interest in not being deceived.¹¹⁴ Second,

110. See *Bates v. State Bar of Arizona*, 433 U.S. 350, 380-81 (1977).

111. *Id.* at 381.

112. *Id.* at 380 (emphasis added); see also Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 890 (1991) (overbreadth forces the state to forego "opportunities to impose sanctions for conduct that the state legislature wanted to prohibit and that is not itself constitutionally protected.").

113. See *supra* notes 100-108 and accompanying text.

114. See *Virginia Pharmacy*, 425 U.S. at 771 ("Untruthful speech, commercial or otherwise, has never been protected for its own sake.").

the speaker may have an interest in free expression.¹¹⁵ Alex Kozinski and Stuart Banner point out that many television ads resemble short films.¹¹⁶ Still, one may doubt the strength of an advertiser's interest in self-expression as compared with her interest in selling a product.¹¹⁷ Furthermore, conceding that an advertiser has some interest in self-expression, one must recall that the only expressive freedom *Virginia Pharmacy* suggests may be denied the advertiser is the freedom to be deceptive or misleading. It is at this point, presumably, that the listener's interest in not being misled outweighs whatever interest in free-expression the speaker may have.

In sum, Justice Blackmun's observations about the "common-sense differences" between commercial and noncommercial speech are best understood as general observations about how the listener's interest varies in the two contexts. In a commercial context, the listener has an interest in receiving truthful information and an interest in being protected from false and misleading information. Moreover, unlike the noncommercial context, it is not necessary to protect false and misleading communications in order to ensure the flow of truthful ones. However, to say that the listener's interests vary between the two contexts is not to say that commercial speech as a category is less valuable than political speech.¹¹⁸ Neither is it to say that commercial speech should be treated in a categorically different manner from non-commercial speech.¹¹⁹

115. Some have argued that commercial advertisers have no interest in free expression. See Baker, *supra* note 66, at 17-18 (profit motive breaks the connection between speech and personal beliefs and commercial speech is not, therefore, entitled to protection); see also Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*, 79 CAL. L. REV. 1229, 1246-48 (1991) (corporation's right to speak is entirely derivative of the listener's right to receive information because corporations are purely utilitarian organizations).

116. See Kozinski & Banner, *supra* note 103, at 639.

117. Kozinski and Banner argue that *Virginia Pharmacy* rejected the profit motive as a basis for distinguishing commercial speech from other speech. See Kozinski & Banner, *supra* note 103, at 639-40. But *Virginia Pharmacy* simply says that the existence of a profit motive does not *disqualify* a speaker from First Amendment protection. See *Virginia Pharmacy*, 425 U.S. at 762. It does not follow that in identifying the interests that must be balanced, the Court should ignore the interests a speaker obviously has and attribute to her interests she may not have. *Virginia Pharmacy* observes that "advertising is the sine qua non of commercial profits," 425 U.S. at 771 n.24, but it seems equally true that profits are the sine qua non of commercial advertising.

118. See *Virginia Pharmacy*, 425 U.S. at 763 ("As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate.").

119. There is nothing in *Virginia Pharmacy* or *Bates* that suggests a retreat from Bigelow's statement that "whether it calls speech 'commercial' or 'commercial advertising' or 'solicitation'—a court may not escape the task of assessing the First Amendment interest at

5. *The Rest of the Court*

Justice Blackmun had seven votes for his opinions in *Bigelow* and *Virginia Pharmacy*. In *Bates* that number dwindled to five, but neither Justice Powell, who wrote the principal dissent, nor Chief Justice Burger questioned Justice Blackmun's balancing approach.¹²⁰ Rather, Justice Powell thought the majority "fail[ed] to give appropriate weight" to the ways advertising of professional services differed from advertising of products.¹²¹ From *Bigelow* through *Bates*, only Justice Rehnquist dissented from the Court's approach. He thought the line drawn in *Chrestensen* between commercial and noncommercial speech "was constitutionally sound and practically workable."¹²²

It is worth pausing for a moment to examine Justice Rehnquist's *Virginia Pharmacy* dissent because elements of it would later find their way into Justice Powell's majority opinions and Justice Rehnquist's own majority opinion in *Posadas de Puerto Rico Assoc. v. Tourism Co.*¹²³ Justice Rehnquist argued that plaintiffs' First Amendment challenge should be treated no differently than a substantive due process claim.¹²⁴ If a legislature could decide to ban a product, he suggested, surely it could take the lesser step of banning its advertising.¹²⁵ Balancing the pros and cons of advertising by pharmacists "should presumptively be the concern of the Virginia Legislature,"¹²⁶ and it was a mistake for the Court to "overrule[] a legislative determination that such advertising should not be allowed."¹²⁷ Thus, while Justice Rehnquist invoked Justice Black,¹²⁸ his approach was pure Frankfurter.¹²⁹

stake and weighing it against the public interest allegedly served by the regulation." *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975).

120. See *Bates v. State Bar of Arizona*, 433 U.S. 350, 389 (1977) (Powell, J., dissenting); *id.* at 386 (Burger, C.J., dissenting).

121. *Id.* at 391 (Powell, J., dissenting) (emphasis added).

122. *Id.* at 405 (Rehnquist, J., dissenting).

123. 478 U.S. 328 (1986).

124. See *Virginia Pharmacy*, 425 U.S. at 784 (Rehnquist, J., dissenting) (quoting *Ferguson v. Skrupa*, 372 U.S. 726 (1963), and *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955)). For an elaboration of this argument, see Jackson & Jeffries, *supra* note 66, at 25-40.

125. See *Virginia Pharmacy*, 425 U.S. at 789 (Rehnquist, J., dissenting) ("Both Congress and state legislatures have by law sharply limited the permissible dissemination of information about some commodities because of the potential harm resulting from those commodities, even though they were not thought to be sufficiently demonstrably harmful to warrant outright prohibition of their sale.").

126. *Id.* at 783 (Rehnquist, J., dissenting).

127. *Id.* at 781 (Rehnquist, J., dissenting).

128. See *id.* at 784, 788 (Rehnquist, J., dissenting).

129. See *supra* notes 18-19 and accompanying text.

B. Second Class Speech: The Era of *Central Hudson*

Despite its near unanimity with respect to the analytic approach in *Bigelow*, *Virginia Pharmacy*, and *Bates*, the Court shifted dramatically over the next three Terms. In a series of opinions by Justice Powell, it abandoned Justice Blackmun's balancing approach in favor of a more categorical one. This new approach culminated in *Central Hudson* and its adoption of an intermediate scrutiny standard for restrictions on commercial speech, which still remains the Court's position.

1. *The Shift Begins: Ohralik and Friedman*

The shift towards a categorical approach began in *Ohralik v. Ohio State Bar Association*.¹³⁰ *Ohralik* involved the in-person solicitation of accident victims by an attorney—what Justice Marshall called a “classic example[] of ‘ambulance chasing.’”¹³¹ Writing for the Court, Justice Powell held that the State could adopt a prophylactic ban against such solicitation.¹³² The result was not remarkable and was consistent with the Court's past focus on the interests of the listener: “Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection.”¹³³ But analytically, *Ohralik* marked a dramatic departure from Justice Blackmun's approach. Where *Virginia Pharmacy* had noted that an individual consumer's interest in commercial speech “may be as keen, if not keener by far, than his interest in the day's most urgent political debate,”¹³⁴ *Ohralik* concluded that commercial speech occupied a “subordinate position in the scale of First Amendment values.”¹³⁵

Justice Powell bolstered this assertion with three main arguments. First, he observed that there was a “‘commonsense’ distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.”¹³⁶ Second, he argued that “[t]o require a parity of constitutional protection for commercial and noncommercial speech

130. 436 U.S. 447 (1978).

131. *Id.* at 469 (Marshall, J., concurring in part and concurring in the judgment).

132. *See id.* at 464-67.

133. *Id.* at 457; *see also* *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 433 (1993) (Blackmun, J., concurring) (“A listener also has little interest in being coerced into a purchasing decision.”).

134. *Virginia Pharmacy*, 425 U.S. at 763.

135. *Ohralik*, 436 U.S. at 456.

136. *Id.* at 455-56.

alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech."¹³⁷ And finally, he noted that the Court had already allowed "modes of regulation that might be impermissible in the realm of non-commercial expression."¹³⁸

The first argument quoted the *Virginia Pharmacy* majority but had more in common with Justice Rehnquist's dissent. Justice Blackmun's "commonsense" distinction between commercial and noncommercial speech did not turn on the fact that commercial speech was traditionally subject to government regulation, but on the fact that at least some commercial speech was verifiable and durable and would not, therefore, be discouraged by government regulation.¹³⁹ Justice Powell's point was quite different—that the State was mostly regulating business, not speech. "A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation."¹⁴⁰ This argument closely resembled Justice Rehnquist's position that commercial speech claims should be treated like substantive due process claims.¹⁴¹

Justice Powell's second argument—that parity with noncommercial speech would dilute the protection accorded noncommercial speech—reflects a misunderstanding of Justice Blackmun's approach. Dilution is a danger that inheres in an absolutist or categorical approach that treats all speech in a given category exactly alike.¹⁴² Balancing does not pose this danger because it allows for case-by-case calibration of the level of protection. The irony is that Justice Powell would himself adopt a categorical approach,¹⁴³ and his placement of commercial speech in an intermediate category is itself an example of

137. *Id.* at 456. For a more recent statement of the same argument, see William Van Alstyne, *Remembering Melville Nimmer: Some Cautionary Notes on Commercial Speech*, 43 UCLA L. REV. 1635 (1996).

138. *Ohralik*, 436 U.S. at 456.

139. *See supra* notes 100-108 and accompanying text. *Bigelow* noted that the relationship of speech to a commercial activity that is subject to regulation "may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged," 421 U.S. at 826, but it did not put commercial speech in a separate category. *See id.* ("a State cannot foreclose the exercise of constitutional rights by mere labels").

140. *Ohralik*, 436 U.S. at 459; *see also id.* at 457 ("In-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component.").

141. *See supra* note 124 and accompanying text.

142. *See supra* notes 29-33 and accompanying text.

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

the dilution tendency of categorical approaches. Justice Powell apparently saw categories as the only alternatives: he could either put commercial and noncommercial speech in the same category and afford them the same protection or put them in different categories and afford them different protection. The option he ignored, without explanation, was the balancing approach that Justice Blackmun had actually used in *Bigelow*, *Virginia Pharmacy*, and *Bates*.

