The Compatibility of Advertising Regulation and the First Amendment—Another View

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By analyzing the different legal, philosophical, and historical roots of advertising-regulatory law and the First Amendment, this study [a] indicates why advertising's regulatory constraints should not be seen as a precedent for regulation of the press, and [b] gives guidance to marketers as to which aspects of their advertising will probably be seen as protected by the First Amendment and which will probably be subject to regulation and government control.

Looking at the historical roots of the First Amendment and advertising regulation, Preston [1980] argued that the two realms are not really incompatible. Preston's discussion looked at the evolution of advertising regulation from the law of caveat emptor, a doctrine of freedom of speech in the marketplace derived from the same philosophical background as the guarantees of freedom of speech found in the First Amendment. While Preston's analysis was based on the similarities and parallels in two bodies of law, the present article shows how insight may also be found in understanding the differences in the legal, philosophical, and historical roots of advertising-regulatory law and the First Amendment. This "second" perspective presents additional evidence of the compatibility of advertising regulation and the First Amendment and gives some indications of how some current issues in this area may be resolved by future court decisions.

Basic Background

Uncertainties and fears for journalists and marketers raised by Supreme Court "extensions" of First Amendment protections to commercial advertising remain extant. [For various perspectives and discussions of past court decisions in this area, see Cohen [1978]; Francois [1978]; Kottman [1979]; and Heller [1978–79].] A few feel that the Supreme Court is moving in a direction that would culminate in the removal of most restrictions on commercial advertising [Trauth and Huffman 1979], while Advertising Age [1980] has expressed an industry desire for strong regulation of advertising veracity by the Federal Trade Commission. On the other hand, it is feared that limited protection for advertising might set a precedent for limited protection of speech and press in other areas [Gillmor and Barron 1979, pp. 639–45; Barrett 1980; Fleuchaus 1979; Middleton 1977]. At least one legal analyst has noted that such a precedent may already have been set in one obscenity case [Roberts 1979, in reference to Young v. American Mini Theatres, Inc. 1976]. Marketers also remain uncertain about exactly which portions and forms of their advertising can be considered protected and which are subject to regulation.

By now it is generally accepted that advertising is entitled to First Amendment protection, but a lesser degree of protection than that provided for what is labeled noncommercial speech. The pragmatic uncertainty for both journalists and advertisers lies in the lack of clear standards for determining exactly what is protected and what is not. Where should the line be drawn?
Few commentators would suggest a standard based on the economic motive for communications, recognizing that all mass media are “commercial” in that they wish to make a profit. Moreover, since one of the first cases in this area held that pharmacists cannot be prohibited from advertising the price of prescription drugs [Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council 1976], the standard cannot be in terms of content alone. It cannot even be said that the communication form is determinate, since Pittsburgh Press v. Pittsburgh Commission on Human Relations [1973] applied this lesser protection to a newspaper’s organizing want ads by sex (e.g., “help wanted—male,” “help wanted—female”), despite the fact that these communications are not really part of commercial advertising. Reich [1979] detailed an economic analysis for determining which communications are to be fully protected, and Fleuchaus [1979] argued for an analysis of the content value of the communications to consumers, but both conceptualizations may appear a bit abstruse, and provide concerned communicators with little basis for advance planning. Cohen [1978] reviewed the then-current body of cases in this area, looking at the various decision bases used, and suggested a balance-of-interests test. While clearer than those of Reich or Fleuchaus, Cohen’s standard still seemed to come down to a case-by-case decision orientation.

Preston [1980] illustrated a valid philosophical basis for regulation, even when the communications can be said to possess First Amendment rights, by looking at parallels between First Amendment law and *caveat emptor* and their historic “exceptions.” Additional understanding can be gained from elaboration of the historic/philosophical roots and the assumptions behind these two legal traditions.