Justice Powell's third argument—that the Court had treated commercial speech differently in the past—rested on the same misunderstanding. If one recognizes that the Court's prior cases employed a balancing approach, then the fact that the Court allowed “modes of regulation that might be impermissible in the realm of noncommercial expression”¹⁴⁴ simply reflects the differing balance of interests in the commercial context. It is only if one thinks exclusively in terms of categories that a greater degree of regulation becomes evidence of a less protected status.¹⁴⁵ Thus, implicit in Justice Powell's judgment that commercial speech occupies a “subordinate position,” was the categorical treatment of commercial speech that would become manifest in *Friedman* and *Central Hudson*.¹⁴⁶

Justice Blackmun joined Justice Powell in *Ohralik*, presumably because he thought permitting coercive commercial speech was not in the interests of the listener.¹⁴⁷ But he dissented the following Term in *Friedman v. Rogers*.¹⁴⁸ *Friedman* upheld a Texas law prohibiting the practice of optometry under a trade name.¹⁴⁹ There was certainly nothing coercive about trade names, but Justice Powell thought they were potentially misleading because they did not reveal an optome-

144. *Ohralik*, 436 U.S. at 456.

145. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 433-34 (1993) (Blackmun, J., concurring). (The Court's “lesser protection” of commercial speech “did not rest . . . on the fact that commercial speech ‘is of less constitutional moment than other forms of speech’ . . . Rather, it reflected the fact that the listener's First Amendment interests, from which the protection of commercial speech largely derives, allow for certain specific kinds of government regulation.”).

146. Justice Powell's approach differed from Justice Blackmun's not just in theory but in practice. Justice Powell gave the arguments in favor of the solicitation ban only limited scrutiny and, in fact, resurrected several of the justifications dismissed in *Bates*. For example, Justice Powell relied on the State's interests in preventing a lawyer from “stirring up litigation” and “subordinat[ing] the best interests of the client to his own pecuniary interests.” *Ohralik*, 436 U.S. at 460-61 & n.19. *Compare Bates v. State Bar of Arizona*, 433 U.S. 350, 376 (1977) (“we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action”); *id.* at 368-69 (rejecting argument that profit motive erodes professionalism).

147. *See supra* note 133.

148. 440 U.S. 1 (1979).

149. *See id.* at 15-16.

trist's identity.¹⁵⁰ Justice Powell added for good measure that "[t]he use of a trade name . . . facilitates the advertising essential to large-scale commercial practices with numerous branch offices, conduct which the State rationally may wish to discourage while not prohibiting commercial optometrical practice altogether."¹⁵¹

Justice Blackmun disagreed with Justice Powell on both points. First, he argued that the Court ignored the fact that trade names could provide valuable information to a consumer, who would associate certain standards of price and quality with a particular name.¹⁵² If the State were concerned that concealing the name of the optometrist was deceptive, it could require disclosure of the optometrist's name in addition to the trade name.¹⁵³ Second, he maintained that the notion that the greater power to ban commercial optometry includes the lesser power to prohibit its advertisement was antithetical to one of the central themes of *Virginia Pharmacy*: that the state could not manipulate the information available to consumers to protect them from activities that it had decided not to regulate directly.¹⁵⁴ Indeed, the greater-power-lesser-power argument was yet another element of Justice Rehnquist's *Virginia Pharmacy* dissent that Justice Powell had now adopted.¹⁵⁵

The categorical nature of Justice Powell's approach also became clearer in *Friedman*. Relying on *Virginia Pharmacy*'s footnote 24, Justice Powell concluded that noncommercial speech "is *categorically different* from the mere solicitation of patronage implicit in a trade name."¹⁵⁶ Justice Powell also began to erect walls around the category of commercial speech by warning the lower courts that "[o]ur decisions dealing with more traditional First Amendment problems do not extend automatically to this as yet uncharted area."¹⁵⁷ Justice Blackmun protested this shift. In past commercial speech cases, he observed, "the Court has balanced the public and private interests that the First Amendment protects against the justifications proffered by the State. Without engaging in any rigid categorization of the degree of scrutiny required, the Court has distinguished between permis-

150. *See id.* at 12-13.

151. *Id.* at 13.

152. *See id.* at 22-23 (Blackmun, J., dissenting).

153. *See id.* at 24-25 (Blackmun, J., dissenting).

154. *See id.* at 27-28 (Blackmun, J., dissenting); *Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

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

156. *Friedman*, 440 U.S. at 11 n.10 (emphasis added).

157. *Id.* at 10 n.9.

sible and impermissible forms of state regulation.”¹⁵⁸ But his protest went unheeded, and the categorical approach foreshadowed in *Ohralik* and *Friedman* crystallized the following Term in *Central Hudson*.

2. Formalizing the Categorical Approach: Central Hudson

In *Central Hudson*,¹⁵⁹ the Court struck down a New York regulation banning ads that promoted the use of electricity. The case provided Justice Powell an opportunity to formalize his categorical approach by announcing a four-part, intermediate-scrutiny test applicable only to commercial speech.¹⁶⁰

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.¹⁶¹

Justice Powell justified this lower level of scrutiny with the arguments articulated in *Ohralik*.¹⁶²

Justice Blackmun criticized the Court’s new test because it did “not provide adequate protection for truthful, nonmisleading, nonco-

158. *Id.* at 20 (Blackmun, J., dissenting).

159. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of New York*, 447 U.S. 557 (1980).

160. Justice Powell also attempted to broaden the definition of “commercial speech” to encompass all “expression related solely to the economic interests of the speaker and its audience.” *Id.* at 561. But this definition did not stick, and the Court subsequently returned to the *Pittsburgh Press* formulation—speech that does “no more than propose a commercial transaction.” *Pittsburgh Press*, 413 U.S. at 385; see *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422 (1993).

161. *Central Hudson*, 447 U.S. at 566. While *Central Hudson*’s intermediate-scrutiny test ultimately requires a court to balance the rights of the speaker against the government’s interests, *Central Hudson*’s approach is categorical (and different from Justice Blackmun’s) because the test to be applied depends on an initial categorization of the speech as commercial or noncommercial. See *supra* note 15.

162. First, commercial speech “occurs in an area traditionally subject to government regulation.” *Central Hudson*, 447 U.S. at 562 (quoting *Ohralik*, 436 U.S. at 455-56). Second, commercial speech “is of less constitutional moment than other forms of speech.” *Id.* at 562 n.5. Compare *Ohralik*, 436 U.S. at 456 (holding that commercial speech occupies a “subordinate position in the scale of First Amendment values”). And third, failing to distinguish between the two “could invite dilution, simply by a leveling process, of the force of the [First] Amendment’s guarantee” with respect to noncommercial speech. *Central Hudson*, 447 U.S. at 562 n.5 (quoting *Ohralik*, 436 U.S. at 456). For a discussion of these arguments, see *supra* notes 136-45 and accompanying text.

erceive commercial speech.”¹⁶³ In contrast to *Friedman*, however, he did not focus on the categorical nature of Justice Powell’s approach. Rather, he emphasized the fact that it left “open the possibility that the State may suppress advertising of electricity in order to lessen demand for electricity” if necessary to serve the State’s interest in conservation.¹⁶⁴ It “strikes at the heart of the First Amendment,” Justice Blackmun wrote, “because it is a covert attempt by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice.”¹⁶⁵

3. *Watering-Down* Central Hudson: Posadas

Although one of the supposed advantages of a categorical approach is its ability to protect speech by restricting the ability of judges to defer to the legislature,¹⁶⁶ *Central Hudson* proved highly manipulable. The most extreme example of this is *Posadas de Puerto Rico Associates v. Tourism Co.*¹⁶⁷ At issue in *Posadas* was a Puerto Rican statute prohibiting the advertisement of casino gambling aimed at residents of Puerto Rico—a classic example of government seeking to discourage an activity it had decided not to ban by prohibiting its advertisement. Writing for the Court, Justice Rehnquist upheld the statute, infusing deference to the legislature into every prong of *Central Hudson*.

Justice Rehnquist found that Puerto Rico’s interest in discouraging casino gambling was substantial because of the “legislature’s belief” that it was substantial and because other jurisdictions had banned casino gambling entirely.¹⁶⁸ Echoing one of the themes of his *Virginia Pharmacy* dissent,¹⁶⁹ he wrote that “the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling.”¹⁷⁰ Justice Rehnquist showed the same deference in applying the final two parts of *Central Hudson*. A re-

163. *Central Hudson*, 447 U.S. at 573 (Blackmun, J., concurring in the judgment). Justice Rehnquist, on the other hand, dissented because he viewed the Court’s test as affording commercial speech a level of protection “that is virtually indistinguishable from that of noncommercial speech.” *Id.* at 591 (Rehnquist, J., dissenting).

164. *Id.* at 573 (Blackmun, J., concurring in the judgment).

165. *Id.* at 574-75 (Blackmun, J., concurring in the judgment).

166. *See supra* notes 23-28 and accompanying text.

167. 478 U.S. 328 (1986).

168. *See id.* at 341.

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

170. *Posadas*, 478 U.S. at 345-46.

striction would be held to “‘directly advance’”¹⁷¹ the government’s interest if the legislature’s belief that it would do so was “reasonable.”¹⁷² And in considering whether the restriction was more extensive than necessary, Justice Rehnquist refused to consider whether counterspeech to discourage residents from casino gambling would be a less restrictive alternative. That decision was “up to the legislature.”¹⁷³ If, as Justice Rehnquist suggested, each prong of *Central Hudson* could be satisfied so long as the legislature’s judgment was reasonable, it was difficult to distinguish this test from rational basis review.¹⁷⁴

C. Rediscovering the Value of Commercial Speech: *Discovery Network*

City of Cincinnati v. Discovery Network, Inc.,¹⁷⁵ was the logical result of the Court’s decision to treat commercial speech as a separate and subordinate category. Cincinnati wanted to reduce the number of newsracks on its city streets, so it banned all commercial newsracks on the theory that commercial speech was less valuable. As Justice Blackmun put it, “[i]n this case, *Central Hudson*’s chickens have come home to roost.”¹⁷⁶

Having come eyeball to eyeball with a city that wished to ban commercial speech for no other reason than its lower value, the Court blinked. In an opinion by Justice Stevens, the Court invalidated the ordinance, stating that “the city’s argument attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimates the value of commercial speech.”¹⁷⁷ *Discovery Network* applied *Central Hudson* far more strictly than *Posadas*. Moreover, the Court’s refusal to rely on the supposed lesser value of commercial speech obliterated the central

171. *See id.* at 342 (quoting *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 511 (plurality)).

172. *See id.*

173. *Id.* at 344; *see also* *Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989) (holding that the final prong of the *Central Hudson* test requires only a “reasonable fit” between the legislature’s ends and the means chosen to accomplish those ends).

174. *See generally* Albert P. Mauro, Jr., Comment, *Commercial Speech After Posadas and Fox: A Rational Basis Wolf in Intermediate Sheep’s Clothing*, 66 TUL. L. REV. 1931 (1992).

175. 507 U.S. 410 (1993).