**Starting Point: Two Clarifications of Popular History**

Popular discussions of communication law (and even some in academic journals) almost lead one to believe that the distinction between commercial speech and other protected forms of speech goes back to the time of the American Revolution. In truth, mass communications advertising as it is known today did not even exist till several decades after the framing of the Constitution, and the so-called landmark case that articulated the commercial speech distinction [Valentine v. Chrestensen 1942] was decided in fairly recent history.

Contrary to the view of history presented in almost all basic advertising texts (as detailed by Norris [1980]), mass communications advertising, other than isolated retailer announcements on billboards or in classified listings, did not really evolve till the latter half of the nineteenth century [Norris 1980; Rotzoll 1980; Sandage, Fryburger, and Rotzoll 1979, ch. 2; Harris and Seldon 1962, pp. 3–21]. The idea of advertising as a form of mass communications—beyond simple, local announcements of items for sale—did not exist at the time of the adoption of the First Amendment to the Constitution. There was no national advertising, and no “pull” strategies to build consumer demand. The few magazines in existence at this early time were not advertising vehicles [Sandage, Fryburger, and Rotzoll 1979, ch. 2; Rotzoll 1980]. Advertising was seen as a simple extension of local market activities, not as a medium for national selling by producers, nor as an avenue for the presentation of ideas.

We also see many references to Valentine v. Chrestensen [1942] as the legal “permission” for advertising regulation, all of which apparently overlook the fact that it was decided almost three decades after the founding of the Federal Trade Commission in 1914. The FTC throughout its history has regulated advertising content in a manner suggested by the advertising
industry itself in the original *Printer's Ink* model statute of 1911 [see Preston [1975, ch. 9] for a discussion of the FTC and its legal-regulatory history]. The only question about the Commission's right to exert such influence was whether or not it was empowered to regulate business activities that harmed consumers without directly influencing competition [Preston 1975, pp. 130–33]. This issue, not the First Amendment, was the reason for the FTC's temporary "loss" of power of direct consumer protection in advertising regulation in 1931 [*FTC v. Raladam*], more than a decade before *Valentine v. Chrestensen*. It was fairly simple for Congress to restore such activity by directly granting the Commission powers of advertising regulation in 1938 [Preston 1975; Francois 1979; Gillmor and Barron 1979], apparently without the First Amendment issue ever being raised.

In sum, each branch of the communications business has historically tended to consider its problems and concerns as separate and distinct [Christian 1979], and the legal perspectives on these two areas were also distinct. While there are many similarities and parallels in the underlying philosophical perspectives, Supreme Court interpretations of the First Amendment and advertising regulation have evolved two different bodies of law and two different legal traditions. The former has evolved from interpretations and applications of constitutional guarantees of freedoms, the latter from laws limiting and/or regulating sales practices. It is only in recent times that the two areas have started to interact. Insight for future decisions on advertising regulation and the First Amendment can come from further analysis of these differences and distinctions.

**Selling, Advertising, and the Law of Contracts**

Few seem to realize that advertising has been considered a part of communications, and discussed as a part of communications law, only in the past 35 years. As recently as a decade ago, the advertising chapter in a communications law text tended to appear out of place, uncertain about its relation to the rest of the book's material. While there may be strong parallels between the theoretical basis for communications law and the origins of advertising law in *caveat emptor* [Preston 1980], Figure 1 illustrates how advertising regulation can be seen to have evolved from laws applicable to sales transactions.

The regulation of advertising was probably not seen as the regulation of communications per se, but as the attachment of liability to the use of language in connection with a sales transaction. The regulation of sales practices, particularly sales communications, derives mostly from the realm of contract law, an area almost totally consisting of rules that (a) give guidance for interpreting words in a contract when the parties disagree as to their meaning, and (b) attach liability for certain uses of language. A contract can be seen as an arrangement for certain goods to be delivered in accordance with a description promised by the seller; advertising can be seen as a "mass offer" (in legal terms, an express warranty) to deliver certain goods as described. Accordingly, the history of advertising regulation consisted of rules for interpreting the language of advertising (though such rules are increasingly being based on consumer research; see Rotfeld and Preston [1981]) and liabilities to make sure advertisers were delivering what they promised.

In other words, advertising regulation can be seen as having been based upon a desire to make sure advertisers deliver on their promises to their customers [Jackson and Jeffries 1979]. If the product is at variance with the promise, the advertiser is directed to make his/her advertising conform to what is actually delivered. The old rule of law of *caveat emptor* and the contemporary regulatory climate of *caveat venditor* can be seen as broad guide-
lines for interpretation of the advertising contract/offer. The former interprets all questions in the seller's favor, the latter tries to interpret promises in terms of the consumer's understanding and expectations.

As the regulation of advertising content grew, several forces in communications law gave impetus to the eventual "blending" of this area with advertising regulation concerns. As shown in Figure 1, there have always been certain exceptions to First Amendment protection, of which commercial speech was only one. Some may say that the final application of the First Amendment to advertising is merely another aspect of the general "weakening" of the courts' treatment of these exceptions, such as libel/slander and obscenity. (For a discussion of legal history and case law in these areas, see Francois [1978] and Gillmor and Barron [1979].) More directly, however, the eventual application of the First Amendment to advertising began with the "birth" of a right to receive information as a part of the freedoms of speech and press.

The right to receive information had a confused and convoluted history prior to its application to advertising, mostly because the Supreme Court
had done little more than recognize that such a right exists. The right was first noticed in the dicta of *Martin v. Struthers* [1943], and most later cases mentioned it as dicta (e.g., *Griswold v. Connecticut* [1965]; *Marsh v. Alabama* [1946]) or ignored it in the final holdings (e.g., *Kleindienst v. Mandel* [1972]). The Court had not treated the right in a theoretically consistent manner. Still, an analysis of the right, its treatment in the lower courts, and the manner in which it arose in Supreme Court cases prompted at least one legal scholar, prior to the final decision in *Virginia State Board of Pharmacy v. Virginia Citizens Council* [1976], to predict the final demise of the commercial speech doctrine [Aitchison 1975].

In the past decade there has been a growing recognition (and lament) of the limited quantity of mass media outlets and the limited access of the general public to those outlets. To some, a partial answer to the negative impact of this factor on our "marketplace of ideas" lies in what may be referred to as "advertorials" or opinion ads [Rotzoll, Haefner, and Sandage 1976, ch. 8]. The opinion of the Court in *New York Times v. Sullivan* [1964] was, in part, recognition that such advertised messages should receive full First Amendment protection.

During this same period, the law finally recognized what communication scholars had discussed for many years, that advertising is the United States's predominant institution for the dissemination of market information to consumers [Rotzoll 1976; Rotzoll, Haefner, and Sandage 1976]. As such, it was only logical that the court apply the right to receive information to advertising communications so consumers could receive the essential information about products and services needed to make purchase decisions [Aitchison 1975]. The applications of the First Amendment to advertising have been not so much a guarantee that advertisers can talk freely about products as a protection of consumer sources of information. Fleuchaus notes:

> Rather than concentrating on the right of the speaker, the court focused on the interest of the consumer and evinced a desire to protect only commercial speech which had value to the consuming public. [1979, pp. 808–9]

Most Supreme Court cases have involved the Court's eliminating total bans on certain forms of truthful advertising.

To some, *Virginia Board of Pharmacy* was an erroneous decision, in that advertising which does no more than solicit a commercial transaction may be regulated in a fashion similar to any other aspect of the marketplace [Jackson and Jeffries 1979]. However, once it is recognized that some forms of advertising (i.e., opinion ads or "advertorials") have little relation to advertising's original role of announcing items for sale, it also becomes evident that opinions and commercial content can be intertwined in the same messages. From an understanding of these differing roots of advertising law and the First Amendment, as well as how and why these two areas have come to overlap in recent times, it should become apparent that advertising regulation will continue to be based on what is offered for sale, making sure that advertisers' descriptions of the product accurately reflect what is delivered. All other aspects of advertising communications are now protected and "free."