176. *Id.* at 436 (Blackmun, J., concurring).

177. *Id.* at 419.

justification for *Central Hudson's* treatment of commercial speech as a separate category.

Justice Steven's ostensible reason for invalidating the ban on commercial newsracks was that the city had failed to establish that there was a "reasonable fit" between the ban and its interests in safety and esthetics.¹⁷⁸ The benefit to the city was minimal.¹⁷⁹ Commercial newsracks were "no greater an eyesore than the newsracks permitted to remain on Cincinnati's sidewalks,"¹⁸⁰ and, in fact, noncommercial newsracks were "arguably the greater culprit because of their superior number."¹⁸¹ In short, unless Cincinnati was concerned about characteristics of commercial newsracks in particular, it would have to treat all newsracks alike.

To reach this conclusion, of course, Justice Stevens had to reject Cincinnati's argument that the supposed low value of commercial speech was itself a valid reason for distinguishing among newsracks. Justice Stevens attacked this argument in two ways. First, he pointed to "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category."¹⁸² He noted it is clear that "much of the material in ordinary newspapers is commercial speech and, conversely, that the editorial content in respondents' promotional publications is not what we have described as 'core' commercial speech. There is no doubt a 'commonsense' basis for distinguishing between the two, but . . . the difference is a matter of degree."¹⁸³ Second, Justice Stevens found Cincinnati's reliance on the distinction unavailing because "the distinction bears no relationship *whatsoever* to the particular interests that the city has asserted."¹⁸⁴ "[T]he typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech," he said, was the State's "interest in preventing commercial harms" flowing from that speech.¹⁸⁵ In a footnote, he suggested that restrictions on commercial speech not "aimed at either the content of the speech or the particular adverse

178. *See id.* at 417.

179. Only 62 of the 1,500-2,000 newsracks in Cincinnati were commercial. *See Discovery Network*, 507 U.S. at 418.

180. *Id.* at 425.

181. *Id.* at 426.

182. *Id.* at 419. This had long been a concern of Justice Stevens. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 579-83 (1980) (Stevens, J., concurring in the judgment); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 81-83 (1983) (Stevens, J., concurring in the judgment).

183. *Discovery Network*, 507 U.S. at 423.

184. *Id.* at 424.

185. *Id.* at 426.

effects stemming from that content” should be “evaluated under the standards applicable to regulations of fully protected speech.”¹⁸⁶

Although Justice Stevens invoked the terminology of *Central Hudson*, his opinion in *Discovery Network* was in many ways a return to the balancing approach of *Bigelow*, *Virginia Pharmacy*, and *Bates*.¹⁸⁷ First, *Discovery Network* suggested that rigid categorization of commercial speech is difficult and that the difference between a newspaper and a commercial publication is “a matter of degree.”¹⁸⁸ Second, the decision rejected the notion that government may treat commercial speech differently merely on the grounds that it is less valuable.¹⁸⁹ Third, the decision suggested that a State may only restrict commercial speech because of some particular characteristic of that speech and that the Court would subject regulations of commercial speech aimed at achieving other purposes to strict scrutiny.¹⁹⁰ Finally, Justice Stevens’ decision reached its conclusion not by placing the speech at issue in a particular category, but by balancing the First Amendment interests at stake (the complete suppression of commercial newstracks) against the State’s interest (removing 62 out of more than 1,500 newstracks).¹⁹¹

Although Justice Blackmun joined Justice Stevens’ opinion, he also wrote separately to call for the abandoning of *Central Hudson*. In Justice Blackmun’s view, there was “no reason to treat truthful commercial speech as a class that is less ‘valuable’ than noncommercial

186. *Id.* at 416 n.11.

187. Justice Stevens tends to prefer balancing approaches. See Kathleen M. Sullivan, *The Supreme Court – Supreme Court 1991 Term: Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 88 (1992) (“Justice Stevens has long favored sliding-scale approaches over categorical rule-bound approaches.”).

188. *Discovery Network*, 507 U.S. at 423. Compare *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (suggesting “that no line between publicly ‘interesting’ or ‘important’ commercial advertising and the opposite kind could ever be drawn”).

189. See *Discovery Network*, 507 U.S. at 419, 428. Compare *Virginia Pharmacy*, 425 U.S. at 763 (consumer’s interest “may be as keen, if not keener by far, than his interest in the day’s most urgent political debate”).

190. See *Discovery Network*, 507 U.S. at 416 n.11. Compare *Central Hudson*, 447 U.S. at 578 (Blackmun, J., concurring in the judgment) (“We have not suggested that the ‘commonsense differences’ between commercial speech and other speech justify relaxed scrutiny of restraints that suppress truthful, nondeceptive, noncoercive commercial speech.”).

191. Predictably, Chief Justice Rehnquist dissented. He warned against “‘allowing individual judges in city after city to second-guess such . . . legislative . . . determinations’ on such matters as esthetics.” *Discovery Network*, 507 U.S. at 445 (Rehnquist, C.J., joined by White and Thomas, JJ., dissenting) (quoting *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 570 (1981) (Rehnquist, J., dissenting)).

speech.”¹⁹² The Court had permitted greater regulation of misleading and coercive commercial speech and speech about illegal activities because the listener’s interest in receiving such speech was minimal.¹⁹³ The *Central Hudson* Court’s mistake was to suggest that the expanded speech regulation it allowed was an indication of commercial speech’s subordinate value generally rather than a reflection of the listener’s reduced interest in receiving certain kinds of commercial speech.¹⁹⁴ By subordinating commercial speech generally, the Court had invited precisely the sort of regulation that *Cincinnati* had imposed.¹⁹⁵

Justice Blackmun also questioned *Ohralik*’s dilution argument. “The very fact that government remains free . . . to ensure that commercial speech is not deceptive or coercive, to prohibit commercial speech proposing illegal activities, and to impose reasonably time, place, or manner restrictions on commercial speech greatly reduces the risk that protecting commercial speech will dilute the level of First Amendment protection for speech generally.”¹⁹⁶ Because the balancing approach he had always advocated permitted courts to give appropriate weight to government interests, protecting commercial speech would not drag down the level of protection for speech in other circumstances.

Discovery Network marked a turning point in the Court’s commercial speech jurisprudence. By rejecting the notion that commercial speech is inherently less valuable than noncommercial speech, the Court removed the main pillar supporting *Central Hudson*’s analytic framework. As I further discuss below,¹⁹⁷ five members of the current Court subsequently expressed their dissatisfaction with *Central Hudson*, indicating that they might be willing to abandon its approach to commercial speech if only they could decide what should replace it.¹⁹⁸ In Part III, I will argue that Justice Blackmun’s listener-oriented balancing approach provides the best alternative to *Central Hudson*,¹⁹⁹ but first I will look at how Justice Blackmun applied the same approach to public forums.

192. *Id.* at 431 (Blackmun, J., concurring).

193. *See id.* at 432-33 (Blackmun, J., concurring).

194. *See id.* at 433-34 (Blackmun, J., concurring).

195. *See id.* at 435-36 (Blackmun, J., concurring).

196. *Id.* at 438 (Blackmun, J., concurring).

197. *See infra* notes 331-36 and accompanying text.

198. *See* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

199. *See infra* notes 343-70 and accompanying text.

II. Public Forum

Another significant development in First Amendment law during Justice Blackmun's time on the Supreme Court was the articulation of a highly structured public forum jurisprudence. The Court had considered cases involving expressive activity on government property since the 1930s,²⁰⁰ but it was not until the 1970s that it began to ask if the property in question was a "public forum."²⁰¹ As the author of *Lehman v. City of Shaker Heights*,²⁰² *Southeastern Promotions, Ltd. v. Conrad*,²⁰³ and *Burson v. Freeman*,²⁰⁴ Justice Blackmun helped shape the Supreme Court's public forum doctrine, while his objection in *Cornelius v. NAACP Legal Defense and Educational Fund*²⁰⁵ to the Court's categorical approach has helped build opposition to that aspect of the Court's doctrine.

As in the commercial speech area, Justice Blackmun has advocated a balancing approach that emphasizes the listener's interests. Though the commitment to balancing is clearest in his *Cornelius* dissent,²⁰⁶ it also appears in *Lehman*, his first public-forum opinion.²⁰⁷ Justice Blackmun's concern for the listener is also evident in *Lehman*, where the Justice allowed a public transit system to ban political ads

200. See, e.g., *Schneider v. New Jersey*, 308 U.S. 147 (1939); *Hague v. Committee for Indus. Org.*, 307 U.S. 496 (1939).

201. The phrase "public forum" emerged from a 1965 article by Harry Kalven, see Harry Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, and was picked up by the Court in *Police Department of Chicago v. Mosely*, 408 U.S. 92, 96 (1972) ("Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.").

202. 418 U.S. 298 (1974) (plurality).

203. 420 U.S. 546 (1975).

204. 504 U.S. 191 (1992) (plurality).

205. 473 U.S. 788, 813-33 (1985) (Blackmun, J., dissenting).

206. See *id.* at 816 (Blackmun, J., dissenting) (quoting *Adderley v. Florida*, 385 U.S. 39, 54 (1966) (dissenting opinion) (a "person's right to speak and the interests that such speech serves for society as a whole must be balanced against the 'other interests inhering in the uses to which the public property is normally put.'")); *id.* (Blackmun, J., dissenting) ("The result of such balancing will depend, of course, upon the nature and strength of the various interests, which in turn depend upon such factors as the nature of the property, the relationship between the property and the message the speaker wishes to convey, and any special features of the forum that make it especially desirable or undesirable for the particular expressive activity.").

207. See 418 U.S. 298, 302-03 (plurality) ("the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the [First] Amendment to the speech in question.").

out of concern for the “captive audience;”²⁰⁸ in *Conrad*, where he overturned a municipal theater’s decision to bar the musical “Hair” because “[t]here was no captive audience;”²⁰⁹ and in *Burson*, where he upheld a ban on campaigning within 100 feet of a polling place on election day to allow voters a final moment for thought before they entered a polling place.²¹⁰

The more categorical approach adopted by the Court in *Perry*²¹¹ and *Cornelius*,²¹² which divides government property into “public forums,” “limited public forums,” and “nonpublic forums,”²¹³ has proved less protective of speech than Justice Blackmun’s approach. The culprit has not been the dynamic of dilution seen in the commercial speech area,²¹⁴ but rather the dynamic of narrowing—the tendency to define categories narrowly because every case within a category is supposed to be treated the same way.²¹⁵ Thus, the Court has limited “public forums” to places like streets and parks, places which have “‘immemorially . . . been held in the public trust and used for purposes of expressive activity,’”²¹⁶ and has defined “limited public forums” by reference to the government’s intent, so that the government’s exclusion of a particular speaker establishes that the government has not created a “limited public forum.”²¹⁷ The dynamic of narrowing inherent in the Court’s categorical approach to public forums has turned a doctrine that was designed to open government property for expressive activity into a tool for closing it.