**"Informative" versus "Contract" Advertising**

The legal problem is how to discern what regulations are permissible when both types of "speech" are combined. Farber [1979] has recommended a contract test drawn from *United States v. O'Brien* [1968] for discerning the limits of advertising regulation. The test states:
Government regulation is sufficiently justified if it . . . furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. [p. 377]

Some might dislike Farber's terminology in referring to a dichotomy of the informative versus the contract portions of advertising, but it is merely looking at the regulation of false and misleading advertising from the perspective that they are comparable to unfulfilled contractual promises. Farber explains:

[A] regulation which prohibits sellers from misrepresenting the qualities of their products in advertising clearly satisfies the first prong of the O'Brien test. It furthers the government interest in enforcing the seller's contractual undertaking to deliver products corresponding to the advertisement. . . . Turning to the second prong of the O'Brien test, the state interest in upholding contractual expectations is unrelated to the suppression of free expression because the contractual function of language is not an aspect of communication that the First Amendment was designed to protect. Regarding the third prong of the O'Brien test, experience has shown that the simple remedy of suits for breach of warranty is insufficient. That remedy comes too late, after the damage is already done, and may never come at all for those consumers who need it most. . . . Some form of active state regulation is necessary for the protection of these consumers, a legitimate state interest unrelated to speech. [1979, pp. 390–91]

Conclusion

Some researchers feel that all aspects of product advertising should be subject to regulation without limitation [Jackson and Jeffries 1979], but such a view attempts to ignore some of the realities of modern advertising and its institutional role in society. Some dispute the application of a particular legal test to determine what can be regulated and what is free [Alexander and Farber 1980], and others attempt to present various legal tests of their own [e.g., Fearnow [1980]; Cohen [1978]; Heller [1978–79]; Watson [1980]]. Farber's legal analysis of recent court decisions on ad regulation and his presentation of the O'Brien test result in conclusions that closely parallel those following from the preceding analysis, which reviewed the historical-philosophical foundations of advertising regulation and its relationship to the First Amendment.

The exact legal test to be applied remains to be decided by the Court. However, an examination of the differing roots of advertising regulation and the First Amendment as presented herein should give both journalists and advertisers a perspective for understanding where the courts will probably draw the line between the regulated and the protected. Logically, the final doctrine will not be applied to already "protected" areas of speech, but rather will focus on the limited rights to previously unprotected areas of speech [Farber 1979; Roberts 1979]. Advertising's new freedoms are not a denial of its historic role as part of a sale, but rather a recognition of advertising's "newer" role as a form of mass communication, providing opinions and general market information. The older activities remain subject to regulatory scrutiny, while its modern roles have gained the constitutional protection they intuitively deserve.

References


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What is evoked is the possible elimination of much FTC action and perhaps even the reversal of the recent trend toward tighter regulation. Also, there seems to be the possibility, for some temporary period at least, of just plain confusion as to what the law of advertising is and will become.

If the problem of incompatibility is less than appears, however, then the job of assimilating First Amendment requirements into ad regulation will involve little conceptual difficulty and is not as likely to create serious changes in advertising regulation as some may think.

METHOD OF ARGUMENT

The method to be used to make an argument for an essential compatibility is founded in the observation that today's advertising regulation has its origins in a law called caveat emptor, which established freedom of speech in the marketplace, and which was created out of the same philosophical background as was the First Amendment's guarantee of freedom of speech. This law therefore, at least in the 18th Century, was highly compatible with the First Amendment.

The argument that follows from this foundation is that today's advertising law stems directly, as a matter of historical fact, from the early law of caveat emptor, with certain strains of caveat emptor actually still existing in what is known as puffery. This in turn means that today's advertising regulation, no matter how tough it may be on the rights of advertisers to communicate, is still essentially a law of freedom of speech rather than restraint of speech and thus should not be difficult to reconcile with the First Amendment. In the discussion that follows, the description of caveat emptor both yesterday and today will be lightly referenced, because it is discussed elsewhere in detail (9).

Some observers of an early draft of this paper have taken issue with the fact that its analysis is grounded in the concept of caveat emptor. They have argued that the law of advertising today is based on the alternate rule of caveat venditor, which means that the seller rather than the buyer must beware.

This alternate Latin phrase is not meaningless. It usefully refers to the fact that sellers today must be wary of many things they hadn't had to be wary of previously. The term stands for a tightening of the law, for the changed attitudes of regulators that the tightening reflects, and for the changed responses that advertisers must now make.

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ABSTRACT

This article argues that advertising regulation and the First Amendment are not nearly so incompatible as has been popularly suggested. The reason lies in their common historical roots. Advertising regulation has its origins in the law of caveat emptor, a law of freedom of speech established from the same philosophical background as was the First Amendment. This relationship is described, and implications for present and future regulation are discussed.

INTRODUCTION

The purpose of this article is to argue that advertising regulation and the First Amendment, in their underlying intent, based on their common historical roots, are not nearly as incompatible as may appear. The appearance of incompatibility is exhibited, for example, in a law review article which speaks of the application of the First Amendment to advertising law as a "rude shock" and as a "dilemma" for the Federal Trade Commission (10).
These are all very real phenomena, and so there is every reason to applaud the coinage of a phrase to describe them. There is, however, no evidence for the existence of a law that is known as caveat venditor.

We can try to imagine what such a law would say if it existed. Presumably it would be the opposite of caveat emptor. It would involve buyers and sellers trading places, exchanging the rights and obligations that they have. If we see what caveat emptor is, then, we will have a good idea of what caveat venditor would be.

THE LAW OF CAVEAT EMPTOR

Caveat emptor is the law that said the seller would have no liability for damage incurred by anyone who believed and relied upon his messages, with two exceptions. If the seller’s claims amounted to either warranty or fraudulent misrepresentation, then the seller would be liable for them. A claim was a warranty if the seller explicitly said “I warrant” or a synonym such as “I promise” or “I guarantee.” A claim was a fraudulent misrepresentation if the buyer could prove that it was known false by its speaker and was used with conscious intent to deceive. The idea of imposing these exceptions to the seller’s freedom still lives, and is reflected in FTC law today in the concept called capacity to deceive.

The rule of caveat emptor held further that the only thing a buyer was entitled to believe and rely upon was what he personally discovered through his own examination of the item for sale, and he would be acting unreasonably and therefore be undeserving of the law’s protection if he relied on what the seller said—again with the two exceptions.

In summary, then, the rule was that speech in the marketplace was absolutely free of restraint unless someone met the burden of proving that the speech was what in today’s terminology would be called deceptive. The principle was one of freedom unless there was a showing of deception.

Now we can see what a law of caveat venditor would say—if such a law existed. It would say that speech in the marketplace is absolutely prohibited unless someone meets the burden of proving it to be truthful and nondeceptive. The principle would be one of restraint unless there was a showing of non-deception.

Which of these principles characterizes today’s law of the marketplace? It is the one that holds speech to be free unless the burden is met to show that it should not be. It is clearly a law founded fundamentally in freedom rather than in restraint.

The reason this is so is that today’s law is a direct descendant of the early caveat emptor. The argument is not that today’s law is still the same, but rather that today’s law contains fundamentally more of the intent of the original concept of caveat emptor than it does of the opposite principle. The original caveat emptor and the First Amendment may be regarded as being essentially the same rule in the sense of the assumptions made about the nature of man and what should be the nature of government. These assumptions were that the human being is capable of separating lies from truth and therefore should be left free to do so.