A. Early Extremes: *Lehman* and *Conrad*

Although the Supreme Court had used the phrase “public forum” in a previous opinion,²¹⁸ *Lehman* was the first case in which the Court gave the concept “serious and divisive doctrinal attention.”²¹⁹ In a

208. *Id.* at 302 (plurality) (quoting *Public Utils. Comm’n v. Pollak*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting)).

209. *Conrad*, 420 U.S. at 556.

210. *Burson*, 504 U.S. at 210.

211. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983).

212. *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1985).

213. *See Perry*, 460 U.S. at 45-46; *Cornelius*, 473 U.S. at 802.

214. *See supra* notes 135-61 and accompanying text.

215. *See supra* notes 29-33 and accompanying text.

216. *International Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680 (1992) (quoting *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515 (1939)) (concluding that airport terminals are not public forums).

217. *See Cornelius*, 473 U.S. at 802-03.

218. *See Police Dep’t of Chicago v. Mosely*, 408 U.S. 92, 96 (1972).

219. Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1734 (1987).

plurality opinion, Justice Blackmun held that the City of Shaker Heights did not have to accept political advertising on its municipal rapid transit system even though it regularly accepted commercial and public-service ads. He began by noting that the passengers on public transportation were “‘a captive audience.’”²²⁰ “[V]iewers of billboards and streetcar signs had no ‘choice or volition’ to observe such advertising and had the message ‘thrust upon them by all the arts and devices that skill can produce.’”²²¹ “These situations,” the Justice concluded, “are different from the traditional settings where First Amendment values inalterably prevail.”²²²

What was needed was balancing: “the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the [First] Amendment to the speech in question.”²²³ Yet, Justice Blackmun did not subject the government’s interests to the same “close inspection” that he would in the commercial speech cases.²²⁴ In fact, he suggested that because the city was acting as the proprietor of a “commercial venture,” its decisions should be upheld so long as they were not “arbitrary, capricious, or invidious.”²²⁵

Although the city had an interest in protecting the “captive audience,” that interest would not support a distinction between commercial and political ads unless the two were in some way different. Thus, Justice Blackmun fell back on the notion that political ads were more “controversial.”²²⁶ Because they might jeopardize the revenue the city earned from the advertising, offend the city’s passengers, raise concerns about favoritism, and lead to problems in parceling out space, it was reasonable for the city to prohibit them.²²⁷ These reasons are not particularly convincing and, indeed, Justice Blackmun would later reject them himself.²²⁸

220. *Lehman*, 418 U.S. at 302 (quoting *Public Utilities Comm’n v. Pollack*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting)).

221. *Id.* at 302 (quoting *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932)).

222. *Id.*

223. *Id.* at 302-03.

224. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 769 (1976).

225. *Lehman*, 418 U.S. at 303.

226. *Id.* at 304.

227. *See id.*

228. *See Cornelius*, 473 U.S. at 822, 829-30 (1985); *infra* notes 263-70 and accompanying text.

In *Conrad*,²²⁹ Justice Blackmun again authored the majority opinion. This time, however, he ruled against the government and was joined by the dissenters in *Lehman*. *Conrad* held that the directors of two municipal theaters could not deny an application to perform the rock musical "Hair" without complying with the procedural safeguards for prior restraints.²³⁰ Central to this holding was Justice Blackmun's conclusion that the municipal theaters at issue "were public forums designed for and dedicated to expressive activities."²³¹ Because the theaters were perfectly compatible with the musical, the rejection was not based on competing applications from other users, and "[t]here was no captive audience,"²³² there was no reason to defer to the directors' decision.

There was obviously some tension between *Conrad* and *Lehman*. Like the city in *Lehman*, the municipal theater directors in *Conrad* were acting in a proprietary capacity. As Justice Rehnquist pointed out in dissent, Chattanooga was "not prohibiting or penalizing the expression of views in dramatic form by its citizens at large, but rather managing its municipal auditorium."²³³ What seemed to distinguish *Conrad* from *Lehman* in Justice Blackmun's mind was the absence of a captive audience. Even if "Hair" was not family entertainment, no one was being forced to go see it.

Lehman and *Conrad* have been criticized for adopting a categorical, "all or nothing" approach to public forums.²³⁴ If there is no public forum, as in *Lehman*, blatant content discrimination is permissible; if there is a public forum, as in *Conrad*, an opera house may not limit itself to operas. Certainly the dramatically different results of these cases are consistent with a categorical approach. But *Lehman* is a balancing opinion that notes the need to consider "the conflicting interests involved" in order to determine "the degree of protection afforded by the [First] Amendment."²³⁵ *Conrad* also suggests that de-

229. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

230. *See id.* at 558-62.

231. *Id.* at 555.

232. *Id.* at 555-56.

233. *Id.* at 571 (Rehnquist, J., dissenting). "May a municipal theater devote an entire season to Shakespeare," he asked, "or is it required to book any potential producer on a first come, first served basis?" *Id.* at 573.

234. *See* Kenneth L. Karst, *Public Enterprise and the Public Forum: A Comment on Southeastern Promotions v. Conrad*, 37 OHIO ST. L.J. 247, 252 (1976); Post, *supra* note 219, at 1734-39.

235. *Lehman*, 418 U.S. at 302-03; *see supra* note 223 and accompanying text. As Robert Post has pointed out, it was Justice Brennan's dissenting opinion in *Lehman* that attempted to outline a categorical public-forum approach. *See* Post, *supra*, note 219, at 1737 ("Bren-

spite the theaters' status as public forums, the case might have turned out differently had the city been able to show that the facilities were not suited to the production, that they were subject to competing demands, or that there was a captive audience.²³⁶ The better explanation of *Lehman* and *Conrad* is that the balancing of conflicting interests placed them at opposite ends of a continuum, not that the Justice who would be such an advocate of balancing in commercial speech cases was a rigid categorizer when it came to public forums.

Still, Justice Blackmun was slower to voice his opposition as the Court moved to a rigid, categorical approach than he had been in the commercial speech area. Although Justice Brennan abandoned the idea of a categorical approach to public forums as early as *Greer v. Spock*,²³⁷ Justice Blackmun voted mostly with the majority in public forum cases until his dissent in *Cornelius*.²³⁸ The main developments in the Court's public forum jurisprudence during this period were the recognition of an intermediate category of "limited public forums"²³⁹ and the formal adoption of a three category approach in *Perry Education Association v. Perry Local Educators' Association*.²⁴⁰

Perry divided all public property into three categories, with different rules for each. In the first category were "quintessential public forums" like streets and parks, "which by long tradition or by government fiat have been devoted to assembly and debate."²⁴¹ In such public forums, "the rights of the State to limit expressive activity are sharply circumscribed" and content-based exclusions would be subjected to strict scrutiny.²⁴² In the second category were "'limited' public forum[s],"²⁴³ "which the State has opened for use by the public as a place for expressive activity."²⁴⁴ Although the State is not required to maintain a limited public forum indefinitely, "so long as it does so it is bound by the same standards as apply in a traditional

nan's larger project . . . was to distinguish two generic kinds of government property . . . subject to distinct regimes of first amendment regulation.").

236. See *Conrad*, 420 U.S. at 555-56.

237. See *Greer v. Spock*, 424 U.S. 828, 859-60 (1976) (Brennan, J., dissenting); see also *Post*, *supra* note 219, at 1744-45.

238. See *Cornelius*, 473 U.S. at 813-33 (Blackmun, J., dissenting).

239. See *Madison Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976); *Widmar v. Vincent*, 454 U.S. 263 (1981).

240. 460 U.S. 37 (1983).

241. *Id.* at 45.

242. *Id.*

243. *Id.* at 48.

244. *Id.* at 45.

public forum.”²⁴⁵ In the third category were nonpublic forums, “[p]ublic property which is not by tradition or designation a forum for public communication.”²⁴⁶ In a nonpublic forum, regulations need only be “reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s views.”²⁴⁷ Justice White concluded that the school mail system at issue in *Perry* was a nonpublic forum, and that it was therefore permissible for the school district to allow only one teachers union to use the mail system because that union was the teachers’ collective bargaining representative.²⁴⁸

Though Justice Brennan dissented in *Perry* and repeated his *Greer* arguments against a categorical approach,²⁴⁹ Justice Blackmun was apparently not moved for he joined Justice White’s opinion without comment. That would change in *Cornelius*, however, where Justice Blackmun dissented from the Court’s evisceration of the limited public forum and, in the process, presented an extended critique of the Court’s categorical approach.

B. Dissenting from a Jurisprudence of Labels: *Cornelius*

At issue in *Cornelius*²⁵⁰ was the federal government’s policy of excluding advocacy groups from the Combined Federal Campaign (CFC), a charity drive aimed at federal employees. Some of these groups argued that they could not be excluded from the CFC because it was a limited public forum for charitable solicitations. Justice O’Connor rejected that argument in a four to three decision.²⁵¹ For Justice O’Connor, the key to whether the government had created a limited public forum was its intent: “The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.”²⁵² The CFC was not a limited public forum because “[t]he

245. *Id.* at 46. Relying on *Widmar* and *Madison*, however, Justice White stated that a limited public forum “may be created for a limited purpose such as use by certain groups or for the discussion of certain subjects.” *Id.* at 46 n.7 (citations omitted). There is a tension between recognizing that public forums may be created for a limited purpose and stating that the same standards apply to limited public forums as apply in a traditional public forum. One of the principles that applies in a traditional public forum is that content-based exclusions are subject to strict scrutiny, *see id.* at 45, yet to create a forum for the discussion of certain subjects is necessarily to make content-based exclusions.

246. *Id.* at 46.

247. *Id.*

248. *See id.* at 46, 51-52.

249. *See id.* at 63 n.6 (Brennan, J., dissenting).

250. *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1985).

251. Justices Marshall and Powell did not participate.

252. *Cornelius*, 473 U.S. at 802.

Government's consistent policy has been to limit participation in the CFC to 'appropriate' voluntary agencies."²⁵³

Justice Blackmun dissented vigorously from what he saw as the evisceration of the limited public forum concept. By focusing on intent, he wrote:

[t]he Court makes it virtually impossible to prove that a forum restricted to a particular class of speakers is a limited public forum. If the Government does not create a limited public forum unless it intends to provide an "open forum" for expressive activity, and if the exclusion of some speakers is evidence that the Government did not intend to create such a forum, no speaker challenging denial of access will ever be able to prove that the forum is a limited public forum.²⁵⁴

Thus, the Court "empties the limited-public-forum concept of meaning and collapses the three categories of public forum, limited public forum, and nonpublic forum into two."²⁵⁵

But Justice Blackmun did not simply criticize the court for failing to keep its categories straight; he also questioned the entire enterprise of dividing government property into categories. In passages reminiscent of *Bigelow* and *Friedman*,²⁵⁶ he argued that proper resolution of public-forum cases turned not on the label applied but on balancing the underlying interests.