This liberal philosophy actually came forth in the marketplace before it did in political affairs, with caveat emptor arising in the 16th Century. The English kings apparently did not see in free marketplace speech any of the sort of threat they saw in statements regarding government. The First Amendment, then, represented a catching up in the political arena of the guarantees of freedom already established in the marketplace. In the marketplace there was no need for the colonists to revolt because freedom already existed, and American judges in the early years produced American law by citing English commercial cases as precedent almost as though the Revolution had never happened.

EVOLUTION OF CAVEAT EMPTOR INTO TODAY’S LAW

Let us now see how caveat emptor evolved after the Revolutionary period. Neither it nor the First Amendment resulted in speech that was absolutely free at all times. With caveat emptor this developed through the two exceptions of warranty and fraudulent misrepresentation. In the early years the most significant thing about these exceptions was that they were hardly ever applied. The seller avoided the warranty rule by choosing not to say the words “I warrant,” and the buyer typically failed to insist that he do so. As for fraud, the buyer typically couldn’t prove that a misstatement amounted to conscious falsity. Thus in practice caveat emptor operated in its early days virtually as though it had no exceptions.

When public policy, however, eventually turned toward protecting consumers, it was the latent power of these two exceptions that was used to do the job. The definitions of warranty and fraudulent misrepresentation were widened so that buyers could much more often establish that the seller’s claims fell into those categories.

Furthermore, the concept of misrepresentation was transformed through the FTC Act of 1914 into what the Commission called the capacity to deceive. The legal mandate in the original act referred only to “unfair methods of competition” (2) and the term “deception” was not added specifically to FTC law until much later (3). However, the Commission created the concept of capacity to deceive almost immediately after 1914. It involved no need to show fraud, nor to prove that anyone was actually damaged by the seller’s claim, nor even that the deceptive understanding got into a single consumer’s head. All the FTC had to do
was assert that the claim had the capacity to deceive some significant portion of the public.

It is mostly in this FTC action that the modern changes in the original rule of caveat emptor have occurred. The exceptions that had earlier been insubstantial and infrequent now became the opposite. Undoubtedly this is what has prompted some observers to say that the rule now is caveat venditor rather than caveat emptor. Of course that is correct in the sense of meaning that sellers who used to face regulation so rarely that they could effectively ignore the possibility must now face it so often that they must always be on guard.

Advertisers may reasonably feel today that, at least in an attitudinal sense, the restraints are the essence of today's law, with freedom being the exception. What was once the tail may now seem to have become the dog. The law of the marketplace certainly appears to be the opposite of what the First Amendment prescribes in the political arena. Students of mass communication get a clear understanding in their coursework that the essential impact of the law is to restrict advertising while it is to free the press (5).

Apparently there is good reason for such different results to have happened. Prior to the American Revolution both political power and marketplace power were privately held, a fact which in the political arena produced conditions against which the colonists rebelled. In the marketplace there was no equivalent complaint, and the marketplace consequently was not a factor in contention. The Revolution's effect, therefore, was to make political power public while marketplace power was allowed to remain in private hands.

Late in the 19th Century public policymakers began recognizing that unrestrained freedom of speech was leading to inequalities of bargaining power for buyers, contrary to what such freedom was intended in theory to produce. Because market power was privately held and becoming concentrated, the number of sources of information, and therefore of countervailing voices, was becoming smaller. False speech was going more and more unrecognized by consumers; the truth of a market claim was becoming more determinable by the speaker yet at the same time less determinable by the hearer than was true for political claims (15).

In the words of James Turner, a Naderite and author of The Chemical Feast (13), the resulting abuses showed that the American Revolution was incomplete. "My overall premise," he has written, "is that consumerism is the economic fulfillment of the American Revolution" (14).

What public policy came to desire, in other words, was that marketplace power and not just political power should be placed in public hands. When this was accomplished by such consumerist actions as the FTC Act, the result was that public control of marketplace speech was pushed to relatively high levels because marketplace structures were largely under private ownership, while control of political speech remained at a relatively low level because political structures were more fundamentally public in nature. There is no doubt that governmental control of the marketplace has resulted in significantly more restriction of marketplace speech than of political speech.

However, the law of the marketplace still holds sellers' claims free unless the burden is met to prove that they fit a modern version of one of caveat emptor's original exceptions. That is why today's advertising regulation is still in essence a rule of freedom rather than a rule of restraint, and thereby essentially compatible with the First Amendment, and not likely to be very much affected by that rule.

This analysis is parallel to that of the search of Rotzoll, Haefner, and Sandage (11) for a term to describe the philosophical foundation of the modern marketplace, which is no longer characterizable as being "classical liberalism." Their choice was "neo-liberalism," because of a desire to adhere to the "classic vision which still persists in the face of often glaring discrepancies between idea and deed. Although that time may yet come, we now show extreme reluctance to replace one ideological tree with another of a totally different variety" (11:51). In the same way, and for the same reasons, the discussion here might arrive at the term neo-caveat emptor as being far preferable to caveat venditor.

A POSSIBLE PROTEST

The following protest can be anticipated. The reader may agree that caveat emptor in its original handling was compatible with the First Amendment, yet argue that the rule's prohibitions have since been so much expanded that the rule today is incompatible with the First Amendment. The argument, in other words, would be that freedom with exceptions doesn't really seem like freedom once the weight of the exceptions passes a certain threshold.

No objection is taken here to such a protest, nor will understanding be lacking for those who wish to describe such a situation as amounting to caveat venditor. Nonetheless, such conditions do not require that the incompatibility of advertising law with the First Amendment be more than a minor matter. In order to show this, let us start with the fact that the First Amendment indeed permits a great deal of regulation of speech.

THE ARGUMENT FOR COMPATIBILITY

The casual observer may feel that any regulation whatever must be incompatible with the First Amendment because of the absolute nature of its wording: "Congress shall make no law...abridging the freedom of speech, or of the press..." Despite its saying that, the First Amendment has not been interpreted to mean that (5). From early times there have been prohibitions, such as against libel and
obscenity, which have amounted to exceptions to that literal wording. And in *Virginia Pharmacy* (15) the Supreme Court made clear that the exception involving deceptive claims was one of the permissible exceptions. *Virginia Pharmacy* is known as the case in which there was an explicit assertion of First Amendment protection for advertising, yet right within that case the exception of no freedom for deceptive claims was affirmed.

Consequently the fact that advertising regulation involves prohibitions against speech cannot be what produces incompatibility. Rather, the area where incompatibility exists is in the regulation of truthful, nondeceptive speech. That is, an important distinction exists between the issue of regulating deceptive speech and that of regulating nondeceptive speech.

For deceptive speech there is no incompatibility; as seen above, both FTC law and the First Amendment prohibit it. But with nondeceptive speech there has indeed been an incompatibility, with the First Amendment protecting it while the FTC has in certain actions prohibited it. It appears now as though the FTC will not be permitted to do that in the future, and that nondeceptive speech thus is an area where the First Amendment is prevailing and is causing regulation to change.

The argument may be made nonetheless that the change will not be a great one, because it appears that the FTC when prohibiting truthful speech has done so not through specific intent. Rather, it has done so indirectly and without prior intent, owing to its overzealousness in attempting to prohibit some accompanying deception. It appears appropriate that the Commission be told not to do that anymore, but the point to be made here is that it wasn't something the FTC had intended to do in the first place.

In the *Beneficial Finance* case (1) the FTC had ordered a total ban of the phrase "instant tax refund" because the consumer loan being offered was not really a refund and was not closely enough related to an applicant's actual tax refund. The appeals court relied on *Virginia Pharmacy*’s invoking of the First Amendment to overrule on the ground that the phrase could be used nondeceptively *if* accompanied by certain qualifying language. The principle established was that the FTC should restrict truthful speech no more than the minimum necessary to eliminate the deception.