The result of such balancing will depend, of course, upon the nature and strength of the various interests, which in turn depend upon such factors as the nature of the property, the relationship between the property and the message the speaker wishes to convey, and any special features of the forum that make it especially desirable or undesirable for the particular expressive activity. Broad generalizations about the proper balance are, for the most part, impossible. The Court has stated one firm guideline, however: the First Amendment does not guarantee that one may engage in expressive activity on government property when the expressive activity would be incompatible with important purposes of the property.²⁵⁷

253. *Id.* at 804. Because the CFC was a nonpublic forum, the exclusion of advocacy groups would be upheld if reasonable and viewpoint-neutral. In concluding that the exclusion of advocacy groups was reasonable, Justice O'Connor invoked the full panoply of justifications found in *Lehman*: the government's status as proprietor; the fear of being overwhelmed with claims of access; the appearance of favoritism; and the assertion that the participation of advocacy groups jeopardized the success of the Campaign. *See id.* at 805, 809-10. *Compare* *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303-04 (1974) (plurality).

254. *Cornelius*, 473 U.S. at 825 (Blackmun, J., dissenting).

255. *Id.*

256. *See supra* notes 67-69, 158 and accompanying text.

257. *Cornelius*, 473 U.S. at 816 (Blackmun, J., dissenting).

Yes, the Court had divided forums into three categories, but the lines between them were blurry and “really more in the nature of a continuum than a definite demarcation.”²⁵⁸ “Thus, the public forum, limited-public-forum, and nonpublic forum categories are but analytic shorthand” for the balancing of interests.²⁵⁹ Justice O’Connor’s approach was flawed because it “simply labels the property and dispenses with the balancing.”²⁶⁰

Under the approach articulated in Justice Blackmun’s *Cornelius* dissent, the government may avoid opening its property for expressive activity when “expressive activity is not compatible with the normal uses of the property.”²⁶¹ This is not a categorical rule, however. His dissent suggests that even if the property is compatible with expressive activity, a court must still weigh the government’s interests against the speaker’s.²⁶² Justice Blackmun’s analysis of the government’s interests in *Cornelius*, though, shows none of *Lehman*’s deference to the government. Indeed, the same justifications that Justice Blackmun found sufficient in *Lehman* he now found wanting. In *Lehman* Justice Blackmun had relied on the city’s role as the proprietor of a rapid transit system,²⁶³ but in *Cornelius* he wrote that “the mere fact that the Government acts as property owner should not exempt it from the First Amendment.”²⁶⁴ In *Lehman* he had pointed to the city’s interest in avoiding the appearance of favoritism,²⁶⁵ but in *Cornelius* he rejected that justification and suggested that “a simple disclaimer in the brochure would . . . suffice to achieve the Government’s interest in avoiding the appearance of support.”²⁶⁶ In *Lehman* he thought the city’s decision to limit car card space to “innocuous and less controversial” advertising was reasonable,²⁶⁷ but in *Cornelius* he wrote that the exclusion of a particular expressive activity must be justified “by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”²⁶⁸ Finally, in *Lehman* he speculated that accepting political advertising

258. *Id.* at 819 (Blackmun, J., dissenting).

259. *Id.* at 820 (Blackmun, J., dissenting).

260. *Id.* at 821 (Blackmun, J., dissenting).

261. *Id.* at 820 (Blackmun, J., dissenting).

262. *See supra* note 257 and accompanying text.

263. *See Lehman*, 418 U.S. at 303-04.

264. *See Cornelius*, 473 U.S. at 822 (Blackmun, J., dissenting).

265. *See Lehman*, 418 U.S. at 304 (plurality).

266. *Cornelius*, 473 U.S. at 829 (Blackmun, J., dissenting).

267. *Lehman*, 418 U.S. at 304 (plurality).

268. *Cornelius*, 473 U.S. at 829-30 (Blackmun, J., dissenting) (quoting *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 509 (1969)).

could jeopardize advertising revenue,²⁶⁹ but in *Cornelius* he noted that “the evidence shows that contributions to the CFC increased during each of the years respondents participated in the Campaign.”²⁷⁰

C. Return of the Captive Audience: *Burson*

Justice Blackmun’s last public forum opinion was *Burson v. Freeman*,²⁷¹ in which he upheld the constitutionality of Tennessee’s prohibition against campaigning within 100 feet of a polling place. He noted that, because the streets and sidewalks covered by the prohibition were “quintessential public forums,”²⁷² the prohibition would have to survive strict scrutiny: “The State must show that the ‘regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.’”²⁷³ Justice Blackmun did not, however, “simply label[] the property and dispense[] with the balancing.”²⁷⁴ Nor did he apply a categorical incompatibility test. Indeed, if he had the case would have come out differently since expressive activities are not incompatible with the normal uses of sidewalks. Rather, he warned:

Despite the ritualistic ease with which we state this now-familiar [strict-scrutiny] standard, its announcement does not allow us to avoid the truly difficult issues involving the First Amendment. Perhaps foremost among these serious issues are cases that force us to reconcile our commitment to free speech with our commitment to other constitutional rights embodied in government proceedings.²⁷⁵

The conflict Justice Blackmun saw was between the rights of the speaker and the rights of the listener exercising her constitutional right to vote. Tennessee had a compelling interest both in “‘preserving the integrity of its election process’” by preventing fraud and in “‘protecting voters from confusion and undue influence.’”²⁷⁶ In Justice Blackmun’s view, the campaign-free zone protected the listener’s interests without unduly impinging upon the speaker’s. As the Justice noted, “[i]t ‘takes approximately 15 seconds to walk 75 feet.’ The

269. See *Lehman*, 418 U.S. at 304 (plurality).

270. *Cornelius*, 473 U.S. at 830 (Blackmun, J., dissenting).

271. 504 U.S. 191 (1992) (plurality).

272. *Id.* at 197.

273. See *id.* at 198 (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)).

274. *Cornelius*, 473 U.S. at 821 (Blackmun, J., dissenting).

275. *Burson*, 504 U.S. at 198.

276. *Id.* at 199 (quoting *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 228-29, 231 (1989)).

State of Tennessee has decided that these last 15 seconds before its citizens enter the polling place should be their own, as free from interference as possible. We do not find that this is an unconstitutional choice.”²⁷⁷

Burson's emphasis on the interests of the listener is consistent with Justice Blackmun's opinions in *Bigelow*, *Virginia Pharmacy*, and *Lehman*.²⁷⁸ Indeed, in some ways, *Burson* brings his public forum jurisprudence full circle to *Lehman*—though its result is more defensible than *Lehman*'s.²⁷⁹ In *Burson*, as in *Lehman*, Justice Blackmun's chief concern was with the “captive audience” and the listener's right, under limited circumstances, not to receive information.

As I discuss further below, the Court's categorical, public-forum jurisprudence has attracted a good deal of criticism from both on and off the Court.²⁸⁰ Justice Kennedy, in particular, has urged the Court to concentrate less on labels and history and more on the objective characteristics that make government property compatible or incompatible with expressive activity.²⁸¹ Yet Justice Kennedy's approach to public-forum issues remains a categorical one²⁸² and, as I argue below, it lacks the flexibility to deal with difficult cases in which the right to speak in a public forum intrudes too drastically on the listener's interests. Justice Blackmun's listener-oriented balancing approach provides a more attractive alternative.²⁸³

III. Listening to Justice Blackmun

The Supreme Court's commercial speech and public forum doctrines are in need of repair. In the public forum area, the Court's categorical approach has effectively limited public forums to places like sidewalks and parks that have historically been available for

277. *Id.* at 210 (quoting *Burson v. Freeman*, 802 S.W.2d 210, 215 (Tenn. 1990) (Fones, J., dissenting)).

278. *See supra* notes 61-66, 220-22 and accompanying text.

279. *Burson* is more defensible than *Lehman* for two reasons. First, the listener's right not to hear, which the State seeks to protect, is far more limited—15 seconds on election day rather than an entire commute every day. Second, *Lehman* rests on what seems to me an insupportable assumption that political ads are more intrusive than other ads. *See supra* notes 226-28 and accompanying text. *Burson* also distinguishes among types of speech, limiting only campaigning and the solicitation of votes, but this distinction relates to the specific listener's interest at stake—her interest in making a voting decision free from last minute influence.

280. *See infra* notes 292-94 and accompanying text.

281. *See International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 698 (1992) (Kennedy J., concurring in the judgments).

282. *See id.* at 699.

283. *See infra* notes 311-24 and accompanying text.

speech and has allowed the government to make content-based exclusions from other property. It has turned a doctrine that was designed to open government property for expressive activity into a tool for closing it, while producing a series of apparently inconsistent results. In the commercial speech area, at least five members of the Court appear ready to abandon *Central Hudson*, but they appear uncertain about what should take its place.

In this Part, I argue that the Court could gain some needed assistance by listening to Justice Blackmun. The listener-oriented balancing approach he advocated in both commercial speech and public forum cases has not only proven more speech-protective than the categorical alternatives the Court has tried, it also provides the flexibility to deal with the hard cases that arise when the speaker's and listener's interests collide. I illustrate my argument by looking at two such "hard cases"²⁸⁴: (1) restrictions on the speech of protesters on public sidewalks outside abortion clinics; and (2) forced disclosures by commercial speakers, such as the Surgeon General's warning in cigarette advertisements and the registration requirements of federal securities law.

A. Public Forum

1. *The Current Confusion*

The categorical, public-forum doctrine articulated in *Perry*²⁸⁵ and *Cornelius*²⁸⁶ has not been very protective of speech. Specifically, it has encountered the problem of narrowing that is inherent in categorical approaches. Because classifying government property as a public forum would require the government to allow expressive activity²⁸⁷ and would allow the government to exclude particular speakers only when the exclusion is narrowly drawn to achieve a compelling state interest,²⁸⁸ the Court has defined this category narrowly. It has limited public forums to places like sidewalks and parks, which "have immemorially been held in trust for the use of the public, and, time

284. I use the phrase "hard cases" in the sense that Ashutosh Bhagwat does: "cases where the law, meaning primarily the doctrine announced by the Supreme Court, appears to point strongly towards a particular result, and yet, because the result seems unduly harsh either to an individual or to society at large, it is unpalatable to the reviewing court." Ashutosh Bhagwat, *Hard Cases and the (D)Evolution of Constitutional Doctrine*, 30 CONN. L. REV. 961, 966 (1998).

285. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

286. *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1985).

287. *See Perry*, 460 U.S. at 45 ("In these quintessential public forums, the government may not prohibit all communicative activity.").