Thus the point about *Beneficial* is that the FTC wasn’t really trying to eliminate truthful messages—it just happened to do so. Therefore, although it was forced to abandon something it wanted to do, there actually was no incompatibility of its law with the First Amendment. The Commission made a mistake, rather, by going beyond what its law authorized it to do. If not for *Virginia Pharmacy*, the mistake may have been allowed to stand.

Parenthetically, a recent article (6) argued that the First Amendment has brought no benefit whatever to national advertising, yet *Beneficial* has clearly benefitted such ads. So has the Listerine court appeal (16) in which the First Amendment also was invoked.

**THE MOST SERIOUS INSTANCES OF INCOMPATIBILITY**

Where else can we find an incompatibility of FTC law and the First Amendment? Where is the FTC trying *explicitly* to prohibit advertising that is truthful and nondeceptive or at least not otherwise proved? The answer is that the Commission may be trying to do this when it makes a charge of *unfair* advertising. The proposed ban on television ads being considered in the children’s case (4) would involve messages that the Commission does not charge with being other than truthful and nondeceptive. Rather, it has suggested that the messages are unfair because young children are unable to cope with them, even if they are truthful.

In this instance the FTC’s interpretation of unfairness may be quite incompatible with First Amendment rights. Witnesses for industry in the proceedings argued very strongly that the First Amendment absolutely rules out what the Commission may try to do.

That rulemaking procedure is far from resolution, but let us assume for a moment that the industry is right and that the First Amendment must overrule the FTC. There remains a way in which what the Commission wants to do may be compatible with the First Amendment. It is the possibility that any charge of unfairness might alternatively be transformed into a charge of deception. That is neither an established principle nor a known fact, yet it seems reasonable to propose. If all unfairness could be construed as deception the FTC could simply abandon the unfairness concept, thereby not only simplifying its procedures but also avoiding any First Amendment problem.

Applied to the children’s case, this would suggest that if the Commission cannot hold that children under eight years old are treated unfairly just by being advertised to, then perhaps it can still hold that advertising will typically deceive them. Certainly the FTC would be likely to try this line of argument if the unfairness charges were turned back. The possibility constitutes yet another way in which the apparent incompatibility of advertising regulation and the First Amendment might fade away.

An area already exists in which both unfairness and deception have been applied. It is advertising substantiation, in which the FTC asks companies to state what support they have for their claims, and particularly whether they have a reasonable basis for what they say. The principle as developed in the *Unburn* case (8) is that it is an unfair practice to make a claim while in possession of no reasonable basis for believing it, even if the claim is true. Because this involves prohibiting truthful speech, and because it continue to page 45
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was developed as an unfairness rather than a deception violation, it might appear that the First Amendment jeopardizes the entire concept.

However, in National Dynamics (7) the FTC established that the reasonable basis principle was a deception violation, which makes the rule more likely to survive First Amendment attacks. In the current case involving dish-washer claims, Sears Roebuck (12) is presenting a First Amendment defense against the charge of unfairness but the FTC is responding that the ads were also deceptive and thus the First Amendment does not matter. That case is pending.

SUMMARY

The following summarizes the argument seen here which suggests that First Amendment incompatibility with advertising regulation is essentially minor. First, advertising law says that sellers' messages are free except where the burden is met to show that they should be prohibited. That is parallel to First Amendment operation. Next, the prohibition of deception is quite in keeping with the First Amendment. Finally, the prohibition of unfairness may not be permissible under the First Amendment, but the FTC may be able in the future to avoid this incompatibility. The Commission has made some of its prohibitions inadvertently while pursuing other acceptable prohibitions, and may in other instances be able to drop the unfairness approach in favor of the substitute ground of deception.

A reasonable conclusion from this is that there is very little incompatibility of advertising regulation and the First Amendment, and that little resulting change in advertising regulation will occur.

REFERENCES

8. Pfizer, 81 FTC 23 (1972).