288. *See id.*; *see also Cornelius*, 473 U.S. at 800.

out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions,'²⁸⁹ while specifically excluding newer forums like airport terminals.²⁹⁰ The Court has also defined the category of "limited public forums" in such a way as to make it relatively easy for the government to prevail by using its exclusion of particular speakers as evidence that it did not intend to create a limited public forum in the first place.²⁹¹

This restrictive approach has drawn a good deal of criticism. Justice Kennedy has argued that the "public forum doctrine ought not to be a jurisprudence of categories rather than ideas or convert what was once an analysis protective of expression into one which grants the government authority to restrict speech by fiat."²⁹² Justice Souter has added that if the Court continues to be so stingy in defining public forums, "we might as well abandon the public forum doctrine altogether."²⁹³ Geoffrey Stone has argued that the Court's "myopic focus on formalistic labels . . . serves only to distract attention from the real stakes."²⁹⁴

On the Supreme Court, Justice Kennedy has taken the lead in trying to breathe life into the public forum doctrine. He has argued that public forums should be defined by their objective, physical characteristics: "If the objective, physical characteristics of the property at issue and the actual public access and uses that have been permitted

289. *Perry*, 460 U.S. at 45 (quoting *Hague v. Committee for Industrial Org.*, 307 U.S. 496, 515 (1939)); *Cornelius*, 473 U.S. at 802.

290. See *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680 (1992) ("given the lateness with which the modern air terminal has made its appearance, it hardly qualifies for the description of having 'immemorially . . . time out of mind' been held in the public trust and used for purposes of expressive activity").

291. See *Cornelius*, 473 U.S. at 804 (finding that the CFC was not a limited public forum because "[t]he Government's consistent policy has been to limit participation in the CFC to 'appropriate' voluntary agencies").

On top of this, the Court's categorical public-forum approach has produced a slew of seemingly inconsistent results. Sidewalks outside embassies, see *Boos v. Berry*, 485 U.S. 312, 318 (1988), and polling places, see *Burson v. Freeman*, 504 U.S. 191, 196 (1992), are public forums, but sidewalks outside post offices are not. See *United States v. Kokinda*, 497 U.S. 720, 727-30 (1990) (plurality). Funds to support student activities are "metaphysical" public forums, see *Rosenberger v. University of Virginia*, 515 U.S. 819, 830 (1995), but funds to support the arts are not. See *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2178 (1998). Moreover, candidate debates on public television are not public forums. *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1642 (1998).

292. *Lee*, 505 U.S. at 693-94 (Kennedy, J., concurring in the judgments).

293. *Id.* at 710 (Souter, J., concurring in the judgment and dissenting).

294. Geoffrey R. Stone, *Content Neutral Restrictions*, 54 U. CHI. L. REV. 46, 93 (1987); see also Post, *supra* note 219, at 1715-16 ("The doctrine has in fact become a serious obstacle not only to sensitive first amendment analysis, but also to a realistic appreciation of the government's requirements in controlling its own property.").

by the government indicate that expressive activity would be appropriate and compatible with those uses, the property is a public forum.”²⁹⁵ He has also extended “limited public forums” to include not just government property used for expressive activity but also funds used to support expressive activity.²⁹⁶

Although Justice Kennedy’s effort to increase the rigor of the public forum doctrine by concentrating on the physical characteristics of the property is a welcome development, his approach remains a categorical one. In *International Society for Krishna Consciousness, Inc. v. Lee*, for example, Justice Kennedy warned that in evaluating the compatibility of government property with expressive activities, a court must look at “expressive activities in general, rather than the specific sort of speech at issue in the case before it; otherwise the analysis would be one not of classification but rather of case-by-case balancing.”²⁹⁷ Elsewhere Justice Kennedy has expressed “misgivings about judicial balancing under the First Amendment.”²⁹⁸ Thus, despite their shared focus on the compatibility of government property with expressive activity,²⁹⁹ Justice Kennedy’s public forum approach is quite different from Justice Blackmun’s. Justice Kennedy would maintain the Court’s current categorical approach, but define public forums more broadly to include all government property that is compatible with expressive activity.³⁰⁰ Once the property had been deemed compatible and declared a public forum, he would permit no further weighing of government interests based on the type of speech involved.³⁰¹ Justice Blackmun, on the other hand, would replace the Court’s categorical approach with balancing. He would not require the government to open its property for expressive activity “when the

295. *Lee*, 505 U.S. at 698 (Kennedy, J., concurring in the judgments).

296. *See Rosenberger v. University of Virginia*, 515 U.S. 819, 830 (1995) (“The SAF is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.”). *But see National Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2178 (1998) (holding that the NEA is not a public forum).

297. *Lee*, 505 U.S. at 699 (Kennedy, J., concurring in the judgments).

298. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 784 (1996) (Kennedy, J., concurring in part and dissenting in part); *see also Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124-25 (1991) (Kennedy, J., concurring in the judgment) (objecting to compelling-state-interest test for content based restrictions on speech); *id.* at 127 (“use of . . . traditional legal categories is preferable to . . . ad hoc balancing.”).

299. *See Lee*, 505 U.S. at 698 (Kennedy, J., concurring in the judgments); *Cornelius*, 473 U.S. at 816 (1985) (Blackmun, J., dissenting). Justice Blackmun joined the part of Justice Kennedy’s opinion in *Lee* that called for the Court to focus on the objective physical characteristics of the government property.

300. *See Lee*, 505 U.S. 698 (Kennedy, J., concurring in the judgments).

301. *See id.* at 699 (Kennedy, J., concurring in the judgments).

expressive activity would be incompatible with important purposes of the property,"³⁰² but even if a property were compatible with speech, Justice Blackmun would allow a court to consider "the nature and strength of the various interests,"³⁰³ including the listener's interests.³⁰⁴ "Broad generalizations about the proper balance are, for the most part, impossible."³⁰⁵

Thus, in *Burson v. Freeman*, Justice Blackmun was able to give effect to the listener's interest despite the compatibility of sidewalks with expressive activity and their status as a public forum.³⁰⁶ "The State of Tennessee has decided that [the] last 15 seconds before its citizens enter the polling place should be their own, as free from interference as possible. We do not find that this is an unconstitutional choice."³⁰⁷ *Burson* was more problematic for those who favored a categorical approach, for the court had repeatedly declared that sidewalks were traditional public forums³⁰⁸ and they were certainly compatible with campaigning. Justice Kennedy voted to uphold Tennessee's restriction, but he was forced to make an ad hoc exception allowing "freedom of expression to yield to the extent necessary for the accommodation of another constitutional right"—voting.³⁰⁹ Justice Scalia, in a further example of the narrowing to which categorical approaches can lead, voted to uphold the restriction on the ground that, while sidewalks usually are public forums, sidewalks around polling places on election day are not.³¹⁰ Justice Blackmun's balancing approach offered a more candid, and ultimately more speech-protective, way of resolving the conflict between the interests of speakers and those of the listener, which Tennessee's restriction was designed to protect.

302. *Cornelius*, 473 U.S. at 816 (Blackmun, J., dissenting).

303. *Id.* (Blackmun, J., dissenting).

304. *See Lehman*, 418 U.S. at 302; *Burson*, 504 U.S. at 199, 210.

305. *Cornelius*, 473 U.S. at 816 (Blackmun, J., dissenting).

306. *Burson*, 504 U.S. at 196 (plurality); *see supra* notes 271-77 and accompanying text.

307. *Burson*, 504 U.S. at 210 (plurality).

308. *See, e.g.*, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

309. *Burson*, 504 U.S. at 213-14 (Kennedy, J., concurring) ("Voting is one of the most fundamental and cherished liberties in our democratic system of government.").

310. *Id.* at 214-16 (Scalia, J., concurring in the judgment). Justice Scalia concluded that because "the environs of a polling place, on election day, are simply not a 'traditional public forum,' . . . they are subject to speech restrictions that are reasonable and viewpoint neutral." *Id.* at 216 (Scalia, J., concurring in the judgment).

2. *The Problem of Abortion Protesters*

Recent cases concerning restrictions on anti-abortion protests on streets and sidewalks around clinics illustrate the advantages of Justice Blackmun's listener-oriented balancing approach.³¹¹ The Court has tended to uphold buffer zones around the entrances and driveways of the clinics,³¹² but has struck down efforts to prevent protesters from physically approaching patients.³¹³

In these cases, the Court has held that injunctions restricting abortion protests must "burden [no] more speech than necessary to serve a significant governmental interest."³¹⁴ According to the Court, the government has a substantial interest in protecting patients' freedom to seek medical services and in protecting them from picketing that threatens their psychological and physical well-being by raising their levels of stress.³¹⁵ Yet the Court's recognition of the listener's interests in these cases has been quite limited. In striking down attempts to prevent protesters from physically approaching patients, the Court has emphasized "that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment"³¹⁶ and has expressed doubt that there is any "right of the people approaching and entering the facilities to be left alone."³¹⁷

Though the Court's decisions purport to apply its categorical public forum approach—or even a more stringent version of that approach³¹⁸—the Court's willingness to uphold restrictions on speech in a traditional public forum suggests at least a degree of balancing.³¹⁹ Under a categorical approach like Justice Kennedy's, even the buffer zones around the clinic entrances would be difficult to maintain because such zones restrict speech in a traditional public forum that is

311. See *Schenck v. Pro-Choice Network of W. New York*, 117 S. Ct. 855 (1997); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994).

312. See *Schenck*, 117 S. Ct. at 868-69 (upholding 15 foot buffer zone); *Madsen*, 512 U.S. at 768-71 (upholding 36 foot buffer zone).

313. See *Schenck*, 117 S. Ct. at 866-68 (striking down 15 foot floating buffer zone around people entering and leaving the clinic); *Madsen*, 512 U.S. at 773-74 (striking down 300 foot "no approach" zone around clinic).

314. *Schenck*, 117 S. Ct. at 865; see also *Madsen*, 512 U.S. at 765. The Court has characterized this test as "somewhat more stringent" than the test applied to legislation restricting speech in a public forum. See *Madsen*, 512 U.S. at 765.

315. See *Madsen*, 512 U.S. at 767-78; see also *Schenck*, 117 S. Ct. at 866.

316. *Madsen*, 512 U.S. at 774 (quoting *Boos v. Barry*, 485 U.S. 312, 322 (1988)).

317. *Schenck*, 117 S.Ct. at 870.

318. See *supra* note 314.

319. See *supra* notes 274-77 and accompanying text.

perfectly compatible with expressive activities in general.³²⁰ It is thus no great surprise that Justice Kennedy joined Justice Scalia's dissents, which argued that there was simply no governmental interest sufficient to survive the strict scrutiny that such restrictions required.³²¹ Justice Scalia's treatment of the listener's interest in these cases was short and to the point: "There is no right to be free of unwelcome speech on the public streets while seeking entrance to or exit from abortion clinics."³²²

Under Justice Blackmun's balancing approach, by contrast, both the buffer zones around the clinic entrances and driveways and those that prevent protesters from physically approaching the patients could be upheld. Although the sidewalks around an abortion clinic are compatible with expressive activity in general, the listener's interest in gaining access to that clinic free from intimidation and harassment must be weighed as well. I must acknowledge, however, that Justice Blackmun did not see it quite that way in *Madsen*, for he joined Chief Justice Rehnquist's opinion for the Court. It was thus left to Justice Stevens to articulate the listener's interest supporting the no-approach zone. The First Amendment, Justice Stevens wrote, "does not encompass attempts to abuse an unreceptive or captive audience, at least under the circumstances of this case."³²³ A protester does not have "an unqualified constitutional right to follow and harass an unwilling listener, especially one on her way to receive medical services."³²⁴

The 15 foot floating buffer zone at issue in *Schenck*, particularly coupled as it was with the right of two "sidewalk counselors" to enter that zone unless the patient objected, seems to me a perfectly reasonable balance between the undoubted right of abortion protesters to

320. See *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 699 (1992) (Kennedy J., concurring) ("courts must consider the consistency of [the property's other] uses with expressive activities in general, rather than the specific sort of speech at issue in the case before it; otherwise the analysis would be one not of classification but rather of case-by-case balancing.").

321. See *Schenck*, 117 S. Ct. at 871-78 (Scalia, J., concurring in part and dissenting in part); see also *Madsen*, 512 U.S. at 784-815 (Scalia, J., concurring in part and dissenting in part). Justice Kennedy did not write separately to explain why abortion, unlike voting, did not qualify for the narrow exception that "permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right." *Burson v. Freeman*, 504 U.S. 191, 213 (1992) (Kennedy, J., concurring); see *supra* note 309 and accompanying text.

322. *Schenck*, 117 S. Ct. at 871 (Scalia, J., concurring in part and dissenting in part).

323. *Madsen*, 512 U.S. at 781 (Stevens, J., concurring in part and dissenting in part).

324. *Id.* (Stevens, J., concurring in part and dissenting in part). Strangely, Justice Stevens joined the Chief Justice's opinion in *Schenck* striking down a seemingly narrower 15 foot floating buffer zone.

make their views known in a place that clearly has symbolic significance for their speech, and the legitimate interests of the listener, likely in an emotional state, to avoid running a gauntlet of protesters. In fact, the listener's interest in *Schenck* in being left alone strikes me as clearly stronger than those of the voters in *Burson* in being free of last minute campaigning. The restrictions in *Schenck* also seem less burdensome than the 100 foot "campaign free zone" upheld in *Burson*.

If one agrees with me that restrictions on allowing protestors to physically approach patients trying to enter an abortion clinic are warranted even on public sidewalks, then Justice Blackmun's listener-oriented balancing approach has much to commend it, and one ought to hesitate before too quickly embracing Justice Kennedy's categorical, compatibility approach.

B. Commercial Speech

1. *The Current Confusion*

The Supreme Court's 1993 decision in *Discovery Network*³²⁵ marked a revival of protection for commercial speech. While Justice Stevens purported to apply the *Central Hudson* test, his approach had more in common with Justice Blackmun's opinions in *Bigelow*, *Virginia Pharmacy*, and *Bates*.³²⁶ Moreover, Justice Stevens' opinion explicitly rejected the notion that commercial speech is inherently less valuable than noncommercial speech,³²⁷ thereby removing *Central Hudson*'s chief justification for putting commercial speech in a less protected category.

Justice Blackmun wrote separately to call explicitly for the Supreme Court to abandon *Central Hudson*,³²⁸ and since his retirement the Court has come close to doing just that. In *44 Liquormart, Inc. v. Rhode Island*,³²⁹ the Court struck down a Rhode Island statute that prohibited advertising the price of alcoholic beverages. At a minimum, *44 Liquormart* further strengthened the Court's protection of commercial speech by overruling *Posadas*. Rhode Island had argued that under *Posadas* its decision as to how it could best promote tem-

325. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993).

326. *See supra* notes 187-91 and accompanying text.

327. *See Discovery Network*, 507 U.S. at 419 ("the city's argument attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimates the value of commercial speech.").

328. *Id.* at 431-38 (Blackmun, J., concurring); *see supra* notes 192-96 and accompanying text.

329. 517 U.S. 484 (1996).

perance was entitled to deference, and that its "greater" power to ban alcohol entirely included the "lesser" power to prohibit its advertisement. Justice Stevens replied that "[t]he reasoning in *Posadas* does support the State's argument, but, on reflection, we are now persuaded that *Posadas* erroneously performed the First Amendment analysis."³³⁰

But 44 *Liquormart* also casts significant doubt on the Court's continued adherence to *Central Hudson*. Part IV of Justice Stevens' opinion, which Justices Kennedy and Ginsburg joined, was highly critical of *Central Hudson*'s categorical approach. "Rhode Island errs in concluding that all commercial speech regulations are subject to a similar form of constitutional review simply because they target a similar category of expression," Justice Stevens wrote.³³¹ "[W]hen a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands."³³² Justice Thomas went further, calling on the Court to abandon *Central Hudson* and return to Justice Blackmun's approach in *Virginia Pharmacy*.³³³ "I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech."³³⁴ Finally, Justice Scalia wrote that though he "share[d] Justice Thomas's discomfort with the *Central Hudson* test,"³³⁵ he was willing to resolve the case by applying *Central Hudson* because he did not believe "we have before us the wherewithal to declare *Central*

330. *Id.* at 509 (plurality); *id.* at 510 ("we decline to give force to [*Posadas*'s] highly deferential approach"); *id.* at 511 (rejecting the "greater-includes-the-lesser" argument). Justice Stevens's repudiation of *Posadas* was joined by Justices Kennedy, Thomas, and Ginsburg, but Justice O'Connor's concurring opinion also rejected *Posadas*'s deferential interpretation of *Central Hudson*: "The closer look that we have required since *Posadas* comports better with the purpose of the analysis set out in *Central Hudson*." *Id.* at 531-32 (O'Connor, J., concurring in the judgment).

331. *Id.* at 501 (plurality).

332. *Id.* (plurality). Justice Stevens ultimately applied the *Central Hudson* test to Rhode Island's statute and found that the statute failed. *See id.* at 504-08 (plurality).

333. *See id.* at 523 (Thomas, J., concurring in part and concurring in the judgment) ("I do not join the principal opinion's application of the *Central Hudson* balancing test because I do believe that such a test should be applied to a restriction of 'commercial' speech . . ."); *id.* at 526 (Thomas, J., concurring in part and concurring in the judgment) ("I would adhere to the doctrine adopted in *Virginia Pharmacy Bd.* and in Justice Blackmun's *Central Hudson* concurrence, that all attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible.").

334. *Id.* at 522 (Thomas, J., concurring in part and concurring in the judgment).

335. *Id.* at 517 (Scalia, J., concurring in part and concurring in the judgment).

Hudson wrong—or at least the wherewithal to say what ought to replace it.”³³⁶

Although five members of the current Court appear to be ready to reconsider *Central Hudson*, it seems quite unlikely that they will be able to agree on what should take its place. Justice Stevens clearly favors a balancing approach similar to Justice Blackmun’s in *Virginia Pharmacy*.³³⁷ Justice Thomas, on the other hand, clearly favors a categorical approach that places truthful, nonmisleading commercial speech in the same category as noncommercial speech.³³⁸ In *44 Liquormart*, he objected to “the inherently nondeterminative nature of a case-by-case balancing ‘test’ unaccompanied by any categorical rules,” and criticized *Central Hudson* for balancing *too much*.³³⁹ Justice Scalia also seems predisposed to adopt a categorical approach.³⁴⁰ And while Justice Kennedy has tended to join Justice Stevens’s commercial speech opinions in full,³⁴¹ he too has expressed misgivings about balancing as a mode of First-Amendment analysis.³⁴²

2. *The Problem of Mandatory Disclosures*

As in the public forum area, a categorical approach for truthful, nonmisleading commercial speech creates some hard cases—particularly when the interests of the speaker and the interests of the listener collide. Mandatory disclosure requirements, for example, pit the commercial speaker’s interest in remaining silent against the listener’s interest in receiving additional information on which to base a decision.

336. *Id.* at 518 (Scalia, J., concurring in part and concurring in the judgment). Justice O’Connor, joined by Chief Justice Rehnquist, Justice Souter and Justice Breyer, were content to stick with *Central Hudson* and found Rhode Island’s prohibition of liquor-price advertising invalid on that basis. *See id.* at 528-32 (O’Connor, J., concurring in the judgment).

337. *See supra* notes 187-91 and accompanying text.

338. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518-28 (1996) (Thomas, J., concurring in part and concurring in the judgment).

339. *Id.* at 527 (Thomas, J., concurring in part and concurring in the judgment). Justice Thomas’s rejection of balancing may make his explicit endorsement of Justice Blackmun’s reasoning in *Virginia Pharmacy* seem odd. *See id.* at 526, 528 (Thomas, J., concurring in part and concurring in the judgment). What Justice Thomas likes about Justice Blackmun’s opinions is not their balancing methodology but their rejection of the paternalistic notion that a State may protect its citizens by keeping them ignorant. *See supra* notes 91-93 and accompanying text; *see also 44 Liquormart*, 517 U.S. at 518, 526 (Thomas, J., concurring in part and concurring in the judgment).

340. *See, e.g., Antonin Scalia, The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989) (urging that balancing analysis “be avoided where possible.”).

341. *See, e.g., 44 Liquormart*, 517 U.S. 484; *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993).

342. *See supra* note 298 and accompanying text.

Under the categorical approach favored by Justice Thomas, such disclosure requirements would seem to be unconstitutional.³⁴³ Under Justice Blackmun's approach, they are not.

A number of laws require commercial speakers to disclose information to the public. Two prominent examples are the Surgeon General's warning label on cigarettes³⁴⁴ and the requirement that issuers file a registration statement before selling securities to the public.³⁴⁵ In a noncommercial context, the Supreme Court has held that the First Amendment protects "both the right to speak freely and the right to refrain from speaking at all."³⁴⁶ Thus, if the First Amendment requires truthful, nonmisleading commercial speech to be treated exactly the same as noncommercial speech, such mandatory disclosure laws are arguably unconstitutional.

Although the Supreme Court has not yet faced the constitutionality of mandatory disclosures by commercial speakers, it may be instructive to examine its treatment of a law just one step removed from such disclosures. In *Glickman v. Wileman Bros. & Elliott, Inc.*,³⁴⁷ Justice Stevens upheld the constitutionality of agricultural marketing orders requiring fruit producers to pay for generic advertising of fruit. He concluded that the First Amendment's protection of commercial speech was not implicated because the marketing orders (1) did not restrain the producers' speech; (2) did not compel the producers to

343. See *infra* notes 353-55 and accompanying text.

344. See 15 U.S.C. § 1333 (1998). For an interesting discussion of the constitutionality of restrictions on tobacco advertising other than warning labels by one of the leading authorities on commercial speech, see Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589 (1996).

345. See 15 U.S.C. § 77e (1994). Commentators have differed over the constitutionality of these registration requirements. Compare Neuborne, *supra* note 61, at 59 ("To the extent SEC forced disclosure rules surrounding registration statements and prospectuses are necessary to permit informed and autonomous investor choice, they pose no first amendment problems in a hearer-centered setting."), and Aleta G. Estreicher, *Securities Regulation and the First Amendment*, 24 GA. L. REV. 223, 287 (1990) ("regulations requiring additional disclosure in the service of a more complete, accurate picture of the business enterprise offering its securities do not violate the first amendment, provided that the extent of the mandatory disclosure does not overwhelm the promotional message"), with NICHOLAS WOLFSON, CORPORATE FIRST AMENDMENT RIGHTS AND THE SEC 121 (1990) ("The attempted distinction between mandatory disclosure and outright prohibition cannot survive analysis.")

346. *Wooley v. Maynard* 430 U.S. 705, 714 (1977); see also *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256-58 (1974) (holding right-of-reply statute unconstitutional); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348 (1995) ("The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit.")

347. 117 S. Ct. 2130 (1997).

engage in any speech themselves; and (3) did not require the producers to fund any political or ideological views.³⁴⁸

The dissenters treated the issue more categorically and found the marketing orders unconstitutional. “Since commercial speech is not subject to any categorical exclusion from First Amendment protection,” Justice Souter wrote, “it becomes subject to a second First Amendment principle: that compelling cognizable speech officially is just as suspect as suppressing it, and is typically subject to the same level of scrutiny.”³⁴⁹ Justice Souter looked at the marketing orders from the speaker’s point of view and downplayed the interest that listeners might have in forced disclosure. He emphasized the commercial speaker’s interest in deciding how to promote its products and rejected the notion that “the consumer’s interest [is] the exclusive touchstone of commercial speech protection.”³⁵⁰ Having concluded that laws compelling commercial speech should be treated the same way as laws restricting such speech, Justice Souter (joined by Chief Justice Rehnquist and Justice Scalia) applied *Central Hudson*’s intermediate scrutiny test and found that they failed every prong.³⁵¹ Justice Thomas, adhering to his position in *44 Liquormart*, thought the marketing orders should be subjected to an even more stringent standard, which they clearly would fail.³⁵²

How would the Court decide a case challenging the constitutionality of mandatory disclosures like cigarette warning labels or registration requirements for securities? Justice Thomas would probably vote to strike down the mandatory disclosures. He favors a categorical approach that treats truthful, nonmisleading commercial speech no dif-

348. *See id.* at 2138. Justice Stevens has elsewhere suggested that requiring mandatory disclosures by commercial speakers would generally be constitutional. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 492-93 (1995) (Stevens, J., concurring in the judgment).

349. *Id.* at 2144 (Souter, J., dissenting). Because the Court had held that the freedom not to speak included the freedom not to subsidize others’ speech, *see, e.g., Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), Justice Souter treated the forced contributions to advertising the same as forced advertising. *See Glickman*, 117 S. Ct. at 2144-45 (Souter, J., dissenting).

350. *Glickman*, 117 S. Ct. at 2143 (Souter, J., dissenting); *see also id.* at 2148 (Souter, J., dissenting) (rejecting the argument that the marketing orders were constitutional because “the effect of compelled funding is to increase the sum of information to the consuming public”). Justice Blackmun’s commercial speech opinions, by contrast, tended to emphasize the listener’s interests and downplay the speaker’s. *See supra* notes 61-66 and accompanying text.

351. *Glickman*, 117 S. Ct. at 2149-55 (Souter, J., dissenting).

352. *See id.* at 2155 (Thomas, J., dissenting).

ferently from noncommercial speech,³⁵³ and he joined Justice Souter in concluding that laws compelling commercial speech should be treated no differently than laws restricting commercial speech.³⁵⁴ If the government cannot require a noncommercial speaker to disclose information that she would prefer to omit,³⁵⁵ Justice Thomas might reason, then neither may it require disclosures of commercial speakers. Such a result strikes me as unpalatable. Mandatory disclosures by those who wish to sell tobacco or securities, like commercial speech generally, serve “individual and societal interests in assuring informed and reliable decisionmaking.”³⁵⁶ “The requirement of a registration statement and prospectus containing standardized data assures a common denominator of information that will generally be available to investors.”³⁵⁷ Cigarette warning labels provide smokers and prospective smokers with useful, truthful information to combat the notion promoted by cigarette advertising that smoking “is consistent with a robust lifestyle.”³⁵⁸ Justice Thomas’s categorical approach would simply ignore these legitimate interests.

Chief Justice Rehnquist, Justice O’Connor and Justice Souter would probably vote to uphold such mandatory disclosures by applying the *Central Hudson* test. In *Glickman*, Justice Souter, joined by the Chief Justice, rejected the notion that laws compelling commercial speech should be treated differently from laws restricting commercial speech³⁵⁹ and applied *Central Hudson*’s intermediate-scrutiny test.³⁶⁰ Justice O’Connor has also been one of the Court’s strongest defenders of *Central Hudson*’s categorical approach,³⁶¹ and I suspect that she would apply it to evaluate the constitutionality of mandatory disclosures (as opposed to the compelled financing of speech that was at issue in *Glickman*).³⁶² While I find such a result palatable, such an analysis is troubling because it would preserve the notion that truthful,

353. See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518-28 (1996) (Thomas, J., concurring in part and concurring in the judgment); *supra* notes 338-39 and accompanying text.

354. See *Glickman*, 117 S. Ct. at 2144 (Souter, J., dissenting).

355. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 348 (1995).

356. *Bates v. State Bar*, 433 U.S. 350, 364 (1977).

357. *Neuborne*, *supra* note 61, at 59-60.

358. *Estreicher*, *supra* note 345, at 272.

359. *Glickman*, 117 S. Ct. at 2144 (Souter, J., dissenting).

360. See *id.* at 2149-55 (Souter, J., dissenting). Chief Justice Rehnquist, the author of *Posadas* and a dissenter in *Discovery Network*, seems particularly disinclined to give commercial speech more than an intermediate level of protection.

361. See, e.g., *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 528-34 (1996) (O’Connor, J., concurring in the judgment).

362. See *supra* notes 347-48 and accompanying text.

nonmisleading commercial speech is entitled to less First Amendment protection than noncommercial speech. Like Justice Thomas, “I do not see a philosophical or historical basis for asserting that ‘commercial’ speech is of ‘lower value’ than ‘noncommercial’ speech.”³⁶³ And, as Justice Blackmun has noted, “the particular consumer’s interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.”³⁶⁴ I fear that the mandatory disclosure cases, if they come, may prove to be commercial speech’s Waterloo, for the Court may reaffirm *Central Hudson*’s placement of commercial speech in an intermediate category simply because it sees no other way to sustain the mandatory disclosures.³⁶⁵

The alternative, of course, would be for the Court to return to its commercial-speech roots and readopt the listener-oriented balancing approach that Justice Blackmun set forth in *Bigelow*, *Virginia Pharmacy*, and *Bates*. That approach rejects the notion that commercial speech is inherently less valuable than noncommercial speech³⁶⁶ and would afford commercial speech full First Amendment protection.³⁶⁷ Yet Justice Blackmun’s approach also recognizes that because the protection of commercial speech is based “principally on the First Amendment interests of the listener,”³⁶⁸ the government may require “additional information, warnings, and disclaimers”³⁶⁹ to serve those interests. Today, only Justice Stevens seems committed to this sort of balancing approach for commercial speech,³⁷⁰ yet it seems clearly preferable to either Justice Thomas’ or *Central Hudson*’s categorical alternatives. Justice Thomas’ categorical approach would ignore the listener’s interest in receiving the disclosures, while *Central Hudson*

363. *44 Liquormart*, 517 U.S. at 522 (Thomas, J., concurring in part and concurring in the judgment).

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

365. It is worth noting that Justice Powell’s fear that full First Amendment protection for commercial speech might invalidate various aspects of securities regulation was, in part, what led him to relegate commercial speech to a “subordinate position in the scale of First Amendment values.” *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978).

366. *See Virginia Pharmacy*, 425 U.S. at 763.

367. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 436 (1993) (Blackmun, J., concurring).

368. *Id.* at 432 (Blackmun, J., concurring).

369. *Virginia Pharmacy*, 425 U.S. at 772 n.24.

370. *See Discovery Network*, 507 U.S. at 416-28 (resolving the case by balancing interests); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 492-93 (1995) (Stevens, J., concurring in the judgment) (suggesting that mandatory disclosure requirements are constitutional).

would give effect to that interest but only by diluting the level of protection afforded to commercial speech generally.

It is often said that hard cases make bad law.³⁷¹ Sometimes, however, “it is bad law that is creating the hard cases.”³⁷² Mandatory disclosures by commercial speakers restrictions on abortion protesters in public forums are “hard cases” only if one insists on adhering to categorical approaches that prevent a court from considering important interests that are legitimately at stake. Under Justice Blackmun’s listener-oriented balancing approach these cases are relatively easy, and so they should be.

Conclusion

In this Article, I have tried to make three points about Justice Blackmun’s First Amendment jurisprudence. First, the Justice was consistent. He employed a listener-oriented balancing approach in both commercial speech and public forum cases, and he maintained that approach throughout his tenure on the Supreme Court.

Second, Justice Blackmun’s approach was more protective of speech than the categorical approaches the Court has employed in each of these areas. This, I have suggested, is because the flexibility of his approach allowed him to avoid the tendencies towards narrowing and dilution that are inherent in categorical analysis and that have manifested themselves in the Court’s commercial speech and public forum jurisprudence. Justice Blackmun’s experience in these two areas contradicts the conventional wisdom that a balancing approach—and particularly a listener-oriented one—must be less protective of free speech.

Finally, I have argued that Justice Blackmun’s approach provides an attractive alternative to the Court’s current approaches to commercial speech and public forums—approaches that have drawn so much criticism. Justice Blackmun’s approach would allow the Supreme Court to sustain sensible regulations of speech—like restrictions on abortion clinic protests and the registration requirements of securities law—without unduly narrowing or diluting the protection of the First Amendment.

371. *See, e.g., Northern Sec. Co. v. United States*, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting).

372. Bhagwat, *supra* note 284, at 984

